Hague Journal on the Rule of Law
https://doi.org/10.1007/s40803-025-00264-5

ARTICLE

False Analogies? Rule of Law 'Backsliding' and Identitarian Claims in Hungary, Poland, and Romania

Bogdan Iancu[1] · **Ștefan Deaconu**[2]

Received: 18 June 2025 / Accepted: 1 October 2025
© T.M.C. Asser Press 2025, corrected publication 2025

Abstract

The article analyses the identity jurisprudence of the Constitutional Courts of Romania, Hungary and Poland. Identity expressions formulated by the constitutional courts in the three juridictions were for a long period of time analogised, perceived as interchangeable expressions of RoL backsliding. As we claim, these analogies were, particularly as regards Romania, false. By the same token, due to the capillarity and crosshybridization of supranational and international legal standards, the legal and political implications of false analogies are not jurisdictionally contained.

In Romania, opposition to the EU institutions was for a long time accidental-coincidental and unsystematic. This specificity was due in turn, as we show, to the specific conditionalities applicable to this country, the specificity of the constitutional framework, and the protracted application of anticorruption conditionalities under the CVM long after the EU accession on January 1st, 2007. However, more recent forays of the Constitutional Court of Romania into the terrain of identity, notwithstanding their declared purposes, raise similar concerns of instrumentalism as in Hungary and Poland.

We argue therefore that, notwithstanding the initial divergence between the jurisdictions and longstanding false analogies made between them, they all converged in the end, the common denominator being identity instrumentalism. In so arguing, we also make a more foundational yet implicit claim regarding the conditions of possibility for constitutionalism in the European Union.

Keywords Constitutional identity · CEE constitutionalism · Copenhagen conditionalities · RoL conditionalities · CVM · Legal instrumentalism · Constitutional identity and militant democracy

✉ Bogdan Iancu
Bogdan.iancu@unibuc.ro

Ștefan Deaconu
stefan.deaconu@drept.unibuc.ro

[1] Faculty of Political Science, Department of Constitutional and Political Theory and History, University of Bucharest, Bucharest, Romania

[2] Faculty of Law, Department of Public Law, University of Bucharest, Bucharest, Romania

Published online: 21 October 2025

1 Introduction: Identity, Europeanisation, West, East

The mysterious concept of constitutional identity has been presented in recent years as a shorthand for camouflaged sovereigntist claims and thus as one of the biggest challenges to European integration. Authors have occasionally proposed that, due to the illiberal perils intrinsic to this notion, one should sideline it (e.g., Fabbrini and Sajó 2019), scrap it as "inherently dangerous", however framed (Kelemen and Pech 2018) or collapse it into less nefarious alternatives, such as common Art. 2 values (Spieker 2020) or constitutional traditions (Fichera and Pollicino 2019).[1]

Comparative studies on identity fall, broadly speaking, in one of two genres. Some are ecumenical, in the formalistic logic of state equality (Spieker 2020; Calliess and van der Schyff 2019). Some are area studies, focusing on the backsliding-identity nexus (e.g., Kovács 2023) in peripheral Member States of various geographical-cultural persuasions (Central, Eastern, Central and Eastern Europe or just: Hungary and Poland). The German Federal Constitutional Court (GFCC) features in either setting, as ideal–typical model (Suteu 2021, esp. Ch. 3) and-or unwitting instigator (Bakó 2018).

This paper deals with various forms of constitutional identity uses at the EU semi-periphery. In the newer Member States of Central and Eastern Europe (CEE) identity problematics are, indeed, idiosyncratic. Partly, CEE region-specific forms of constitutional enculturation generate distinct ways of understanding identity and Europeanness. Partly, as we argue, identity positions react to specific EU conditionalities. As conditionalities changed over time, so did effects and reactions. The added value lies in our disentangling of three clusters of incentives bearing on identity assertions (positive constitutional law, EU conditionalities, constitutional culture) and in showing how they interacted with one another in three paradigmatic peripheral jurisdictions. Such incentive structures produced different configurations of identity assertions and resulted in different sets of national-supranational exchanges. The essential argument we make here is that failure to take such specificities into account and to distinguish carefully the preconditions bearing on identity positions has occasionally resulted in forced analogies and/or overreaches. In so doing, we aim to implicitly add nuance to 'RoL-backsliding' narratives and to challenge a familiar, overworn Orientalist trope: the "post-communism" passe-partout into all things Eastern (Iancu 2025c). The article qualifies such explananda, proposing more complex epistemological alternatives.

We compare the Europe-related identity jurisprudence of the Constitutional Court of Romania (CCR), the Polish Constitutional Tribunal (PCT), and the Hungarian Constitutional Court (HCC). The choice of national case studies covered by this study is not accidental. Romania, Hungary, and Poland are notorious 'problem jurisdictions' in the European Union. All three countries generated post-accession

[1] Scholarship on identity in the context of the EU is enormous. A full literature review would clutter the argument with no added epistemological benefit. For an exhaustive review of literature as of 2023 and a nuanced argument distinguishing, along three dimensions (generative, substantive, relational), acceptable uses from the abuse of identity, see Julian Scholtes's reference book (Scholtes 2023).

constitutional crises (in Hungary, after 2011, in Poland, post-2015, in Romania, in 2012 and 2016–2019, 2024–2025), which reverberated into rule of law crises with EU and Council of Europe implications. Reams of books and articles exploited the dominant analogy between Poland and Hungary. Romania is relatively understudied in the literature but was occasionally compared and/or contrasted to Hungary (e.g., in standard academic format, von Bogdandy and Sonnevend 2015; in op-ed format, Scheppele and Perju 2012; Mueller 2013) and more recently to Poland (e.g., Puleo and Coman 2023; Bojarski 2025).[2] Similarities of treatment and cross-hybridization are more noticeable in landmark Strasbourg and Luxembourg cases, especially as regards RoL standards deduced from new understandings of judicial independence as a standalone (Bustos Gisbert 2022) or derived (Kadlec and Kosar 2022) principle.[3] Unlike the fields of the academe or public commentariat, where comparative interests recede or revive in sync with the ebb and flow of crises, international and supranational RoL caselaw evolves distinctly. Courts are bound by a need to keep judicial tests and standards coherent and consistent over time and space.

Specific differences exist between these jurisdictions, underexplored in the literature and unreflexively analogized in legal practice. If regarded from the vantage point of conditionality evolutions, Romania, unlike Hungary and Poland, belongs to a different generation of rule of law-centered, EU- and CoE-driven, reform requirements. Whereas RoL-derived expectations applicable to Poland and Hungary focused primarily on judicial independence, Romanian reform packages emphasized anticorruption. The implications of this paradigm shift are for instance evident in the different configuration of the Romanian national High Judicial Council[4] or in

[2] Part of the reason why Romania was relatively ignored lies in the nature of the RoL conditionalities applicable to it and the way in which they interacted differently with the political system. We explore this correlation throughout. At the apex of the Romanian constitutional system, intense power conflicts of relatively shorter duration burst between parliaments and governments dominated until recently by the center-left, on the one hand, and the presidency and its allies, on the other. The presidency has been an electoral bastion of the center-right since 2004 and the meta-narrative of the center-right was for over two decades anticorruption. Such apex conflicts overlapped with the fight against corruption, tied until recently to a European conditionality, the CVM, pegged in turn on to the rule of law (Iancu 2024). When conflicts arose, false analogies were drawn between Hungary and Romania, in 2012, more recently between Romania and Poland in 2016–2019 (due to a false impression of similarity, resulting from falsely analogised judicial reforms). As crises receded after elections and/or corruption convictions, Romania was forgotten again. Analogies served local interests and were amplified accordingly, also by local centre-right discourse entrepreneurs (more educated, better networked and thus more adept up to a point at 'boomeranging' externally-internally their dual-use, selective interpretations of the events). See on the more problematic facets of soft law interactions, with an emphasis on judicial networking, Parau 2018.

[3] Notably, to exemplify with ECtHR cases only, *Kövesi v. Romania* (ECtHR, 5 May 2020, No. 3594/19, *Kövesi v Romania)* is, other things being equal, an extrapolation of the reasoning and holding of *Baka v. Hungary* (ECtHR, 23 June 2016, No. 20261/12, *Baka v Hungary).* The recent judgment in *Danileț v. Romania* (ECtHR, 20 February 2024, No. 16915/21), currently referred to the Grand Chamber, is a jurisprudential extension of *Kövesi, Baka,* and *Żurek v. Poland (*ECtHR, 16 June 2022, No. 39650/18).

[4] See, e.g., Selejan-Guțan 2018, arguing that the unusual degree of the Romanian high judicial council (CSM, *Consiliul Superior al Magistraturii*) autonomy in the Romanian case vis-à-vis received international good practices was predicated upon the correlative beliefs that enhanced CSM autonomy would be inherently conducive to a better pursuit of anticorruption and that extreme levels of corruption in Romania warranted this constitutionally-entrenched tweaking of the good practice blueprint.

the stress on prosecutorial autonomy ('independence'), and a pattern of conflation in the statuses of prosecutorial and judicial 'magistrates.'[5] Relevant distinctions will be teased out in the analysis below. Another difference pertinent to our argument concerns constitutions as such, the legal bases for identity claims. In Poland and Romania, constitution-making and revisions in view of enlargement, respectively, have predated the accessions. Contrariwise, Hungary adopted post-accession a new constitution, the Fundamental Law of 2011, widely perceived as negatively reactive to Europe if not downright reactionary. In Poland and Hungary, identity positions were from the onset formulated in blunt majoritarian terms. Contrariwise, in Romania, responding to anticorruption monitoring, analogous decisions were initially expressed in the language of fundamental rights and could have been presumptively integrated in a liberal-constitutional, cosmopolitan identity paradigm (Kumm 2023).[6] Paradoxically however, as we will show, whereas 'backsliding' analogies were initially false, basic intuitions regarding the perils of identity have been ultimately proven correct across the board.

In what follows, the next section will discuss the constitution/conditionality nexus. The third part of the argument will compare and contrast the positions of the three constitutional courts. The paper closes with exploratory conclusions.

2 Poland, Hungary, Romania: The Incentives and Disincentives of Identity-Formation

Identity,[7] as a relational posture of the constitution, must ideally be metabolised through conscious engagement with the past and/or a vision of the future. This was seldom the case in the post-communist systems of CEE, for a variety of reasons that will be reviewed in this section. Some of these reasons have to do with regional and country-specific constitutional developments. Some relate to the Union and the ways in which it approached the different stages of its eastward enlargement. Some result from the burdens of unexamined pasts. The following subsections will briefly describe the layers of incentives and disincentives bearing on constitutional identity formation in the three jurisdictions subject to analysis. We will proceed in a partly reverse-chronological order, reviewing first the way in which post-1989 transitions affected constitution-making and identity-formation (2.1., below), moving on to the specific configuration of conditionalities applicable to these jurisdictions, and the

[5] So-called 'backsliding' in Romania was also milder or at least kept in check for longer, which qualifies comparisons (Tănăsescu 2021, Iancu 2023).

[6] More generally, since liberal constitutions are Janus-faced, comprising both national and cosmopolitan elements, the theoretical argument can be made that conformity should be assessed from the cosmopolitan vantage point/common denominator 'outwards' (Perju 2024).

[7] Our analysis builds on a premise and a hypothesis. First (premise), *constitutional* identity should be distinguished from other adjectival qualifications (state, popular, social, national, etc.) (Martí 2013). Second and relatedly (hypothesis), judicial assertion of identity claims should ideally be legally constrained by the text, in relation to either an eternity limitation or to an entrenchment clause, which cut both ways. Conversely, the existence of such positive-legal pegs is a necessary but not sufficient condition.

effects of such conditionalities on identity-relevant actions and reactions (Sect. 2.2). The 'dark legacies' of pre-communism,[8] lurking unexamined and now, arguably, resurfacing, are tucked away at the end of the section.

2.1 Multiple Identities and Multiple Constitutional Transitions

The conventional technique through which an untouchable constitutional core is singled out is the 'limits of revision' or entrenchment provision.[9] The former instrument is often called, after the German fashion, eternity clause. This is not to deny that constitutional identity claims in relation to Europe or as a brake on representative democracy may be derived from other sources.[10] Conversely, a constitutional court may make no or little use of such norms, even when readily accessible. We explore as a hypothesis the question whether the existence of positive constitutional law limitations has at least the potential to discipline tendentially, ideally in a liberal-democratic sense, recourse to identity claims. In the absence of a positive law peg, constitutional identity is, we hypothesize, more prone to collapse in subjective assertions based on judicial representations regarding national identity, smuggled into constitutional law through ideational back doors.[11]

In Germany, whose scholarship and jurisprudence served as a model in Europe –and often enough as an alibi in Central and Eastern Europe– the idea of as such of constitutional identity expressed as unamendability predated the Basic Law of

[8] It is regrettable that a CEE-focused study equivalent, other things equal, to Joerges and Galeigh (2003), has not yet been pursued as regards the pre-communist period. The new Member States, as we argue here, were almost exclusively represented by their elites and viewed westward, respectively, as "postcommunist".

[9] An eternity (limits of revisions) clause blocks revision in discrete respects that are considered of paramount importance and thus unamendable. Entrenched provisions shield important features from the default revision procedure, by providing safeguards or an enhanced revision procedure e.g., the Equal Suffrage Clause of the US Constitution (Art. V, Section I, Clause III, which requires states's consent for depriving them of equal Senate representations) or Art. 168 of the Spanish Constitution (which diverges from the Art. 167 ordinary revision procedure as regards certain elements such as rights, monarchy, the official language, etc.).

[10] We are not unaware of the wide variety of forms such provisions may embrace, from French (Art. 89) and Italian (Art. 139) "republican form of government" minimalism, through Art. 79 (3) German Basic Law sobriety, and all the way to the wide subject-matter pallette of revision reservations listed in Art. 288 of the Constitution of Portugal, letters a through o (state unity and independendence, worker rights, review of positive constitutionality and unconstitutionality by ommission, the autonomy, political and administrative, of the Madeiras and Azores archipelagos, etc.). The Norwegian Constitution provides a particularly interesting example, of an 'ontologically' open-ended limitation. Its eternity clause reads, tersely, that only such "modifications of particular provisions which do not alter the spirit of the Constitution" are allowed (Art. 121). We are also cognizant of the fact that identity clauses are amenable to expansive interpretation, in and of themselves or as a result of judicial creativity. The argument here is only that textual groundedness cuts both ways, inwardly and outwardly (amendments *and* delegations) and presents *prima facie* the *potential* to discipline and legitimate identity claims.

[11] The hypothesis we test is not that unamendability might prevent backsliding (e.g., Suteu 2024, testing, Halmai 2015, making that claim, which he later nuanced). We ask a distinct question, albeit one informed by partly overlapping concerns, namely, whether an eternity provision, entrenching revision limitations in an otherwise overall liberal constitution, might prevent identity review from being instrumentalised in illiberal ways.

1949. Carl Bilfinger first used the term during the Weimar interwar, with the argument that constitutions presuppose an inner harmony that could not be upturned by some amendments, without however specifying what would be the areas or types of articles implicitly shielded from revisions. More influentially, Carl Schmitt (Schmitt 2010 (1928), at 23ff) advanced the thesis of fundamental constitutional decisions, which distinguish the *constitution* as such (unalterable, except by direct intervention of the sovereign people through a new constituent act) from constitutional revision laws. The latter could be adopted with relative ease under the Weimar constitution, whereas the practice of passing with qualified majority derogations from the Weimar Constitution (*Verfassungsdurchbrechung*, 'breaking through the constitution')[12] was also relatively common. Schmitt illustrated the make-up of the 'inner constitutional core' of Weimar with concrete examples: his shibboleth, the position of the Reich President, fundamental rights (amenable to limitation but not abolition, *Vernichtung*), the vertical division of powers between the *Reich* and the states, the republican form of government, parliamentarism. These pillars formed the Constitution as political decision, so that, for instance, representative democracy could not be legitimately replaced by a two-third *Reichstag* majority with a Soviet-style system (*Rätesystem*). Only the sovereign people in the exercise of its constituent power could make such changes. Neither Schmitt nor Bilfinger were mentioned during the works of the Herrenchiemsee Convention or later in the Parliamentary Council debates over what would become Art. 79 (3) of the 1949 West German Constitution (Basic Law, *Grundgesetz*). However, Schmitt's paternity over the concept has been acknowledged in the literature (Polzin 2014, 2016). The *Bundesverfassungsgericht* first mentions the term 'identity' in relation to European integration, in the Solange I decision, relating the concept initially to Art. 24 GG, transfer of sovereign prerogatives (*Hoheitsrechte*) to international organizations and the way in which such transfers impacted on fundamental rights (Scholtes 2025b). Over time, identity and its twin, *ultra vires* review, were worked out by the GFCC, eventually unspooling the implications of Art. 79 (3) in relation to European integration.[13] A paradox of identity in the German context is the outward weaponization of an instrument designed for inward countermajoritarian control. What was initially meant as a cosmopolitan feature was metamorphed into a defence of a "right to democracy" (Halberstam and Möllers 2009, at 1254), with the occasional tinge of state-centric

[12] The first Law for the Protection of the Republic (*Republikschutzgesetz*) of 1922, discussed in Iancu 2025a (this issue), was for instance an example of *Verfassungsdurchbrechung*. Since the law contained limitations of fundamental rights not subject to legislative reservation (for example the so-called *Kaiserparagraph*, limiting the free movement of the former imperial family, i.e., banning German citizens), it had to be adopted with a two-third majority. The provision was excluded, among others, from the watered-down 1929 version, the Second Law for the Defence of the Republic, due to the lack of such a majority in the *Reichstag*.

[13] These implications were fully elaborated around Art. 79 (3) in the 2009 Lisbon Decision. Nonetheless, Art. 23 (1), on transfer of sovereign prerogatives to the EU, incorporated by reference Art. 79 paragraphs (2) and (3) already in 1992 (as well as subsidiarity and the Solange I presumption of equivalent levels of rights protection).

undertones. Nonetheless, at least up until the PSPP ruling,[14] the GFCC was careful with the instrument and self-limited its usage through a complex doctrinal and system-relational dialectic.

This form of identity dialectics could not be replicated in Central and Eastern Europe, partly due to the way in which constitutional developments unfolded. Poland went through a roundtable, negotiated transition and adopted its 'real' constitution after close to a decade of dithering and protracted disagreement on structure and constitutional ideology. The 1997 Polish Constitution was approved by a thin majority of 53.3%, in a confirmatory referendum with participation of only 42,9%. This meant that the fundamental law was fraught by a sociologically diminutive basis of legitimacy from the onset (Blokker 2021, at 139). Constitutive indecision, itself a by-product of unresolved conflicts and unaccepted compromises, is juridically expressed also by the conspicuous lack of an eternity clause. Ideological foundations, are relegated to soft law, the preamble, formulated in turn as an uneasy combination of Christian particularism and countervailing pledges to universal values.

Hungary also made the transition by roundtable negotiation. Unlike Poland, it ended up formally operating within the legal shell of its 1949 communist constitution for over two decades. This was a unique arrangement, with coherence provided by extensive liberal-democratic revisions and juristic bootstrapping. As regards the latter, using the innovative notion of the 'invisible constitution', the Solyóm Constitutional Court conjured up a form of identity-lite, presumably operable also against formal constitutional amendments. This form of identity, which, as the Chief Justice himself admitted, amounted to constitution writing, was 'read into' the transitional document (Sajó 1995; Halmai 2018). The initial paradigm, shaped by an explicitly liberal-constitutional understanding of constitutionalism, was upturned post-accession, in 2011, with yet another peculiar turn. The Fundamental Law of 2011 does not contain revision limitation clauses either but projects constitutional identity, and even the 'constitutional' qualification as such,[15] onto Hungarian history. History, whose particular expression the fundamental law supposedly is, 'hovers' above the legal document, an artifice that conflates the constitutional-legal notion of identity with the political or philosophical concept and the latter with judicial historicism.

Unlike both Poland and Hungary, Romania went through a violent revolution and transition and adopted its constitution very early, in the close aftermath of the 1989 revolution. Its 1991 constitution does contain an eternity clause. The make-up of the clause reflects however identitarian ambiguities not too dissimilar from those affecting the other two countries. The violent revolution led to a transition driven by the National Salvation Front (FSN), a 'successor party' which has dominated Romanian politics in its various avatars up until recently. Even a general reference to the

[14] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 5, 2020, Case No. 2 BvR 859/15, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html

[15] Kovács 2023, at 153: "Even the official name of the current constitution, 'The Fundamental Law of Hungary', implies that the document is simply *a part of this historical constitution*, *but it is not the country's constitution*." [emphasis added]. As Scholtes 2023 puts it, the fundamental law of 2011 "historicises constitutional law" and "constitutionalises history."

revolution itself, as the creative act, had to wait. Through an anticlimactic 2003 revision triggered by the impending EU and NATO accessions (Iancu 2023),[16] a reference to the 'democratic traditions of the Romanian people' was inserted in Art. 1 (3), alongside a *renvoi* to 'the spirit of the Revolution of 1989.'

What is now Art. 152 (Limits of revision) fuses three dimensions or 'bodies' of the post-communist constitution (Iancu 2025b). First, the republican form of government was shielded from revision, which may at a superficial reading appear similar to French and Italian republican clauses. In the actuality of constitution-making in 1991, the clause expressed deep dissensions in the assembly. The FSN was interested in pre-empting indefinitely any future return to the pre-communist monarchy. The latter was at that time a favourite trope of the anti-communist, centre-right opposition (the so-called 'historical parties'). Second, the ethnocentric vein of Romanian constitutionalism of all imaginable colours is entrenched by a set of references to the unitary, national state and the official language. These clauses are expressive of lingering constitutional fears of centrifugal dissolution,[17] reinforced at the time by fresh experiences of interethnic conflict in Transylvania. A third and last set of values shielded from revision belongs to the universalistic-cosmopolitan dimension (multiparty system, judicial independence, rights and their guarantees). This latter facet of Romanian constitutionalism resulted from decorative 1991 'bricolage' (Tushnet 1999) and has arguably remained the weakest link.[18] For instance, the institution of the Ombudsman (Advocate of the People) was provided for textually in the 1991 Constitution but the creation of the entity as such was neglected until 1997, when its organic law (Law 51/1997) was finally adopted. A major cosmopolitan departure from constitutional history was the creation of a Constitutional

[16] The revision was *presented* as necessary for paving the way for EU and NATO accessions, even as in reality it contained many other modifications, directly or indirectly connected to EU accession, related to NATO accession or unrelated to either and purely internally-driven (Deaconu 2013, at 104–106). Such marketing and the process itself resulted in a typical form of "constitution without the constitutional moment" (Sajó 2005). This was problematic in terms of reaching the validation turnout, which stood at the time at 50% of the voters; an overwhelming majority of the population desired integration but most saw no particular reason to vote in the confirmatory referendum. The poll was extended by emergency ordinance and took place over two days. Raffles were organized to lure more voters. Romanian sociologist Cătălin Stoica mentions a particularly perplexing anecdote, where an umbrella, not likely to fit through the slot, was found inside a sealed ballot box. This indicated, for lack of a better alternative explanation, that the seal had been tampered with, the box opened and stuffed. In the commotion of this process, one of the members of the local electoral board must have accidentally dropped the object in, before resealing the box (Stoica 2025, at 60–61). The validation turn-out was in any event met (55.7%), with 91.1% approval.

[17] After 1918, the 'Wilsonian' Romanian state that resulted from the union of the preexisting 'Old Kingdom' and historically/ethnically Romanian portions of the former Austro-Hungarian and Russian Empire was double in its population and territory. With size came also increased diversity. Only 70% of the Greater Romanian state citizens were ethnic Romanians (Schmitt 2019). The framers of the 1923 constitution insisted therefore on the formulation "the Romanian" (*românul*) throughout, instead of '(Romanian) citizen', as proposed by the ethnic minority representatives in the Assembly (Iancu 2023).

[18] Antonie Iorgovan himself, chair of the expert constitutional drafting committee, resigned his CCR judgeship midway through his term, to go into politics as a senator.

Court but its powers were initially and remained for over a decade diminutive.[19] Some elements of internationalism were even diminished by the 2003 revision, although the revision was ostensibly 'marketed' as necessary for NATO and EU accessions. In 2003, for instance, the initial solution of monism with the primacy of international law in the field of fundamental rights in what constitutes now Art. 20 was 'renationalised' by an added safeguard clause.[20] Inasmuch as the CCR used the identity provisions inwardly, in its mandatory review of amendments, it has consistently emphasised statism (blocking for instance all attempts at territorial reorganisation in the name of unity) and sidestepped rights (cf. Suteu, at 110–111).[21] Therefore, in spite of the existence of a revision clause in the Romanian post-communist constitution, its meaning and leaning have been from the beginning ambiguous.

2.2 Multiple Constitutional Identities and Multiple Conditionalities

Integration requirements differed also in relation to waves of accession, thus influencing, at least initially, specific constitutional positionings. Unlike the EU-15 countries, the so-called 'New Member States' of Central and Eastern Europe went through significant reforms of their constitutional and legislative-institutional systems. This was, as already mentioned, a direct result of the changed, Copenhagen-driven modality of accession. This modality presupposed in turn, already under the 'political acquis', significant 'democracy and rule of law' conditionalities, amounting to a form of 'state building'. In pre-accession, the 'master of conditionalities' was and has remained the Commission (Ziller 2018; Janse 2019), which came up with various demands. Whereas the statement that "the candidate countries were asked to comply but were not told with what" (Kochenov 2008, at 315) may be polemical overkill, they were certainly told different things at different times. Emphasis in the articulation of the 'state-building' acquis and the definition of arch-conditionalities changed over time and with respect to different interlocutors.

[19] Romania had imported US-style judicial review in 1912. The 1991 constituents could have fallen back on that element of tradition, separating it from the monarchical elements of pre-communist constitutionalism. They chose not to do so, since, as argued by Professor Iorgovan in the Drafting Committee (Iorgovan 1998, p. 202), "without a Constitutional Court, there is no place for you in Europe nowadays." Yet the CCR in its initial version was undermined by politicization, inexperience, and -last not least- the possibility, never used but nonetheless intimidating, of parliamentary override of its decisions.

[20] Art. 20 (2) as revised in 2003 reads: "Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, *unless the Constitution or national laws comprise more favourable provisions."* [emphasis added].

[21] The CCR has for example cleared for referendum the attempted revision of Art. 48 in order to introduce in it the familiar red herring of CEE conservatism, the heterosexual familiy, to replace the current, neutral reference to "spouses." It did so by using, for the first and only time in its short history, an originalist interpretation, in the sense that, in 1991, no one understood spouses to mean anything other than a man and woman. DCC 580/2016, M.Of. 857 of October 27, 2016. One could have reasonably argued that a neutral formulation was in and of itself an unamendable guarantee of a right, under Art. 152 (2). The referendum was in the event not validated, failing to meet the turn-out requirements (30% participation, 25% valid votes).

For the 'Big Bang' wave, judicial reforms were arguably the main RoL predicate, under the banner of the judicial council model (Bobek and Kosař 2014; Kosař 2016). Interactions were however relatively less formalised for the class of 2004. Hungary joined the EU with a constitution whose very legitimacy was fluid and questionable; the constitutional tables could be and eventually were turned. Poland inserted the council model in an early constitution, albeit adopted in view of and to secure accession, predated the full formulation of the conditionality blueprint. The inchoate international/supranational formulation of the standard resulted in an inchoate constitutional entrenchment of the requirement,[22] as regards the arguably most crucial feature of the 'judicial self-government' blueprint.[23] The implied EU and CoE understandings of judicial independence Poland supposedly joined the EU under in 2004 (Śledzińska-Simon 2018)[24] were consequently not made explicit in the 1997 constitutional text.

Starting with Romania and Bulgaria, definitional RoL emphasis was distinctly placed on anticorruption. With the partial exception of Croatia, which joined in 2013, anticorruption has remained the 'new' RoL conditionality fortress, in conjunction with, but also partly modifying prior judicial independence-derived templates and blueprints. This newer paradigm is still evident in RoL packages negotiated with the Western Balkans (Hogic 2024), as well as, more recently, with Moldova and Ukraine (Rabinovych 2024). Romania, together with Bulgaria, was also placed also under a sui-generis form of post-accession conditionality, the Cooperation and Verification Mechanism (CVM), which lingered on long after the 2007 accession. Unlike Bulgaria, albeit the CVM was formally applicable to its southern neighbour as well, Romania actually engaged in the anticorruption reforms and went through a very long and polarising anticorruption campaign.

Identity is always used in pushback modality by national constitutional courts in conversation with their international and supranational counterparts. Consequently, the way in which the response is formulated depended on the specific configuration of conditionalities applicable to any given jurisdiction.

[22] This is arguably an excellent vindication of Dimitry Kochenov's 2008 insight, referenced above.

[23] Art. 187 (2) of the Polish Constitution provides that 15 members of the National Judicial Council are judges but does not specify how these are to be selected. Considering that this ommission made the 2017 legislative initiatives possible, which in turn led to the full-blown Polish constitutional crisis, the under-specification of the selection procedure/requirements is in retrospect, to say the least, regrettable.

[24] Bobek and Kosař (2014) identify four dimensions the "Judicial Council Euro-Model": constitutional entrenchment, judicial self-government, significant attributions (regarding selection, training, etc.) and the chairmanship of such institutions by the national Chief Justice. It is not clear when precisely the crucial feature of councils, namely, that they should be predominantly or at least 50% elected by peers, not by national parliaments, was fully crystalised. It was a feature of the JC model by the time Slovakia adopted the JC model in 2001 and certainly by 2003, when Romania adopted its revision, changing from a Spanish-type Council to the peer-selected JC model. In the literature (Garoupa and Ginsburg 2009; Bobek and Kosař 2014), references with respect to this orthodoxy (good practice) date back to the 2000s. Currently, all EU candidate countries, except for Serbia, and recent (post-2004) MS, have adopted the self-government model (Castillo Ortiz 2023).

The existence of the CVM and the actual implementation of its benchmarks[25] shaped the dialogue of the CCR with the CJEU distinctly, channelling and translating the identity-centred answers in the ostensibly liberal-constitutional language available, namely, fundamental rights. The non-existence of a genuine constitution[26] in the case of Hungary meant that the tables could be turned, by denying the very basis of legitimacy under which accession took place.[27] The non-inclusion of a clear set of demands in the Polish constitution (partly because such demands were not articulated in due course) has meant that a reiteration of expectations had to be reinvented ex-post. Recreating conditionalities more a decade and a half after EU accession presents, other things equal, difficulties once epigrammatically associated with the post-communist transition. It is easier to make fish soup out of an aquarium than to reconstruct the aquarium out of fish soup.

2.3 Multiple Identities, Post-multiple Pasts

In an interesting departure from formalism, Signe Larsen is correct to point out that EU constitutional systems differ and that attachments to sovereignty and the nation are a commonality of the postcommunist constitutions cluster (Larsen 2021, 2023). The way in which sovereignty was approached is also peculiar to the region, historically rooted in multiple pasts. Regional particularities colour the understanding of constitutional identity and of constitutionalism more generally.

Whether by negotiated or violent change, all these systems calibrated their relations to various constitutionally-relevant past legacies. In the immediate aftermath of the 1989 transitions, the three countries, as more generally the formerly communist region of East-Central Europe, presented themselves exclusively as 'post-communist.' This partial but accurate descriptor of 1989 events has turned into a mental boilerplate and proves incredibly resilient to change even after 36 years. The CEE jurisdictions were approached as 'post-communist' by international organizations, as well as by mainstream 'transitology' and public opinion. From an identity-relevant analysis, these countries were however, already in 1989, "post many other things as well" (Krygier and Czarnota 2006, at 301).

As the immediate transition receded, older facets of their multiple personalities started to surface, in synergy or in competition with the aftereffects of the proximate authoritarian past. To wit, with the half-exception of Czechoslovakia, no part of the CEE region could make credible claims to a pre-communist liberal-democratic past. Such constitutional systems as existed during the interwar were of the façade variety, ontologically situated somewhere in between the 'nominal' and the 'semantic'

[25] The CVM was initially supposed to lapse on January 2010 but was extended for a much longer period of time. Monitoring under the Romanian CVM was formally suspended in 2022, lifted for both countries in 2023.

[26] See Kovács 2007, at 1709, observing a more general trend of considering 1989 constitutions as 'imposed' by the international community and thus 'inorganic.'

[27] According to the recital in the 'National Avowal' (the preamble of the New Fundamental Law): "We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we therefore proclaim it to be invalid."

(Loewenstein 1965 (1957), at 147ff). Elections did take place but were managed in a variety of ways. Management was, in turn, a reflexion of poorly urbanised societies, whose predominantly agrarian natures also influenced idiosyncratic political-ideological divides (Mitrany 1951), including the way in which the communism legacies would be approached in the post-1989 period.

Poland rediscovered statehood in 1918 and experimented with universal male franchise suddenly and for a handful of years, from 1919 until the 1926 coup, which instituted the openly authoritarian 'Sanation Movement.' Hungary had to conjure up a democratic nation-state from the ashes of its multi-ethnic, absolutist niche in Austria-Hungary. It collapsed into various authoritarian experiments almost instantaneously. Romania had to adjust a preexisting nation state to ethnic diversity and overnight extension of the franchise. It practiced parliamentarism for a brief interlude, in between the first and only free general elections in 1919 and the dissolution of the ensuing parliament after four months. After 1920 and up until open authoritarianism came to pass in 1938, the elites of the Romanian 'Old Kingdom' withdrew into known routines, marginally adapted to the new realities. What the three countries had in common prior to communism was the lack of any experience with or even steps towards the genuine reconciliation of democracy with counter-majoritarian, legal fetters on majority rule (in other words, with constitutionalism as such). This incapacity was, moreover, structural. It derived primarily from the nature of the societies, poorly urbanized, agrarian, and divided neatly between a thin sliver of urban elites and the great masses of *misera contribuens plebs*.

Exclusive insistence on post- and anticommunism after the 1989 transitions camouflaged these problematic and multi-layered pasts. Underneath the then-fashionable, lazy trope of 'return to Europe,' the unstated implication was that the aftereffects of communism alone prevented a seamless reintegration of the jurisdictions into the 'common constitutional area' of EU and the Council of Europe. The CEE understanding of European integration, anti-communism, or indeed the rule of law was from the beginning a very complicated proposition (Komárek 2014). A skewed allocative effect of EU-driven affluence has for example often resulted in instrumentalised local approaches to conditionalities and narratives. These reinterpretations and adaptations were depicted as 'European rule of law' and conscripted to naturalise inequalities and justify all manner of related domestic pathologies. Conversely, populists instrumentalised the mounting social discontents in the form of exclusionary togetherness and tokenistic forms of recognition (Zomerski 2025). Outwardly, they opposed to Europe a tribalistic[28] understanding of sovereignty, embellished by mystified pre-communist glories.[29]

[28] As more elegantly put by Julian Scholtes, 'solipsistic' (Scholtes 2023).

[29] This particular affliction affects often RoL defenders as well. See the comment in Scholtes, Venice Commission and the Mental Map of European Constitutionalism (Scholtes 2025a, b, in this issue) on Hanna Suchocka, former Prime Minister of Poland and VC member. In a VC report, the latter described the Polish Constitution of 1791 as an example of CEE constitutional traditions. However, for all its merits in the local context, a constitution that effectively equated nobility with the nation was/is hardly a paragon of constitutionalism in its Western, liberal-constitutional, normative variety. The legal class of nobility was abolished in 1921, more than a century later (e.g., Hillar 1992).

The three dimensions of identity analysed in the section, played themselves out, explicitly or implicitly, in the positions of the Constitutional Courts, analysed in the third and last substantive articulation of our argument.

3 Constitutional Identity in the Caselaw of the Constitutional Courts of Romania, Poland and Hungary: Normative Divergence, Instrumental Convergence

The analysis in this section will inquire into the extent to which the caselaw of the constitutional courts of Romania, Poland and Hungary is similar or dissimilar as regards the concept of constitutional identity. We will also probe into the more important issue as to whether the so-called resistance to the EU of the constitutional courts of these Member States followed the same premises and goals.

As argued in this section, identity was approached in Hungary and Poland in "ethnocultural" format (Kovács 2017), and weaponised by the captured (PCT) or packed (HCC) courts. In Hungary, an instrumental understanding of identity was used to block the Council decision on refugee relocation. The backtracking of accession-driven reforms on court organisation did not need to be countered by use of this tool, as a result of desynchronised evolutions at the level of EU law. An Art. 7 reasoned proposal regarding Poland was initiated years before that in respect of Hungary.

Polish developments were at the centre of RoL-driven adjudication. The PCT used identity as a tool to counter and justify backsliding in terms of Copenhagen-derived standards concerning judicial independence. The crucial guarantees had not been entrenched in the 1997 constitution and could be upended by post-2015 by PiS-controlled absolute majorities in Parliament. By the same token, the inchoate inclusion of judicial self-government bulwarks was due to the fact the Polish Constitution, albeit driven by EU accession needs, was adopted early, before the full conceptualisation of such guarantees and unrevised prior to accession.

Romania stood out as a beacon of conditionalities, at the level of the formal legislative, supranational, and constitutional framework. Unlike the other two countries, it was subject to anticorruption conditionalities. CVM monitoring lingered on post-accession for almost 16 years. The CCR gave circumstantial reasons for constitutional identity optimism, adopting a *prima facie* cosmopolitan, liberal-constitutional vocabulary to express limited and carefully circumscribed reservations.

3.1 Hungary and Poland: The Road to Strategic Tribalism

Under the postcommunist constitution with which Hungary joined the Union, identity vis-à-vis Europe was not on the agenda. The exception was a side-remark in a concurring opinion by Justice László Trócsányi, attached to the Lisbon Judgment of the 'old' HCC. Notably, Trócsányi used sovereignty and identity as interdependent (Bakó 2018, at 882). Under the new Fundamental Law of 2011, the 'new' HCC's position in relation to sovereignty and "constitutional identity" was formulated for

the first time in Decision no. 22/2016.[30] The legal issue at hand was the constitutionality of Council Decision 2015/1601 of 22nd of September 2015, the refugee relation decision. Concretely, 1.294 refugees were to be relocated to Hungary from Italy and Greece.

In context, the HCC lend a helping hand to the government, once other avenues to thwart relocation and weaponise the issue had failed. A referendum was first boycotted by the opposition and could not reach the 50% participation requisite for validation. Thereafter, the Seventh Amendment could not be passed in time, since the FIDESZ coalition was two votes shy of qualified constitutional majority. Actions for annullment were pending before the CJEU. The HCC obliged and dug out a petition by the Commissioer for Fundamental Rights, which had long been lodged and had laid buried for over a year. Thus, a cause of action was contrived for the purpose of expressing reservations in identity format, without however responding to the actual petition (Scholtes 2023; Bakó 2018).

Formally, the Hungarian court issued an abstract interpretation regarding the limits imposed by the fundamental law to primacy. As later formulated in a Bucharest allocution by President Tamás Sulyok, as he then was, the HCC considered that constitutional identity was part and parcel of national sovereignty, as revealed by 'historic constitution' of Hungary. EU law prevails, unless it violates the latter: "Within the new conceptual framework sovereignty will enable people to achieve freedom by exercising a democratic control through a pacified and democratic legal system also within the EU. The Hungarian Constitutional Court has embraced this concept of sovereignty which prevails in its practice and scope of jurisdiction.'' (Sulyok 2019, at 76). National sovereignty was understod as coextensive with the sovereignty of the people, as expressed more concretely by Orbán-controlled political majorities. The HCC underlined that EU accession does not signify forsaking sovereignty, merely brings about the joint exercise of specific powers. Decision 2/2019[31] further 'interpreted' a new provision of the Hungarian Fundamental Law, which stipulated that the refugees arriving from safe third-party states (in practice, Serbia) do not have an individual right to refugee status. In essence, the ruling gave constitutional imprimatur-legitimacy to the notorious southern border barrier and attendant practices. In so doing, it interjected another helping hand to the government in the course of an infringement proceeding opened by the Commission.

[30] Hungarian Constitutional Court, Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law, English version available at https://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf.

[31] Decision 2/2019 (III.5.) Petition aimed at interpreting Article E) (2), Article R) (4), Article XIV (4) and Article 24 (1) of the Fundamental Law (transfer of competence to the European Union, group expulsion). Synopsis in English at https://hunconcourt.hu/datasheet/?id=A69AEC612BA90BAEC125830C005216DB

In Decision no. 9/2018,[32] HCC parsed the issue of Hungary's accession to the Unified Patent Court (UPC). The government wanted in essence to undermine ratification, in order to not have to co-finance the patent court. Using an 'idem per idem' reasoning and an extremely narrow understanding of sovereignty, the majority essentially blocked the ratification of the UPC Agreement, with the argument that the Hungarian Act of Approval ratifying the UPC Agreement lacked sufficient basis in EU treaties, whereas ratification could not proceed under general international treaty law either. This interpretation, deriving from a narrow construal of the EU clause, likely preempted by ricochet other forms of enhanced cooperation, e.g., most likely foreclosing a potential participation in the EPPO.[33] Even authors inclined towards an amicable position towards the HCC admitted, euphemistically, that this was "an excessive protection of sovereignty" (Gombos and Orbán 2022).[34] In an instructive reversal of *Zauberlehrling* roles (the pupil becomes the teacher), the GFCC itself followed initial suit, with a brief reference to the Hungarian precedent.[35] Eventually, the saner angels of German constitutional law and identity prevailed and the GFCC reverted to a more EU-friendly and ratification-positive position.[36]

In Poland, until 2015, the PCT and legal doctrine shared the opinion according to which powers that cannot be transferred were part of constitutional identity and they reflected the values of the Polish Constitution. As the 1997 constitution does not contain an eternity clause, the notion was in effect imported wholesale from German, French, and Czech constitutional law by the PCT in its Lisbon judgment.[37] The contours of this borrowing in Polish context were of necessity unclear and even problematic from the very onset but the posture as such of the Tribunal was euro-friendly (Ziółkowski 2023). This position was however stated only once and its implications remained academic. Therefore, constitutional identity was simply postulated as a legal concept that excludes certain devolutions of sovereign prerogatives, the core attributes of statehood, which represent the fundamentals of the political system. Transfer of the latter would not be possible on the basis of article 90 of the Polish Constitution.

[32] Decision 9/2018 (VII. 9.) AB on the interpretation of Article E) paragraphs (2) and (4), Article Q) paragraph (3) and Article 25 of the Fundamental Law https://public.mkab.hu/dev/dontesek.nsf/0/fd1f9b7e8c54e0d7c1258162002ecc58/$FILE/9_2018_EN_final.pdf. Technically, the issue was resolved along the positive law dichotomy as to wether an international agreement had become part of the EU *acquis*, so that article E (the dedicated EU provision) would be considered the correct constitutional legal basis for ratification or that it did not and thus article Q (on the ratification of international treaties) should apply. The HCC held that the UPC fell under Q and could not be ratified, since it impinged on the constitutional prerogatives of domestic courts.

[33] We are indebted to Attila Vincze for this pointer and for his many useful comments and bibliographical suggestions regarding the HCC identity caselaw. As neither of us reads Hungarian, we were partly at the mercy of Romanian, German, and English translations.

[34] Both authors teach at the National University of Public Service, under the PM office, one was an HCC clerk.

[35] BVerfG, Order of the Second Senate of 13 February 2020—2 BvR 739/17—, paras. 1–21, https://www.bverfg.de/e/rs20200213_2bvr073917en (reference to the HCC Decision 9/2018 at Para 17).

[36] BVerfG, Order of the Second Senate of 23 June 2021—2 BvR 2216/20—, paras. 1–81, https://www.bverfg.de/e/rs20210623_2bvr221620

[37] Case K 32/09 [2010] CT.

Identity was rediscovered during the shift in the make-up and stance of the Polish Constitutional Tribunal, starting with the 2015 constitutional crisis, whose onset cast a pall over the legitimacy of the tribunal. The legal ground for this attitudinal change came from rising tensions between Poland and the EU as regarding Art. 19 (1) TEU "effective legal protection in the fields regulated by EU law." As is well known, the dispute between Poland and the EU has been based on Poland's introduction of a spate of legislative changes interfering with the independence of the courts.

The major rift was the July 14, 2021 decision in the Case P 7/20. In its reasoning, the Constitutional Tribunal stated that „the second sentence of Article 4 (3) TEU in conjunction with Article 279 TFEU, to the extent that the CJEU imposes ultra vires obligations on the Republic of Poland as a Member State of the European Union by issuing provisional measures relating to the system and jurisdiction of Polish courts and the procedure before Polish courts, is incompatible with the Constitution of the Republic of Poland".[38] The Court order in the Case P 7/20 represents a significant departure from the previous Polish constitutional jurisprudence. The essential argument was that the ECJ overreached and thus construed the institutive treaties *ultra vires*. This was allegedly so since areas of organisational structure and the functioning of Polish courts are unalienable expressions of sovereignty and thus the ECJ interpretation clashed with constitutional identity. An even more abrasive form of stonewaling came about in October 2021, with the ruling in Case K 3/21.[39] The PCT held that Arts. 1, 2, 4(3), 19 (1) TEU are (in various 'conjunctions' with one another) unconstitutional, if understood, in essence, to allow ordinary courts to bypass PCT decisions or if construed to question in any way the new judicial organisation laws, including judicial appointments by the new judicial council. At the heart of most recent disputes have been the so-called 'neo' or 'Schrödinger' (Stambulski 2024) judges appointed after the 2018 reform.

Both the HCC and PCT advance a vision of identity that is underpinned by no acceptable liberal-constitutional preconditions. Both courts are instruments of political majorities, by constitutional (Hungary)[40] and appointments (Poland) packing. Neither constitution has an unamendable core that would restrain internal revision as well as external delegation of sovereign prerogatives. The concept as such was the by-product of hermeneutical-judicial 'bricolage' by selective borrowing, especially but not solely from the GFCC. Lurking in the backdrop are also lags of RoL/constitutional Europeanisation. In the case of Hungary, the lack of ironclad constitutional

[38] Case P 7/20 [2021] CT.

[39] Case K 3/21 [2021] CT.

[40] In Hungary, packing was more orderly achieved, by increasing the size of the HCC and stripping it of powers, while simultaneously depleting its docket by removing causes of action (notably, *actio popularis*). President Sulyok, whose Bucharest musings about inalienable sovereignty are cited above, was appointed to the bench in 2015. Formerly a doctoral student of the then-minister of justice, he proved his worth by helping the government in immigration/EU primacy cases (Vincze 2022), also by allocating such cases to himself as rapporteur. He is described in a socio-legal study as one who "hardly ever made a ruling […] that was any surprise to the Minister of Justice, and none that was even unpleasant for the Minister of Justice" (Hanelt and Vincze 2024, at 390).

guarantees on accession opened up the legal framework for a post-accession constitutional coup. Identity as suh was not even necessary, since its legal basis could be written and overwritten like a palimpsest, to suit parliamentary majority needs. When eventually used, this specific tool served merely as an instrumental afterthought.

In the case of Poland, the implied EU and CoE understandings of judicial independence Poland joined the EU under were not made explicit in the constitutional text. The failure was partly a result of the insufficient crystallisation, as of 1996–1997, of a conventional knowledge whose implications (from the elected council model to 'non-regression') had to be "recreated" ex post, incrementally and piecemeal. To give just one example out of many possible, the *Reppublika* case[41] cast the principle of non-regression in stone in 2021. It could be argued, however disingenuously, that from a strictly constitutional identity-oriented point of view, Poland could very well have traded in its elected council for a Spanish-type council in 2017. This process of supranational reconstruction occurred therefore in asynchonous synergy with the PCT's fending off supranational demands by recourse to the blunt –and in both the Polish and the Hungarian constitutional context largely fictious tool– of 'constitutional identity.'

3.2 Romanian Identity: From Rights to Militancy, From "National-Constitutional" to "Popular"

Until relatively recently, the Romanian Constitutional Court has not used the concept of constitutional identity extensively and, more importantly, to any practical effect. In a practice characterised by extremely rare citation of foreign precedents (Tănăsescu and Deaconu 2013),[42] the introduction of this novelty was relatively well-surrounded from the beginning by references to GFCC caselaw, also to the PCT Lisbon Decision.

The initial shyness of the Romanian Court, as revealed also by foreign referencing props, was owed partly to unfamiliarity with the concept. Mostly, it reflected a widespread desire, shared initially also by the RCC, to prove that the values and principles inscribed in the EU legal order were unconditionally and even unquestionably accepted (Varga 2019). The country had joined late and the CVM singled

[41] Case C-896/19, *Repubblika v Il-Prim Ministru*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2021, EU:C:2021:311.

[42] According to the study (Tănăsescu and Deaconu 2013), direct citations of foreign judgments were identified in only fourteen decisions out of 13,234 rulings rendered in the period 1992–2011, as covered by the authors. Most of these concerned rights (eleven out of fourteen) and in ten out of fourteen references are made to support the majority reasoning (nine out of those were unanimous rulings). Early identity citations were similarly mechanical-analogical and rote. The CCR became more interested in the comparative complexities in 2019, when it also convened a conference on the topic, with guests representing various constitutional judicatures. Proceedings were published as a volume (Dorneanu and Krupenschi 2019) and are available in open access on the Court's website https://www.ccr.ro/wp-content/uploads/2022/01/Identitatea-constitutionala-nationala-in-contextul-dreptului-european-2019.pdf This short-lived and positional epistemological curiosity receded in inverse correlation with audacity in the use of this instrument.

it and Bulgaria out as quasi-, 'one foot in the door' members. The evolution of the identity jurisprudence has consequently been evasive over the initial years after the accession.

The notion as such surfaced prior to 2018, without extensive elaboration, in precatory and disjointed form. Identity was first mentioned[43] in a decision regarding the representation of Romania in the European Council, which reached the CCR as an *Organstreit* procedure under Art. 146 (e), resulting from a conflict at the apex of the Romanian dual executive.[44] The issue was whether the President or the Prime Minister should have represented the country in the European Council. Mentioning identity in that context (with due citation to the Lisbon Decision of the GFCC) was *obiter dictum* at best, since the case could have been and was eventually disposed of expeditiously, simply by reference to the nature of Romanian semipresidentialism. Further iterations followed, for instance, also in 2012, regarding the position of Parliament as a core political institution in charge of expressing sovereign powers: "[E]ach Member State, according to the constitutional identity principle, has full autonomy when it comes to adopting the rules of organization for the members of the Parliament…".[45] In a subsequent decision of 2012, the Court stated, also in *obiter,* that applying EU law in the Romanian legal system was warranted just "as long as the national constitutional identity [was] not breached."[46] The notion of constitutional identity was thus relegated to a fuzzy, yet primarily stylistic or ornamental conceptual status.

In 2018–2019, the attitudinal posture suddenly went from full colaborative openness to deadlock and from unreflexive obsequiosness to abruptly, albeit obliquely expressed defiance.

The reason for both the initial ambivalence and the eventual shift was the protraction of the CVM monitoring, which placed Romania, alongside Bulgaria, in an unusual situation, that of a peculiar form of membership with strings attached. The mechanism was a hybrid form of crypic 'hard' EU law (the 2006 decisions) and a soft law thicket (the reports fleshing out progress).[47] CVM monitoring was based on anticorruption, which resulted in a protracted and highly polarising campaign. Anticorruption was pursued primarily by repressive means, through criminal law instruments. The desire to produce results, encouraged also by the EU overemphasis on effectivenes, spilled over in some unorthodox practices, e.g., the (in)famous institutional cooperation between prosecutors and the domestic intelligence service

[43] The decision on the constitutionality of the so-called 'Euro-amendments' refers to sovereignty (devolution) only, in relation to the limits of revision. DCC 148/2003, M.Of. No. 317, May 12, 2003.

[44] DCC 683/2012 regarding the solution of a juridical conflict of constitutional nature between the Government, represented by the Prime Minister, and the President, respectively, M.Of. No. 479 of July 12, 2012.

[45] DCC 964/2012 on the exception of unconstitutionality of the provisions of art.1 letter f of Law no. 119/2010 establishing some measures for pensions, M. Of. No. 23 of January 11, 2013.

[46] DCC 64/2015 on the exception of unconstitutionality of the provisions of art. 86 para. (6) of Law no. 85/2006 on the insolvency procedure, M.Of. no. 286 of April 28, 2015.

[47] *See* the comprehensive discussion on the CVM hard/soft law complexities in Ștefan (2024).

(Iancu 2024, 2023).[48] Consequently, the RCC pushback was expressed in the language of defending fundamental rights guarantees and the rule of law, as domestically understood.

The tone hardened somwhat in Decision no. 104/2018, by introducing identity as a putatively handy trump card. The Court stated that, as a principle, "by applying art. 148 (2) and (4) of the Constitution, Romania applies in good faith the obligations resulting out of the accession act, without interfering with the EU's exclusive competence, and, as it was established in its jurisprudence, according to the compliance clause included in art. 148 of the Constitution, Romania cannot adopt a normative act contrary to its obligations as a Member State. All of these hereby shown have a constitutional limit, expressed by the Court previously as 'national constitutional identity."[49]

Domestic jurisprudential climax was reached in the trail of political conflicts concerning the creation of the Section for the Investigation of Offences Committed within the Judiciary (SIOJ, Romanian acronym SIIJ), during the crisis of 2017–2019. The section stripped the DNA (*Direcția Națională Anticorupție*, National Anticorruption Directorate), the anticorruption prosecutorial watchdog, of its initial competence over corruption crimes committed by magistrates. In the view of the supporting parliamentary majority, along with some judicial associations, this change protected judges and prosecutors from alleged abuses or overrreaches by the DNA. In the diametrically opposed view of the presidency, the opposition, and other associations,[50] the move significantly dented the effectiveness of the fight against corruption and thus breached the CVM. In Decision no. 137/2019,[51] the issue related to a refusal to send out a preliminary reference to the CJEU, which MPs of the opposition, the authors of an objection of unconstitutionality, asked for. The CCR refused to oblige. Translated in legal doctrine, the matter concerned the so-called 'theory of interposed norms' (Enache and Titirișcă 2021; comprehensively, Benke 2023), according to which an EU norm can only be considered in constitutional adjudication if it is incidental and if its meaning is clear enough to be considered a normative reference. The RCC concluded that, as regarded the CVM, "the meaning of EU Commission Decision 2006/928/CE of the 13th of December 2006 (…), an act that was adopted before Romania's accession to the EU, has not been

[48] See, on the implications in EU law on the decisions curbing the intense cooperation between anticorruption prosecutors and the domestic intelligence service, the Opinion by AG Bobek delivered on 4 March 2021 in Case C 379/19 (DNA Oradea), ECLI:EU:C:2021:174.

[49] DCC 104/2018 on the objection of unconstitutionality of the Law amending Law no. 161/2003 on certain measures for maintain transparency for dignitaries, public officials and for businesses, preventing and punishing corruption, M. Of. no. 446 of May 29, 2018. At Par. 81.

[50] Judicial associations were as polarised and intrepid as political actors regarding anticorruption and anti-anticorruption, respectively. See Doroga and Bercea (2023), on judicial associations as judicial independence entrepreneurs. The argument's emphasis bears primarily on the stance of one specific association, AFJR.

[51] DCC 137/2019 on the objection of unconstitutionality of the provisions of the Law adopting the Emergency Ordinance of the Government no. 90/2018 on certain measures for operationalization of the Section for Investigating the Offences Committed Within the Judiciary (SIOJ, Rom. SIIJ). M.Of. no. 295 of April 17, 2019.

interpreted by the Court of Justice of the European Union when it comes to its content, character and duration and whether it is part of the Treaty of accession (…) which is part of the internal legal order, therefore the Decision 2006/928/CE cannot be considered a normative reference in the constitutional control of art. 148 of the Constitution."[52] What the Court essentially said was that, whereas the CVM was binding and had direct effect, its constitutional relevance was clear enough only in terms of one of the four 'benchmarks', stipulating Romania's obligation to create an administrative agency with powers regarding conflicts of interest, incompatibilities, wealth declarations and administrative decisions regarding unjustified wealth. Such an agency, the National Integrity Agency, had already been created in 2010. The other three reference objectives, including, notably, the crucial pursuit of repressive anticorruption through the DNA, were deemed too vague to reach the constitutionally cognizable level of 'rules interposed in the rule of reference.'[53] As for soft law recommendations by the Commission (the CVM progress reports), they were now[54] deemed completely irrelevant. With citation to the Polish 'Lisbon Decision', and repurposed-anachronistic reference to its own Euro-friendly jurisprudence, the CCR intimated that judicial organisation writ large might fall in the exclusive national sovereign scope anyhow.[55] The Court restated its position even more forcefully in Decision 390/2021, in the sense that the "[CVM] has no constitutional relevance, as it neither complements a fundamental law lacuna nor does it provide for a higher standard of [fundamental rights] protection."[56] The CCR introduced now the essentialist notion of a "substantive identity nucleus" (*nucleu identitar de fond*), leaning on a confirmatory reference to the GFCC Lisbon Decision and in juxtaposition to the strictures of Art. 4 (2) TEU (as understood by the Romanian court).[57] And yet, as ever and arguably unlike the GFCC, the CCR did not make an attempt to spell out and enumerate the subject-matters, fields or decisions this nucleus contains.

The saga continued and eventually generated an open conflict between the CCR and the CJEU, which locked horns in December 2021, just before Christmas (Iancu 2022). The latter encouraged ordinary courts, in the name of CVM imperatives (effectiveness of the fight against corruption), to disregard constitutional decisions, should a 'systemic risk of impunity' be generated by the same. The former rebuffed its Luxembourg counterpart by issuing a vitriolic press release. The note, posted on the Court's website, stated that primacy under Art. 148 (2) did not affect the fundamental law itself but only legislation proper.[58] This conflict eventually abated

[52] DCC 137/2019, Para. 99.

[53] At. Para. 100.

[54] An earlier decision, DCC 2/2012, M.Of. No. 131 of February 23, 2012, did refer explicitly to the soft law recommendations as binding. It did so, however, under the "best efforts" provision of Art. 148 (4) of the Constitution, not the provision which refer to primacy of EU law over national legislation, Art. 148 (2). The CCR has a relatively consistent track record of interpreting primacy as applying to legislation strictly construed, not to constitutional norms proper.

[55] DCC 137/2019, Para. 101.

[56] DCC 390/2021, M. Of. No. 612 of June 22, 2021, Para. 49.

[57] DCC 390/2021, Paras. 81–82.

[58] Anecdotally, perhaps revealing of the new CCR mood, are the representations regarding the CJEU in the thick memoir published after his term ended by Daniel Morar, the first Chief Prosecutor of the

Taricco-style, generating in its trail a new phase, that of impunity via statute of limitations acquittals. In essence, the CCR rendered a ruling in 2018, which interpreted a statute of limitations provision (Art. 155 (1)) in the New Criminal Code (NCC of 2014) constitutional, only insofar as the statute of limitations is interrupted by procedural acts which are notified to the accused.[59] Later, in 2022, another decision held that, since the lawmaker had taken no remedial action, and thus regular courts issued contradictory interpretations and verdicts, the norm was unconstitutional per se and the statute of limitations had run uninterrupted from 2018 to 2022.[60] Immediately thereafter, the provision was amended accordingly. By now the higher courts and the CSM were hostile to anticorruption and perhaps overly friendly to the rights of defendants (Tănăsescu and Selejan-Guțan 2024). The High Court issued an interpretive ruling which, on the basis of the CCR decisions, extended the suspension of the interruption of the statute of limitations from the moment of the entry into force of the NCC, in the application of *lex mitior*.[61] The Court of Justice interjected and ruled in the sense that ordinary courts were to follow the CCR holdings but not necessarily the HCCJ preliminary ruling, if such interpretations create a risk of systemic impunity and affect PIF-Directive-relevant crimes (such as aggravated VAT fraud).[62] This shift from a traditional stance of brushing the CCR off by recourse to primacy, unity, effectiveness to dialogue and amity represented a significant turnabout of the Luxembourg court.[63] It might have come too late to ensure equipose and general harmony. Most recently, the HCCJ in Bucharest rendered another preliminary ruling, deflecting, by a sophisticated-adapted restatement, the limiting effects of the CJEU judgment vis-à-vis its own 2022 ruling.[64] None of the judgments in this cluster of Romanian cases touches on 'national constitutional identity.' Even when higher courts were asked to do so, they declined the invitation. All spoke the

Footnote 58 (continued)
DNA. Morar, later a Constitutional Court justice, was generally perceived as the *éminence grise* behind the CCR majority decisions that put fundamental rights and RoL dents, *often justifiably*, in the pursuit of the fight against corruption. Recounting a visit to Luxembourg, during which he also assisted at final pleadings in a case involving sanctions, Morar showers the CJEU with epithets such as 'revolting precarity', 'superficiality', 'bias and lack of rigor in expounding juridical arguments' (and much more). He praises the GFCC *PSPP* ruling in passing, to conclude, well-rounded: "Perhaps this is the explanandum for why constitutional courts do not always yield to the judgments of the Court of Justice of the European Union." (Morar 2022, at 553). Unless otherwise indicated, all translations belong to the authors.

[59] DCC 297/2018. M. Of. No.518 of June 25, 2018.

[60] DCC 358/2022. M. Of. No. 565 of June 9, 2022.

[61] HCCJ Preliminary Ruling (*Decizie*) 67/2022, Panel for Preliminary Rulings on Questions of Law. M. Of. No. 1141 of November 28, 2022.

[62] Judgment of the Court (Grand Chamber) of July 24, 2023 in Case C-107/23 PPU-Lin. ECLI:EU:C:2023:606.

[63] Following in the wings of the CVM lifting by the Commission, this 'tidal turn' (Tănăsescu and Selejan-Guțan 2024) disappointed the legitimate expectations and vested ideological, political and policy interests of many domestic anticorruption entrepreneurs in all fields of public endeavor (ranging from judicial associations such as the AFJR, to parties built on anticorruption platforms such as the USR, to academics invested in CVM-tied narratives). Many such local stakeholders have consequently accused the apex EU institutions for their 'deviationist' turn from locally-enculturated RoL-derived EU values.

[64] HCCJ Preliminary Ruling (*Decizie*) 37/2024, Panel for Preliminary Rulings on Questions of Law. M.Of. No. 697 of July 18, 2024.

universalitic language of rights, as it affected the fine points of substantive and procedural criminal law doctrine.

As the CVM was lifted and the CJEU relented, identity assertions were rendered moot or rather, as it turned out, were placed in abeyance. Whereas in the confrontational stage, the stress was on rights, an element of the eternity clause, Constitutional Court of Romanian (CCR) itself did not consider identity in exclusive relation to the eternity clause or, indeed, fully work out the methodological and conceptual contours of this notion. The areas that are part of the national constitutional identity have not been outlined. Sometimes, sovereignty appears to be the identity predicate and the opinions of two assistant magistrates of the RCC, expressed in the legal doctrine, might prove relevant. According to them: "not any constitutional conflict could lead to the use of this constitutional limit, only those that can gravely impact the existence of the identity and sovereignty of the state" (Benke and Costin 2016, at 92).[65] What that limit was remained opaque. The sources of identity were also mysterious. In a volume edited by the court, one of the justices (Varga 2019) opined for example that the founts of constitutional identity would be threefold: Art. 1, that defines the state (perhaps even the entire first title, primarily focused on the state and elements of nationhood); the eternity clause of Art. 152, and the EU integration or conformity provisions of Art. 148.[66] A more recent study of identity co-authored by a former CCR justice and a former First Assistant-Magistrate (Toader and Safta 2023) points out overlaps between the concepts 'national identity' and 'constitutional identity.' For definitional clout as regards the state- and ethnocentric elements of identity under the current constitution, the authors adduce supporting evidence from the pre-communist constitutions of 1866 and 1923, the 'royal dictatorship' constitution of 1938, and the three communist constitutions of 1948, 1952, and 1965.[67]

Such epistemological flexibility did not portend well. To general surprise, the CCR revived identity in 2024 and repurposed it inward. This came about in the famous 'Șoșoacă ruling' of October 2024, that annulled a Central Electoral Bureau decision. In Ruling 2/2024, identity was used to prop the main reasoning. The CCR

[65] Károly Benke, a highly capable and well-published legal professional in his own right, is the current first assistant magistrate. The twenty-some assistant magistrates are not clerks but the technical apparatus, salaried on par with their High Court of Cassation counterparts, and in a way the closest that the CCR has to a form of institutional memory. Unlike the nine CCR justices, whose mandates are nine-year-long and term-limited, assistant magistrates also hold life tenures.

[66] It is somewhat ironical that precisely the justice designated by the UDMR, the Hungarian faction in parliament, chose to find the primary source of identity (also) in arguably the most ethnocentric part of the fundamental law.

[67] Some, not many, provisions do overlap, notably Art. 3 (4) 'No foreign populations may be displaced or colonized on the territory of the Romanian State.' This particular norm has an ethnocentric lineage going back to the Constitution of 1866, in which (then, as Art. 3: The Romanian territory cannot be colonised with foreign populations.) it served as a sidekick to Art. 7, which initially forbade the naturalization of non-Christians (read: the Jews). Accidentally inserted in the 1991 Constitution and thereafter largely forgotten, Art. 3 (4) was occasionally mentioned in political debates during the migration crisis, as a possible argument for refusing to accept, Hungarian-style, migrant quota allocations. Should this provision be understood as an element of constitutional identity, manifold consequences, arguably illiberal, could be derived from it.

included aggressive Euroscepticism in a newly-created category of 'general substantive conditions,' whose vetting could lead, if unmet by a candidate, to an electoral disqualification. The terminology as such was creative: "identity nucleus of the Romanian people", "national identity of the Romanian people", "the constitutional identity of the people and of the society."[68] Whether the prior concept of national constitutional identity morphed into three different notions or whether identity was a common constitutional catchall concept attaching to people, Constitution, and nation (separately or in common) has remained undertheorized. In the "Șoșoacă ruling," the new use of identity was putatively Europeanised, by bridging Art. 1 'values' and the eternity clause of Art. 152[69] and relating both, in turn, to the identical values of "the great European family which is founded on the ideas of democracy and the rule of law,."[70] The reference in Art. 1 (3) to the "the spirit of the Romanian democratic traditions and the ideals of the December 1989 Revolution" allegedly invites such national-supranational constitutional synthesis.[71]

This form of creativity went against the grain of the entire line of cases using national constitutional identity as a brake of primacy. The ruling raised significant procedural doubts, pointed out by a dissenting judge and later by the Venice Commission. Substantively, neither EU nor NATO membership require a 'constitutionalised' form of ratification by amendment. The eternity clause dates back to an age when membership in the two organisations was hardly realistic and is not cosmopolitan in its ethos. Article 1 itself can be revised and, indeed, was revised in 2003, to insert precisely the phrase which the CCR utilized in 2024 as springboard for its stream of consciousness dive into values.

More importantly, the context as such in which the ruling was rendered by a six-judge majority in a seven-judge CCR panel was not conducive to Dworkinian ethics. At the time, rather than perceived as defending Romania's NATO and EU memberships against Mrs. Iovanovici-Șoșoacă (a candidate who stood no realistic chance of winning the elections), the move was seen as manufacturing a runoff. By taking Iovanovici-Șoșoacă out, Marcel Ciolacu, the then-Social Democratic Party president, could be eased into the Presidency of Romania. Whereas such speculations can in the end neither be proved nor disproved conclusively, the disqualification set in motion the annulment of 2024, a crisis from the fallout of which the country is still reeling (Iancu 2025a, b). Identity resurfaced in a press release issued in March 2025 to justify Ruling 7/2025,[72] in yet another hermeneutical avatar: 'the constitutional

[68] CCR Ruling No. 2/2024, M.Of. No. 1003 of October 8, 2024. Paras 33, 37.

[69] Ruling 2/2024, Para 40.

[70] Ruling 2/2024, Para 38.

[71] Ruling 2/2024, Para 33: "Also, Art. 1 (3) spells out that such values must be understood and applied 'in the spirit of the Romanian democratic traditions and of the December 1989 Revolution.' This wording has interpretive authority over values and builds an axiological bridge to the people's constitutional-democratic tradition, in its historical becoming, and to the democratic aspirations of the Romanian Revolution of 1989."

[72] CCR Ruling No 7/2025, M.Of. No. 229 of March 14, 2025.

identity of the Romanian state.'[73] The ruling validated the disqualification by BEC of Călin Georgescu's candidacy for the restaged May elections.

To sum up, whereas for a while the concept of "national constitutional identity" was used by the CCR, for the most part, in an orthodox, ostensibly cosmopolitan-constitutional fashion, recent developments show that recourse to identity was primarily reactive and partly instrumental. The Court's recent forays into problematic doctrinal innovations, supported also by recourse to this notion, reveal just as much instrumentalism as was practiced by assumedly 'sovereigntist' Polish and Hungarian counterparts. The cavalier manipulation of this imaginary in the current context is fraught with many perils, including those it purports to combat. As a Romanian author recently quipped, "bottling militant democracy in the identitarian receptacle looks like fighting fire with a Molotov cocktail" (Guțan 2025).

4 Conclusion

Our initial argument was significantly qualified in reaction to the most recent Romanian events. We started our research early in the fall of 2024, by noticing a false analogy between Romania, on the one hand, and Poland and Hungary, on the other. What is common to the HCC and PCT is their expressed belief in the fundamental importance of the Constitution as a reflection and pledge of popular and state sovereignty. Also common is in practice their thinly veiled political leaning, achieved under rule by law, including fundamental law, in Hungary and partly by para-constitutional means in Poland (*id est*, appointment manipulation). In Romania, the CCR might be politically influenced but it was never 'packed' in either of these two senses. Romanian CCR appointment rounds occurred lawfully, resulting in shifting configurations, as is the natural state of constitutional-political affairs. Foundationally, the notion of national constitutional identity as such was wielded differently in Romanian early caselaw, by stressing, as practical corrolaries of national constitutional identity, fundamental rights and the rule of law. These elements are not ethnocentric, belonging to a common cosmopolitan languaguage that national constitutions, the EU, and the CoE share. We concluded however that the courts have in common a practice of instrumentalising said pledges and their expressions.

Identity formulations were in all three cases reactive to specific EU conditionalities, which in the case of Hungary were unrelated to pre-accession requirements. In Poland, the Constitutional Tribunal used identity to justify backtracks on pre-accession commitments. In both Hungary and Poland, we reviewed sustained efforts of the constitutional courts to question the principle of primacy of EU law and second-guess ECJ judgements, whose application is sidestepped due to an alleged breach of the principle of constitutional identity. In practice, judgements expressed in juristic

[73] Available at https://www.ccr.ro/comunicatul-presedintelui-curtii-constitutionale-a-romaniei-cu-privire-la-publicarea-hotararii-nr-7-2025-privind-contestatiile-formulate-impotriva-deciziei-biroului-electoral-central-nr-18d-din-9-mart/ (in Romanian). All links were last accessed on September 15, 2025.

format thinly veiled rationalisations of national political decisions, especially as regards the HCC.

Contrariwise, in Romania, the opposition to the EU institutions appeared coincidental, tentative, and unsystematic. This specificity was due, as we showed, to the context of conditionalities applicable to this country and their protracted application long after the EU accession on January 1st, 2007. Reactivity produced a different jurisprudential configuration.

We called into question analogies between these juridictions at the levels of EU and CoE institutions and in the literature. The RCC also had, in principle, a much more solid grounding when it expressed identity-originated reservations to the primacy of EU law or to international law standards. Unlike either of the other two countries, its 1991 Constitution has possessed from the very beginning an eternity clause and hypothetical limits to integration tied to the identity clause were also spelled out from the very onset. Moreover, the opposition to the idiosyncratic EU conditionalities, whose application continued long after the 2007 accession, was formulated for the most part in universalizeable constitutional language (fundamental rights and the rule of law). Such formulations were, as it eventually turned out, primarily reactive and circumstantial. Recent forays of the CCR into the terrain of identity, notwithstanding their declarative purposes, raise similar concerns of instrumentalism as in Hungary and Poland.

Our argument incidentally charts the way in which accession failures and shortcomings have invited identity instrumentalism. The admission of Hungary into the Union while the country had not first put its constitutional house in order opened the door widely to the subsequent instrumentalisation of constitution-making. In the Hungarian setting, identity could simply be extemporised in positive fundamental law form, as the need arose. The underspecification of conditionalities in the case of Poland led to a polarised back and forth between the PCT and the CJEU, whereby the Polish tribunal conscripted a fictitious constitutional identity in response to a set of constitutional conditionalities, which were themselves reconstructed ad hoc and polemically.

Romania stood apparently apart. It was approached for a long time as a similarly RoL-backsliding juridiction, even as the definition as such of the rule of law applicable to this country differed significantly from that applicable to older new Member States. Analogies were false and overbroad, since the frameworks provided by the respective settings (political capture and/or attempts to thoroughly restructure and politicise judicial institutions here, instrumental anticorruption and anti-anticorruption there) were different. Paradoxically however, the deeper intuition behind the false analogy has ultimately, in time, proven to be correct.

Acknowledgements This paper was initially presented in the conference Rule of Law Ideal Models: Centrality under Stress or 'Peripheralisation of the World', within the project ROLPERIPHERAL (PN-III-P4-PCE-2021-0319). The event was organised in Bucharest on September 26-27, 2024 by the New Europe College, with the support of the Romanian Association of Constitutional Law and the University of Bucharest (the Faculty of Political Science, the Centre for the Study of Constitutional Law and Political Institutions --CDCIP-- in the Law Faculty, and CEREFREA). We thank colleagues present at the event for their questions and comments. We thank Attila Vincze for useful comments and bibliographic pointers with respect to HCC caselaw. Last but certainly not least, the two authors are greatly indebted to the two anonymous reviewers; responding to their careful, insightful, generous comments has

significantly enhanced the sophistication of the argument and the flow of the text. Mistakes are shared by the co-authors.

Author Contributions Bogdan Iancu wrote the main text and the general theoretical framework, Ștefan Deaconu contributed primarily to the jurisdictional case study part. The project as such and the idea to compare these three jurisdictions were commonly agreed and discussed by the coauthors.

Funding Research for this paper was partly funded by UEFISCDI—Exploratory Research (PN-III-P4-PCE-2021-0319, ROLPERIPHERAL).

Data Availability No datasets were generated or analysed during the current study.

Declarations

Conflict of interest The authors declare none.

References

Bakó B (2018) The zauberlehrling unchained? The recycling of the German Federal Constitutional Court's case law on identity-, ultra vires-, and fundamental rights review in Hungary. Zeitschrift Für Ausländisches Öffentliches Recht und Völkerrecht (ZaöRV) 78:863–902

Benke K (2023) The saga may continue: on the intricate dialogue between the Constitutional Court of Romania and the Court of Justice of the European Union. Cent Eur J Comp Law 4(2):9–40. https://doi.org/10.47078/2023.2.9-40

Benke K, Costin A (2016) Consecinţe ale receptării jurisprudenţei Curţii de Justiţie a Uniunii Europene şi a Curţii Europene a Drepturilor Omului în jurisprudenţa Curţii Constituţionale în materie administrative Revista Română de Drept European (No. 3), pp 85–107

Blokker P (2021) Constitutional politics and populist conservatism: the contrasting cases of Poland and Romania. Eur Polit Soc 24(1):132–149. https://doi.org/10.1080/23745118.2021.1956243

Bobek M, Kosař D (2014) Global solutions, local damages: a critical study in judicial councils in Central and Eastern Europe. Ger L J 15(7):1257–1292. https://doi.org/10.1017/S2071832200019362

Bojarski L (2025) Judicial resistance: missing part of judicial independence? The case of Poland and beyond. Oñati Socio-Legal Ser 15(2):662–700. https://doi.org/10.35295/osls.iisl.1893

Bustos Gisbert R (2022) Judicial independence in European constitutional law. Eur Const Law Rev 18(4):591–620. https://doi.org/10.1017/S1574019622000347

Calliess Ch, van der Schyff G (2019) Constitutional identity in a Europe of multilevel constitutionalism. OUP, Oxford

Castillo-Ortiz P (2023) Judicial governance and democracy in Europe. Springer. Heidelberg

Deaconu Șt. (2013) Drept constituțional (ed. a doua). C. H. Beck, București

Dorneanu V, Krupenschi C-M (2019) (eds.) Identitatea constituțională națională în contextul dreptului european. Ed. Hamangiu, București

Doroga S, Bercea R (2023) The role of judicial associations in preventing rule of law decay in Romania: informal communication and strategic use of preliminary references. Ger Law J 24(8):1393–1411. https://doi.org/10.1017/glj.2023.69

Enache M, Titirişcă C (2021) References for preliminary rulings submitted in a priori constitutional review. Insights from Romania in Light of Decision No. 137 of 13 March 2019 of the Romanian Constitutional Court. Eur Const Law Rev 17(1):107–129. https://doi.org/10.1017/S1574019621000122

Fabbrini F, Sajó A (2019) The dangers of constitutional identity. Eur L J 25(4):457–473

Fichera M, Pollicino O (2019) The dialectics between constitutional identity and common constitutional traditions: which language for cooperative constitutionalism in Europe? Ger Law J 20(8):1097–1118. https://doi.org/10.1017/glj.2019.82

Garoupa N, Ginsburg T (2009) Guarding the guardians: judicial councils and judicial independence. Am J Comp Law 57:103–134

Gombos K, Orbán E (2022) The Hungarian and German constitutional courts refused the ratification of the agreement on a Unified Patent Court. What's next? J Intellect Prop Law Pract 17(1):35–44. https://doi.org/10.1093/jiplp/jpab170

Guțan M (2025) The new enemies of Romanian militant democracy: fighting radical-right populism and manipulative social media. Available at SSRN (last accessed on October 16, 2025): https://ssrn.com/abstract=5272229 or https://doi.org/10.2139/ssrn.5272229

Halberstam D, Möllers C (2009) The German Constitutional Court says "Ja zu Deutschland!" Ger Law J 10(8):1241–1258. https://doi.org/10.1017/S2071832200001577

Halmai G (2015) Judicial review of constitutional amendments and new constitutions in comparative perspective. Wake for Law Rev 50:951

Halmai G (2018) Silence of transitional constitutions: the "invisible constitution" concept of the Hungarian Constitutional Court. Int J Const Law 16(3):969–984. https://doi.org/10.1093/icon/moy067

Hanelt E, Vincze A (2024) Managing courts in competitive authoritarian regimes. Z Vgl Polit Wiss 18:381–400. https://doi.org/10.1007/s12286-024-00621-y

Hillar M (1992) The Polish constitution of May 3, 1791: myth and reality. Pol Rev 37(2):185–207

Hogic N (2024) Pre-enlargement reform failures in the Western Balkans: social and economic preconditions of the rule of law. Hague J Rule Law 16:693–714. https://doi.org/10.1007/s40803-024-00235-2

Iancu B (2022) Goat, cabbage and wolf. In *VerfBlog,* 2022/1/07, https://verfassungsblog.de/goat-cabbage-and-wolf/. https://doi.org/10.17176/20220107-195122-0. Last accessed on October 16, 2025.

Iancu B (2023) The evolution and gestalt of the Romanian constitution. In: von Bogdandy A, Huber PM, Ragone S (eds) The max Planck handbooks in European Public law: volume II constitutional foundations. Oxford UP, Oxford, pp 493–547

Iancu B (2024) Quick fix solutions-anticorruption as core/peripheral modality of the 'rule of law.' Hague J Rule Law 16:611–642. https://doi.org/10.1007/s40803-024-00220-9

Iancu B (2025a) Militant democracy and rule of law in three paradoxes: the annulment of the Romanian presidential elections. Hague J Rule Law. https://doi.org/10.1007/s40803-025-00245-8

Iancu B (2025b) Continuitate și ruptură în constituționalismul românesc. Hamangiu, București (**forthcoming**)

Iancu B (2025c) The rule of law under threat: eroding institutions and European remedies. In: Böttner R, Blanke J-H (eds) Edward Elgar, Cheltenham, 2024. 62, C. M. L. Rev (62) 3, pp 988–991. https://doi.org/10.54648/cola2025053 **(book review)**

Iorgovan A (1998) Odiseea elaborării Constituției-fapte și documente, oameni și caractere; cronică și explicații, dezvăluiri și meditații. Editura Uniunii Vatra Românească, Târgu Mureș

Janse R (2019) Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement. Int J Const Law 17(1):43–65. https://doi.org/10.1093/icon/moz009

Joerges C, Ghaleigh NS (2003) Darker legacies of law in Europe: the shadow of National Socialism and Fascism over Europe and its legal traditions. Hart, Oxford

Kadlec O, Kosar D (2022) Romanian version of the rule of law crisis comes to the ECJ: the AFJR case is not just about the cooperation and verification mechanism. Common Mark Law Rev 59(Issue 6):1823–1852

Kelemen RD, Pech L (2018) Why autocrats love constitutional identity and constitutional pluralism: lessons from Hungary and Poland. RECONNECT working paper 2/2018, at (last accessed on October 16, 2025). http://icedd.luiss.it/files/2019/02/Why-autocrats-love-constitutional.pdf

Kochenov D (2008) EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of democracy and the rule of law. Kluwer Law International, The Hague

Komárek J (2014) Waiting for the existential revolution in Europe. Int J Const Law 12(1):190–212. https://doi.org/10.1093/icon/mou004

Kosař D (2016) Perils of judicial self-government in transitional societies. Oxford UP, Oxford

Kovács K (2017) The rise of an ethnocultural constitutional identity in the jurisprudence of the East Central European courts. Ger Law J 18(7):1703–1720. https://doi.org/10.1017/S2071832200022501

Kovács K (2023) Reconceptualising constitutional identity: the case of Hungary. In: Kovács K (ed) The jurisprudence of particularism: National Identity Claims in Central Europe. Hart, Oxford, pp 149–169

Krygier M, Czarnota A (2006) After postcommunism: the next phase. Annu Rev Law Soc Sci 2:299–340

Kumm M (2023) Un-European identity claims: on the relationship between constituent power, constitutional identity and its implications for interpreting Article 4(2) TEU. In: Kovács K (ed) The jurisprudence of particularism: National Identity Claims in Central Europe. Hart, Oxford, pp 173–186

Larsen SR (2021) Varieties of constitutionalism in the European Union. Mod Law Rev 84:477–502. https://doi.org/10.1111/1468-2230.12614
Larsen SR (2023) The European Union as 'militant democracy? In: Komárek J (ed) European constitutional imaginaries: between ideology and utopia. OUP, Oxford, pp 75–91
Loewenstein K (1965 (First edition, 1957) Political power and the governmental process. University of Chicago Press. Chicago & London
Martí JL (2013) Two different ideas of constitutional identity: identity of the constitution v. identity of the people. In: SáizArnáiz A, Alcoberro C (eds) National constitutional identity and European integration. Intersentia, Antwerp, pp 17–36
Mitrany D (1951) Marx against the peasant: a study in social dogmatism. University of North Carolina Press, Chapel Hill
Morar D (2022) Putea să fie altcumva: o istorie subiectivă a justiției după 1990. Humanitas, București
Mueller J-W (2013) Hungary's power grab should make the EU rethink its role, The Guardian of March 11, 2013. Available at (last accessed on October 16, 2025) https://www.theguardian.com/commentisfree/2013/mar/11/hungary-power-grab-eu-role
Parau CE (2018) Transnational networking and elite self-empowerment: the making of the judiciary in contemporary Europe and beyond. Oxford University Press, Oxford
Perju V (2024) Elements of a doctrine of transnational constitutional norms. Int J Const Law 22(2):292–317. https://doi.org/10.1093/icon/moae023
Polzin M (2014) Irrungen und Wirrungen um den Pouvoir Constituant: Die Entwicklung des Konzepts der Verfassungsidentität im deutschen Verfassungsrecht seit 1871. Der Staat 53(1):61–194
Polzin M (2016) Constitutional identity, unconstitutional amendments and the idea of constituent power: the development of the doctrine of constitutional identity in German constitutional law. Int J Cont Law 14(2):411–438. https://doi.org/10.1093/icon/mow035
Puleo L, Coman R (2023) Explaining judges' opposition when judicial independence is undermined: insights from Poland, Romania, and Hungary. Democratization 31(1):47–69. https://doi.org/10.1080/13510347.2023.2255833
Rabinovych M (2024) Eu enlargement policy goes east: historical and comparative takes on the EU's rule of law conditionality vis-à-vis Ukraine. Hague J Rule Law 16:715–737. https://doi.org/10.1007/s40803-024-00223-6
Sajó A (1995) Reading the invisible constitution: judicial review in Hungary. Oxf J Leg Stud 15(2):253–267. https://doi.org/10.1093/ojls/15.2.253
Sajó A (2005) Constitution without the constitutional moment: a view from the new member states. Int J Const Law 3(Issue 2–3):243–261. https://doi.org/10.1093/icon/moi018
Scheppele KL, Perju V (2012) Separating law and politics in Romania, reprinted by Paul Krugman in the New York Times, July 12, 2012
Schmitt C (2010) zehnte Auflage (1928) Verfassungslehre. Duncker & Humbolt, Berlin
Schmitt OJ (2019) Hundert Jahre Einsamkeit-Grundzüge der Geschichte Rumäniens'. 6–8 Osteuropa (Durchblick: Politik und Gesellschaft in Rumänien), pp 7–35
Scholtes J (2023) The abuse of constitutional identity in the European Union. OUP, Oxford
Scholtes J (2025a) The Venice Commission and the mental map of European constitutionalism. Hague J Rule Law. https://doi.org/10.1007/s40803-025-00257-4
Scholtes J (2025b) Freeing constitutional identity from unamendability: Solange I as a constitutional identity judgment. Zeitschrift Für Ausländisches Öffentliches Recht und Völkerrecht 85(2):547–568. https://doi.org/10.17104/0044-2348-2025-2-547
Selejan-Guțan B (2018) Romania: Perils of a 'Perfect Euro-Model'of Judicial Council. Ger Law J 19(7):1707–1740
Śledzińska-Simon A (2018) The rise and fall of judicial self-government in Poland: on judicial reform reversing democratic transition. Ger Law J 19(7):1839–1870. https://doi.org/10.1017/S2071832200023257
Spieker LD (2020) Framing and managing constitutional identity conflicts: How to stabilize the 'modus vivendi' between the Court of Justice and national constitutional courts. Common Mark Law Rev 57(2):361–398
Stambulski M (2024) Schrödinger's Judges: challenges to the rule of law restoration in Poland. VerfBlog. Last accessed on October 16, 2025. https://doi.org/10.59704/40c1cd516ac7885c
Ștefan O (2024) Preserving the rule of law through transnational soft law: the cooperation and verification mechanism. Hague J Rule Law 16:671–692. https://doi.org/10.1007/s40803-024-00222-7

Stoica CA (2025) Turul care n-a fost: Autopsia sumară a unui moment electoral (sperăm) unic. Humanitas, București

Sulyok T (2019) Sovereignty and European law in the Jurisdiction of the Hungarian Constitutional Court. In Dorneanu V, Krupenschi C-M, Identitatea constituțională națională în contextul dreptului european. Ed. Hamangiu, București, pp 75–78. Available at (last accessed on October 16, 2025): https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf

Suteu S (2021) Eternity clauses in democratic constitutions. OUP, New York

Suteu S (2024) Friends or foes: Is unamendability the answer to democratic backsliding? Hague J Rule Law 16:315–338. https://doi.org/10.1007/s40803-024-00233-4

Tănăsescu ES, Selejan-Guţan B (2024) A turn of tide in the fight against corruption in Romania: the CJEU between systemic risk of impunity and fundamental rights. ERA Forum 25:567–591. https://doi.org/10.1007/s12027-025-00820-4

Tănăsescu ES, Șt D (2013) Romania: analogical reasoning as a dialectical instrument. In: Groppi T, Ponthoreau MC (eds) The use of foreign precedents by constitutional judges. Hart, London, pp 321–345

Tănăsescu SE (2021) The independence of justice as proxy for the rule of law in the EU case study—Romania. Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società (NAD-DIS) 3. Available at (last accessed on October 16, 2025). https://riviste.unimi.it/index.php/NAD/article/view/15826

Toader T, Safta M (2023) Identitatea. constituțională națională și identitatea constituțională europeană. Rev Stiinte Juridice 2023(1):33–50

Tushnet M (1999) The possibilities of comparative constitutional law. Yale Law J 108(6):1125–1309

Varga A (2019) Determinarea conținutului identității constituționale: consacrare normativă și jurisprudențială. In Dorneanu V, Krupenschi C-M, Identitatea constituțională națională în contextul dreptului european. Ed. Hamangiu, București, pp 20–28. Available at (last accessed on October 16, 2025). https://www.ccr.ro/wp-content/uploads/2022/01/Identitatea-constitutionala-nationala-in-contextul-dreptului-european-2019.pdf

Vincze A (2022) Unsere Gedanken sind Sprengstoff – Zum Vorrang des Europarechts in der Rechtsprechung des ungarischen Verfassungsgerichts. Eur Grundrechte Z 49(1):13–21

von Bogdandy A, Sonnevend P (2015) Romania/Hungary, constitutional crisis in the European constitutional area: theory, law and politics in Hungary and Romania. Hart Publishing, Oxford

Ziller J (2018) Agencification as European Union Acquis. In: Iancu B, Tănăsescu ES (eds) Governance and constitutionalism: law, politics and institutional neutrality, 1st edn. Routledge, London

Ziółkowski M (2023). In: Kovács K (ed) The jurisprudence of particularism: national identity claims in Central Europe. Hart, Oxford, pp 127–148

Zomerski W (2025) Anatomy of a Liberal Fall: Poland's 2025 Presidential Election, VerfBlog, 2025/6/11. Last accessed on October 16, 2025. https://verfassungsblog.de/poland-presidential-election-2025/. https://doi.org/10.59704/ee63bc06c3062698

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

Springer Nature or its licensor (e.g. a society or other partner) holds exclusive rights to this article under a publishing agreement with the author(s) or other rightsholder(s); author self-archiving of the accepted manuscript version of this article is solely governed by the terms of such publishing agreement and applicable law.