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Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References

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Abstract

This Article explores the manner in which, faced with the rule of law crisis generated by the 2017–2019 national legislative reforms, the Romanian judicial associations, organized as NGOs, have fulfilled their declared purpose of safeguarding judicial independence. By relying on effective communication tactics—including international networking and lobbying or informal discussions with high-level EU representatives—coupled with a strategic use of preliminary references, they have shed light on some of the most sensitive elements of the Romanian context, garnering both internal and international support in the process. In particular, by taking advantage of the CJEU’s increased willingness to engage with questions concerning the rule of law and the organization of the national judicial systems, the Romanian judicial associations have managed to design strategies capable of triggering preliminary rulings on the most heated and politically charged questions concerning the judiciary. This Article seeks to highlight the specific features and informal elements of such strategies.

Keywords: Rule of law crisis; Romanian judicial associations; informal communication techniques; reference for a preliminary ruling

A. Introduction: Rule of Law Erosion in Romania

In early 2017, Romania saw its biggest mass protests since the 1989 Revolution,¹ triggered by the Government’s adoption, via emergency legislation, of several controversial amendments to the Criminal Code and the Criminal Procedure Code.² The following years would bring about

¹See Redactia Stiri, VIDEO FOTO Jumatate de milion de oameni au iesit in strada la Bucuresti si in tara. 500.000 de romani au cerut demisia guvernului Grindeanu, dar premierul i-a sfidat in direct la Antena 3. Momente inaltatoare in inima Capitalei, HOTNEWS.RO (Feb. 5, 2017), <https://www.hotnews.ro/stiri-esential-21586479-duminica-ziua-care-este-anuntat-cel-mai-mare-protest-impotriva-ordonantei-13.htm>.

²The “infamous” Government Emergency Ordinance No. 13/2017 was repealed in February 2017; see GUVERNUL ROMÂNIEI, ORDONANȚA DE URGENȚĂ A GUVERNULUI, GUVERNUL ROMÂNIEI Press Release nr.13/2017 a fost abrogată (Feb. 5, 2017), <https://gov.ro/ro/guvernul/sedinte-guvern/ordonanta-de-urgenta-a-guvernului-nr-13-2017-a-fost-abrogata1486303690>, following mass protests throughout Romania and overwhelmingly critical reactions from civil society, legal specialists, and international bodies. See Bianca Selejan-Gutan, “We Don’t Need No Constitution”—On a Sad EU Membership Anniversary in Romania, VERFASSUNGSBLOG (Feb. 1, 2017), <https://verfassungsblog.de/we-dont-need-no-constitution-on-a-sad-eu-membership-anniversary-in-romania/>;

numerous changes, in the area of both criminal law and the legislation concerning the organization and functioning of the judiciary—the so-called “Justice Laws”³—many of which were considered to have been aimed at weakening the judiciary, the fight against corruption, as well as having had an overall effect of democratic backsliding and rule of law decay.⁴

Specifically in relation to the judiciary, the amendments had contained inconspicuous but widespread measures undermining judicial independence, including the capture of the highest positions in the judicial system hierarchy, such as the management of judicial inspection bodies; of the newly created Section for Investigating Offences in the Judiciary, or of the Supreme Council of the Magistracy (SCM); silencing of judicial criticism with sanctions on judges and prosecutors for engaging in public debate on legislative reforms;⁵ and overall quick justice reforms, avoiding public debates.⁶ Among those elements, the repeated use of Governmental Emergency Ordinances⁷ without parliamentary debates, *ex ante* constitutional control, or legislative approval, enhanced the apprehension that the aim was not a solid system of reforms with long-term goals, but a strategy for the extent of changes and the level of political interference to go unnoticed.⁸

The amendments to the Justice Laws put forward between 2017 and 2019 gave rise to waves of public protest, both within civil society⁹ and among the magistrates working in the judicial system.¹⁰

Romania: Anti-government protesters form EU flag, DW.COM (Feb. 27, 2017), <https://www.dw.com/en/romania-protesters-form-eu-flag-at-anti-government-rally/a-37723734>; Kit Gillet, *Protesters in Romania Denounce Plan to Decriminalise Misconduct Offences*, THE GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/world/2017/feb/01/romanians-protests-emergency-law-prisoner-pardons-corruption>; Daniel Brett, *Romania's Protests: A Response to a Three-Pronged Assault on Anti-Corruption Measures*, EUROPP BLOG (Feb. 2, 2017), <https://blogs.lse.ac.uk/europpblog/2017/02/02/romanias-protests-a-response-to-a-three-pronged-assault-on-anti-corruption-measures/>.

³The Justice Laws, before the most recent amendments in 2022, comprised Law No. 303/2004 on the Status of Judges and Prosecutors, Law No. 304/2004 on the Organization of the Judiciary, and Law No. 317/2004 on the Superior Council of Magistracy. Following the legislative changes in December 2022, the Justice Laws currently include Law No. 303/2022 on the Status of Judges and Prosecutors, Law No. 304/2022 on the Organization of the Judiciary, and Law No. 305/2022 on the Superior Council of Magistracy.

⁴For a brief overview of the European Commission's Control and Verification Mechanism Reports between 2017 and 2020, see EUROPEAN COMMISSION'S PROGRESS REPORT ON ROMANIA UNDER THE COOPERATION AND VERIFICATION MECHANISM, EUROPEAN COMMISSION, Press Release IP/18/6365, (Nov. 13, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6365; EUROPEAN COMMISSION REPORTS ON PROGRESS IN ROMANIA UNDER THE COOPERATION AND VERIFICATION MECHANISM, EUROPEAN COMMISSION Press Release IP/21/2881, (June 8, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2881.

⁵See Elena-Simina Tănăsescu, *Romania: From Constitutional Democracy to Constitutional Decay?*, in NEW POLITICS OF DECISIONISM 177 (Violeta Beșirevic ed., 2019); see also The Good Lobby Profs (@GoodLobbyProfs), TWITTER (Apr. 23, 2021, 6:19 AM), <https://twitter.com/GoodLobbyProfs/status/1385538867244191745> (retweeting Re: Disciplinary Actions Against Three Romanian Magistrates, FORUMUL JUDECĂTORILOR (Apr. 30, 2021), <http://www.forumuljudicatorilor.ro/index.php/archives/4409>).

⁶For an extensive analysis of the Romanian rule of law context and its impact on the referrals, see Raluca Bercea & Sorina Doroga, *The Romanian Report*, in TRIAL NATIONAL REPORTS BELGIUM, HUNGARY, ITALY, POLAND, PORTUGAL, ROMANIA, SLOVENIA, SPAIN, THE NETHERLANDS 52 (Madalina Bianca ed., 2022).

⁷The Governmental Emergency Ordinances touched upon important judicial management issues: From appointments to judicial inspection management positions, SIOJ, and appointments to top prosecutorial offices.

⁸See Opinion of Advocate General Bobek, ECJ, Cases C-291/19, *Asociația 'Forumul Judecătorilor din România' v. Inspekția Judiciară*, ECLI:EU:C:2020:746, (Sept. 23 2020), paras. 255, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=231501&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3370768>.

⁹See *Thousands of Romanians Protest Against Judicial Reforms*, EURACTIV (Nov. 6, 2017), <https://www.euractiv.com/section/justice-home-affairs/news/thousands-of-romanians-protest-against-judicial-reforms/>; Elena Stanciu, Isabela Paulescu, Anamaria Toma, Daniela Malache, Tina Țucui, Otilia Halunga, & Dan Mihăescu, *Proteste în țară față de proiectul de modificare a Legilor Justiției—mii de persoane în stradă*, AGERPRES (Nov. 11, 2017), <http://www.agerpres.ro/social/2017/11/05/proteste-in-tara-fata-de-proiectul-de-modificare-a-legilor-justitiei-mii-de-persoane-in-strada-19-47-40>; Peter Janku, *Romania's Controversial Judicial Reform*, DW.COM (Dec. 24, 2017), <https://www.dw.com/en/romanian-judicial-reform-critics-decry-parliamentary-coup-threat-to-democracy/a-41923648>; Cristian Stefanescu, *Mass Protests in Romania: Stop Corruption!*, DW.COM (Jan. 21, 2018), <https://www.dw.com/en/mass-protests-in-romania-stop-corruption/a-42240041>.

¹⁰See Loredana Diacu, “Mulțumim, 3500!” *Cetățenii le mulțumesc magistraților care au spus NU politizării Justiției*, THE EPOCH TIMES (Nov. 10, 2017), <https://epochtimes-romania.com/news/multumim-3500-cetatenii-le-multumesc-magistratilor->

Of the many voices heard in the public sphere during that period criticizing the governmental and legislative measures, a particular group of associations of judges and prosecutors crystallized over time and asserted itself as a collective voice of Romanian magistrates “promoting and defending the independence of judges and the rule of law, as well as safeguarding the status of the profession.”¹¹

Against this backdrop, over a span of only four years, 2019–2022, various Romanian ordinary courts, including the supreme one, *Înalta Curte de Casație și Justiție* (“HCCJ”), referred to the CJEU no less than twenty-four requests for preliminary rulings on issues related to the rule of law.¹² While the total number of requests referred between 2007 and 2022 by all Romanian courts was 293—slightly over eighteen per year, on average—the eleven rule of law referrals submitted in 2019 alone constitute over half of the yearly general average. Additionally, the rule of law referrals between 2019 and 2022 constitute 8.19 percent of all the referrals ever submitted by Romanian courts under Article 267 TFEU from its accession in 2007 until the end of 2022.¹³ In several cases, the preliminary references arose in proceedings initiated at the national level either by magistrates¹⁴ or by associations of judges and prosecutors.¹⁵

[care-au-spus-nu-politizarii-justitiei—266432](https://www.europafm.ro/protest-al-magistratilor-fata-de-modificarea-legilor-justitiei-si-a-codurilor-penale/); Liliana Nicolae, *Protest al Magistratilor Față de Modificarea Legilor Justiției Și a Codurilor Penale*, EUROPA FM (Dec. 18, 2017), <https://www.europafm.ro/protest-al-magistratilor-fata-de-modificarea-legilor-justitiei-si-a-codurilor-penale/>; Colag foto, *PROTESTELE MAGISTRAȚILOR DIN ROMÂNIA—18-21 DECEMBRIE 2017*, FORUMUL JUDECĂTORILOR (Dec. 2017), <http://www.forumuljudecatorilor.ro/wp-content/uploads/Protestele-magistratilor-din-Romania-18-21-decembrie-2017-7.pdf> (depicting a photo collage of several protests staged by Romanian magistrates in December 2017).

¹¹Dragoș Călin, *The Role of Associations of Judges in Defending the Rule of Law: Legitimacy of Unconditional Locus Standi in Situations Where They Seek to Obtain Effective Jurisdictional Protection in Areas Regulated by European Union Law*, OFFICIAL BLOG OF UNIO (Jan. 16, 2023), <https://officialblogofunio.com/2023/01/16/the-role-of-associations-of-judges-in-defending-the-rule-of-law-legitimacy-of-unconditional-locus-standi-in-situations-where-they-seek-to-obtain-effective-jurisdictional-protection-in-areas-regulated/>.

¹²Organized in a cascade of so far seven waves, these cases are: First wave, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 & C-397/19, *Asociația ‘Forumul Judecătorilor din România’ v. Inspectia Judiciara*, ECLI:EU:C:2020:746, (May 18, 2021), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=231501&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3372863>. Second wave, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19, & C-840/19, *Criminal Proceedings Against PM*, ECLI:EU:C:2021:1034, (Dec. 21, 2021), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=251504&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3381407>. Third wave, Case C-430/21, *Proceedings Brought by RS*, ECLI:EU:C:2022:99, (Feb. 22, 2022), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=254384&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3381800>; Case C-817/21, *RI v. Judicial Inspection*, ECLI:EU:C:2023:391 (May 11, 2023), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=273603&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3382563>; Case C-709/21, *MK* (Jan. 31, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0709>; Case C-131/22, *EF*, (May 20, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022CB0062> (removed by Order of the President of the Court). Fourth wave, Case C-216/21, *Asociația ‘Forumul Judecătorilor din România’ v. Consiliul Superior al Magistraturii*, (Apr. 6, 2021), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244581&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3383109>. Fifth wave, Case C-817/21, *R.I. v. Judicial Inspection*, ECLI:EU:C:2023:391, (May 11, 2023), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=273603&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3384040>. Sixth wave, Case C-205/22, *C.D.A. v. I.J.*, (July 8, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022CB0205> (removed from register); and seventh wave, *Annulment of Administrative Act Partial Annulment of Order No. 108/03.06.2022*, MINISTERUL JUSTITIEI, (June 9, 2023), https://portal.just.ro/46/SitePages/Dosar.aspx?id_dosar=460000000048421&id_inst=46 (the requests are available only on the portal of the referring court) (last visited Aug. 8, 2022). For an extensive analysis of the first wave of referrals, see Madalina Moraru & 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, Asociația ‘Forumul Judecătorilor din România, and Their Follow-Up at the National Level*, 18 EUR. CONST. L. REV. 1 (2022).

¹³See Mihai Sandru, *All Preliminary Referrals Made by Romanian Courts, Registered at the Court of Justice of the European Union*, CTR. FOR EUR. LEGAL STUD. (Dec. 31, 2022), <https://www.csde.ro/?p=3751> (listing the applicable cases).

¹⁴See e.g., one of the main critics of the Romanian Justice Reform, Prosecutor Bogdan Ciprian Pîrlog.

¹⁵Namely, *Asociația Forumul Judecătorilor din România* (the Romanian Judges’ Forum Association), and *Asociația Mișcarea pentru Apărarea Statutului Procurorilor*, the Association-Movement for the Defense of the Prosecutors’ Status.

From the outset, the Romanian rule of law referrals have been characterized as displaying “an exceptionalism that highlights several political premises, a political polarization within the judicial system (a factual situation that goes beyond mere political reasons) and a lot of unclear factual elements. In short, these rule of law referrals carry—one would agree—*mixed baggage*.”¹⁶ Neither the Romanian High Court of Cassation and Justice nor the Romanian Constitutional Court (RCC) have been captured in the rule of law crisis. However, by comparison, similar courts or tribunals of Member States facing worse rule of law challenges submitted a smaller or relatively equal number of references to the CJEU. For example, there is only one rule of law reference for a preliminary ruling stemming from Hungary,¹⁷ while the twenty-four Romanian references made over four years come closer to the total of thirty-five requests received by the CJEU from Polish courts over five years, in the period between 2016 and 2020.¹⁸

Starting with its judgment in Case C-64/16, *Associação Sindical dos Juizes Portugueses*, the CJEU took the opportunity to “[stretch] the reach of EU law to an extreme, bringing virtually the entire national judicial organization under its purview”¹⁹ and prepare the field in order to intervene in the debates concerning various controversial constitutional reforms and the independence of the judiciary in several Member States. The ruling thus “shifted the focus from the economic crisis (or Eurocrisis) to the ‘rule of law crisis.’”²⁰

This Article argues that by taking advantage of the CJEU’s increased willingness to engage with questions concerning the rule of law and the organization of the national judicial systems, several Romanian associations of judges and prosecutors managed to design strategies to be employed at every stage of the controversial measures adopted at national level, capable of triggering preliminary rulings on the most heated and politically charged questions concerning the judiciary and the rule of law. By relying on effective communication tactics—including informal discussions with high-level EU representatives—coupled with the strategic use of preliminary references, judicial associations have shed light on some of the most sensitive elements of the Romanian rule of law crisis, garnering both internal and international support in the process. The present Article seeks to highlight the specific features and some informal elements of the abundant judicial dialogue fueled by the Romanian associations of judges and prosecutors as a response to the national rule of law crisis.

Part II describes the general role and functioning of judicial associations in Romania, providing a wider context for understanding the specific approaches of the associations most active in fighting the erosion of judicial independence. Part III illustrates the various strategies employed by these actors, through both formal and informal means, in order to co-opt international support and stimulate the CJEU to weigh in on the controversial measures. Part IV analyzes how the strategies identified in Part III contributed to shaping and instrumentalizing the preliminary references submitted by a section of the Romanian courts during the period of the contested reforms.

¹⁶See Valentin Constantin, *Paleosuveraniști vs. Activism Fragil*, in CJUE ȘI CCR IDENTITĂȚI ÎN DIALOG 475–95 (Valeriu Stoica ed., 2022); see also Elena-Simina Tănăsescu & Bianca Selejan-Gutan, *A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania*, VERFASSUNGSBLOG (June 2, 2021), <https://verfassungsblog.de/a-tale-of-primacy/>.

¹⁷See Case C-564/19, *Criminal Proceedings Against IS*, ECLI:EU:C:2021:949 (Nov. 21, 2021), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=249861&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3384925>.

¹⁸For the ever-worsening Polish rule of law situation, see Laurent Pech, Patryk Wachowicz, & Dariusz Mazur, *Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action*, 13 HAGUE J. RULE L. 1 (2021).

¹⁹See Matteo Bonelli & Monica Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary*, 14 EUR. CONST. L. REV. 622 (2018); see also Thomas von Danwitz, *Values and the Rule of Law: Foundations of the European Union—An Inside Perspective from the ECJ*, 21 POTCHEFSTROOM ELEC. L. J. 1, 14 (2018).

²⁰Bonelli & Claes, *supra* note 19, at 623.

B. Judicial Associations in Romania

Under the professional rules applicable to both judges and prosecutors in Romania, a key component of the magistrates' freedom of association is the right to set up or join existing judicial associations.²¹ Judges, prosecutors, and other assimilated judicial personnel are entitled to:

[C]reate or join local, national or international professional organizations for the purpose of protecting their professional rights and interests, they may become members of scientific or academic societies, as well as of any non-profit private legal persons and are entitled to occupy positions in the governing bodies of the latter.²²

Existing judicial associations in Romania function under the legal framework of non-profit associations, in line with the provisions of Government Ordinance no. 26/2000 on associations and foundations. According to data collected with respect to Romania by the Consultative Council of European Judges (CCJE) for the preparation of the CCJE Opinion no. 23 of 2020,²³ as of February 2020 there were six main judicial associations active in Romania: *Asociația Magistraților din România* [the Association of Magistrates in Romania] (AMR);²⁴ *Uniunea Națională a Judecătorilor Români* [the National Union of Romanian Judges] (UNJR); *Asociația Judecătorilor pentru Apărarea Drepturilor Omului* [the Association of Judges for the Defense of Human Rights] (AJADO);²⁵ *Asociația Forumul Judecătorilor din România* [the Romanian Judges' Forum Association] (AFJR);²⁶ *Asociația Națională a Magistraților Pensionari din România* (the National Association of Retired Magistrates in Romania) (ANMPR); and *Asociația Themis-Casația* [the Association Themis-Casația] of former judges and magistrates at the High Court of Cassation and Justice (ICCJ).

The information comprised in the national database of associations and foundations—*Registrul Național O.N.G.* [the National NGO Register]²⁷—reveals that in fact there are several other judicial associations currently functioning at the national or local level.²⁸ However, for the purpose of our

²¹We use the term “judicial associations” to refer generally to associations of judges, even though some of them may also include prosecutors and other assimilated personnel—magistrates, as the concept is understood in the Romanian legal system. However, for the purposes of this Article and within the INFINITY project conceptual framework, we do not conduct a specific analysis of associations of magistrates that do not include judges—in other words, associations of prosecutors and/or other assimilated magistrates except judges. We note however that some prosecutors' associations, especially *Asociația Mișcarea pentru Apărarea Statutului Procurorilor* (AMASP) and *Asociația Inițiativa pentru Justiție* (AIJ) have been and continue to be closely involved in the efforts and practices adopted by judicial associations in order to forestall or reverse the rule of law decay and, therefore, many of our references will also include AMASP and AIJ. See *Asociația Mișcarea pentru Apărarea Statutului Procurorilor*, ASS'N MOVEMENT FOR THE DEF. OF THE PROSECUTORS' STATUS (Aug. 10, 2023), <https://amasp.ro>; Justice Initiative Association, *Asociația Inițiativa pentru Justiție*, FACEBOOK (Aug. 10, 2023), <https://www.facebook.com/profile.php?id=100064535779065&sk=about>.

²²Law No. 303/2022 on the Status of Judges and Prosecutors, art. 206. Similar provisions were included in the previous relevant legislation, repealed on December 16, 2022 by the entry into force of Law No. 303/2022. Law No. 303/2004 on the Status of Judges and Prosecutors had stipulated in Article 11 the possibility of judges and prosecutors becoming members of scientific or academic societies, as well as of any non-profit private legal entities, while Article 76 of the same Act had recognized the freedom of judges and prosecutors to set up or join local, national, or international professional organizations for the purpose of protecting their professional rights and interests, as well as the private entities indicated in Article 11, and to become members of their governing bodies.

²³See CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, ANSWERS TO THE QUESTIONNAIRE FOR THE PREPARATION OF THE CCJE OPINION NO. 23 (2020): “THE ROLE OF THE ASSOCIATIONS OF JUDGES IN SUPPORTING THE JUDICIAL INDEPENDENCE” (2020), <https://rm.coe.int/romania-en-reply/16809f965e> [hereinafter ANSWERS TO THE CCJE QUESTIONNAIRE].

²⁴See ASSOCIATION OF MAGISTRATES IN ROMANIA, <https://asociația-magistratilor.ro> (last visited Aug. 8, 2023).

²⁵See *Asociata Judecatorilor pt Apararea Drepturilor Omului*, FACEBOOK, <https://www.facebook.com/JudecatoriPentruAparareaDrepturilorOmului> (last visited Aug. 31, 2023).

²⁶See FORUMUL JUDECATORILOR, <http://www.forumuljudecatorilor.ro>, (last visited Aug. 31, 2023).

²⁷NATIONAL NGO REGISTER (2023), <https://www.just.ro/wp-content/uploads/2023/01/30ian2023Asociatii.pdf>.

²⁸See *Asociația Magistraților Europeni pentru Drepturile Omului* [Association of European Magistrates for Human Rights in Bucharest], HOTĂRĂRI CEDO, <http://www.hotararicedo.ro/> (last visited Aug. 8, 2023); *Asociația pentru Apărarea Drepturilor și Independenței Judecătorilor* [Association for the Protection of the Rights and Independence of Judges in

analysis, the most relevant are the ones indicated above and, in particular, the first four—AMR, UNJR, AJADO, and AFJR—representing the interests of judges currently active within the Romanian judiciary. As a general observation, most judicial associations listed in the National NGO Register include among their objectives the protection of the rights and interests of judges or magistrates in general or in relation to other actors, as well as different forms of wording corresponding to the protection of the independence of the judiciary.²⁹

While the strictly formal role of associations in judicial governance or disciplinary procedures is limited, they constitute important fora of internal judicial interaction³⁰ and are capable of exercising influence in significant areas of the functioning of the judiciary. For instance, judicial associations may endorse the applications of certain judges or prosecutors seeking election as members of the Superior Council of the Magistracy (SCM)³¹ and their representatives may participate in plenary or section meetings of the SCM, expressing their points of view on matters under debate.³² Judicial associations may also engage in defending judges in the course of disciplinary proceedings and may request the SCM to defend judges' reputations in situations where it is deemed that their independence or impartiality might be threatened.³³

Associations of judges and prosecutors may also interact, to various extents, with Parliament in the lawmaking process or with Government members, especially the Minister of Justice. For instance, both AMR and UNJR indicated that they had been invited to participate in the works of the Parliament concerning the amendments to the Justice Laws during various periods between 2015–2017³⁴ and that occasional meetings had taken place with the Minister of Justice, either upon the invitation of the latter or, more frequently, upon the request of the AMR. Both AMR and UNJR were invited to participate in working groups at the Ministry of Justice and to present their views on draft laws, reports, or strategies promoted by the Ministry.³⁵

As far as representation is concerned, there is little public information available on the number of judges who are members of a specific judicial association at any given point in time. Not-for-profit associations, including judicial associations, do not incur a legal obligation to publish

Oradea], HOTĂRĂRI CEDO, <http://www.hotararicedo.ro/> (last visited Aug. 8, 2023); Asociația Judecătorilor Români [Association of Romanian Judges in Cluj-Napoca], HOTĂRĂRI CEDO, <http://www.hotararicedo.ro/> (last visited Aug. 8, 2023).

²⁹The statute of the Romanian Judges' Forum Association includes the extensive objective of ensuring societal progress through an independent, impartial and performing justice, through the affirmation and protection of the independence of the judiciary in relation to the other powers in the state, through the initiation, organization, support, coordination and carrying out of projects concerning the improvement, modernization, and reformation of the system of administration of justice.

See *Statut, FORUMUL JUDECĂTORILOR*, <http://www.forumuljudecatorilor.ro/index.php/statut> (last visited Aug. 8, 2023). The statute of Asociația Mișcarea pentru Apărarea Statutului Procurorilor includes very similar wording. See *Despre noi, AMASP*, <https://amasp.ro/despre/> (last visited Aug. 8, 2023).

³⁰According to the ANSWERS TO THE CCJE QUESTIONNAIRE, their members communicate informally through “the council [of the association], through branches, through the president, through dissemination of information, through communication and feed-back, using e-mail groups, WhatsApp groups, through (often) informal discussions, etc.” as answered by the AMR; using “online platforms, discussion groups which include members of the associations, by means of informal meetings, conferences, seminars organized by the association, scientific reunions, inside the country and abroad” as answered by the UNJR; through

its own internet site where all the association's decisions, publications and debates by members of the association will be posted, including those of the management bodies; the editing and distribution of specialized publications of any type (journals, periodicals, journals in electronic format etc.) related to the association's area of activity

as answered by the AFJR See ANSWERS TO THE CCJE QUESTIONNAIRE, *supra* note 23, at 4.

³¹See Law No. 305/2022 on the Superior Council of Magistracy art. 7(2) (Rom.); Law No. 317/2004, on the Superior Council of Magistracy art. 7(2) (Rom.), in force until December 15, 2022, had contained the same provision in Article 7(2).

³²See Law No. 305/2022 art. 29(2) (Rom.); Law No. 317/2004 art. 29(2) (Rom.).

³³See ANSWERS TO THE CCJE QUESTIONNAIRE, *supra* note 23, at 5.

³⁴See *id.* at 8–10.

³⁵See *id.* at 11–12.

records regarding their members.³⁶ Furthermore, membership figures tend to fluctuate significantly, especially in the context of polarized public debates on the amendments to the Justice Laws and at times diverging public positions adopted by some judicial associations.³⁷ In light of these complexities, we focus on identifying strategies capable of setting formal institutions in motion against the backdrop of the rule of law crisis in Romania. Some of the most vocal associations of judges and prosecutors—especially AFJR, AIJ, and AMASP—relied on existing formal institutions—such as preliminary rulings—as well as on specific patterns of communication at the supranational level in order to create an active resistance, both internal and external, to the phenomenon of rule of law backsliding.

C. Strategies in Times of Crisis

In the following subsections we will map out some of the most frequently employed practices of judicial associations and assess their impact on, and interaction with, existing formal institutions in the Romanian context.

1. Internal and External Communication Strategies

Throughout the period between 2017 and 2019, when most of the controversial amendments to the Justice Laws and criminal legislation were implemented, but also in the aftermath of the first rule of law referrals from the Romanian courts, the Romanian Judges' Forum Association (AFJR) emerged as one of the most vocal judicial associations condemning the changes and drawing attention to their detrimental effects, both visible and potential, within the system. Together with two other prosecutors' associations, the Association on the Movement for the Defense of Prosecutors' Status (AMASP) and the Justice Initiative Association (AIJ), the AFJR embarked upon a vigorous campaign to contest these changes and forestall their effects. The use of military-style terminology may appear exaggerated in this description, but on closer inspection the diversity of communication channels and the strategies employed could indeed warrant such a characterization.

From the early days of the amendments to the Justice Laws being announced, AFJR had mobilized considerable efforts to publicly convey its opposition to the proposed changes and to block the advancement of the process. Referencing the 2010 London Declaration on Judicial Ethics adopted by the European Network of Councils for the Judiciary,³⁸ the members of AFJR justified their

³⁶The number of members of an association, which cannot be less than three, is mainly relevant from the perspective of the legal entity's internal financial auditing obligations, Government Ordinance No. 26/2000 arts. 27, 27¹ (Rom.), but there is no special requirement of public disclosure of the number of members.

³⁷We note, for example, the different stance adopted in respect of some of the more recent amendments to the Justice Laws by AMR, UNJR, and AJADO, as compared to the position expressed by AFJR, AIJ, and AMASP. While all associations were critical of the proposed amendments to the Justice Laws in 2020, the issues highlighted by AMR, UNJR, and AJADO, including the potential interferences in the judiciary by the secret services—as shown in <https://www.unjr.ro/2020/10/01/unjr-amr-ajado-discuta-pe-tema-modificarii-legilor-justitiei-dar-nu-negociaza-interferanta-serviciilor-in-justitie/>—and alleged errors in the Cooperation and Verification Mechanism (MCV) reports concerning Romania—as shown in <https://www.unjr.ro/2020/02/17/amr-unjr-ajado-apr-au-solicitat-expertilor-comisiei-europene-refacerea-rapoartelor-mcv-din-cauza-erorilor/>—differ significantly from the aspects criticized by AFJR and AIJ, with the latter stressing the need to closely observe the recommendations in the MCV and Venice Commission reports and to depoliticize the appointment process for high-ranking prosecutors. See Redacția RFJ, *Asociația Forumul Judecătorilor din România și Asociația Inițiativa pentru Justiție solicită Ministrului Justiției să sesizeze Comisia de la Veneția privind proiectele de modificare a "legilor justiției"* Prezentate la 30 Septembrie 2020, FORUMUL JUDECĂTORILOR (Nov. 18, 2020), <http://www.forumuljudecatorilor.ro/index.php/archives/4260> and <https://www.juridice.ro/704991/fjr-si-ajj-distrugearea-independentei-justitiei-este-accentuata-prin-atitudinea-actiunile-si-inactiunile-ministrului-justitiei.html>.

³⁸See EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, LONDON DECLARATION ON JUDICIAL ETHICS (2010), https://www.ency.eu/images/stories/pdf/ethics/encj_london_declaration_recj_declaration_de_londres.pdf; see also EUROPEAN

protest and public criticism by stating that “when democracy and fundamental freedoms are endangered, the judge’s duty of restraint becomes subsidiary to their duty of indignation [reference omitted]. Consequently, the judges’ reactions, expressed through their representatives or through the professional associations which they have set up, are legitimate and are to be expected.”³⁹ In line with this approach, AFJR and its representatives engaged in a communication campaign on multiple levels, targeting a wide audience, from civil society and members of the general public to decision-makers in the Government, Parliament, and within the national judiciary itself, but also international institutions and other international networks and entities.

On a national level, AFJR relied on its website—<http://www.forumuljudecatorilor.ro>—and its open-access publication, the Judges’ Forum Journal,⁴⁰ as the main platforms from which to communicate their members’ critical views in respect of the legislative amendments and the evolutions taking place within the Romanian judicial system. Between 2017 and 2019, over 130 articles were posted on AFJR’s website on topics related to the amendments to the Justice Laws, national and international reactions, position papers, memoranda, as well as other materials supporting the magistrates’ condemnation of these developments.⁴¹ Many of the materials posted on the association’s website were also regularly sent for publication in other fora, such as www.juridice.ro, the most important online platform dedicated to legal practitioners and academics in Romania.⁴²

Additionally, in order to demonstrate its representativeness within the Romanian judiciary, AJFR frequently resorted to publishing memoranda, position papers, or calls for action “signed” by lists comprising the full names and affiliations of judges and prosecutors who had endorsed the position expressed in the respective document.⁴³ Furthermore, AFJR’s representatives not only

NETWORK OF COUNCILS FOR THE JUDICIARY, JUDICIAL ETHICS REPORT 2009–2010 (2010), <https://www.ency.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf>.

³⁹See Judge Dragos Calin, *Brochure, “Romanian Magistrates Oppose the Project to Amend the ‘Justice Laws’ Proposed by the Ministry of Justice: August–October 2017,”* JURIDICE, (Oct. 30, 2017), <https://www.juridice.ro/543999/brosura-magistratii-romani-se-opun-proiectului-de-modificare-a-legilor-justitiei-propus-de-ministerul-justitiei-august-octombrie-2017.html>. The brochure itself contains, apart from the AFJR criticism of the 10 main proposed amendments to the Justice Laws, a memorandum for the rejection of the amendments, signed by over 3,700 magistrates from different courts throughout Romania, as well as a “small ‘referendum’ of magistrates” within the judicial system at the date of the memorandum, demonstrating that the majority of judges and prosecutors in the country endorsed the memorandum and opposed the proposed changes to the Justice Laws. See Dragos Calin & Ionuț Militaru, *Romanian Judges And Prosecutors Against Proposed Changes Of Laws Regarding The Judiciary*, FORUMUL JUDECĂTORILOR, (August–October 2017), <http://www.forumuljudecatorilor.ro/wp-content/uploads/Romanian-Judges-and-Prosecutors-against-Proposed-Changes-of-Laws-regarding-the-Judiciary-1.pdf>. The brochure also highlights the support of civil society representatives for the magistrates protesting against the legislative changes by showing photos of “thank you flash-mobs” organized by “32 civic organizations . . . staged in front of the Bucharest, Cluj-Napoca, Iasi, Galati, Timisoara, Craiova, Constanta, Brasov, Sibiu and Oradea tribunals.” *Id.* at 117.

⁴⁰See the last number here: <http://www.forumuljudecatorilor.ro/index.php/current-issue>. REVISITA FORUMUL JUDECĂTORILOR (Vasile Muscalu ed., 2021), <http://www.forumuljudecatorilor.ro/index.php/current-issue>. The online archive of the journal is available at <http://www.forumuljudecatorilor.ro/index.php/lectura-online>. Online Archive of the Judges’ Forum Journal, FORUMUL JUDECĂTORILOR, <http://www.forumuljudecatorilor.ro/index.php/lectura-online> (last visited Aug. 8, 2023).

⁴¹All the articles may be accessed, in reverse chronological order, at <http://www.forumuljudecatorilor.ro/index.php/articles>. Online Archive of the Judges’ Forum’s Articles, FORUMUL JUDECĂTORILOR, <http://www.forumuljudecatorilor.ro/index.php/articles> (last visited Aug. 8, 2023).

⁴²The *Juridice.ro* website includes tens of entries—articles, statements, press releases, and so on—attributed to AFJR, AMASP, and AIJ. See Online Archive of AFJR, AMASP, and AIJ Articles, JURIDICE, <https://www.juridice.ro/?s=fjr> (last visited Aug. 8, 2023).

⁴³For several examples of memoranda, calls for action, and position papers issued by AJFR and endorsed by large numbers of magistrates, see *The Memorandum of the Romanian Magistrates for the Withdrawal of the Project to Amend the “Justice Laws,”* JURIDICE, (Oct. 30, 2017), <https://www.juridice.ro/538255/memorial-magistratilor-romani-pentru-retragerea-proiectului-de-modificare-a-legilor-justitiei.html>; Romanian Magistrates’ Resolution For The Defence of Rule of Law Bucharest, JUDGES’ FORUM (May 25, 2015), <http://www.forumuljudecatorilor.ro/index.php/archives/3248>; *Peste 1000 de*

took part in press and radio interviews in which they described the activities of the association, but also presented the views of its members on the controversial amendments to various pieces of legislation influencing the justice system.⁴⁴

In resorting to these strategies, the judge and prosecutor members of these associations sought to convey their message of protest not just among other magistrates and legal professionals in the Romanian justice system, but also among members of the general public, by using channels and modes of communication capable of reaching all levels of society.

As far as “external” communication is concerned, the strategy applied by the associations—especially by AFJR—from the early days of the legislative reforms was to translate most of their position papers, calls for action, and open letters into English,⁴⁵ or sometimes both English and French,⁴⁶ and post them on the AFJR website. In many cases, the translations immediately

magistrați solicită suplimentarea ordinii de zi a ședinței plenului Consiliului Superior al Magistraturii din data de 14 iunie 2018 cu cererea de apărare a independenței sistemului judiciar formulată de Asociația Forumul Judecătorilor din România, FORUMUL JUDECĂTORILOR, (June 13, 2018), <http://www.forumuljudecatorilor.ro/index.php/archives/3286>; Aproximativ 1700 de magistrați susțin, cu titlu individual, solicitarea adresată Ministrului Justiției de a abandona imediat procedura de revocare a Procurorului General al României, FORUMUL JUDECĂTORILOR, (Oct. 26, 2018), <http://www.forumuljudecatorilor.ro/index.php/archives/3438>; Forumul Judecătorilor din România: Comunicat cu privire la Legile de modificare a Legilor Justiției. UPDATE 18.10: Lista susținători—591 magistrați, FORUMUL JUDECĂTORILOR, (Oct. 14 2018), <http://www.forumuljudecatorilor.ro/index.php/archives/3407>; Memoriu pentru respectarea statului de drept în România. Mandat de reprezentare, FORUMUL JUDECĂTORILOR, (Apr. 8, 2018), <http://www.forumuljudecatorilor.ro/index.php/archives/3672>.

⁴⁴For some of the interviews offered between 2017 and 2021 by Judge Dragoș Călin and co-president of -AFJR- Ioana Ene Dogioiu, see, e.g., *Intarirea Independentei Procurorului Creeaza Teroare. Magistratii Romani Lucreaza Ca in Africa*, ZIARE.COM (Dec. 11, 2017), <https://ziare.com/stiri/justitie/judecatorul-dragos-calin-intarirea-independentei-procurorului-creeaza-teroare-magistratii-romani-lucreaza-ca-in-africa-interviu-1492661>; *Dragoș Călin (Forumul Judecătorilor): Sesizarea Comisiei de la Veneția, benefică pentru independența justiției. Mai bine mai târziu, decât niciodată*, NEWS.RO (May 2, 2018), <https://www.news.ro/justitie/dragos-calin-forumul-judecatorilor-sesizarea-comisiei-de-la-venetia-benefica-pentru-independenta-justitiei-mai-bine-mai-tarziu-decat-niciodata-1922401002002018051518092054>; Ionel Stoica, *INTERVIU Judecatorul care a conceput sesizarile la CJUE in cauzele din Romania vizand statul de drept: “Este nevoie de o vointa politica majoritara pentru masuri legislative urgente,”* ZIARE.COM (Sept. 25, 2020), <https://ziare.com/stiri/justitie/interviu-cu-dragos-calin-judecatorul-care-a-conceput-sesizarile-la-cjue-in-cauzele-din-romania-vizand-statul-de-drept-1633279>; *Interviu Dragoș Călin: De ce este nevoie de un forum al judecătorilor?*, WOLTERS KLUWER, (June 14, 2021), <https://www.wolterskluwer.com/ro-ro/expert-insights/interviu-dragos-calin-forumul-judecatorilor>. Also, for an interview offered in 2019 by Judge Anca Codreanu, co-president of -AFJR-, after the meeting of a group of judges in Brussels with the then Vice-President of the European Commission, Frans Timmermans, and -CVM- experts, see *Exclusiv: Din culisele intalnirii magistratilor romani cu Frans Timmermans: “cea mai profunda consideratie pe care ne-a aratat-o cineva vreodata,”* ZIARE.COM (Apr. 9, 2019), <https://ziare.com/stiri/justitie/exclusiv-din-culisele-intalnirii-magistratilor-romani-cu-frans-timmermans-cea-mai-profunda-consideratie-pe-care-ne-a-aratat-o-cineva-vreodata-interviu-1557184>.

⁴⁵See *The Romanian Magistrates’ (Judges and Prosecutors) Request to the Parliament and Government*, FORUMUL JUDECĂTORILOR (June 9, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3762>; see also *Call of the Romanian Judges and Prosecutors to the European Union Members States’ Justice Ministers*, FORUMUL JUDECĂTORILOR, (Feb. 6, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3577>. Other press releases and posts in English include, for example, *The Romanian Judges’ Forum Association, the Movement for Defence of Prosecutors’ Status Association along with the Initiative for Justice Association Express Their Extreme Concern About the Amendments Made to the “Laws of Justice” by an Emergency Ordinance Adopted by the Romanian Government*, FORUMUL JUDECĂTORILOR (Feb. 21, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3605>; Press Release, FORUMUL JUDECĂTORILOR, (Feb. 15, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3594>.

⁴⁶See *4 aprilie 2019—pentru prima dată în istorie, magistrații altui stat membru al Uniunii Europene decât Belgia au protestat la Bruxelles pentru statul de drept*, FORUMUL JUDECĂTORILOR (May 4, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3735> (describing the April 2019 meeting in Brussels of the group of judges and prosecutors representing AFJR, AMASP, and AIJ with the then Vice-President of the European Commission, Frans Timmermans, which was posted on -AFJR-’s website).

followed the Romanian version of the documents,⁴⁷ thus allowing a wider international audience to follow the key developments in Romania, have a better grasp of the relevant nuances, and receive the information on ongoing events through the lens and interpretation of the AFJR, rather than those of other actors within the system.

This proved to be an effective approach to raise awareness, engage international and European actors—both institutional and otherwise—and galvanize their support. The website of AFJR purported to offer an “unfiltered” view, a firsthand account of the debates taking place internally in Romania, providing direct access to the intricacies of the national developments to the international readership, who would otherwise have had to rely on limited information from the general media. The fact that this was “expert communication” disseminated by members of the judiciary working at the core of the system, who were knowledgeable in the technical aspects of the legislation but also had an insider perspective into the politics surrounding them, rendered such reports even more valuable to international readers, especially to stakeholders such as the EU Commission, GRECO, or the Venice Commission.

II. International Networking and Lobbying

Another effective strategy complementing the associations’ communication with an international readership was to actively engage with counterparts in judicial networks and to directly address several international stakeholders in order to mobilize their support.

For instance, in November 2018 AFJR requested the Consultative Council of European Judges (CCJE) to express its “position on the independence of the judiciary in Romania,” by referring to “a battle going back to 2017 over the preservation of the independence of judges and prosecutors, as well as other issues.”⁴⁸ In response to this request, the CCJE Bureau confirmed that it “agree[d] with the concerns expressed by the Romanian Judges Forum Association as regards the independence of judges in Romania and the adoption of Amendments to the Laws on the Superior Council for Magistracy, on the Statute of Judges and Prosecutors and on Judicial Organization”⁴⁹ and conducted in its turn a legal analysis of some of the amendments to the Justice Laws, with frequent references to the relevant Venice Commission and CVM reports.

Such calls for support addressed to international bodies and representatives of different institutions were a frequently used approach, designed not only to raise awareness, but also to familiarize the international stakeholders with the more technical aspects of the controversial legislative amendments. For instance, the letters submitted by AFJR in March 2018 to several representatives of international bodies—Mr. Frans Timmermans, Vice President of the European Commission, Mr. Michele Nicoletti, President of the Parliamentary Assembly of the Council of Europe, Mr. Thorbjørn Jagland, Secretary General of the Council of Europe, and Mr. Anders Samuelsen, Chair of the Committee of Ministers—urging them “to consult the European Commission for Democracy through Law (the Venice Commission) on certain current issues regarding the amendment in Romania of the ‘laws of justice’ and certain related regulations,”⁵⁰

⁴⁷This is seen in the public call of AFJR and AIJ magistrates addressed to the Romanian political leaders—the President, the Prime Minister, and the Minister of Justice—published in both Romanian and English in the Judges’ Forum Journal. See, e.g., JUDGE DRAGOS CALIN & JUDGE LUCIA ZAHARIA, *APEL PUBLIC AL MAGISTRĂILOR ROMĂNI* (2019), <http://www.forumuljudecatorilor.ro/wp-content/uploads/Art-1.pdf>. The English translation of the document is clearly intended to reach an international readership.

⁴⁸Consultative Council of European Judges, *Report on Judicial Independence and Impartiality in the Council of Europe Member States*, 20th Sess., Doc. No. 3 (2020), at 34.

⁴⁹Consultative Council of European Judges, *Opinion of the CCJE Bureau Following a Request by the Romanian Judges Forum Association as Regards the Situation on the Independence of the Judiciary in Romania*, 20th Sess., Doc. No. 4 (2019), at 2.

⁵⁰See *La data de 11 martie 2018, Forumul Judecătorilor din România a solicitat unor organisme europene consultarea Comisiei de la Veneția asupra unor aspecte vizând modificarea în România a “legilor justiției,” FORUMUL JUDECĂTORILOR* (Mar. 30, 2018), <http://www.forumuljudecatorilor.ro/index.php/archives/3168> (signaling these requests and including links to the texts of the letters). The texts of the letters are almost identical, with the exception of their addressees. See LETTER TO MR.

all included, in addition to the description of the contested legislative changes in Romania, abundant references to ECtHR case law, previous Venice Commission reports in respect of other states, as well as comparative accounts of relevant legislation in other European countries. Significantly, the letters also proposed the wording of the questions that ought to be addressed to the Venice Commission.⁵¹ A similar letter was sent in 2019 to Mrs. Liliane Maury Pasquier, President of the Parliamentary Assembly of the Council of Europe (PACE).⁵² All these constitute examples of informality, employed with the aim of complementing and strengthening the associations' formal actions to garner international support.

Other informal elements included, in addition to the letters sent to international bodies, direct meetings between the representatives of AFJR and members of European monitoring institutions, which were often followed by public statements of support from the latter. For instance, the co-president of AFJR, Mr. Dragoș Călin, recalls that on "January 18, 2018, five Romanian judges and prosecutors, representing the Romanian Judges' Forum Association, took part in a technical debate, in Bruxelles [*sic*], with European Commission officials, on the evolution of the judicial system in Romania."⁵³ Following the meeting, in a joint statement issued on January 24, 2018, the President of the European Commission, Jean-Claude Juncker, and First Vice-President, Frans Timmermans, expressed their concern regarding the legislative developments in Romania and "calle[d] on the Romanian Parliament to rethink the course of action proposed," warning "against backtracking" on the progress achieved under the CVM.⁵⁴

The representatives of the AFJR also met with representatives of GRECO in February 2018⁵⁵ and once again with Vice-President Frans Timmermans and other European Commission officials in April 2019.⁵⁶ On the occasion of the last meeting, the participating delegation of Romanian judges and prosecutors also initiated a protest on the steps of the Palace of Justice in Brussels, with the AFJR account of the event indicating that "for the first time in history, magistrates from a member state other than Belgium protested in Brussels for the rule of law."⁵⁷

FRANSE TIMMERMANS REQUESTING TO CONSULT THE VENICE COMMISSION, FORUMUL JUDECĂTORILOR (2017), <http://www.forumuljudecatorilor.ro/wp-content/uploads/Letter-to-Mr.-Frans-Timmermans-request-to-consult-the-Venice-Commission.pdf>; LETTER TO MR. MICHELE NICOLETTI, PRESIDENT OF THE PARLIAMENTARY ASSEMBLY REQUESTING TO CONSULT THE VENICE COMMISSION, FORUMUL JUDECĂTORILOR (2017), <http://www.forumuljudecatorilor.ro/wp-content/uploads/Letter-to-Mr.-Michele-Nicoletti-President-of-the-Parliamentary-Assembly-request-to-consult-the-Venice-Commission.pdf>; LETTER TO SECRETARY GENERAL THORBJORN JAGLAND REQUESTING TO CONSULT THE VENICE COMMISSION (2017), <http://www.forumuljudecatorilor.ro/wp-content/uploads/Letter-to-Secretary-General-Thorbjorn-Jagland-request-to-consult-the-Venice-Commission.pdf>; LETTER TO MR. ANDERS SANUELSEN, CHAIR OF THE COMMITTEE OF MINISTERS, REQUESTING TO CONSULT THE VENICE COMMISSION, FORUMUL JUDECĂTORILOR (2017), <http://www.forumuljudecatorilor.ro/wp-content/uploads/Letter-to-Mr.-Anders-Samuelsen-Chair-of-the-Committee-of-Ministers-request-to-consult-the-Venice-Commission.pdf>.

⁵¹See LETTER TO MR. MICHELE NICOLETTI, PRESIDENT OF THE PARLIAMENTARY ASSEMBLY REQUESTING TO CONSULT THE VENICE COMMISSION, FORUMUL JUDECĂTORILOR, 5, 10, 15, 17, 21, 24, 16, 33 (2017), <http://www.forumuljudecatorilor.ro/wp-content/uploads/Letter-to-Mr.-Michele-Nicoletti-President-of-the-Parliamentary-Assembly-request-to-consult-the-Venice-Commission.pdf>.

⁵²For the text of the letter, see Astăzi, 06.03.2019, Adunarea Parlamentară a Consiliului Europei a decis sesizarea Comisiei de la Veneția cu privire la OUG care modifică legea justiției, FORUMUL JUDECĂTORILOR, (Mar. 6, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3636>.

⁵³Dragoș Călin, *Changes Brought to the "Justice Laws" During the 2017–2019 Interval. The Serious Impairment of the Rule of Law Principles. Remedies*, in 900 DAYS OF UNINTERRUPTED SIEGE UPON THE ROMANIAN MAGISTRACY 1, 12 (Dragoș Călin ed., 2020).

⁵⁴See JOINT STATEMENT OF PRESIDENT JUNCKER AND FIRST VICE-PRESIDENT TIMMERMANS ON THE LATEST DEVELOPMENTS IN ROMANIA, EUROPEAN COMMISSION (Jan. 24, 2018), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_423.

⁵⁵Călin, *supra* note 53, at 13.

⁵⁶See Întâlniri la Bruxelles cu oficiali de prim rang ai Comisiei Europene și ai Parlamentului European, FORUMUL JUDECĂTORILOR (Apr. 6, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3669>.

⁵⁷See 4 April 2019—*For the First Time in History, Judges and Prosecutors from a Member State of the European Union Other Than Belgium Protested in Brussels for the Rule of Law*, FORUMUL JUDECĂTORILOR (May 28, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3735>. For a detailed account of the meetings with Commission representatives and CVM experts in Brussels in April 2019, see the interview offered by judge Anca Codreanu, then co-president of AFJR.

In February 2019, in the context of an informal meeting of ministers of justice and internal affairs held in Bucharest, AFJR, AMASP, and AIJ launched a call addressed to the Ministers of Justice of the EU Member States requesting that “they include in the agenda the state of justice independence observance in Romania, in light of the fact the Romanian state representatives ignore the European Commission Reports issued under the Cooperation and Verification Mechanism, the Venice Commission’s opinions and the GRECO Reports.”⁵⁸

These examples display an intensity of informal engagement far beyond what is typically expected of judicial associations, based on a programmatic use of communication, networking and lobbying, in order to enlist the support of European institutional actors. As we will show in the following sections, these strategies proved to be useful “primers” for the next step: co-opting the Court of Justice of the European Union in the Romanian rule of law saga.

III. “Ghostwriting” of Preliminary Questions

An important driving force behind the Romanian rule of law referrals was an individual judge: Dragoș Călin, co-president of AFJR.⁵⁹ Having obtained a doctoral degree in law on the topic of *The Dialogue Between Constitutional Courts and the Court of Justice of the European Union*, Judge Dragoș Călin was one of the first three interns at the ECJ before Romania’s accession, where he translated the historical cases of the Court and made them available for the National Institute of the Magistracy, thus creating a learning basis of European law for young trainees. Later, he became a trainer of the same Institute in the field of European Union law. In an interview in 2021, Judge Călin explained that the activity of the Romanian Judges’ Forum Association, established in 2007, was centered around a group of Romanian magistrates amounting, in some periods, to 3,000 judges and prosecutors.⁶⁰ The publication of the association, the Judges’ Forum Journal, collected the points of view of judges and academics from outside Romania⁶¹ regarding the rule of law developments in respect of judicial independence.

Throughout the period of the most controversial legislative changes in Romania, AFJR and its allied associations of prosecutors became a collective voice of reference, both internally and for international audiences, constantly monitoring and providing real time reactions to the legal and political developments taking place at national level. Thus, AFJR emerged as a self-described “whistleblower”⁶²

Ioana Ene Dogioiu, *Exclusiv: Din culisele intalnirii magistratilor romani cu Frans Timmermans: “cea mai profunda consideratie pe care ne-a aratat-o cineva vreodata”*, ZIARE.COM (Apr. 9, 2019), <https://ziare.com/stiri/justitie/exclusiv-din-culisele-intalnirii-magistratilor-romani-cu-frans-timmermans-cea-mai-profunda-consideratie-pe-care-ne-a-aratat-o-cineva-vreodata-interviu-1557184>.

⁵⁸Călin, supra note 53, at 32. See also *Apel către Miniștrii de Justiție ai statelor membre ale Uniunii Europene*, JUDGES’ FORUM (Feb. 6, 2019), <http://www.forumuljudecatorilor.ro/index.php/archives/3575> (RO) and <http://www.forumuljudecatorilor.ro/index.php/archives/3577> (providing the full text of the letter addressed to the Ministers of Justice).

⁵⁹See DRAGOȘ CĂLIN, 900 DAYS OF UNINTERRUPTED SIEGE UPON THE ROMANIAN MAGISTRACY: A SURVIVAL GUIDE (2020) (providing a personal account of this experience); see also Curriculum Vitae of Dr. Dragoș Alin Călin, CENTER FOR EUROPEAN LAW STUDIES (Dec. 31, 2022), <https://www.csde.ro/?p=1897>.

⁶⁰*Interviu Dragoș Călin: De ce este nevoie de un forum al judecătorilor?*, WOLTERS KLUWER (June 14, 2021), <https://www.wolterskluwer.com/ro-ro/expert-insights/interviu-dragos-calin-forumul-judecatorilor> [hereinafter *Interviu Dragoș Călin*].

⁶¹An impressive list of names is provided by the judge. See *id.*

⁶²In an online statement responding to a press article published on Ziare.com, AFJR highlights its intense activity dedicated to ensuring judicial independence in Romania. The post indicates that AFJR

behaved like a whistleblower signaling the authorities’ backsliding in respect of the statute of judges, it has issued public statements on all the aspects concerning the violation of the magistrates’ independence, it has prepared and sent to all the relevant authorities materials concerning the proposed legislative measures having serious repercussions on the independence or immovability of the members of the judiciary... it has participated in transparently organized meetings with the European Commission, the Venice Commission, GRECO, the Consultative Council of European Judges etc. and, not least, it has taken part in tens of public protests on the steps of the courthouses.

See *Drept la replica ziare.com*, FORUMUL JUDECĂTORILOR (Feb. 18, 2023), <http://www.forumuljudecatorilor.ro/index.php/archives/6642>.

and a tireless communicator to European institutions. Given the richness of their strategies and the intensity of their activity, designing a series of cases that would allow them to engage the CJEU in a dialogue on the most contentious topics appeared to be the next logical step in these associations' course of action.

In fact, in a press interview introducing him as “the judge who designed the CJEU referrals in the Romanian rule of law cases,” Judge Dragoș Călin confirmed that the dialogue with the external institutions monitoring the situation in Romania had built up to a point where the preliminary references to the CJEU had become the natural way forward:

We had practically managed to build a concrete structure that would serve to bring a case before the CJEU. Step by step. *It was therefore extremely simple to also draft the references to the European Court of Justice. Since I was, practically, together with my colleagues, at the origin of all these efforts and after having been in dialogue, practically daily, with the relevant international entities, I quickly formed in my mind a way to give real effects to all the successive, numerous and extremely well-reasoned recommendations*, so that they could have real effects in the absence of the Romanian legislative and governmental will. It takes vision to do something of this sort, including to think of the next steps in detail, to consider the inherent difficulties, including the mental resistance of those around you, not to mention the daily attacks of the so-called jukebox press. . . .

There were also colleagues who were more skeptical, including some Romanian academics with whom I talked, but the logic I drew from the first relevant CJEU judgment on these topics (*Associação Sindical dos Juizes Portugueses*, case C-64/16) emboldened me and I could quickly imagine situations in which the CJEU could develop its own case law, the interpretation of the rule of law requirements, bearing in mind the European Union values and principles enshrined in articles 2 and 19(1) of the Treaty on the European Union (TEU) and article 47 of the Charter of Fundamental Rights. Also, *during the same time, I was discussing with my Polish colleagues and we were encouraging each other to follow the same path.*⁶³

The paragraphs above reveal that while the preliminary questions in the Romanian rule of law cases were indeed formally submitted to the CJEU by the national courts, the litigation design and the drafting of the questions themselves could in fact be attributed to the group of judges and prosecutors active within these associations as “ghostwriters” in the sense used by Tommaso Pavone. Interestingly, however, this is not an instance of lawyers working “to emancipate judges from the institutional constraints obstructing Europeanization and to integrate them within a fledgling transnational network of European courts,”⁶⁴ but of judges and prosecutors acting at the same time from within and from outside of the judicial system in order to grapple with internal threats to the independence of the judiciary.

D. Strategic Use of Preliminary References

The Romanian rule of law referrals are clearly embedded in the formal mechanism of the preliminary ruling set in place by Article 267 TFEU. Yet our claim on this level is that the Romanian situation illustrates an interesting dynamic between elements of formality and informality. As indicated in Part III of the Article, the strategies employed by judicial associations

⁶³INTERVIU Judecătorul care a conceput sesizările la CJUE în cauzele din România vizând statul de drept: “Este nevoie de o voință politică majoritară pentru măsuri legislative urgente,” ZIARE.COM, (Sept. 25, 2020), <https://ziare.com/stiri/magistrati/interviu-cu-dragos-calin-judecatorul-care-a-conceput-sesizarile-la-cjue-in-cauzele-din-romania-vizand-statul-de-drept-1633279> (emphasis in the last sentence added).

⁶⁴TOMMASO PAVONE, THE GHOSTWRITERS: LAWYERS AND THE POLITICS BEHIND THE JUDICIAL CONSTRUCTION OF EUROPE 16 (2022).

swung between the two ends of the spectrum in order to catalyze the referral of preliminary questions, with the CJEU's interpretation feeding back into the national legal and political debate, where the loop was subsequently repeated. Specificity and purposiveness are therefore essential to describe the manner in which preliminary references were used.

Within the matrix of the official channel provided by Article 267 TFEU—under which references may be submitted by any court or tribunal—the Romanian rule of law referrals have, recurrently and significantly, activated only parts of the national judicial network, with the exclusion of others, despite their equal justification, competence, and interest in the referred questions. As in the *Portuguese Judges* case,⁶⁵ most of the Romanian references were driven by “entrepreneurial national magistrates,” seeking empowerment vis-à-vis other courts—the HCC or the RCC—and, in some cases, vis-à-vis other branches of power—the executive and the legislative—in a context of systemically curtailed judicial independence.

Objectively, besides the High Court of Cassation and Justice, the Romanian judicial system includes 177 first instance courts [*judecătoria*], fifty-one tribunals [*tribunale*], and sixteen courts of appeal [*curți de apel*].⁶⁶ Of these, the High Court of Cassation and Justice only referred in cases pertaining to the second wave,⁶⁷ seeking an interpretation of the principle of the primacy of EU law that would allow it to disapply a number of decisions delivered by the Romanian Constitutional Court between 2016 and 2019. The High Court of Cassation and Justice thus protected its own case law and ultimately its position within the judicial system.⁶⁸

A different lens would apply to the requests submitted by other ordinary courts. Statistics are again relevant on their own: Of the fifty-one Romanian tribunals only three referred questions to the ECJ, and of the sixteen courts of appeal only six did. Moreover, of the three referring tribunals, two are inferior to two of the referring courts of appeal—namely, the Bucharest Tribunal is inferior to the Bucharest Court of Appeal, while the Pitești Tribunal is inferior to the Pitești Court of Appeal. Within this last level of hierarchy, three courts of appeal, closely connected geographically, referred twice—Craiova Court of Appeal—three times—Bucharest Court of Appeal—and five times—Pitești Court of Appeal—respectively.⁶⁹ For sure, the onus of designing the EU law dimension of the case or of the questions referred did not fall—or at least, not exclusively—on the individual litigants. Relevantly, the Pitești Court of Appeal withdrew at a later date the two referrals it had submitted in cases where the applicants in the main proceedings were individuals⁷⁰ and continued with the three others where the applicants were the magistrates’

⁶⁵*Criminal Proceedings Against IS*, Case C-564/19; Case C-64/17, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117 (Feb. 27, 2018), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=199682&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3395510>. For an exhaustive contextual analysis, see Michal Ovádek, *The Making of Landmark Rulings in the European Union: The Case of National Judicial Independence*, 30 J. EUR. PUB. POL'Y 1119 (2023).

⁶⁶See *Centrul National de Informare Publica*, JUSTITIA ROMANA, <https://justitia-romana.org/> (last visited Aug. 8, 2023).

⁶⁷*Criminal Proceedings Against PM*, Joined Cases C-357, C-379, C-547, C-811 & C-840/19.

⁶⁸While the RCC had already proclaimed the supremacy of the constitution over EU law based on an undefined constitutional identity concept in Decision 104/2018, Decision 685/2018 obliged the High Court of Cassation and Justice to select all five members of a panel judging corruption cases on appeal by the drawing of lots, instead of just four of them, as the practice had been until then; at a later moment, Decision 417/2019 established an obligation upon the High Court of Cassation and Justice to set up specialized panels to adjudicate on first instance corruption offences; similarly, Decision 51/2016, Decision 302/2017, and Decision 26/2019 prohibited the use by prosecutors and judges of evidence found by way of technical surveillance carried out by other specialized bodies of the Romanian Intelligence Service, although authorized by judges. The referrals made by the HCCJ were motivated both by the fact that several of its panels were looking at cases involving high-ranking politicians, including the leaders of the parties in the ruling coalition, and because, following the RCC decisions, public officials already sentenced for high corruption offenses were offered the possibility to introduce extraordinary actions to reopen finalized proceedings, risking the criminal investigation being closed due to time prescription.

⁶⁹See MINISTARUL JUSTITIEI, <https://portal.just.ro/> (last visited Aug. 8, 2023) (providing an illustrative representation of their geographical disposition).

⁷⁰Case C-709/21, MK, (Nov. 24, 2021), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0709](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0709;); C-131/22, EF & Others, (Feb. 25, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022CN0131>.

associations—the Romanian Judges’ Forum Association and the Association on the Movement for the Defence of Prosecutors’ Status.⁷¹

These referrals may clearly be described as forms of strategic litigation, as already acknowledged in the history of the recent dialogue between the CJEU and national courts.⁷² In the very best sense of the word, a connivance—in other words, a tacit agreement—appears to have been reached by a small number of pro-European national panels of the courts that chose to rely on the privileged link with the CJEU provided by Article 267 TFEU in order to slow the rule of law decay affecting judicial independence. In many cases stemming from Romania and elsewhere, these strategies pushed at the limits of the formal institution.

For instance, in response to the exception of the inadmissibility of a preliminary question raised on account of the lack of the need to refer in the *IS* case, AG Pikamäe notes in the very first paragraph of his Opinion that the recent rule of law questions brought to the attention of the CJEU by the national courts of several Member States “are appeals for assistance from national judges concerned by or even subject to disciplinary proceedings.”⁷³ Although such requests must be answered in compliance with the conventions surrounding the reference for a preliminary ruling, AG Pikamäe confirms that the connecting element, closely associated with the concept of *res judicata*, has in such cases “a dimension other than [the] strictly legal.”⁷⁴

Besides specificity and purpose, another key element characterizing the Romanian rule of law referrals may be “the interest to refer.” In principle, from the point of view of the ECJ, all references enjoy a presumption of relevance, all the more so when the Member States’ rule of law systems are at stake. However, in order to respond to the national judges’ appeals for assistance indicated above, the ECJ had to expand its jurisdiction in a very bold, systemic interpretation of Article 19(1) TEU. Concerned about such a change, Advocate General Bobek warned of “gates which are too open” in his Opinion on judicial reforms in Romania.⁷⁵ When the individual interests in the main proceedings were overcome by the systemic interest, the authors of the preliminary questions were sure to be supported by the CJEU on account of their previously reiterated and successful interactions. Interest-wise, the whole spectrum has been amply illustrated by the initiatives of the Romanian associations of judges and prosecutors.

For example, similarly to the *Miasto Łowicz* case,⁷⁶ some of the judges involved in referring to the CJEU or in following its guidance had been subject to disciplinary actions⁷⁷ opened by the Judicial Inspection led by the same Chief Inspector whose mandate was challenged in the first

⁷¹Case C-127/19, Asociația “Forumul Judecătorilor Din România” & Asociația Mișcarea Pentru Apărarea Statutului Procurorilor, (Feb. 18, 2019), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=214635&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3395871>; C-355/19, Asociația “Forumul Judecătorilor Din România”, Asociația Mișcarea Pentru Apărarea Statutului Procurorilor” & OL, ECLI:EU:C:2021:393, (May 18, 2021), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3395979>, and the case referred within the seventh and latest wave—the requests are available at https://portal.just.ro/46/SitePages/Dosar.aspx?id_dosar=460000000048421&id_inst=46.

⁷²These are, perhaps, already one of the distinguishing marks of rule of law referrals. See Ovádek, *supra* note 65.

⁷³*Criminal Proceedings Against IS*, Case C-564/19, ECLI:EU:C:2021:949, at para. 1.

⁷⁴*Id.* at para. 2.

⁷⁵Asociația ‘Forumul Judecătorilor din România,’ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, & C-397/19, ECLI:EU:C:2020:746. For a detailed analysis of the CJEU judgment in this case, see Ondrej Kadlec and David Kosar, *Romanian Version of the Rule of Law Crisis Comes to the ECJ: The AFJR Case is Not Just About the Cooperation and Verification Mechanism: Asociat, ia “Forumul Judeca” torilor din România,*” 59 COMMON MKT. L. REV. 30 (2022).

⁷⁶See Case C-558/18, *Miasto Łowicz*, ECLI:EU:C:2020:234, (Mar. 26, 2020), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=224729&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3396709>.

⁷⁷See Dragoș Călin, *Case C-817/21, Inspekția Judiciară*, OFFICIAL BLOG OF UNIO (Jan. 18, 2022), <https://officialblogofunio.com/2022/01/18/case-c-817-21-inspectia-judiciara-compatibility-of-the-organization-of-an-authority-competent-to-carry-out-the-disciplinary-investigation-of-judges-which-is-under-the-total-control-of-a-single-pers/> (providing an overview of the disciplinary actions).

wave of requests for preliminary rulings.⁷⁸ Relevantly, on June 7, 2021, Judge Costin Andrei Stancu from the Pitesti Court of Appeal established, using the criteria provided by the CJEU in the *AFJR* case, that the Section for Investigating Offences in the Judiciary had operated contrary to the EU rule of law standards in a case concerning three other magistrates. The judge decided that the power of investigation should have been established in favor of the regular bodies of the Public Ministry. Shortly afterwards, the Judicial Inspection began disciplinary investigations against Judge Stancu.⁷⁹

As a legitimate response, the cascade of subsequent referrals may be considered the consequence⁸⁰ of a Constitutional Court constantly reluctant to endorse the CJEU responses in previous rule of law referrals and, most recently, of doubts concerning the effectiveness of legislative reforms amending the previous deficient national rules.⁸¹ Indeed, an overarching theme that runs through all the waves of referrals is the conflict between EU law and constitutional jurisprudence,⁸² which puts national judges into a dilemma: Choosing between facing disciplinary sanctions for giving effect to EU law over national constitutional jurisprudence or risking engaging the Member State's liability for non-implementation of EU law while following the constitutional jurisprudence.⁸³

The latest reference to the CJEU, the fifth submission by the Pitești Court of Appeal over a period of four years, includes as applicants in the national proceedings the same two active associations, AFJR and AMASP. The reference is explained by Judge Călin Dragoș, the co-president of AFJR, as follows:

[T]he request for a preliminary decision recently submitted by the Pitești Court of Appeal will allow the Court of Justice of the European Union to analyse the creation of a new development, establishing the legitimacy of unconditional *locus standi* in situations where associations of judges seek to obtain effective jurisdictional protection in areas regulated by European Union law (promoting and defending the independence of judges and the rule of law, as well as safeguarding the status of the profession). Such an intervention would be a salutary one, likely to strengthen or reinforce, in certain EU Members where the counter-reform of the rule of law has gained momentum in the past years, the role that the associations of judges or prosecutors have undertaken at any risk, despite threats, unfair criticism and concerted attacks against their members.⁸⁴

⁷⁸See The Good Lobby Profs (@GoodLobbyProfs), TWITTER (Apr. 30, 2021, 6:19 AM), <https://twitter.com/GoodLobbyProfs/status/1385538867244191745> (retweeting *Disciplinary Actions Against Three Romanian Magistrates*, FORUMUL JUDECĂTORILOR, (Apr. 30, 2021), <http://www.forumuljudecatorilor.ro/index.php/archives/4409>). For more details on Inspecția Judiciară, see Raluca Bercea, *It's all about (the Romanian) Context. The Judgement in Case C-817/21*, EULAWLIVE BLOG (May 26, 2023), <https://eulawlive.com/op-ed-its-all-about-the-romanian-context-the-judgement-in-case-817-21-inspectia-judiciara-by-raluca-bercea/>.

⁷⁹The disciplinary investigation against Judge Stancu was rejected by the Supreme Council of the Magistracy after several postponements only on April 14, 2022, once the legislation dismantling the SIOJ was passed.

⁸⁰Madalina Moraru & Raluca Bercea, *The Romanian Saga on the Rule of Law: A Point of Reference on Primacy of EU Law, Judicial Independence and Rule of Law Standards*, EULAWLIVE BLOG (April 1, 2023), https://issuu.com/eulawlive/docs/weekend_edition_137/s/21891699.

⁸¹Specifically, Law No. 303 of November 15, 2022 on the Status of Judges and Prosecutors, published in the OJ No. 1102 of November 16, 2022.

⁸²See Diana Botău, *La Cour Constitutionnelle de la Roumanie et le droit de l'Union européenne. Amitié ou réserve?*, in *LA DÉCENNIE EUROPÉENNE DE LA ROUMANIE ET LA BULGARIE. LE BILAN D'UNE APPARTENANCE DIFFÉRENCIÉE À L'UNION EUROPÉENNE* (Oana Andreea Macovei ed., 2022).

⁸³See Moraru & Bercea, *supra* note 80.

⁸⁴Dragoș Călin, *The Role of Associations of Judges in Defending the Rule of Law: Legitimacy of Unconditional Locus Standi in Situations Where They Seek to Obtain Effective Jurisdictional Protection in Areas Regulated by European Union Law*, OFFICIAL BLOG OF UNIO (Jan. 16, 2023), <https://officialblogofunio.com/2023/01/16/the-role-of-associations-of-judges-in-defending-the-rule-of-law-legitimacy-of-unconditional-locus-standi-in-situations-where-they-seek-to-obtain-effective-jurisdictional-protection-in-areas-regulated/>.

But in fact, in response to other rule of law requests, the CJEU had already expanded the scope of its own jurisdiction to cover the protection of national judicial independence and, in what was considered to be a groundbreaking constitutional moment—the *Portuguese Judges* case—it required Member States to ensure that national courts comply with the principle of judicial independence regardless of the substance of the matter, or regardless of any material connection between EU and national law in any given proceedings. This was indeed considered one of the most far-reaching judge-led developments in EU law in the recent past. Would the attempt to persuade the Court of Justice to now declare the *unconditional* locus standi of the associations of judges and prosecutors that the national law refuses to recognize—on account of the principle of procedural autonomy—not constitute a genuine example of mixed judicial informal practice established between national judges and external actors? Undisputedly, while the CJEU is “allowed” to expand its competence even more, the magistrates’ associations use a formal institution to seek empowerment vis-à-vis other power holders at the national level, thus becoming privileged partners of the CJEU itself.

Finally, it is also noteworthy that, while two magistrates’ associations—AFJR and AMASP—have been very active in their dialogue with the CJEU and other European bodies, several other associations of magistrates exist in Romania, and it is common knowledge that they refuse to publicly state the number of their members. This triggers two consequences. On the one hand, it is difficult to assess whether the position expressed by the two associations that fueled the judicial dialogue with the CJEU indeed reflects that of the larger Romanian body of magistrates, or at least of a significant part of it. On the other hand, because the other professional associations neither joined the “activists” before the CJEU, nor generally pursue trade union goals, one can only presume that, at least in part, their main activities consist of legislative lobbying, which inherently leads to assuming political sympathies or, worse, political loyalties, which most probably collided with the aims pursued by AFJR within the reference period.⁸⁵

Besides, the magistrates’ professional animosities have been exposed in public more than once, with the generous help of a part of the national press. Thus, while between 2017 and 2019 the attacks against the judiciary formed part of a larger systemic campaign aimed at the rule of law in its various components—for example, the long-lasting TV show named *The Parallel State*⁸⁶—recent press posts denounce the alliance between the CJEU and ordinary courts that attack the Romanian Constitutional Court,⁸⁷ also exploiting the narrative of “cartels” attacking

⁸⁵See Constantin, *supra* note 16.

⁸⁶European Commission 2020 *Rule of Law Report Country Chapter on the Rule of Law Situation in Romania*, at 4, COM (2020) 322 final (Sept. 30, 2020).

⁸⁷See Elena Dumitrache, *INALTA CURTE SUBMINEAZA SUVERANITATEA ROMANIEI, Este cel mai vadit atac la adresa Constitutiei. Publicam in forma integrala decizia ICCJ din dosarul fratilor Mazare care calca in picioare Legea fundamentala si stabileste precedentul periculos de nesocotire a deciziilor CCR obligatorii. ICCJ a dat intaietate CJUE, refuzand rejudecarea cauzei, pe motiv ca infractorii nu trebuie sa scape*, LUMEA JUSTITIEI (May 17, 2022), <https://www.luju.ro/inalta-curte-submineaza-suveranitatea-romaniei-este-cel-mai-vadit-atac-la-adresa-constitutiei-publicam-in-forma-integrala-decizia-iccj-din-dosarul-fratilor-mazare-care-calca-in-picioare-legea-fundamentala-si-stabileste-precedentul-periculos-de-nesocotire>; Adrian Severin, *ICCJ—o amenintare la adresa ordinii constitutionale a Romaniei ICCJ—o amenintare la adresa ordinii constitutionale a Romaniei*, LUMEA JUSTITIEI (June 22, 2022), <https://www.luju.ro/iccj-o-amenintare-la-adresa-ordinii-constitutionale-a-romaniei>. See also Av. Silvia Uscov, *Desteptii prescriptiei*, LUMEA JUSTITIEI (July 22, 2022), <https://www.luju.ro/desteptii-prescriptiei>; George Tarata, *ICCJ SI-A MOTIVAT ATENTATUL ANTICONSTITUTIONAL—Exclusiv: hotararea prin care judecatorii ICCJ Alina Ioana Ilie, Oana Burnel, Anca Alexandrescu si Dan Andrei Enescu au refuzat sa aplice Decizia CCR 685/2018 privind nelegala compunere a Completelor de 5, ca sa mentina condamnarea nelegala a Elenei Udrea. Judecatorii ICCJ s-au temut ca Udrea putea beneficia de Decizia CCR 417/2019, care implica reluarea procesului de la zero, iar astfel ar fi existat riscul ca memoria martorilor sa se altereze*, LUMEA JUSTITIEI (June 17, 2022), <https://www.luju.ro/iccj-si-a-motivat-atentatul-anticonstitutional-exclusiv-hotararea-prin-care-judecatorii-iccj-alina-ioana-ilie-oana-burnel-anca-alexandrescu-si-dan-andrei-enscu-au-refuzat-sa-aplice-decizia-ccr-685-2018-privind-nelegala-compunere-a-completelor-de-5-ca-sa>.

national sovereignty.⁸⁸ As the CJEU did not invite all associations of magistrates in Romania to submit *amicus curiae* opinions in the rule of law cases, one can only make assumptions on the position of the competing associations in the matter. The practice of referrals, although recurrent among its users, did not contaminate other actors in the judicial system.

E. Conclusion

As indicated in the second part of this Article, the safeguarding of judicial independence and the rule of law frequently appears among the declared purposes of judicial associations in Romania, organized as NGOs, as a general principle guiding their activity. The present Article has sought to explore the manner in which, in the context of the rule of law crisis generated by the 2017–2019 legislative amendments, this objective has taken on a systemic dimension and contributed to shaping the Romanian courts' dialogue with the CJEU.

Following the pressures experienced at national level by members of the judiciary, individually and collectively, several judicial associations emerged as actors prominently engaged in efforts to mitigate the erosion of judicial independence. These groups placed themselves at the forefront of the internal debates and led an intense informal dialogue with international institutions concerning the rule of law decline in Romania. Using a diverse array of strategies, including direct communication with EU institutions, meetings with high-level representatives, extensive English-language articles and press releases, as well as international networking and lobbying, the judicial associations managed to catalyze Romanian courts into dialogic action with the CJEU. They acted as ghostwriters for the most relevant preliminary questions and used strategic litigation to co-opt the CJEU into the national debates.

This process involved a feedback loop between the judicial associations, national judges, and the CJEU, which in turn contributed to further developments in the CJEU's own approach to preliminary rulings on questions of EU fundamental values. This line of cases therefore adds a distinct layer of meaning to the traditional thesis of integration through national "judicial empowerment."⁸⁹ As indicated in the section analyzing the Romanian preliminary references starting with the *Portuguese judges* cases, a different type of empowerment of national judges may be observed, with the CJEU opening the possibility of judges-as-litigants engaging in dialogue with it on rule of law issues, even when the strictly formal requirements of the preliminary reference procedure have to be bent outside their normal bounds.

In fact, the openness displayed by the Court in the series of references stemming from the Romanian courts has led to calls for the CJEU to take an even bolder step by establishing the unconditional *locus standi* of the magistrates' associations in situations where they try to obtain effective jurisdictional protection in areas regulated by European Union law. Should the Court grant this interpretation of EU law, the repetitive referrals fueled so far by individual actors would become the norm. Time will tell whether "the Court's expansive interpretation, advancing integration through the backdoor" will become once again "a prime target of normative critiques levied against ECJ-led integration through law"⁹⁰ or whether, in a context of increasingly frequent challenges to the rule of law, even in established democracies, this approach will become a useful "toolkit" for European judiciaries under pressure.

⁸⁸See Cornel Nistorescu, *Vreme de aparat Constitutia Romaniei*, LUMEA JUSTITIEI (Oct. 27, 2022), <https://www.luju.ro/vreme-de-aparat-constitutia-romaniei>

⁸⁹R. Daniel Kelemen & Alec Stone Sweet, *Assessing the Transformation of Europe: A View from Political Science 193* (Yale L. Sch., Pub. L., Working Paper No. 295, 2017).

⁹⁰Ovádek, *supra* note 65.

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