# Between the Lines of Constitutional Identity and Rule of Law: The Shades of Romanian Identitarian Walls in dialogue with the ECJ

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**Abstract:** On a general note, the paper explores the concept of constitutional identity within the European Union (EU) and its significance in the European harmonization and unification process. It highlights the potential conflicts that may arise between the EU's identity, defined by its shared core values, and the constitutional identities of its member states. This situation may present paradoxical conflictual instances for the existence and functionality of the EU. The rule of law is presented as a solution to these conflicts, preserving the integrity and legitimacy of the EU's objectives and its common jus rationale. This is conditional on the meaningful and sincere appropriation by member states of a common understanding of the rule of law. As such, the classic questions arise: what is the rule of law? Are there different avatars of the rule of law? In this context (which may be philosophical), I will discuss whether constitutional identity is a national rule of law or whether the rule of law is – nowadays – a feature that national identity must adopt in the context of being part of a supranational legal and political entity built on certain common values assumed through membership. The paper leans towards the second hypothesis, arguing that the first only reflects the historical weaknesses of national systems based on national pride. While this pride is rational to some extent, it comes at the cost of the EU's effectiveness. On a more concrete note, the paper focuses on the decision of the Court of Justice of the European Union (CJEU; May 18th, 2021) regarding the impact of EU law on Romanian justice, as well as on the decision and subsequent responses of the Romanian Constitutional Court (CCR). The CCR's decision and responses, which state, for example, that EU law does not replace the Romanian Constitution and propose a constitutional limit based on "national constitutional identity", have sparked considerable controversy.

**Keywords:** (national/ European) rule of law, constitutional identity, European identity

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## Introduction

The European Union (EU) functions as a supranational entity built upon shared values, legal principles, and political goals aimed at achieving unity and cooperation among its member states. Central to its mission is the establishment of a cohesive legal framework (jus commune), though achieving this goal poses significant challenges. These challenges primarily revolve around balancing the collective European identity with the individual identities of its member states. This creates a tension between the aspiration for a unified European identity and the distinct national identities rooted in each member state's constitution. As an example, to give context, we may consider the - quite paradoxical

- "identitarian" (judicial) conflicts between EU law and national constitutional law. To align with the objectives outlined for this paper, the main references will be involving the Romanian judiciary and constitutional justice. Therefore, I aim to explore, from a bird eye view, the concept of constitutional identity within the national and EU context, its implications for European harmonization and unification, and the role of the rule of law in addressing potential conflicts. Identity, whether national, legal or constitutional, fundamentally boils down to how individuals and/ or states perceive, comprehend, and prioritize their affiliations and responsibilities within their national and international contexts. This understanding is determined by personal interests, stakes involved (even pride), and the capacity to grasp concepts such as constitutional identity (in national and supranational context) and the rule of law (as a way to have a substantial standardised law).

**Supremacy of EU Law (European Identity) *versus* National Constitutional Identity**

The doctrine of the supremacy of EU law, established by the Court of Justice of the European Union (CJEU), holds that EU law takes precedence over national laws, including constitutional provisions[1]. This principle is necessary for the uniform application of EU law across member states[2], yet challenged[3] by some member states by invoking their constitutional identity as a defence against EU legal obligations that they perceive as infringing on their core constitutional values[4]. Article 4(2) of the Treaty on European Union (TEU) explicitly recognizes the importance of national constitutional identity. It mandates that the EU must respect the "national identities" of its member states, which are "inherent in their fundamental structures, political and constitutional". This provision attempts to balance the need for European integration with respect for national sovereignty. Additionally, incorporating limitations on supremacy into the Treaty and the CJEU's case law actually strengthens the supremacy of EU law. This is because it is ultimately EU law that governs national identity or constitutional traditions by allowing for such limitations[5].

At its core, constitutional identity embodies the fundamental principles and values that underpin a state's governance structure. These may include democratic norms, the rule of law, respect for human rights, and the protection of minority rights. However, beyond these universal principles lie the distinct historical experiences and cultural traditions that shape each nation's constitutional identity. For example, the constitutional identity of Germany is deeply influenced by its post-war history, enshrining principles of federalism, social welfare, and collective memory of past atrocities[6]. The constitutional identity of France is steeped in the legacy of the French Revolution, emphasizing principles of liberty, equality, and fraternity[7], while the United Kingdom's constitutional identity reflects its long history of parliamentary sovereignty and common law traditions[8].

Within the EU, the concept of constitutional identity becomes particularly salient as member states

1. https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html; Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECLI:EU:C:1963; Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C: 1964:66.

2. Milena Apostolovska-Stepanoska, and Leposava Ognjanoska, "The Doctrine of Supremacy of European Union Law: Foundations, Scope and Future Perspectives," *Regional Law Review* (2020): 21–38.

3. Justin Lindeboom, "Why EU Law Claims Supremacy," *Oxford Journal of Legal Studies* 38, no. 2 (2018): 328–356. Accessed March 6, 2024. https://doi.org/10.1093/ojls/gqy008.

4. Julian Scholtes, "Abusing Constitutional Identity," *German Law Journal* 22, no. 4 (June 2021): 534–556. Accessed March 6, 2024. DOI: https://doi.org/10.1017/glj.2021.21. Renáta Uitz, "National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades", (2016). Accessed March 18, 2024. https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/; Gábor Halmai, "National(ist) Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism," *EUI Working Papers*, *LAW Department of Law*, (2017). Accessed March 10, 2024, https://cadmus.eui.eu/bitstream/handle/1814/46226/LAW_2017_08.pdf?sequence=1.

5. Lindeboom, 340.

6. Scholtes, 543.

7. Pol Eve, "Le principe de l'identité constitutionnelle et la remise en question de la déférence au droit de l'Union," *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae - Sectio Iuridica*, Tomus LXI (Budapest: 2022), 55 et. Seq. Accessed March 6, 2024.

8. Paul Craig, "Constitutional Identity in the United Kingdom: An Evolving Concept," in *Constitutional Identity in a Europe of Multilevel Constitutionalism,* eds. C. Calliess, G. van der Schyff (Cambridge University Press, 2019), 284–302.

grapple with the tension between national sovereignty and supranational integration. While the EU provides a legal and normative framework aimed at encouraging cooperation and unity among its diverse member states, it also challenges the primacy of national identities and legal systems, because it can and, in context, it has to[9]. This tension is most evident in debates surrounding issues such as sovereignty, immigration, and the balance of power between EU institutions and national governments (and, more recently or more visible, constitutional justice).

All these are expected, I shall say, due to the fact that the concept of constitutional identity is elusive[10], as it can be interpreted in various ways depending on what is at stake[11]. As already mentioned, at its core, constitutional identity serves as the foundation upon which a nation's legal and political framework is built, encompassing historical legacies, cultural nuances, and societal values. It represents the matrix of a nation, reflecting its historical journey, struggles, and aspirations. Sounds romantic, true, necessary, and positive. However, in the context of the European Union, the notion of constitutional identity takes on added complexity as member states have to face a balance between preserving their sovereignty and embracing the collective ethos of European integration. This integration implies a common political identity and a shared human identity grounded in principles of liberty and equality. However, this collective identity can sometimes clash with the romanticized notion of national identity, which is rooted in a specific cultural heritage and political territory dedicated to self-preservation.

National constitutional identity often comes into attention in cases where EU law is perceived to breach areas traditionally reserved for national (identitarian) sovereignty. For example, issues related to family law, education, and public morality often involve deep-seated national traditions and values. When CJEU issues judgements that member states perceive as infringing on these domains, tensions can arise, as well as tolerance or acceptance. A notable example is the CJEU's ruling in the case of Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (2004)[12]. In this case, CJEU upheld Germany's ban on certain violent video games on the grounds that it was a legitimate expression of Germany's constitutional commitment to human dignity, even though it restricted the free movement of goods within the EU. However, things may become more contentious, with no clear middle ground, when the primacy of EU law is challenged by national law on the form and substance of national constitutional identity. The CJEU has consistently held that EU law takes precedence over national law, including national constitutional law. This principle was established in the landmark case of Costa v ENEL (1964)[13]. However, several national constitutional courts have challenged this doctrine. *Exempli gratia*, the German Federal Constitutional Court (FCC), in its Lisbon Treaty Judgment (2009)[14], asserted that while Germany recognizes the primacy of EU law, it reserves the right to review whether EU actions remain within the limits of their conferred competences.

Thus, the concept of constitutional identity is not static; it evolves with societal changes and historical developments. As societies take on the concrete effects of the challenges of the 21st century, from climate change to technological disruption, *e.g.* AI, the notion of constitutional identity must adapt to new realities while staying true to its foundational principles of justice, equality, and human dignity.

Moreover, the Brexit referendum of 2016 can be an example of how national identity can influence a country's relationship with the EU to the point of exiting the European supranational order. The campaign (whilst populist) emphasized taking back control of laws and borders, reflecting a strong sentiment that EU membership was incompatible with the UK's historical constitutional identity and sovereignty[15].

Indeed, the problematic of integration is sensible to pride, politics and historical romantism. That is why the principle of subsidiarity is a mechanism through which the EU seeks to balance integration

9. Lindeboom, 340 et. Seq.

10. Robbert Bruggeman, and Joris Larik, "The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity," *Utrecht Journal of International and European Law* 35, no. 1 (2020): 20–34. Accessed May 9, 2024.

11. *Exempli gratia*, "Taricco Saga", see *Ibid.*, 25 et. Seq.

12. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A62002CJ0036.

13. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61964CJ0006.

14. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

15. Kevin Barker, "Brexit as a constitutive force in the Commonwealth: Constitutional identities and the withering Sovereign," *International Journal of Postcolonial Studies. Interventions* (2023): 1–19. Accessed March 6, 2024. https://doi.org/10.1080/1369801X.2023.2288121.

with respect for national identities, even though the most important principle for having a functional EU is the supremacy of European Law. Enshrined in Article 5(3) TEU, subsidiarity ensures that decisions are taken as closely as possible to the citizen, allowing national governments to act in areas where they are more effective than the EU. This principle is intended to prevent unnecessary interference by the EU in matters that can be better handled at the national or local level, thereby safeguarding national constitutional identities. This can be seen as a roadmap with too many roads and detours that lead to a presumed desired destination: a harmonized and unified EU – extrinsically (law – European *jus commune*) and intrinsically (identity through common understood and lived principles and standards, *i.e.* socio-legal culture that produces law enabled by a certain recognised and respected jurisprudence, mainly that developed by CJEU).

Both national constitutional identity and European identity share a common goal of shaping the future by drawing from past experiences, though they emphasize different aspects. Each member state seeks to achieve common objectives such as welfare and human protection, but with unique approaches tailored to their own context. These approaches may be shaped by factors such as religion, (subjective) politics, pride, and even historical conflicts between certain states that share membership.

I believe that we need to grasp the overall idea of national constitutional identity and European identity without getting too caught up in trying to define them precisely. They're slippery concepts, so giving them a loose interpretation can actually help us see the bigger picture and understand the issues at stake.

National constitutional identity is a dynamic and competing narrative, historically driven[16], constantly reinterpreted and reaffirmed through the lived experiences and evolving consciousness of its citizens, standing as a testament to their enduring historic legacy and context connected to the present[17] and future ambitions, *e.g.* aspirational and aversive constitutionalism[18]. Therefore, there is no surprise that the quest to find and preserve constitutional identity is not without its pitfalls. While it seeks to uphold cherished values and traditions, it can inadvertently veer into the territory of authoritarianism or ethnocentrism, perpetuating inequalities and exclusions within society. Striking a balance between preserving identity and fostering inclusivity is a challenge that necessitates continuous introspection and adaptation, *i.e.*, how much one "understands", wants to "understand" and can "understand".

European identity is (also) a "living organism" with past cognitive ties, continually evolving as it embraces new influences and adapts to contemporary challenges. It reflects a union that, while distinct in its parts, maintains a cohesive whole for all its members. Like any organism, it can experience periods of illness and recovery. Though the concept of being "healthy" is subjective, it can be understood as maintaining a minimal standard of being, specifically, the European identity grounded in the rule of law.

So, the story goes on. It may be a never-ending story, which may be a positive aspect.

**Interpreting Common Standards and Principles:**
**The identity of rule of law or the rule of law as identity – national and/ *versus* European**

When we talk about making the laws of different countries in the EU work together, it's not just about rules; it's about understanding the different cultures, traditions, and values of Europe. The EU wants everyone to share basic ideas like democracy, human rights, and following the law, but each country has its own way of thinking. Consider how different countries view judicial activism. Some are used to courts defending individual rights, while others prefer restraint and put more accent on national sovereignty[19]. In Eastern Europe, countries transitioning from communist rule are still figuring out democracy and liberalism and merging them into liberal democracy[20]. So, deciding when to let courts

16. Manuel Guțan, "Constitutional Identity as Competing Historically Driven Narratives", in *Law, Culture and Identity in Central and Eastern Europe. A Comparative Engagement*, eds. Cosmin Cercel, Alexandra Mercescu, Mirosław Michał Sadowski (Routledge, 2024), 137 et. Seq.
17. Ibid., 137.
18. Kim Lane Scheppele, "Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models", *International Journal of Constitutional Law* 1, no. 2 (April 2003): 296–324. Accessed March 6, 2024. https://doi.org/10.1093/icon/1.2.296.
19. See Martin Belov, ed., *Courts and Judicial Activism under Crisis Conditions: Policy Making in a Time of Illiberalism and Emergency Constitutionalism* (London: Routledge, 2021). Also, see the book's review, by Roghină Răzvan Cosmin, in *Romanian Journal of Comparative Law*, no. 2 (2022): 411–457.
20. Bogdan Dima, *Sisteme de guvernare în democrațiile din centrul și sud-estul Europei* (Bucharest: Hamangiu, 2015), 2–13.

act (including constitutional courts) and when to hold back can be hard or a double edge sword[21]. Sometimes, holding back is seen as important to protect national identity and values. Other times, pushing forward is needed to safeguard rights and freedoms. And these stances between activism and restrain can be inversed.

As such, it is once again self-explanatory why the concept of constitutional identity intersects with broader debates surrounding cultural and political liberalism within the EU. Cultural ethnocentrism, or the belief in the superiority of one's own culture, can influence the legal and political cultures of member states, shaping their attitudes towards European integration and liberalism. Societies with a more homogenous cultural identity may exhibit greater resistance to liberal principles that challenge traditional values and norms. Therefore, there is no surprise that constitutional identity acts as a legal tool (*lato sensu*) for safeguarding a nation's constitutional characteristics. However, there are challenges in defining common constitutional standards, such as the rule of law, which can be interpreted differently. These standards encompass various aspects like human dignity, predictability, proportionality in lawmaking, and judicial independence. Constitutional identity, as such, encapsulates the essence of a nation's self-perception and its projection onto the international and/or supranational stage, intertwining the principles of constitutionalism with national identity. At its core, constitutionalism embodies the noble ideal of constraining governmental powers and safeguarding fundamental rights. It serves as a set of instruments/ political ideas against tyranny and arbitrary rule, fostering the rule of law and ensuring accountability within the corridors of power. However, beyond its theoretical underpinnings, constitutionalism finds resonance in the lived experiences of individuals and communities, shaping their interactions with the state[22], having constitutional moments as crossroads[23].

The concept of constitutional identity goes beyond legal theory and textual interpretation, encompassing cultural, social, and historical narratives. To put it more historically romantic, it reflects a nation's soul, embodying the struggles and triumphs of its constitutive people over time. However, this does not imply that the soul is entirely shaped by social experiences within national borders. The experiences of other states, societies, or communities can and proved to be valuable and influential to others, contributing to the development of laws and forming a part of a borrowed identity (legal transplants). However, that does not necessarily mean that the effects will be the same everywhere, or even that the initial intentions were the same when adopting certain solutions outside the organic process of social and legal creation. *Exempli gratia* - as a general standpoint - from the Magna Carta to the Universal Declaration of Human Rights, European Convention of Human rights and EU Charter of Fundamental Rights, each milestone in international and constitutional history leaves a mark on the global, regional and national collective consciousness, shaping the contours of national identity by appropriation, from where we may - yet again - consider the legal transplant phenomenology[24].

When discussing the rule of law, it's not surprising that it can be viewed and understood through detachment, yet simultaneously reshaped by emotions, aspirations, and epistemological shortcomings. The concept of the rule of law, although not always named as such, has ancient roots, emerging with the recognition of the benefits of written laws for governing societies. From ancient times, civilizations understood the importance of codifying rules to ensure order and facilitate communication over time.

In various legal traditions, such as the English *rule of law*, German *Rechtsstaat*, and French *État de droit*, the core idea revolves around the primacy of law and the protection of individual rights. The English tradition, rationalized by A.V. Dicey, emphasizes key legal principles like generality, publicity,

21. Bianca Selejan-Guțan, "When activism takes the wrong turn: The case of the Romanian Constitutional Court," in *Courts and Judicial Activism under Crisis Conditions. Policy Making in a Time of Illiberalism and Emergency Constitutionalism*, ed. Martin Belov (Routledge, 2021), 128.

22. Dieter Grimm, "Constitutions, Constitutional Courts and Constitutional Interpretations at the Interface of Law and Politics", in *The Law/ Politics Distinction in Contemporary Public Law Adjudication*, ed. Bogdan Iancu (Utrecht: Eleven International Publishing, 2009), 22 et. seq.

23. Jon Elster, "Constitutionalism in Eastern Europe: An Introduction," *The University of Chicago Law Review* 58, no. 2 (1991): 447.

24. See Razvan Cosmin Roghină, "Comparative Law and Legal Transplant. Romanian Struggles with the Past and New Directions for the Future," Romanian Journal of Comparative Law, no. 1 (2022): 72–85.

non-retroactivity, and predictability[25], viewing the judiciary as a safeguard of citizens' rights[26]. In contrast, the German understanding, *Rechtsstaat*, a concept originating in German legal thought, *i.e.,* that of Immanuel Kant and Friedrich Carl von Savigny, emphasizes the idea of a state governed by law. It entails that governmental powers are limited by legal rules and that both citizens and authorities are subject to the law. Initially, *Rechtsstaat* reflected a formal adherence to legal norms, but over time it evolved to encompass substantive protections for fundamental rights and freedoms. Following World War II, especially in post-war Germany, *Rechtsstaat* underwent significant development, prioritizing the protection of human dignity and fundamental rights. This evolution transformed the traditional positivist notion of *Rechtsstaat* into a constitutional state (Verfassungsstaat), where adherence to the constitution and respect for human rights take precedence[27]. Thus, *Rechtsstaat* represents a core aspect of modern democratic governance, ensuring the law rules and safeguards individual liberties within a substantial qualitative legal framework. The concept of the French État de droit, stemming from the 1789 Revolution, seeks to protect individual rights from legislative overreach, thereby restraining the authority of the legislature in favour of constitutional supremacy. In essence, it asserts that the government's actions are constrained by the will of the people, and its primary duty is to ensure the welfare and happiness of the true sovereign, i.e. the French nation, which is protected by its inner national sovereignty translated into supreme written norms – integrated in the definition of article 6 and 16 of the French Declarations[28] – that cannot be overridden without popular consent.

These legal frameworks reflect different historical and philosophical contexts. The English tradition, rooted in trust and evolutionary constitutionalism, views law as a product of gradual development and emphasizes judicial protection of rights. The French tradition, born out of distrust and revolutionary constitutionalism, places greater emphasis on limiting government power and protecting individual liberties. Despite these differences, the ultimate goal of all avatars of rule of law is to establish a legal framework that governs the state and ensures the protection of individual rights. Whether through common law evolution/ organic (re)evolution, formal legalism (prospects, or aspirational legal identity), or constitutional safeguards (eternity clauses), these legal principles aim to create a society governed by certain qualitative laws rather than any formal written rules.

When considering the notion of the rule of law as an identity, the emphasis shifts significantly towards what a legal system actually produces in terms of truthfulness, perhaps closer to the organic evolution of law, excluding legal transplants that often clash with the living past, proposing an alternative present and a future of total change. For instance, Article 1 paragraph 3 of the Romanian Constitution describes the state as a "rule of law" state, alongside being social and democratic, where human dignity, rights and freedoms of citizens, free development of human personality, justice, and political pluralism represent supreme values, in line with the democratic traditions of the Romanian people and the ideals of the December 1989 Revolution and are guaranteed. Without delving into the issue of Romanian democratic traditions, it may be useful to note that one who seeks the living spirit of democratic traditions in Romania's constitutional history will be disappointed, noting a stark difference between text and reality, and, in some cases, illiberal distortions of constitutional texts considered emblematic of Romanian liberalism[29]. Therefore, at the national level, the rule of law has its own identity, especially considering that the society in question is historically ethnocentric in the birth and argumentation of political existence within a determined territory based on *jus sanguinis* criteria intrinsic to conscience, such as religion, projecting further models of evaluation and protection of social values such as marriage and family[30]. The referendum held on October 6 and 7, 2018, regarding the modification of the Romanian

25. Albert V. Dicey, *Introduction to the Study of The Law of The Constitution* (London, New York: Macmillan and Co', 1889), 268-273. http://archive.org/stream/introductiontos04dicegoog#page/nl 6/mode/2up.
26. Rainer Grote, "Rule of Law, Rechtsstaat and Etat de Droit", in *Constitutionalism, Universalism and Democracy: A Comparative Analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law*, (ed.), C. Starck (Baden: Nomos Publishers, 1999), 283.
27. Michel Rosenfeld, „The rule of Law and the legitimacy of constitutional Democracy", *Southern California Law Review*, 74, no. 5 (2001): 1329.
28. https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen. Accessed May 18, 2024.
29. Guțan "Constitutional Identity as Competing Historically Driven Narratives", 155 et. Seq. Also, see Roghină Răzvan Cosmin, "Cultural and Political Challenges in the Historical Roots of Legal Transplants in Romania. The Paradox of Conservation Through Change," *Romanian Journal of Comparative Law*, no. 2 (2022): 133–226.
30. Ibid.

Constitution illustrates this challenge vividly. The initiative, primarily led by the Coalition for Family and backed by the Orthodox and Roman Catholic Churches, sought to redefine the concept of family as the union between a man and a woman, rather than simply between "spouses". Despite failing to meet the validation threshold due to low voter turnout, the referendum uncovered a profound presence of Romanian religious identity. The vast majority of participants favoured the revision, signalling a societal bias against certain minorities. This exposes a facet of Romanian democracy, where the will of the majority can encroach upon individual freedoms, contradicting the principles of a robust constitutional democracy. And it is only one example from many. Yet alone, the respective experience suggests that Romanian interpretation of the rule of law diverges from the European conception, as it is infused with historical and cultural subtleties. The concept of the free development of human personality, when seen through a Romanian lens, tends to conflate spirituality with Christian values. Of course, the Romanian case is not unique, but it is a landmark for ethnocentric rule of law, thus a rule of law that reflects a national identity. This perspective suggests a specific rhetoric: *how can the state, which was created by us, the Romanians, who have been Christians from the very beginning and have built the Romanian state with our blood, be governed by laws that disregard our way of being, our core values, and our social way of being?*

Beyond cultural influences, the identity of the rule of law and also the rule of law as identity are deeply rooted in the legal philosophy and epistemology of nations. At a general level, the rule of law appears to have a universal meaning. However, when considering national historical contexts and specific societal values, the application of the rule of law varies, often depending on who is subject to it. In this context, the functioning of courts plays a critical role in upholding the fundamental principles of a fair legal system (rule of law in both meanings): treating all individuals equally, offering clarity on the law, and ensuring its consistent application. Central to achieving these objectives is judicial independence, which serves as the linchpin for the system's success. In Romania, this principle is enshrined as an "eternity clause" in the Constitution (article 152[31]), signalling its enduring significance in shaping the identity of the legal framework.

However, when supranational deliberations and recommendations/ conclusions/ judgements are ignored or altered by subjective political motives, national pride, or excessive activism, as exemplified by the recent cases involving Romania's Constitutional Court, complications inevitably arise. Instead of solidifying the rule of law, such tendencies risk eroding the rule of law under the guise of "constitutional identity". Ideally, the national rule of law should harmonize with European standards – for a common identity of a *jus commune*.

**The Romanian Constitutional Court fighting for (?) Judicial Independence and Constitutional Identity (aga)in(st) the European Rule of Law and CJEU!?**

Romania's accession to the European Union in 2007 marked an important achievement in its journey toward democratization and rule of law consolidation. The EU's conditionality mechanisms, particularly the Cooperation and Verification Mechanism (CVM), have been instrumental in monitoring and supporting Romania's efforts to strengthen its judiciary and combat corruption. However, challenges persist, and the concept of constitutional identity often intersects with the broader rule of law concerns. The Romanian Constitutional Court (RCC) has been at the forefront of defining and defending (*lato sensu*) Romania's constitutional identity (also, *lato sensu*). In recent years, the RCC has issued several judgements that highlight the tensions between national sovereignty, linked to constitutional identity, and EU integration, linked to European rule of law.

The judgements by the Court of Justice of the European Union on May 18, 2021, in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, and C-397/19[32] has sparked significant reactions and interpretations across various perspectives. *A priori*, the Romanian courts sought clarity on two main issues from the CJEU. Firstly, they questioned the primacy of EU law over national legislation, especially concerning the CVM's recommendations. Secondly, they raised concerns about recent judicial reforms, including the creation of a special prosecutorial section against magistrates, *i.e.* the SIOJ, and changes to national courts' compositions. The CJEU clarified that while the CVM and its benchmarks are binding on Romania, the specific recommendations within CVM reports are not legally binding. However, the European Court emphasized Romania's obligation to adhere to the CVM's

31. https://www.ccr.ro/en/constitution-of-roumania/. Accessed March 12, 2024
32. https://curia.europa.eu/juris/liste.jsf?num=C-83/19. Accessed March 16, 2024

objectives under EU law, irrespective of the Romanian Constitutional Court's stance. *In concreto*, the CJEU's decision, particularly point 7 of its judgement, (re)asserts the supremacy of EU law over constitutional provisions of member states. It mandated that national courts must set aside national laws, even constitutional ones, if they conflict with EU law, specifically based on Decision 2006/928[33] or Article 19(1) of the Treaty on European Union (TEU). Regarding the judicial reforms, the CJEU found that certain aspects, like the interim appointment of the chief inspector of magistrates, contradicted EU law. Additionally, it raised concerns about the potential misuse of the special prosecutorial section for political purposes, and engaged the national courts with the further examination, as it is a feature of their independence and part of the rule of law core background.

The ruling by the European Court served as a robust confirmation of the authority of EU law, emphasizing the need to uphold EU standards, particularly in preserving judicial independence. Additionally, it offered clear direction to national courts, urging them to give precedence to EU law over conflicting national regulations. The decision put the Romanian Constitutional Court in a challenging position[34], as it faced constructive pressure to consider the tangible impacts on future policy choices in Romania, particularly concerning attempts to reverse controversial judicial reforms.

The aftermath of the CJEU's judgement saw a twist in Romania. Initially, on June 7, the Pitești Court of Appeal acted on the European decision. The court determined that the Section for Investigating Criminal Offences within the Judiciary (SIOJ) no longer had the authority to handle a specific case. Consequently, the court declined to proceed with the case until a new prosecutor was to be appointed. However, just a day later, on June 8, the RCC issued its verdict[35] on a challenge of constitutionality regarding certain articles of the Law on judicial organization related to the SIOJ. In a decision labelled as a legal rollercoaster of constitutional incoherences[36], the RCC essentially nullified the effect of the CJEU judgement in national courts. Firstly, despite the CJEU indicating otherwise, the RCC argued that the SIOJ met the necessary standards and didn't infringe upon constitutional principles. Secondly, the RCC acknowledged that judges could disregard national laws conflicting with EU laws, but then stated that EU law didn't override the Romanian Constitution.

The Constitutional Court noted that

> "a court has the power to examine the conformity of a provision "of the national laws", therefore belonging to the domestic law, with provisions of EU law in the light of Article 148 of the Constitution and, should it find it contrary to EU law, it **has the power to apply, as a matter of priority, provisions of EU law in disputes concerning the subjective rights of citizens. In all cases, the Court finds that, by the concepts of 'national laws' and 'domestic law', the Constitution refers exclusively to infra-constitutional legislation**, since the Basic Law retains its hierarchically superior position by virtue or Article (11) (3) of the Basic Law. Thus, when it provides that "the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws", **Article 148 of the Constitution does not give EU law priority over the Romanian Constitution, so that a national court does not have the power to examine the conformity of a provision of national law, found to be constitutional in the light of Article 148 of the Constitution, with the provisions of EU law**."[37]

This logic was flawed on multiple levels, especially in regard of legal reasoning and corresponding in-force laws.

i) Conflict in Hierarchy of Norms: RCC asserts that EU law takes precedence over conflicting internal laws but does not take precedence over the Constitution. However, if EU law is superior to internal (domestic) laws, it logically follows that it should also be superior to the Constitution, as the

33. Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption. See https://eur-lex.europa.eu/eli/dec/2006/928/oj. Accessed March 16, 2024

34. Elena Simina Tănăsescu, and Bianca Selejan Guțan, "A Tale of primacy," June 2, 2021. https://verfassungsblog.de/a-tale-of-primacy/ . Also, see Constantin Pintilie, „Curtea Constituțională a României la o răscruce de drumuri", (May 21, 2021). Accessed May 6, 2024. https://www.juridice.ro/703024/curtea-constitutionala-a-romaniei-la-o-rascruce-de-drumuri.html#_ftn13

35. https://www.ccr.ro/wp-content/uploads/2021/06/Decizie_390_2021.pdf

36. See Bianca Selejan-Guțan, "A Tale of Primacy Part. II", June 18, 2021. Accessed May 6, 2024. https://verfassungsblog.de/a-tale-of-primacy-part-ii/

37. https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf: 45. Accessed May 6, 2024.

Constitution is an internal (domestic) law.

ii) Ambiguity in Definition of internal law(s): RCC essentially defines "internal law" as excluding constitutional law. However, this creates ambiguity because constitutional law is part of domestic law. The Court tries to argue that the constitution is somewhat separated from national law due to its supremacy. However, while it is imbued with supremacy, it remains a national law designed to govern all other laws from a superior regulatory standpoint, but its authority does not extend beyond national borders, thus a constitutional law remains domestic and internal. It is the heart and brain of the national legal system. While it's true that the Constitution reflects the identity of a nation, and RCC may use article 152 of the Romanian Constitution to resist European interventions or judicial dialogue, ultimately, constitutional law sets the standards and expectations for the legal content of internal law, serving as its core that incorporates social and political values, whether native or borrowed, whether purely national or supranational. As such, it is - or it should be - an embraced (European) constitutional stance to merge certain values and principles in the interest of the human being and national citizens gathered within a common European citizenship.

RCC also mentioned that

> "**the principle of the rule of law entails legal certainty**, that is to say, the legitimate expectation on the part of the addressees as to the effects of the legal provisions in force and the way in which they are applied, so that any subject of law may predictably determine his or her conduct. In so far as some courts disapply of their own motion the provisions of national law which they consider to be contrary to European law, whereas others apply the same national rules, considering them to be consistent with European law, the standard of foreseeability of the rule would be seriously undermined, which would give rise to serious legal uncertainty and, consequently, would lead to the infringement of the principle of the rule of law."[38]

The RCC's legal thinking process may illustrate a departure from the substantial rationale (and principles) of the rule of law, whether grounded in national identity or internationally recognized traditional versions such as "rule of law", "état de droit", or "Rechtsstaat".

i) Judicial Independence: One of the cornerstones of the rule of law is the independence of the judiciary. Judges must have the freedom to interpret and apply the law without undue influence or pressure. This independence necessarily implies that different judges might arrive at different conclusions when interpreting complex legal issues, including the relationship between national and European law.

ii) Case-by-Case Basis: The application of law often depends on the specific facts and circumstances of each case. Different factual scenarios can lead to different judicial outcomes even when the same legal principles are applied. Thus, some variability in judicial decisions is a natural and acceptable outcome of a robust judicial system, thus of a coherent by difference rule of law (and this is not paradoxical).

iii) Legal Pluralism: In a system where multiple legal orders coexist (national and European law), some degree of interpretative diversity is inevitable. National courts are not merely applying national law; they are also interpreting how national law aligns with European law. This dynamic interplay between different legal orders can lead to differing interpretations.

iv) Evolution of Legal Standards: The legal landscape, especially in the context of European Union law, is continuously evolving. New judgments from the CJEU and changes in EU legislation can shift the interpretation of laws. Expecting absolute predictability in such a fluid environment is unrealistic. As a "rule of law safety net", the national rule of law should be synchronised with the supranational one, being standardised.

v) Mechanisms for Harmonization, *i.e.* preliminary Ruling Procedure: The EU legal system has mechanisms in place to address discrepancies in the application of EU law, such as the preliminary ruling procedure under Article 267 TFEU. National courts can (and sometimes must) refer questions of EU law to the CJEU for clarification. This mechanism helps harmonize the interpretation of EU law across member states.

vi) Judicial Dialogue: Continuous judicial dialogue between national courts and the CJEU promotes consistency in the application of EU law. Over time, this dialogue contributes to the convergence of legal interpretations and enhances legal certainty (a feature that was highlighted by the RCC in the

38. Ibid., 47.

above paragraph).

vii) Legal Certainty vs. Absolute (?) Predictability: Legal certainty does not require absolute predictability in every judicial decision. Instead, it requires that laws are clear and accessible, and that individuals can understand their legal rights and obligations. Some degree of judicial interpretation and evolution is compatible with legal certainty, as long as there are mechanisms to address significant divergences.

viii) Practical Implications and Rule of Law, *i.e.*, practical Necessity: The practical functioning of a legal system requires allowing courts the discretion to interpret and apply the law, especially in new or complex areas. Restricting judicial discretion excessively in the name of predictability can stifle legal development and adaptation. Overemphasizing predictability at the expense of judicial independence and adaptability can undermine the broader concept of the rule of law. In consequence, by context, in my opinion, a degree of judicial activism can be positive.

Adding to the confusion, the RCC suggested that only political authorities, not the courts, were bound to adhere to the European Commission judgements, despite CJUE stating otherwise, *i.e.*:

> "The Court finds that **the CJEU, in declaring Decision 2006/928 to be binding, has limited its effects from a twofold perspective**: on the one hand, it has established that the obligations resulting from the Decision are a matter for the Romanian authorities competent to cooperate institutionally with the European Commission (paragraph 177 of the judgment), and thus for the political institutions, the Romanian Parliament and the Government of Romania, and, secondly, that the obligations are to be exercised in accordance with the principle of sincere cooperation laid down in Article 4 TEU. **From both perspectives, the obligations cannot be binding on the courts, i.e. State bodies which are not empowered to collaborate with a political institution of the European Union.**"[39]

While it may be logical to assign responsibilities to political institutions for matters of collaboration and policy implementation, it raises questions about the enforceability and accountability of European decisions and judgements. If European obligations cannot be enforced directly by judicial bodies, it might lead to a gap in accountability and hinder the effectiveness of the European law and jurisprudence (more in an epistemological sense). Additionally, this approach could potentially undermine the principle of separation of powers if the judiciary is excluded from enforcing certain obligations.

> The Court therefore finds that the application of point 7 of the operative part of the judgment, according to which a court "is [...] permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU", has no basis in the Romanian Constitution, since, as previously stated, Article 148 of the Constitution enshrines **the primacy of EU law** over conflicting provisions of national laws. **The CVM reports, drawn up on the basis of Decision 2006/928, by their content and effects, as established by the judgment of the CJEU of 18 May 2021, do not constitute rules of EU law, which the court should apply as a matter of priority, removing the national rule. Therefore, the national judge cannot be asked to decide that recommendations should be applied as a matter of priority to the detriment of national law, since the CVM reports do not establish legal rules and are therefore not likely to conflict with national law.** This conclusion is all the truer where the national legislation has been declared to be in conformity with the Constitution by the national constitutional court in the light of the provisions of Article 148 of the Constitution[40].

As such, the RCC argued that MCV reports, based on Decision 2006/928, do not constitute European law and therefore cannot take precedence over national legislation. However, the logical contradiction lies in the fact that if Decision 2006/928 forms the basis for these reports, they are inherently linked to European law. Even if the reports themselves aren't legally binding, they provide assessments and recommendations based on European legal standards.

All these effectively created a legal quagmire, leaving judges unsure whether to follow EU law and risk disciplinary action or comply with the RCC's directive. Meanwhile, the European Commission

39. Ibid.
40. Ibid.

released its latest report on Romania's progress under the Cooperation and Verification Mechanism (CVM), emphasizing the importance of judicial independence and tackling corruption[41]. Despite these European *recommendations* (directions), the RCC basically contradicted the direction(s) set by the CJEU and the prior recommendations of the Commission. In essence, while the CJEU judgement aimed to clarify Romania's obligations under EU law, the RCC decision muddied the waters, leaving judges caught between conflicting legal directives.

The Craiova Court of Appeal, by a ruling of 29 June 2021, raised another question to the CJEU[42] regarding the independence of judges. It wanted to know if a national law allowing disciplinary action against a judge for not following a decision of the Constitutional Court conflicted with EU law, which requires judges to prioritize EU law over national law. The President of the CJEU fast-tracked the case, as disciplinary actions stemming from this clash of laws could seriously undermine the independence of courts and the stability of Romania's judicial system. In essence, it came to be reiterated that no national law, not even a constitutional one, should undermine EU law's unity and effectiveness. Any national court dealing with a case involving EU law must disregard any conflicting national laws. This reconfirmed CJEU's consistent stance on prioritizing EU law over national laws. However, for the Romanian context, it also set a stage for deeper conflict between the RCC and ECJ.

Fast forward to November 2021, the Romanian Constitutional Court doubled down on its stance in a letter to the Ministry of Justice[43]. It reiterated their belief that the Commission's reports weren't legally binding and thus couldn't dictate how Romanian courts operated. This back-and-forth highlighted a fundamental clash between EU law and Romania's interpretation of its own legal framework behind the shadows of the walls of constitutional identity and an original understanding regarding the sense of judicial independence within the rule of law. In the aftermath of all these "rollercoaster stories", the judges in Romania faced disciplinary action for daring to apply the CJEU's judgement(s) and challenge the status quo set by RCC. The situation became even more convoluted when judges seemingly flip-flopped on their stance, possibly under pressure from disciplinary proceedings.

On December 21, 2021, the CJEU issued another preliminary ruling on five interconnected cases initiated by Romanian courts[44], focusing on conflicts between RCC and EU law. These conflicts arose from high-level corruption cases involving government officials. The issue at hand was whether certain rulings by Romania's Constitutional Court (in the procedure of solving legal conflicts of constitutional nature), concerning criminal procedure rules in cases of fraud and corruption, were in line with EU law. Specifically, the concern was that constitutional rulings might violate EU law provisions aimed at safeguarding the Union's financial interests, ensuring judicial independence, upholding the rule of law, and maintaining the primacy of EU law. To simplify, the case law involved decisions made by the RCC which deemed certain methods of gathering evidence unconstitutional, *i.e.* with the help of the intelligence service, leading to the exclusion of related evidence in certain criminal cases. Additionally, another decision declared the composition of certain judicial panels illegal, *i.e.*, the composition of the 5-judges' panels of the High Court of Cassation and Justice.

Shortly after the "European judgement", the Romanian Constitutional Court released a press statement signed by its president, Judge Valer Dorneanu[45]. The statement essentially directed national judges to reconsider the effects of the EU law's primacy on Romanian law, suggesting that constitutional revisions might be necessary. While the statement may be dismissed as harmless, regarding legal effects, it reflects a broader pattern of the RCC's involvement in political disputes and interference with judicial processes.

Afterwards, in response to long delays and compliance with the CJEU, Romania's Parliament adopted Law No. 49/2022, which dismantled the Section for Investigating Criminal Offences within the Judiciary (SIOJ) and amended the Criminal Procedure Code. This law, however, faced strong

41. Bruxelles, 8.6.2021, COM(2021) 370 final https://commission.europa.eu/document/download/4fffb4e1-d68b-4e95-80bc-22c5a1911385_ro?filename=com2021370_ro.pdf. Accessed May 6, 2024.
42. https://www.forumuljudecatorilor.ro/index.php/archives/4450?lang=en
43. For a thoroughly grounded critique pertaining to the letter, see Bianca Selejan-Guțan, "A Tale of Primacy, part III," November 17, 2021. Accessed May 6, 2024. https://verfassungsblog.de/a-tale-of-primacy-part-iii/
44.https://curia.europa.eu/juris/document/document.jsf?text=&docid=251504&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1116963.
45. https://www.ccr.ro/wp-content/uploads/2021/12/Comunicat-presa-23.12.2021.pdf. Accessed May 4, 2024.

criticism from the Venice Commission in Opinion No. 1079/2022[46], which mainly expressed concerns that the new mechanism might not differ fundamentally from the SIOJ, potentially weakening anti-corruption efforts within the judiciary. The Venice Commission recommended that the DNA's powers to investigate and prosecute corruption cases involving judges and prosecutors be restored. Investigating corruption by magistrates requires specialized skills and resources, which the system proposed by Law No. 49/2022 lacks. For this reason, the Venice Commission supported specialized, autonomous units for such investigations to ensure independence and effectiveness. Furthermore, in the context of the already adopted Law, the Commission recommended enhancing the role of the prosecutorial section of the Superior Council of Magistracy (SCM) in selecting prosecutors for investigating judicial offenses, ensuring a competitive selection process, clearer appointment criteria, and longer appointment terms. Despite these recommendations, Romanian lawmakers did not incorporate the Venice Commission's suggestions. Instead, Order No. 108/03.06.2022 assigned several prosecutors from the Prosecutor's Office attached to the High Court of Cassation and Justice to investigate corruption cases, thus limiting the DNA's competence.

Despite all these qualitative legislative inertia (related to the substantial meaning of the rule of law), the 2022 CVM report acknowledged Romania's progress in implementing judicial and anti-corruption reforms, concluding that Romania met its CVM commitments and recommending closing all benchmarks. On July 5, 2023, the Commission informed the Council of its intention to repeal Decision 2006/928/EC, which established a cooperation and verification mechanism for Romania, and to officially end the mechanism. This intention was also communicated to the European Parliament. In a letter dated July 26, 2023, the Council acknowledged the Commission's intention to officially terminate the cooperation and verification mechanism for Bulgaria and Romania, and as of 16 September 2023, Decision 2006/928/EC was repealed by the Commission[47].

**Conclusions**

The Romanian legal landscape is an identitarian undetermined flux, with national constitutional interpretations and resistance to EU legal supremacy influencing the identity of the rule of law. This creates a fragmented environment where judicial independence is at risk, and the primacy of EU law is not fully acknowledged. The tension between national sovereignty and EU integration shapes the legal system, resulting in a duality where national courts struggle to balance EU directives, judgements and recommendations with constitutional judgements. This further leads to a lack of predictability and uniformity in legal application, causing uncertainty for legal practitioners and the public. Reluctance to fully embrace EU legal principles weakens the rule of law, as seen in the judiciary's hesitation to apply EU law due to the risk of disciplinary action. This hesitation undermines judicial autonomy and the true meaning of judicial independence as enshrined in the Romanian Constitution, *i.e.* article 152.

The significance of national identity within the Romanian rule of law is not adequately defined by the Romanian Constitutional Court (RCC)[48]. The lack of substantive engagement with the judiciary leaves this identity hollow. Consequently, what emerges is not a true reflection of Romanian legal ethos within the broader framework of the Romanian legal system. Instead, there are discernible gaps in legal philosophy and political alignment, which in turn influence the standards of legal comprehension, whether on a universal or European scale.

Although the RCC addresses constitutional identity, it often functions more as a tool for confrontation rather than a means for genuine dialogue, thereby undermining both internal cooperation and engagement at the European level. Consequently, the Romanian rule of law finds itself in a precarious position, suspended between a constitutional identity lacking defined parameters and the European

46. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)003-e:13 et. Seq. Accessed May 16, 2024.

47. https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4456. Accessed May 6, 2024.

48. Manuel Guțan, "Este Curtea Constituțională a României un portdrapel al identității constituționale naționale?," *Revista Română de Drept European (Comunitar)*, no. 1 (2022): 28-45. Guțan argues that the CCR, while referencing "constitutional identity" in its decisions, often fails to clearly define this term or its specific components. He emphasizes that Romanian constitutional identity should be understood as a product of historical accumulation, sedimentation, and perpetuation of certain values, principles, institutions, aspirations, and constitutional anxieties over time. This identity is significantly shaped by the ideological, constitutional, and political-state developments that took place in Romania from the 19th century until the post-revolutionary constitution of 1991.

conception of the rule of law. What remains apparent are faint echoes of Romanian identity in a monologue with the CJEU, albeit tinged with apprehension.

The RCC's autonomous and sometimes autocratic behaviour, along with its selective self-referencing, can hinder constructive judicial dialogue and create legal inconsistencies. Both the judiciary and the RCC derive their legitimacy from the Constitution. However, while RCC judges are appointed by political authorities, their functional legitimacy - which comes from upholding the rule of law - depends on public trust in the court's independence and the quality of its decisions[49].

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49. Bianca Selejan-Guțan, Elena-Simina Tănăsescu, "The role of precedents and case-based reasoning in the case law of the Romanian Constitutional Court", in Constitutional Law and Precedent International Perspectives on Case-Based Reasoning, ed. Monika Florczak-Wątor (London, New York: Routledge, 2022), 188.

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