Between Dialogue, Conflict, and Competition: The Limits of Responsive Judicial Review in the Case of the Romanian Constitutional Court

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Abstract

A response to Rosalind Dixon's Responsive Judicial Review (Oxford University Press 2023) assessing her theory's prospects and caveats in the Romanian constitutional context. The piece analyses recent case law from the Romanian Constitutional Court and highlights three important shortcomings that limit the applicability of Dixon's framework: the tendency toward formalism in constitutional interpretation, an impoverished rights review culture, and the persistent conflictual positioning of the Constitutional Court vis-à-vis other constitutional actors. The article ends by speculating on developments that may yet render responsive judicial review more of a reality in Romanian constitutionalism than present conditions may allow.

Keywords

Democratic backsliding in Central and Eastern Europe (CEE) and elsewhere has not infrequently used the guise of legality to hide its attacks on the constitutional edifice. Be it in the form of wholesale constitutional replacement and
amendments as in Hungary\textsuperscript{1} or sub-constitutional change dismantling judicial independence as in Poland,\textsuperscript{2} the more severe the departure from the rule of law, the more urgent the search for solutions. Even in countries where applying the populist or authoritarian label is questionable, such as Romania, we have consistently seen attacks on the rule of law via reforms to the judicial system and illiberal citizens initiatives.\textsuperscript{3} Thus, while seemingly stable as compared to other actors in the region, Romania’s democratic trajectory remains fraught by conflict and contestation.\textsuperscript{4} This trajectory has been influenced and at times steered by interventions from an increasingly assertive Constitutional Court.

In this brief article, I proceed from the question of whether the neo-Elyan account of judicial review as representation-reinforcing proposed by Dixon\textsuperscript{5} is applicable to the Romanian Constitutional Court. Focused on addressing three distinct forms of democratic dysfunction – anti-democratic monopoly power; democratic blind spots; and democratic burdens of inertia – the theory of responsive judicial review (RJR) is premised on free and fair elections, political rights and freedoms, and checks and balances amounting to a democratic minimum core. At its core, it updates, adds to, and adapts for our present times Ely’s defence of judicial review as a tool necessary to reinforce the democratic process.\textsuperscript{6} The appeal in the face of democratic backsliding is clear. This collection of articles is not the first to consider whether Elyan ideas fit, and if so how, national contexts very different from the one in which he had conceived of his theory.\textsuperscript{7} However, this collection is the first to consider these ideas in the CEE context and does so with the benefit of decades of experience with both the democratic process and constitutional adjudication in the region.

While I am generally sympathetic to Dixon’s theory, I will show that there are three, interconnected, reasons why the Romanian Constitutional Court

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\bibitem{1} Renata Uitz, “Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary” 13\textsuperscript{i} International Journal of Constitutional Law (2015) 279–300; and also Kovacs and Toth in this special issue.

\bibitem{2} Wojciech Sadurski, \textit{Poland’s Constitutional Breakdown} (Oxford University Press, Oxford, 2019).

\bibitem{3} Alexandra Mercescu, “\textit{Non Sequitur} in Constitutional Adjudication: Populism or Epistemic Deficit?” in Fruzsina Gardos-Orosz and Zoltan Szente (eds.), \textit{Populist Challenges to Constitutional Interpretation in Europe and Beyond} (Routledge, Oxford, 2021), 194–216.


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would struggle to engage in RJR as proposed by her. Neither of these contradict her preconditions for courts' ability to engage in RJR, namely judicial independence, political and civil society support, and remedial power. Rather, they have to do with the style of judicial reasoning and the judicial culture prevalent at the RCC. This makes them more elusive to pinpoint as well as remedy. Nor is the problem one of individual capacity, i.e. of RCC judges simply lacking, as an individual failing, “the requisite mix of legal and political skills necessary to identify relevant democratic blockages and determine how and when they can most effectively be countered by judicial intervention”\(^8\). Instead, the limitations discussed below are systemic and long-standing. In my concluding remarks, however, I revisit RJR’s potential in the Romanian context and explore possible sources of change to the RCC’s jurisprudence and working methods that offer reasons for optimism.

1 A Brief Summary of the Theory of Responsive Judicial Review

Dixon’s RJR theory has a clear aim: to increase the likelihood that judicial review exercised by apex and constitutional courts increases democratic responsiveness in any given jurisdiction. It is grounded in Elyan ideas insofar as it starts from a defence of judicial review as representation-reinforcing (rather than anti-democratic), but it updates and adds to Ely’s ideas considerably. Dixon’s objective is to add at least two components to what was missing in Ely’s theory: an investigation into the preconditions for effective judicial intervention, as well as a broadening of the thesis beyond the United States and its particular institutional arrangements and forms of judicial review. In both respects, certainly, her account succeeds in widening and deepening the scope of analysis and represents a significant contribution to the field.

Dixon’s RJR also makes two additional contributions, one acknowledged by the author explicitly and one that is up to her readers to note and appreciate. On the one hand, it is an account that is nuanced and deeply contextual, carefully circumscribing the scope and application of its different elements to the nature of the jurisdictions and courts it discusses. It is in this sense that she calls hers a “sometimes view of the promise of judicial review”:\(^9\) not one that can be assessed in the abstract and for all time, but always tentatively and based on conditions on the ground. She is the rare constitutional theorist who exhibits modesty about the reach of their own theory, such as when she admits

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\(^8\) Dixon, op.cit. note 5, 4.

\(^9\) Ibid., 13–16.
that RJR may not always be achievable in practice.10 Dixon is addressing courts primarily, seeking to offer judges (who it assumes are well-intentioned and eager to ‘get it right’) guidance for how to proceed in thorny scenarios, such as when constitutional meaning is ambiguous and the priority among constitutional values unclear.11 Dixon’s focus on understudied and undertheorised aspects of judicial practice such as authorship, tone, and narrative in judicial decision-making12 therefore adds to the growing literature on judicial statecraft.13

On the other hand, Dixon’s theory also has the virtue of offering a useful new vocabulary. Her discussion of antidemocratic political monopoly, legislative blind spots, and burdens of inertia arms us with discrete and carefully constructed notions that capture different facets of what, exactly, is going wrong in the legislative (and sometimes executive or administrative) arena and what ills courts are well-placed to address. These are the specific manifestations of democratic dysfunction her theory seeks to tackle. Bringing conceptual clarity in this area – especially given the proliferation of scholarship addressing democratic backsliding which does not always distinguish between them – is another virtue of the book.

What Dixon means by antidemocratic political monopoly includes both institutional and electoral measures designed to entrench partisan bias and skew democratic competition.14 Such measures may be public and overt or less visible and indirect, but their overall effect will be to diminish the capacity of the opposition to perform its accountability role and to stand a chance at elections, as well as to disempower other accountability mechanisms that could call the executive to account. Legislative blind spots, in turn, refer to those gaps or oversights in legislation that may be due to anything from limited foresight about how it may operate in practice to unintended consequences or knock-on effects.15 Finally, by legislative burdens of inertia, Dixon seeks to capture the variety of ways in which democratic legislatures may be unresponsive to their public, whether it be due to shifting priorities, coalition bargaining, the complexity of operationalising certain commitments (for example, giving effect to social rights protections), or simply state weakness.16 As can be seen

10 Ibid., 15.
11 Ibid., 5.
12 Ibid., 12.
14 Dixon, op.cit. note 5, 72.
15 Ibid., 82–84.
16 Ibid., 84–87.
from this brief summary, she is careful not to impute nefarious motives to legislatures whose democratic responsiveness is faulty. Instead, Dixon makes room for the possibility that judicial intervention may well be needed as a way to complement, nudge, and improve the actions of the legislature.\footnote{In this respect, it shares an ethos with another recent intervention in the area of judicial review theories: Aileen Kavanagh’s \textit{The Collaborative Constitution} (Cambridge University Press, Cambridge, 2023).}

One final note is useful here, before proceeding to test Dixon’s ideas as against the Romanian constitutional experience. She herself admits that, while aiming at universal applicability, her \textit{RJR} theory may operate differently between common law and civil law jurisdictions.\footnote{Dixon, op.cit. note 5, 18, 152–153.} An example discussed below is that of the different role played by precedent and doctrines of \textit{stare decisis} across the two traditions. There are, however, other relevant distinctions. For example, Dixon cites with approval the concreteness of judicial review in common law systems, insofar as it allows judges to consider legislation in the context of a concrete case and, therefore, to assess its effects (including indirect).\footnote{Ibid., 152.} She considers specialised, Kelsenian courts – who typically have powers of abstract review – possibly better positioned to identify legislative burdens of inertia, while ordinary courts may be better placed to spot legislative blind spots.\footnote{Ibid., 153.}

However, these observations are more speculative and tentative, understandable given that Dixon’s main objective is not necessarily to explain how her theory matches onto different types of legal systems. Nevertheless, her claim to offer a universal theory of judicial review bears testing against not just civil law jurisdictions in general, but those steeped in particular traditions, pathologies, and habitus as the Central and Eastern European ones are. The Romanian example discussed here, and the other contributions to this special issue are attempts to work through what Dixon’s theory may look like as applied to this context.

2 Formalistic Legal Reasoning

The RCC is not the only court in the region to exhibit a high level of formalism in its judicial reasoning.\footnote{Peter Cserne, “Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case?” in Michal Bobek (ed.), \textit{Central European Judges Under the European Influence: The Transformative Power of the EU Revisited} (Hart, Oxford, 2015), 23–42. See also Gruev, Kosar & Ourednickova, and Krstic in this special issue.} Inherited from the communist legal method, this
formalism manifests itself in the form of judgments that are dry and couched in the language of applying objective norms rather than solving complex conflicts. These courts often do not perceive themselves as discursive courts, meaning they do not perceive their audience as including the general public and do not necessarily identify a duty incumbent upon themselves to justify their reasoning to this broader public. With the rise of longer judgments, separate and dissenting opinions, the publication of decisions online, the translation of judgments etc., this detachment from the public at large is beginning to change. However, formalism in legal reasoning remains difficult to overcome.

It is important to note that the type of legal formalism I refer to here is an extreme and pernicious version of the appeal to law’s inherent normativity and rejection of extra-legal sources for its interpretation. It is not necessary to rehash old debates between defenders of legal formalism and its critics in order to show the appeal to legal formalism in CEE has often resulted in an abdication of the judicial role. Legal theorists defending legal formalism, such as Ernest Weinrib, are concerned with safeguarding the law’s autonomy and internal intelligibility (the law as “intelligible as an internally coherent phenomenon”) against the encroachment of political readings of legal normativity. Often, such scholars react to what they perceive as the oversimplification – to the point of caricature – of the appeal to form that is the bread and butter of the legal method. In the words of Brian Leiter, accounts of formalism that equate it with “nothing more than mechanical deduction on the model of the syllogism” misinterpret it and do not represent views shared by anyone today. He terms this view “vulgar formalism” and contrasts it with the more sophisticated versions that are actually in use.

The problem in the CEE context is that, in many instances, adjudication there has exhibited the features of such “vulgar formalism”. This was often


25 By "sophisticated", Leiter means those who accept formalism’s view of law and adjudication as rationally determinate but simultaneously “recognize that legal reasoning is not mechanical, that it demands the identification of valid sources of law, the interpretation of those sources, the distinguishing of sources that are relevant and irrelevant, and so on, and they offer a theoretical account of how these various bits of reasoning are done “rightly.” Ibid., 112.
the case in the early years of democratic transition, when new constitutional courts were created with unprecedented powers of constitutional review but also lacking in experience of navigating the more political waters they found themselves in. Examples below illustrate how still today, the Romanian Constitutional Court struggles to move beyond the mechanical appeal to legal rules, even in cases where the law may have exhausted its ability to provide clear-cut answers. Again, however, this is not solely a Romanian pathology. For instance, Serbia’s Constitutional Court has remained notoriously ineffective, particularly at holding political branches to account. Its “judicial dormancy in political disputes” has been attributed, at least in part, to “judges’ past habits and extensive ideology of legal formalism”.26 The anti-politics stance adopted by the Serbian judges combined with a long-standing attitude of judicial deference to political authority together make the Serbian court distinctly ineffective.27

A final concession here is that the charge of legal formalism against CEE courts needs to be contextualised and substantiated. Zdenek Kühn’s account of the continuities between communist and postcommunist legal ideology and method was a necessary addition to our understanding of CEE judiciaries.28 Nevertheless, it is important to accompany such general remarks with in depth case studies and empirical analysis to trace how, precisely, such formalism has operated in practice and over time.29 My aim is not to levy a blanket accusation, either against legal formalism as a method and philosophy of adjudication or against CEE or Romanian judges as a whole. Instead, I wish to illustrate how even in highly sensitive rights disputes, and decades into the postcommunist transition, the Constitutional Court of Romania continues to exhibit some of the worst traits of Leiter’s “vulgar formalism”. This in turn raises the prospect that Dixon’s theory of responsive judicial review may be a long way away from capturing the reality of Romanian constitutional adjudication.

Let us take as an example the 2016 decision that validated the citizen’s initiative on constitutionally redefining the family as between a man and a woman.30 Its proponents had argued that, given that the Romanian Civil Code...
only recognised heterosexual marriage, the Constitution needed to be brought in line and a possible expansion of the right to marry needed to be prevented via explicit amendment. They also invoked international human rights law to support their position, arguing that both Article 16 of the Universal Declaration of Human Rights and Article 12 of the European Convention on Human Rights recognised the foundational societal role of the (in their view, heterosexual and procreative) family and mandated the state to protect it as an institution. Here, then, was a preemptive, rights-restricting initiative couched in the language of human rights, casting the right to marry as one that pertains exclusively to heterosexual couples and that would stand to be negatively impacted by any extension of its scope.

The RCC’s approach was formalistic, even while paying lip service to various theories of judicial interpretation and to an engagement with international human rights law (more on the latter below). It engaged in a thin textualist reading of ‘family’, checking for its ordinary, dictionary meaning, before engaging in what could be termed an originalist reading of Article 48 which stood to be amended. It concluded that, because at the time of the 1991 constituent assembly, the general, accepted meaning of the family was as between a man and a woman, that is the meaning that was enshrined in the constitutional text. This ignored the language of Article 48 itself, which guarantees equality between the spouses in gender-neutral language. It also ignored the fact that the Civil Code at the time of the Constitution’s adoption was similarly ambiguous and only when revised in 2009 clearly stipulated the sexes of the spouses. While I would not go so far as to argue that this meant de facto constitutional recognition for same-sex marriage since 1991, it is nevertheless the case that the constitutional text was far more elastic and capacious than the RCC had allowed.

Moreover, the RCC also answered the question of whether the proposed amendment would contravene Art 152(2) of the Romanian Constitution, part of the Constitution’s eternity clause, incompletely and formally. Article 152(2) contains a typical non-retrogression clause on rights, stipulating that “no revision shall be made if it results in the suppression of the citizens’ fundamental rights and freedoms, or of the safeguards thereof.” The Court largely sidestepped the substantive question before it, however, of whether an explicit constitutional reference to the heterosexual family/marriage inserted in the Constitution violated the constitutional guarantee against discrimination. Instead, the Court reasoned convolutedly that the proposed amendment merely specified the content of an existing right to marry; as that right had never been extended to same-sex couples, it could not be the case that their rights were being suppressed here. It said nothing whatsoever on equality
and non-discrimination. The substantive part of the judgment, moreover, was
disposed of in a single paragraph. Nowhere did the Court admit that, given
that same-sex marriage was barred by legislation, the citizens' initiative could
only be read as seeking to future-proof this prohibition by enshrining it at the
constitutional level.31

To be clear, I am not claiming that the RCC should have de facto recognised
same-sex marriage in its review of the citizens' initiative. Nor am I here
criticising the outcome of its review for its conservative nature (though I
do discuss its limited conception of rights in the next section). Instead, the
analysis above is meant to show how the appeal to legal formalism obscured
an overly rigid style of judicial reasoning, one that even by its own measure
failed to engage with the complexity of the case before it. Whether this was
incidental or a purposeful obfuscation meant to remove the RCC from the line
of fire regarding a highly controversial social issue is irrelevant. What remains
instead is an unconvincing appeal to formalist method and the purported
limits of positive law.

This formalistic (others have called it unprofessional,32 or worse) style
of judicial reasoning has broader implications for the suitability of the RJR
framework to the RCC. This style of reasoning makes the RCC as it currently
operates still ill-suited to the type of value judgment RJR demands. It is not
just that the RCC lacks a coherent conception of the democracy or minority
rights it views itself as the guardian of, but rather that it fails to even raise the
question in the first place. In the case discussed, it was not that the Court failed
to sanction legislative in/action33 nor that it prioritised other constitutional
values or even constitutional non-responsiveness34 nor that it developed a
responsive approach to the protection of the rights in question in the face of
widespread disagreement over their content.35 Instead, the formalist method
applied, coupled with a dubious understanding of what rights protection
actually required, led the RCC down a path where it could serenely sidestep the
crucial substantive question before it. As we will see shortly, more recent RCC

31 See Simina Tanasescu, “De l’initiative populaire au référendum constitutionnel en
32 Vlad Perju, “Neprofesionalismul Curtii Constitutionale: Despre azivul pozitiv dat initiativei
de modificare a definitiei casatoriei in Constitutia Romaniei”, Contributors.ro (16 October
2016), available at https://www.contributors.ro/neprofesionalismul-curtii-constitutionale-
despre-azivul-pozitiv-dat-initiativei-de-modificare-a-definitiei-casatoriei-in-constitutia-
-romaniei/.
33 Dixon, op.cit. note 5, 46.
34 Ibid., 64.
35 Ibid., 276.
activity does show a willingness to move beyond this type of analysis, but this remains exceptional, while the bulk of the Court’s output remains formalistic.

3 An Impoverished Rights Review Culture and Transnational Engagement

Briefly revisiting the 2016 decision on the constitutional definition of the family, we are reminded that the RCC accepted the amendment proponents’ linking of the family to the right to marry, subsuming both to a narrow, ultraconservative procreative function. It bears repeating that what is impugned here is not that the Court did not recognise same-sex marriage. Indeed, that was not the question before it. Instead, it is both the style and the robustness of its legal reasoning that are disputed and whose suitability to responsive judicial review are being called into question.

The Court went further, however, no doubt attempting to buttress its credentials as a rights protecting court. It sought to justify an artificial distinction between the family as tied to marriage under Article 48 and the protection of the family and private life elsewhere in the Constitution (Article 26(1)), arguing that only the former and not the latter were in question in the case. Nor did the Court resort to international human rights law as a source for a richer analysis, despite numerous amici curiae raising comparative case law to argue that the law on same-sex marriage recognition had advanced considerably. This omission is even more glaring when considering that Article 20 of the Romanian Constitution explicitly makes international human rights treaties directly applicable where they offer a level of protection higher than domestic law. They have been recognised as part of a “constitutionality block” meant to enshrine constitutional supremacy and compliance with international human rights standards, whereby the latter would prevail in case of conflict but be interpreted as in line with the fundamental principles of the Romanian Constitution.36 Put differently, once duly ratified, an international treaty is to be interpreted as being in compliance with national law and any apparent inconsistencies are to be reconciled through interpretation.37 As seen in the case of the 2016 popular initiative, however, this requirement to harmonise

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37 Ioan Muraru and Elena-Simina Tanarescu, Constitutia Romaniei: Comentariu pe article, Editia 2 (Editura C.H. Beck, Bucharest, 2019), 152.
constitutional and international human rights norms was sidestepped when
the Court framed the issue as not involving rights limitations at all.
One might be tempted to view a subsequent, 2018 decision as more robust
in terms of its rights analysis on account of its outcome.\footnote{Decision no. 534/2018 of 3 October 2018.} The decision
accepted the right of same-sex couples married in the EU to have their
marriage recognised in Romania for the purposes of entitling the foreign
spouse to residence. Unlike in 2016, the 2018 decision recognised that same-
sex relationships were protected under the constitutional (Article 26) and
European right to family and private life (Article 8 \textit{ECHR} and Article 7 of the
EU Charter of Fundamental Rights). Both the judgment and the Chief Justice
in extrajudicial statements were unambiguous that the decision did not
amount to a \textit{de facto} recognition of same-sex marriage in the country. Instead,
the outcome was presented as the \textsc{rcc} merely falling in line with European
law.\footnote{Cited in Ema Stoica, “Şeful ccr , despre cazul Coman-Hamilton: Persoanele de acelaşi
sex căsătorite au dreptul de liberă circulaţie şi la şedere în România/ ACCEPT: Adrian şi
Clai, doar „un pic” căsătoriţi”, \textit{Mediafax} (18 July 2018), available at https://www.mediafax
.ro/social/seful-ccr-despre-cazul-coman-hamilton-persoanele-de-acelasi-sex-casatorite-
au-dreptul-de-libera-circulatie-si-la-sedere-in-romania-accept-adrian-si-clai-doar-un-
-pic-casatoriti-17360291.} This after it had itself seized the European Court of Justice seeking
a preliminary ruling on the legal question at the heart of the case. The \textsc{ecj}
recognised residence rights of same-sex partners whose marriage had been
legally performed in the EU, even where the Member State does not otherwise
formally recognise same-sex unions.\footnote{Relu Adrian Coman and Others v. \textit{Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne}, Case C-673/16, 5 June 2018.}

For five years after the \textit{Coman} judgment, Romanian immigration authorities
continued to refuse to issue a residence permit to Coman’s spouse, despite
threats of infringement proceedings by EU authorities. No administrative
procedure was initially created by the Romanian Government to facilitate
recognition of same-sex unions completed abroad; nor did the Romanian
Parliament amend legislation in order to mandate this. It was only in September
2023 that the Ministry of Interior finally introduced the needed amendments
to the relevant legislation.\footnote{Lege pentru completarea Ordonanţei de urgenţă a Guvernului nr. 194/2002 privind
regimul străinilor în România, adopted 20 September 2023.} Its justification for doing so was tailored in the
narrowest of terms, making it clear that it was not aiming at recognition of
either same-sex marriage or civil partnerships and that the changes were
meant to give effect to European law and avoid the country being subject to
infringement proceedings. It was only in September 2023 that the law was finally changed.

Coman and others had in the interim initiated proceedings before the European Court of Human Rights (ECtHR), arguing that non-implementation of the ECJ decision violated their Convention rights. Given the direction of travel in Strasbourg, it was only a matter of time until the ECtHR would add another layer to this saga and find the Romanian state in breach of the Convention. The inevitable indeed happened in May 2023, when the Strasbourg court – in a case involving twenty-one same-sex couples – found Romania in breach of its Convention obligations, notably Article 8, for failing to provide the applicants with any form of legal recognition of their relationships. It also dismissed the Romanian authorities’ arguments that there were public interest reasons for failing to act or that their approach was within their margin of appreciation under the Convention.

Returning to responsive judicial review theory, is this an example where the multi-actor dialogue that should have followed judicial intervention failed to materialise? In the first instance, the clear position of neither the domestic nor supranational courts seemed to suffice to incentivise national authorities to change the *de facto* situation of same-sex partners. Is the five-year timespan between judicial pronouncements and legislative change realistic or problematic? Is the change in the law to be seen as a victory, despite its very narrow contours (only the right to residence of foreign spouses where the marriage was concluded within the European Union being recognised)? Or in RJR terms, is this to be assessed as a burden of inertia finally pierced, if not overcome entirely?

Dixon herself is somewhat ambivalent about defining success in her theory of judicial review. The main measure of that success appears to be whether actual legislative change ensues, certainly in what legislative blind spots or burdens of
inertia are concerned. However, where the effects of judicial intervention are less direct, and also where the on the ground impact of legislative change is not straightforward, gauging success will be a complex equation. Dixon suggests empirical work and large-n comparisons as the methods needed to assess such impacts. The Romanian example here also adds another dimension: the difficulty of determining good faith when evaluating legislative change. One could say that, even belated and incomplete, legislative reform should be welcomed. However, obfuscation, delays, and minimal impact by design can be tactics used to diminish the impact of otherwise positive legal change.

Could one argue that, at least in what the courts involved are concerned, the Coman case represents a successful instance of judicial dialogue? I believe that would overestimate the good faith of the RCC. Rather, I would argue this was an instance in which it sought to pass the buck on a controversial decision to the European Court. The RCC had been notoriously reluctant to refer cases to the European Court of Justice, interpreting the mechanism of seeking ECJ preliminary rulings on the interpretation of EU law as voluntary rather than compulsory. In some instances, in fact, they went further and used the preliminary ruling mechanism as a mechanism to settle domestic scores, including intra-judicial conflict.

For example, in 2019, the Romanian High Court of Cassation and Justice asked for a preliminary ruling on whether a decision of the RCC on the composition of judicial panels in corruption cases – resulting in the need to redo the panels, and the trials, in 800 cases – was in violation of EU law. This was part of a larger package of reforms to the judicial system, including creating a new institution to hold magistrates criminally liable for disciplinary offences, that seriously called into question judicial independence in the country. The Romanian Constitutional Court had controversially found these changes in line with the Constitution and positioned itself as both defiant of and acting within the bounds of European rule of law standards. It also thereby came into conflict with ordinary courts, which had sought to comply with such standards and disapply the problematic reforms as contravening EU law. The ECJ judgment reinforced the primacy of EU law, including standards

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46 Ibid., 158.
47 Vita, op.cit. note 36.
49 For a comprehensive account of this matter, see Madalina Moraru and Raluca Bercea, “The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia ‘Forumul Judecătorilor din România’, and Their Follow-up at the National Level”, 18:1 European Constitutional Law Review (2022) 82–113.
set in the Cooperation and Verification Mechanism to which Romania was still subject.\textsuperscript{50} However, in the aftermath of the ECJ’s decision, the RCC put a stop to this dialogue by prohibiting domestic courts from disapplying national law already found to be constitutional (thus also the impugned justice reforms).\textsuperscript{51} The RCC invoked national constitutional identity in a sovereigntist way as a shield against its encroachment and effectively interpreted the Constitution in isolation from EU law.\textsuperscript{52}

I acknowledge that this form of dialogue between the domestic and the supranational is not the main object of the RJR theory, which focuses instead on dialogue with the legislature and acknowledges the lack of focus on international or regional courts.\textsuperscript{53} Nevertheless, the good faith and commitment to responsiveness that inform the book’s approach could be extrapolated to courts’ engagement internationally. The Romanian case, however, represents a cautionary tale on this front. Rather than aiming at better, more robust decision-making and more responsive outcomes, dialogue in the examples presented here was resorted to as a means to eschew responsibility for controversial decisions or else shift the arena for score settling to the international plane.

A counterexample came in 2020, when we find a Constitutional Court with a partially different composition issuing a much more comprehensively-reasoned decision in a case involving a bill seeking to ban the teaching of gender studies.\textsuperscript{54} The judgment was certainly an improvement on prior ones, insofar as it directly engaged with the substantive question before it. The Court proceeded to distinguish between biological sex and socially-constructed gender and to defend that distinction in law. It also emphasised the need for Romania to comply with its obligations under international human rights law and European law, both of which have a superior status to the constitution within the hierarchy of norms and both of which protect the principle of

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\textsuperscript{50} Asociația “Forumul Judecătorilor din România”, Case C-83/19 (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19), 18 May 2021.

\textsuperscript{51} Decision no. 390/2021 of 8 June 2021.

\textsuperscript{52} Moraru and Bercea, op.cit. note 49, 105–108. On CEE constitutional courts resorting to constitutional identity claims to limit the implementation of EU law, see Kriszta Kovacs (ed.), The Jurisprudence of Particularism: National Identity Claims in Central Europe (Hart, Oxford, 2023).

\textsuperscript{53} Dixon acknowledges her focus is almost exclusively domestic constitutional and appellate courts, leaving aside the role transnational courts could play in countering democratic blockages. Dixon, op.cit. note 5, 18.

\textsuperscript{54} Decision 907/2020 of 16 December 2020.
equality. The RCC found the proposed ban on gender studies to conflict with a number of constitutionally guaranteed rights, as well as to contravene the principle of the rule of law insofar as it introduced confusion in Romanian law.

This is probably one of the closest instances in which the RCC has come to operating as a court that could embrace RJR. Gaps remained in the judgment, insofar as it did not engage in a proportionality analysis when assessing conflicts with qualified rights, nor a ‘best interests of the child’ analysis when considering the right to education and the protection of children and youth. The link between embracing proportionality analysis and giving rise to a so-called “culture of justification” has long been discussed in the scholarship on judicial review and need not be entered into here. Suffice it to note that the close examination of legislative aim and means that proportionality review entails is seldom exhibited in the judgments of the RCC. If and when the Court develops this aspect of its reasoning, it will be a contributing factor to its rapprochement to the tenets of RJR.

4 A Conflictual Rather than Dialogical Disposition vis-à-vis other Constitutional Actors

The opposition between the RCC and the High Court mentioned above has not been limited to contexts in which the European Court could be brought in as umpire. As Bianca Selejan-Gutan has documented, the RCC underwent a gradual and painful process of becoming established in the country’s constitutional arena. According to Selejan-Gutan, its role as Kelsenian negative legislator rendered it both alien to the constitutional architecture initially and prone to political capture subsequently. The Court’s incremental transformation into a positive legislator brought it into conflict with the legislature the more it trespassed on the latter’s constitutional competence. In some instances, this assertiveness reached into the realm of informal


constitutional amendment. For example, the Court went from accepting the constitutionality of a quorum requirement in referendums on presidential impeachment, left to the discretion of parliament, to viewing a turnout quorum as constitutionally required to ensure an ‘authentic’ expression of sovereign will, to again retreating behind deference to the legislature within a span of six years.\(^5\) Case law inconsistency is not unheard of, of course, but in this instance, it occurred in highly politically charged contexts (two presidential impeachments with referendums pending at the time of the decisions) and on the basis of judicial reasoning that mainly ignored the inconsistency rather than seeking to reconcile or at least acknowledge it.

In Dixon’s account of RJR, such inconsistencies are discussed in terms of the role the doctrine of *stare decisis* may play. She acknowledges the limited weight of precedent in civil law systems, though even there a consistent line of decisions will have weight.\(^5\) Even in common law jurisdictions, however, when it comes to constitutional case law, the ultimate authority rests with the constitutional text rather than precedent, thus weakening the import of *stare decisis*.\(^6\) Interestingly, Dixon discusses the possibility of courts exploiting the flexibility of the *stare decisis* doctrine to widen their room for manoeuvre. Thus, how strongly they insist on the doctrine of precedent will be part of the choices at their disposal in calibrating judicial review, and they may indeed choose to weaken the scope of the doctrine where they wish to leave more room for dialogue with the legislature.\(^6\) However, the Romanian example above may be a better fit among the scenarios Dixon acknowledges of where the case for weakening *stare decisis*, and thus weakened judicial review, is not warranted.\(^6\) If the main aim of such judicial modulation is to increase democratic responsiveness, a court adopting blatantly contradictory judgments on highly politically salient questions within a short timespan cannot be said to serve that aim.

Other instances of conflict with the legislature have included the RCC declaring unconstitutional legislative omissions and also so-called ‘abrogatory norms’ such as: the decriminalisation of insult and slander; the abrogation of the special retirement benefits for magistrates (including constitutional judges); and the abrogation of procedural remedies. In addition to striking

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59 Dixon, op.cit. note 5, 212.

60 Ibid.

61 Ibid., 204.

62 Ibid., 241.
these down, the RCC also brought the norms they were meant to replace back into force, thereby arguably undermining the principle of legal certainty.63

Moreover, the RCC’s competence was expanded legislatively in 2010 to include powers of review over parliamentary standing orders and other resolutions. The exercise of this power has further politicised the Court. An attempt to claw back this power via constitutional amendment was later also struck down by the RCC on grounds of its breaching the principle of judicial independence, entrenched in the constitutional eternity clause (more specifically, access to constitutional justice as an unamendable fundamental right).64 Here was the RCC therefore deploying its powers of review to protect its own jurisdictional turf, by “blocking the removal of additional competences it had only gained via legislation and which had never been constitutionalized directly.”65

This last case could be viewed as partially analogous to the Indian Supreme Court’s NJAC case and therefore to judicial overreach, in the name of unamendability, beyond the democratic minimum core.66 In that case, the Indian Supreme Court struck down a legislative attempt to modify the judicial appointment process on the grounds that, by bringing in political elements, the new model undermined judicial independence, itself a component of the constitutional basic structure and as such unamendable. In practice, the change would have removed the veto power of a collegium of justices, including the Chief Justice and other judges, and brought India in line with other jurisdictions’ mixed model of judicial appointments. Dixon’s analysis of the Indian case, though sympathetic to the Court’s sensitivity to possible attacks on its independence, notes the misfire of the basic structure doctrine. The Indian court wrongly elevated the country’s particular, long-standing model of judicial appointments to the rank of necessary element for democratic constitutionalism.67

I would argue that the problem is compounded in the case of the RCC by the fact that it has never developed a comprehensive unconstitutional constitutional amendment doctrine, preferring instead to issue limited findings of breaches of the constitutional eternity clause on a case by case basis. In some

63 Selejan-Gutan, op.cit. note 57, 573.
64 Decision no. 80/2014, 16 February 2014, para. 442.
66 Dixon, op.cit. note 5, 61.
67 Ibid., 126.
instances, it did so on a macro level, without differentiating between elements of a massive amendment package to clearly indicate which one violated which unamendable feature.\textsuperscript{68} Whatever benefits in combating democratic dysfunction an unconstitutional constitutional amendment doctrine may have, they will be opaque and hard to predict in the Romanian constitutional context given the RCC's \textit{ad hoc}, under-reasoned, and formalistic deployment of unamendability. Furthermore, as we saw in the previous section, the RCC has moved to embrace a sovereigntist doctrine of constitutional identity to curtail the reach of EU law in the domestic sphere, thereby aligning itself with “defiant constitutional and supreme courts” in Europe.\textsuperscript{69}

5 Concluding Remarks

The three axes of analysis above – interpretive formalism, an impoverished rights review culture, and the conflictual relationship with other constitutional actors – would suggest there is no hope for the RCC to operate in line with Dixon's RJR theory. Indeed, the critical lens adopted here is meant to caution against too easy extrapolation from the contexts in which RJR is an easier fit. Unlike the discursive courts often found in common law systems, the RCC and many of its counterparts in CEE have very different approaches to constitutional interpretation and to solving constitutional conflicts. As discussed, they often approach questions before them formalistically, in an effort to be seen to merely apply the law rather than mould it. This occurs even though the constitutional controversies raised are deep and no less ripe for reasonable disagreement. This weakness is compounded by the RCC's tendency to either ignore or else underplay the rights conflicts before it. The examples given here may have focused on gender equality and judicial independence, but the fact that the RCC continues to be unable to deploy a comprehensive proportionality analysis is problematic beyond these specific contexts. Ultimately, what I hope to have highlighted is how much RJR depends on courts discharging their role in good faith. Not only has the RCC not engaged in dialogue and cooperation with other constitutional and supranational actors constructively, but it has consistently found itself in open conflict with both ordinary courts and the High Court. This has resulted in delays and ambiguities in solving legal questions as well as in tarnishing the RCC’s standing as a judicial actor.

\textsuperscript{68} Suteu, op.cit. note 65, 65.
\textsuperscript{69} Moraru and Bercea, op.cit. note 49, 85.
The picture is not entirely bleak, however. As we have seen in the case of its 2020 gender studies decision, the RCC has shown itself capable of more robust substantive reasoning on rights issues, of departing from dry formalism, as well as of resisting the regional tide of apex courts embracing the fight against so-called ‘gender ideology’. It is surely not a coincidence that there were intervening changes to the judicial bench, with one new judge bringing expertise on gender equality.

I would argue that another development has improved the quality of RCC output, even if not necessarily changing the outcome of individual judgments. I refer here to the growing use of dissenting opinions in a court that initially rejected them entirely. Dissents have the virtue of revealing the complexity of a legal case and may even indicate the future direction of travel for the court. They have grown in popularity among European courts, even though the civil law tradition had long sought to retain the impersonal, stylised language of nameless collective judgments as a guarantee of their legitimacy. For instance, the two dissenting judges in the controversial RCC Decision 390/2021 which pitted constitutional identity against EU law supremacy emphasised the principle of sincere cooperation with the European legal order and its protection of the rule of law and judicial independence. As such, they can be said to have shown the alternative path the RCC could have taken – and maybe could still take – when confronted with similar conflicts in the future.

Finally, we could speculate whether the conflictual positioning of the different constitutional actors in Romania could itself be a guarantee against democratic backsliding. Persistent clashes and even competitiveness, including between courts at different levels and the RCC, are certainly not desirable in their own right. Paradoxically, however, this cacophony of voices may well be preferable to unanimity and falling in line to rubberstamp the undoing of rule of law safeguards as we have seen courts do elsewhere in the region. Thus, while RJR may not be a frame of analysis that appears immediately pertinent to the Romanian context, its prospects may well improve as Romanian constitutionalism itself evolves.

70 Brodeala and Epure, op.cit. note 55.
71 Ibid., 750–751, discussing the role of Judge Simina Tanasescu in the 2020 judgment.
73 Kelemen, op.cit. note 22.