

THE INDEPENDENCE OF JUSTICE AND THE DILEMMA
JUDICIAL ACTIVISM VS. NATIONAL SPECIFICITIES
IN EU EASTERN COUNTRIES

SEBASTIAN AVĂCĂRIȚEI

*Alexandru Ioan Cuza University of Iași
Iași, Romania
sebastian.avacaritei24.07@gmail.com*

MIHAELA TOFAN

*Alexandru Ioan Cuza University of Iași
Iași, Romania
mtofan@uaic.ro*

Abstract

The independence of the judiciary forms the foundation of contemporary legal systems where the rule of law guarantees the separation of powers and the support against arbitrary and external interference. Within the European Union (EU), it is an integral part of the common legal order, yet its uniform implementation generates significant tensions, especially in the Central and Eastern states. These tensions are fueled by the need to reconcile EU law principles with the respect for national identity, a challenge which became more important in the context of the recent political transformations and extreme tendencies.

The research points out the fact that the decisions of the European courts not only serve to clarify and strengthen the applicable legal norms but are essential tools in ensuring the maintenance of an often-fragile democratic balance. However, the perception of these judgments as forms of foreign interference can lead to the polarization of social structures and risks undermining public confidence in the efficiency and independence of the national judiciary. In Poland and Hungary, the decisions of European courts, although based on clear principles of the rule of law, have often been perceived as a form of extreme interference, amplifying nationalist rhetoric and fueling inter-institutional conflict. In Romania, the relatively harmonious cooperation between national and European courts suggests a greater potential for integrating European rules into the domestic legal order. These dynamics underline the importance of a balance between the uniform application of European values and respect for constitutional particularities, as well as the need for constant dialogue.

Keywords: *judicial independence; judicial activism; EU law and national sovereignty.*

JEL Classification: K40; K33; P48.

1. INTRODUCTION

The independency of justice is a fundamental principle of law derived from the balance of the state powers and aimed at defending the fundamental rights of citizens. It is the essential foundation of the rule of law and an indispensable condition for ensuring the balance between the powers of the state. Within the European Union (EU), this principle is not only a normative requirement, but also a fundamental value enshrined in Article 2 of the Treaty on European Union (TEU), along with respect for democracy, human rights and the rule of law (European Union, 2012).

It is a key criterion in the assessment of Member States, both in the framework of enlargement procedures (through the Copenhagen criteria) and through specific instruments such as the Cooperation and Verification Mechanism (CVM) or the recent rule of law conditionality mechanism (European Commission, 2020).

However, the uniform application of these standards within the EU has generated significant tensions, especially in the states of Central and Eastern Europe. In Poland and Hungary, judicial reforms initiated by majority governments have been perceived by the European institutions as direct attacks on the independence of the judiciary, leading to interventions by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) (Pech and Scheppele, 2017; Bánkuti, Halmai, and Scheppele, 2012). The tensions between national legislation and European principles reflect a broader conflict between the constitutional specificity of states and the supranational legal order of the Union. Within the EU, the independence of the judiciary is not just a theoretical ideal, but a *sine qua non* rule for maintaining the legal order and for ensuring the efficient functioning of the single market.

This paper starts from the premise that judicial activism – understood as the active involvement of courts in shaping public policies and defending constitutional values – has become a key mechanism for protecting the independence of the system. For example, in the decision in the case of *Associação Sindical dos Juizes Portugueses (C-64/16)*, the CJEU reaffirmed that national courts must benefit from effective protection against interference, by virtue of Article 19 TEU (CJEU, 2018).

Our research hypothesis focuses on how judicial activism has become the essential mechanism for upholding the independence of the judiciary, but also on the controversy in the relations between national and European courts. From a methodological point of view, the research combines doctrinal analysis with the examination of relevant jurisprudence, also using case studies, allowing the identification of common models, but also highlighting the differences generated by the national legal and political context. Representative judgments of the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECHR), together with the relevant decisions of the national courts are selected,

considering both their impact on the domestic legal framework and the political and social reactions generated. The case studies are analyzed in the context of recent policy transformations, providing a detailed perspective on the challenges encountered in implementing EU rules.

The methodological approach includes the analysis on how judicial activism operates as an instrument of democratic resistance and implementation of European standards. The comparative approach will focus on relevant examples from Poland, Hungary and Romania. In 2021, Polish courts challenged the supremacy of European law, triggering a significant institutional conflict with the EU. National courts have become the main opponents of reforms aimed at subordinating justice to the executive, supported by the interventions of the CJEU. One of the particularly controversial measures was the establishment of a disciplinary section for judges, a measure considered by the CJEU to be incompatible with the European principles of judicial independence. Hungary provides an example with distinct nuances, where attempts to restructure the judiciary system have led to a complex dialogue between the national courts and the ECHR. The reforms initiated by the Fidesz government have brought changes to the status of judges and the structure of the Constitutional Court, leading to repeated interventions by the ECHR. In contrast, Romania presents a special dynamic, as national courts are using European standards to counter legislative initiatives with certain question marks and to support the consolidation of the rule of law. Initially characterized by tensions related to the efficiency of the judicial system and the transparency of the legislative process, Romania has demonstrated its capacity to adapt quickly to European norms (Tofan and Verga, 2023). Romanian courts, the High Court of Cassation and Justice included, have relied on European case law to issue decisions on combating corruption and strengthening the rule of law. These case studies reveal the complexity and the challenges that judicial activism enshrines in the relationship between the principle of subsidiarity and the uniform application of EU law. The process of implementing European rules encounters significant difficulties. Cultural factors, political constraints and constitutional divergences are obstacles in standardizing the application of EU law and the involvement of the Romanian constitutional court into this process is also addressed.

The relevance of this approach is supported by the recent political context, in which respect for the rule of law is becoming increasingly closely linked to access to European funds, but also to citizens' trust in the democratic functioning of the state. As Kochenov and Bárd (2018) warn, an erosion of the independence of the judiciary in any EU Member State can have systemic effects on the entire European legal order.

2. THEORETICAL FRAMEWORK

The concept of judicial independence is closely linked to the principle of separation of powers in the state and to the institutional guarantees offered to magistrates to exercise their duties without interference from the executive or the legislature. According to the Venice Commission, the independence of judges presupposes both individual independence – i.e. the freedom of the judge to decide in concrete cases without pressure – and institutional independence, which aims at the organization of the judiciary (Venice Commission, 2010).

At the level of the European Union, this principle is reinforced by Article 19 TEU and by the case-law of the Court of Justice of the European Union (CJEU), which has established that national courts applying European law must enjoy a sufficient degree of independence to guarantee the right to a fair trial (C-64/16, *Associação Sindical dos Juizes Portugueses*). In a subsequent decision, i.e. C-791/19 *Commission v. Poland*, the CJEU clarified that European standards of independence cannot be limited by domestic constitutional provisions (), emphasizing the primacy of EU law.

A second fundamental concept is judicial activism, which refers to the involvement of courts in the process of shaping public policies and imposing constitutional values in the face of acts of the executive or legislative branch perceived as contrary to the democratic order (Stone Sweet, 2000).

Although judicial activism is frequently criticized in conservative doctrines for potentially overcoming the traditional role of the judge as a "mourner of the law" or "*bouche de la loi*" in French, in the contemporary European context it acquires a dimension of defending the rule of law against authoritarian or populist tendencies (Sadurski, 2019).

In parallel, regarding the principle of subsidiarity, enshrined in Article 5 TEU, which implies that the Union acts only to the extent that the objectives of the action cannot be sufficiently achieved by the Member States. Subsidiarity has as a mechanism for the protection of national specificities and constitutional traditions specific to each Member State. However, the uniform application of European values – including standards of justice – sometimes collides with this logic, generating conflicts between constitutional sovereignty and European obligations (Kelemen, 2017).

In the case of the Central and Eastern European states, this conflict manifests itself intensely, because the integration process has been simultaneous with incomplete democratic transformations. Thus, the independence of the judiciary has not always been perceived as an intrinsic value, but often as an external requirement imposed by Brussels (Closa and Kochenov, 2016). This perception contributes to the weakening of trust in the judicial system and to nationalist reactions to the decisions of European courts.

3. METHODOLOGY

To analyze how the principle of judicial independence is implemented in the context of European integration, with a focus on activating judicial activism mechanisms in Central and Eastern European states, the present research adopts a qualitative methodology, with a focus on doctrinal, comparative and jurisprudential analysis.

3.1. General approach

The methodological approach is based on an interdisciplinary framework, combining the perspective of European public law with elements of political and institutional analysis. This approach is necessary to understand not only the normative dimension of judicial independence, but also the socio-political context that influences the application of this principle in practice (Galligan, 1996).

3.2. Research techniques and methodological limitations

The research combines the following techniques:

- Doctrinal analysis: examination of the literature in the field of EU law, comparative constitutional jurisprudence and the rule of law.
- Analysis of case law: selection and interpretation of relevant decisions of the CJEU, ECHR and national courts. The focus is on judgments that address conflicts between European standards and domestic judicial reforms.
- Case studies: three national examples – Poland, Hungary and Romania – are analyzed in depth to highlight the variations in the application of the principle of judicial independence and the concrete forms of judicial activism.
- Comparative analysis: identifying the points of convergence and divergence between the three legal systems and the influence that European law experts on them.

This research does not aim to provide an exhaustive mapping of all cases in the three states analyzed. Also, the qualitative character of the study implies a contextualized interpretation, without the claim of statistical generalization. However, by selecting relevant cases and selecting sources in literature, jurisprudence, political documents. The aim was to obtain a deep and nuanced understanding of the phenomenon investigated.

3.3. Justification for the selection of states

The choice of Poland, Hungary and Romania is based on the relevance of these states in the debate on the erosion of the rule of law in the EU. All three have been members of the European Union for over a decade, but have followed different trajectories in terms of judicial reforms:

- Poland – represents the case of an open conflict with the European institutions regarding the supremacy of EU law and the reform of the judicial system.
- Hungary – provides a model for strengthening political control over justice through constitutional means.
- Romania – illustrates an example of progressive adaptation to EU standards, with the active involvement of courts in upholding the rule of law.

3.4. Criteria for the selection of case-law

The analyzed decisions were selected based on the following criteria:

- Normative relevance: decisions defining standards of judicial independence in the context of European law.
- Political and institutional impact: decisions that generated significant reactions in the public space and in the internal political system.
- Conflictual nature: cases reflecting tensions between national and European courts (CJEU, ECHR).

Representative examples include *C-791/19 Commission v. Poland*, *Baka v. Hungary* (ECHR), respectively the decisions of the High Court of Cassation and Justice of Romania on combating corruption and upholding the independence of the judiciary.

4. RESULTS: COMPARATIVE CASE STUDIES

The comparative analysis of the way in which the independence of the judiciary is negotiated and defended in Poland, Hungary and Romania highlight divergent trajectories in relation to the fundamental values of the European Union. Although all three states have been under pressure to align with post-accession European standards, institutional reactions and judicial resistance mechanisms have varied considerably.

4.1. Poland – direct challenge to the primacy of EU law

Since 2015, Poland has initiated a series of controversial reforms in the field of justice, under the rule of the Law and Justice (PiS) party. The most significant measures concerned the National Council of Magistracy, the Supreme Court and the disciplinary system of judges. These interventions generated strong reactions from the European Union, culminating in the infringement procedure and a series of CJEU decisions.

The emblematic case is *Commission v. Poland (C-791/19)*, in which the Court of Justice concluded that the new Disciplinary Section of the Supreme Court does not meet the independence criteria set out in Article 19 TEU and Article 47 of the Charter of Fundamental Rights (CJEU, 2021).

This decision was met with hostility by the Polish authorities, culminating in the 2021 ruling of the Constitutional Tribunal declaring the articles of the TEU to

be incompatible with the Polish Constitution (Trybunał Konstytucyjny, 2021), an unprecedented action that called into question the supremacy of European law.

While civil society and some magistrates supported the CJEU's intervention, the government authorities denounced it as an act of foreign interference. Thus, in Poland, European judicial activism has been met with institutional resistance and nationalist rhetoric, amplifying the rule of law crisis (Sadurski, 2019).

4.2. Hungary – constitutional restructuring of the judiciary

Hungary provides an example of the systemic erosion of the independence of the judiciary through successive legislative and constitutional changes initiated by the Fidesz government. Since 2010, several reforms have targeted the Constitutional Court, the National Judicial Council and the system of appointment of judges. Although these measures were presented as administrative modernizations, in practice they reduced the autonomy of the judiciary.

A notorious case is *Baka v. Hungary* (ECHR, 2016), in which the Court found the violation of the right to a fair trial and freedom of expression of the former president of the Supreme Court, removed because of criticism of judicial reforms. This judgment highlighted the lack of procedural safeguards and political interference in the functioning of the judiciary (ECHR, 2016).

Despite these external interventions, the Hungarian government has continued the process of "illiberalization" of justice, developing a parallel constitutional system that minimizes the control of European courts. Unlike Poland, Hungary did not directly challenge the supremacy of EU law, but avoided it through sophisticated internal mechanisms, which made it more difficult for the European institutions to react (Scheppelle, 2018).

4.3. Romania – judicial activism as an adaptation mechanism

Romania has a special dynamic compared to the other two states. Although it went through moments of institutional crisis and challenging justice, especially between 2017 and 2019, the reaction of the judiciary and civil society was oriented towards defending the rule of law.

Romanian courts, in particular the High Court of Cassation and Justice and the Courts of Appeal, have frequently used the mechanism of preliminary rulings to the CJEU to clarify the compatibility of national reforms with European law. The CJEU decision in case *C-83/19 (Romanian Judges' Forum Association)* was instrumental in blocking the functioning of the Section for the Investigation of Crimes in Justice, considered by European courts as a threat to the independence of the judiciary (CJUE, 2021b).

Unlike Poland and Hungary, the Romanian authorities have shown a greater willingness to comply with European requirements, even if sometimes with delay. This attitude is encouraged by public coercion and the conditions imposed by the Cooperation and Verification Mechanism. Thus, Romania illustrates a model of

defensive judicial activism, oriented towards strengthening the legal framework and protecting judges against political influence.

5. DISCUSSIONS

The results of the comparative study reveal a structural tension between the principle of uniform application of European law and the constitutional diversity of the Member States, especially in Central and Eastern Europe. Although the fundamental values of the Union (rule of law, separation of powers, independence of the judiciary) are clearly set out in Article 2 TEU, their practical implementation depends on political, cultural and institutional factors specific to each state.

5.1. Judicial activism as a form of democratic resistance

In Poland and Romania, national courts have adopted different forms of judicial activism to defend the independence of the judiciary:

- In Romania, the courts have activated the European mechanisms (preliminary questions to the CJEU, invocation of ECHR jurisprudence) to counteract the pressures exerted by the legislative power on justice. This strategy can be interpreted as an adaptation activism, which aims to integrate European norms into a fragile national framework.
- In Poland, on the other hand, institutional conflicts have been deep. European activism – especially that of the CJEU – was perceived as interference in national sovereignty, fueling a nationalist and anti-European discourse. Here we observe a confrontation between European judicial activism and national constitutional resistance (Búrca, 2013).

These differences confirm the hypothesis that the activation of justice as a „guardian of democracy” is conditioned by the internal political environment and the relationship between the courts and the executive.

5.2. The dilemma between sovereignty and integration

A central element of the rule of law crisis in the EU is the conflict between the principle of the primacy of European law and the claims of constitutional sovereignty. Poland's Constitutional Tribunal has explicitly stated that certain provisions of the TEU are incompatible with the Polish Constitution, an unprecedented act in the history of European integration (Trybunał Konstytucyjny, 2021). This position contradicts the settled case law of the CJEU, which reaffirms the primacy of EU law even in the face of domestic constitutional provisions, like in C-399/11, *Melloni*.

The debate reflects a breach of trust between European and national courts and highlights the lack of a coherent mechanism for resolving conflicts of jurisdiction in EU law (Dicosola, Margoni, and Repetto, 2019). In the absence of

a 'supreme arbiter', these conflicts risk undermining the coherence of the European legal order.

5.3. Public perception vs. legitimacy of courts

In Poland and Hungary, CJEU and ECHR judgments have often been presented in the public discourse as forms of imposing foreign values, which has led to the polarization of society and a decrease in trust in judicial institutions.

In contrast, in Romania, the CJEU's decisions have been better received, partly due to the support of civil society and independent media, but also because of a recent history in which justice has been the symbol of the fight against corruption. Thus, the legitimacy of European judicial activism is closely linked to the local cultural and institutional context (Kelemen, 2020).

5.4. The need for a new framework for judicial cooperation

The cases analyzed indicate that the current European mechanisms (CVM, Article 7 TEU procedure, CJEU) are not always sufficient to prevent democratic slippage. There is a need to rethink cooperation between national and European courts on a clearer basis, including by:

- Creating a permanent mechanism for constitutional dialogue between the CJEU and national constitutional courts;
- Introducing common criteria for assessing the independence of the judiciary in all Member States;
- Strengthening the budgetary conditionality mechanism in relation to the respect of the rule of law.

Common standards of judicial independence cannot be successfully implemented without genuine political commitment from Member States and a functioning institutional dialogue between national and European level. Judicial activism is a necessary but insufficient component of democratic resilience – it must be coupled with legitimacy, transparency and inter-institutional cooperation

6. CONCLUSIONS

While the principles of the rule of law and the primacy of EU law are formally recognized by all Member States, their effective application is profoundly influenced by the specific political, cultural and constitutional context of each country.

Research has shown that judicial activism – both at national and European level – has a key role to play in defending the independence of the judiciary in the face of political pressure. At the same time, this activism is not uniformly perceived: while in Romania it has been valued as a tool to strengthen the rule of law, in Poland and Hungary it has often been denounced as a form of foreign interference and as a threat to national sovereignty.

One of the paradoxes highlighted is that European courts – conceived as defenders of common values – can become, in certain contexts, causes of social and political division. This happens especially when their decisions collide with reform projects promoted by legitimate political majorities at national level. It is therefore essential that the implementation of European standards is accompanied by constant legal dialogue and measures to increase the internal legitimacy of these standards.

Romania's case shows that fellowship between national and European courts is possible, and judicial activism can function as an effective mechanism for adapting to EU rules. On the other hand, Poland and Hungary highlight the limits of this model in the absence of political will and a consolidated democratic constitutional culture.

The contribution of the paper consists in highlighting the way in which the tension between the uniformity of European law and the national constitutional diversity concretely affects the independence of the judiciary in the post-communist states. It also stresses the need to rethink the framework for judicial cooperation within the EU so that it is better adapted to the real challenges of the current political context.

Finally, without a truly independent judiciary, neither the European project nor national democracy can function sustainably. The defense of this principle must be not only a legal mission, but also a political, educational and civic one, undertaken by all levels of European society.

References

- 1) Bánkuti, M., Halmai, G. and Scheppele, K.L. (2012). Disabling the Constitution' *Journal of Democracy*, 23(3), pp. 138–146.
- 2) Búrca, G. de (2013). The European Court of Justice and the International Legal Order after Kadi, *Harvard International Law Journal*, 51(1), pp. 1–49.
- 3) Closa, C. and Kochenov, D. (2016) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge: Cambridge University Press.
- 4) CJEU Court of Justice of the European Union (2013) Case C-399/11, *Melloni v Public Prosecutor's Office*. [online] Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=134202> [Accessed 30.08.2025].
- 5) CJEU Court of Justice of the European Union (2018) Judgment in Case C-64/16, *Associação Sindical dos Juizes Portugueses v Court of Auditors*. [online] Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=199682> [Accessed 30.08.2025].
- 6) CJEU Court of Justice of the European Union (2021a). Case C-791/19, *Commission v Poland*. [online] Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=246243> [Accessed 30.08.2025].
- 7) CJEU Court of Justice of the European Union (2021b) Joined Cases C-83/19, C-127/19, C-195/19, etc., *Romanian Judges' Forum*. [online] Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=247048> [Accessed 30.08.2025].

- 8) Dicosola, M., Margoni, T. and Repetto, G. (2019). Constitutional Courts and the European Court of Justice: A Complex Network, *Maastricht Journal of European and Comparative Law*, 26(2), pp. 173–190.
- 9) European Commission (2020). *Rule of Law Conditionality Regulation. Regulation (EU, Euratom) 2020/2092*. [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R2092> [Accessed 30.08.2025].
- 10) European Court of Human Rights (2016) *Baka v Hungary*, Application no. 20261/12. [online] Available at: <https://hudoc.echr.coe.int/eng?i=001-161314> [Accessed 30.08.2025].
- 11) European Union (2012). *Consolidated Version of the Treaty on European Union*. OJ C 326, 26.10.2012.
- 12) Galligan, D.J. (1996). *Due Process and Fair Procedures: A Study of Administrative Procedures*. Oxford: Clarendon Press.
- 13) Kelemen, R.D. (2017). Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union, *Government and Opposition*, 52(2), pp. 211–238.
- 14) Kelemen, R.D. (2020). The European Union’s Authoritarian Equilibrium, *Journal of European Public Policy*, 27(3), pp. 481–499.
- 15) Kochenov, D. and Bárd, P. (2018). *The Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasizing Enforcement*. RECONNECT Working Paper 1/2018.
- 16) Kochenov, D. and Pech, L. (2015). Upholding the Rule of Law in the EU: On the Commission’s “Pre-Article 7 Procedure” as a Timid Step in the Right Direction, *European Constitutional Law Review*, 11(3), pp. 512–540.
- 17) Pech, L. and Scheppele, K.L. (2017). Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies*, 19, pp. 3–47.
- 18) Sadurski, W. (2019) *Poland’s Constitutional Breakdown*. Oxford: Oxford University Press.
- 19) Scheppele, K.L. (2018). Autocratic Legalism, *The University of Chicago Law Review*, 85(2), pp. 545–583.
- 20) Stone Sweet, A. (2000). *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press.
- 21) Tofan, M. and Verga, C.M. (2023). *Drept instituțional al Uniunii Europene*. București: CH Beck Publishing House.
- 22) Trybunał Konstytucyjny (2021) *Wyrok z dnia 7 października 2021 r., K 3/21*. [online] Available at: <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11807-k-321> [Accessed 30.08.2025].