NAD
Nuovi Autoritarismi e Democrazie:
Diritto, Istituzioni, Società

The independence of justice as proxy for the rule of law in the EU - Case study - Romania

Elena Simina Tănăsescu[*]

Abstract

The concept of rule of law has been addressed as a formal or as a substantive notion. Although it does not enjoy a generally accepted academic definition and its practical transposition varies according to the implementing State, it is a founding value and a functional necessity for the European Union. However, the recent case law of the ECJ on this matter seems to narrow down the concept of rule of law to one of its elements, namely the independence of justice. This is due to the specific context in which the ECJ had to develop the standard, and which is linked to the rule of law backsliding noticed over the past few years in Hungary and Poland and, to some extent, in Romania. In the specific case of Romania, the ECJ displayed a moderate stance, possibly due to the fact that an institutionalised monitoring of the rule of law has been in place since 2007.

Keywords: Rule of law – independence of justice – Romania.

CONTENTS: 1. Introduction. 2. Rule of law as an abstract concept. 3. Rule of law and the independence of justice. 4. Rule of law in the European Union: from value to legal standard. 5. Rule of law and democratic backsliding within the EU. 6. Why the independence of justice matters. 7. Rule of law and independence of justice in Romania. 7.1 Independence of justice – Romanian legal framework. 7.2 Independence of justice – Romanian legal and institutional reforms. 7.3 Independence of justice – preliminary questions of Romanian courts. 7.3.1 Primacy of EU and the specifics of the Mechanism of Cooperation and Verification instituted by Decision 2006/928/EC. 7.3.2 Judicial organisation and disciplinary regime of magistrates. 7.3.2.1 Disciplinary regime of magistrates. 7.3.2.2 Composition of courts specialised in the fight against corruption. 8. Conclusion.

[*] Full Professor of Constitutional and European Law, University of Bucharest, Judge of the Constitutional Court of Romania. The essay was submitted to double blind peer-review.

1. *Introduction*

Rule of law is a broad interdisciplinary concept that can difficultly be encapsulated in a general or universally accepted academic definition. To start with, the very label of the concept varies according to the different languages that use it: rule of law, *Etat de droit*, *Rechtsstaat etc.*[1]. These various designations reflect different contents in various environments and according to different legal traditions. Then, the abstract concept of rule of law seems to lack the proper content and the logical consistency needed in order to acquire a scientific definition that would rely mainly on descriptive characteristics – that distinguish it from any other scientific concept already known – and not on exclusively prescriptive objectives set forth by the human intellect. Finally, in practise, the concept has migrated from one State to another, and, in the process, it has acquired new meanings[2], although a common denominator can be inferred from all particular cases acknowledged worldwide.

In recent years, the concept of the rule of law has become crucial for the legal system of the European Union (EU). While it has to be acknowledged that the rule of law has been an implicit core value of the EU ever since the creation of the community of States[3], the concept has gradually developed into a principle opposable to the EU institutions and, finally, into a fully-fledged legal standard imposable by the Court of Justice of the European Union (ECJ) on Member States[4]. This evolution has been accelerated by what has been spelled out in 2013 by Viviane Reding, Vice-President of the European Commission and Justice Commissioner as "rule of law crisis"[5]. In her speech she referred to «the Roma crisis in France in summer 2010; the Hungarian crisis that started at the end of 2011; and the Romanian rule of law crisis in the summer of 2012». Subsequent evolutions in other Member States have put the rule of law, and particularly the independence of justice, at the forefront of the legal and judicial debate within the EU[6]. They have also contributed to a fresh analysis of the EU scope of powers and to the development of an innovative approach by the ECJ of its competence to interpret and validate EU law. Since the reversal of democratic transitions or the backsliding of established democracies has often started with the systematic demolition of independent courts, it is the principle of the independence of justice that became the core of arduous judicial debates within the EU. Based on legal instruments developed by the Council of Europe and various institutions of the EU, particularly on articles 19 TEU and article 47 of the Charter of Fundamental Rights, the ECJ declared the independence of justice to be

[1] L. Heuschling, *Etat de droit. Rechtsstaat. Rule of Law*, Dalloz, Paris, 2002.
[2] E. Carpano, *Etat de droit et Droits européens*, L'Harmattan, Paris, 2005.
[3] According to the European Court of Justice «The Community is based on the Rule of Law, in as much as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty». See Case 294/83*, Parti Ecologiste "Les Verts"* v. Parliament.
[4] «The main sense of the RoL (rule of law – *n.n.*) thereby achieved at the layer of the European Union revolves around the value of legality including judicial review as a tool *vis à vis* non-compliance». See G. Palombella, *The EU's Sense of the Rule of Law and the Issue of its Oversight,* EUI Working Paper Robert Schuman Centre for Advanced Studies, Vol. 125, 2014, p. 2.
[5] V. Reding, *The EU and the Rule of Law – What Next?*, 4 September 2013, speech /13/677, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677.
[6] L. Pech, S. Platon, *Judicial Independence Under Threat: The Court of Justice to the Rescue*, in *Common Market Law Review*, Vol. 55 No. 6, 2018, pp. 1827-1854.

a vital element of the rule of law and underlined its importance as core value and legal principle defining EU integration as prescribed by article 2 TEU.

In the specific case of Romania, the events of the summer of 2012 have been considered rather a "constitutional crisis"[7] than a systemic backsliding of the rule of law. Given the fact that since its accession to the EU, *i.e.,* since the 1st of January 2007, Romania – together with Bulgaria – is subject to a mechanism of cooperation and verification (MCV) meant to monitor the fulfilment of specific benchmarks in the areas of judicial reform and the fight against corruption, strict enforcement of the EU *acquis* in the particular area of justice and rule of law has been systematically supervised by the European Commission. Until 2017-2018 this has been considered sufficient to guarantee adherence to the fundamental values and principles of the EU. However, following the general elections of December 2016, a rather populist executive supported by a similar majority in Parliament triggered a swift attack on the independence of the judiciary through legislative amendments, institutional reforms and the weakening of the criminal or integrity legal framework. Regular reports issued in the framework of the MCV started to reflect the situation on the ground and to mention possible systemic threats to the rule of law and the independence of justice. Parliamentary elections of December 2020 have changed the political majority and managed to put in place an executive which placed high on its agenda the reversal of most judicial reforms undertaken during 2017-2018.

Although the rule of law backsliding in Romania has been weaker and of a shorter duration than those observed in other EU Member States, Romanian courts capitalised on the experience gained by the ECJ with regard to the protection of the rule of law and started to address preliminary questions pertaining to the compliance of Romanian judicial reforms with EU *acquis* on judicial independence. At the cut-off date of this paper only one of these cases had been decided by the ECJ[8], while opinions of the Advocate General are available in all of them. From all the above one can infer that the stance taken by the EU with regard to Romania may be alleviated by the fact that the MCV is still in place and the dimensions of the backsliding have been lesser than in other Member States, but significant deviations from what it has now become a fully-fledged EU *acquis* in the area of rule of law are and will continue to be sanctioned.

2. *Rule of law as an abstract concept*

Rule of law is an abstract notion. From an analytic point of view, the concept of rule of law has been addressed either as a purely formal notion, or as a formal and procedural one, or as a substantive and even teleological notion.

Thus, in what has been labelled as a "thin" or legalistic conception of the rule of law, the notion has been defined as a set of formal values that compel the human conduct through the governance of rules[9]. Those rules are enacted by the State and they pertain to

[7] B. Iancu, *Separation of Powers and the Rule of Law in Romania. The Crisis in Concepts and Contexts*, in A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Hart/C.H. Beck, Oxford/Munich, 2015, pp. 153-170.
[8] On May 18th, 2021, the ECJ ruled in Joined Cases C-83/19, C-127/19, C-291/19, C-355/19 and C-397/19, *Asociația "Forumul Judecătorilor din România"*. A brief analysis of this decision is provided in the final section of this paper.
[9] L. Fuller, *The Morality of Law*, Yale University Press, New Haven, 1964.

formal aspects that legitimate power – such as non-retroactivity, publicity, universality of reach or non-discrimination – making possible the compliance of human conduct with laws. Joseph Raz created a metaphor where the rule of law is viewed as a sort of "sharpener" of the law, enhancing its effectiveness[10]. By formally expressing power through laws which can be enforced either benevolently or by the State power, laws acquire the capacity to subject human behaviour in a more efficient way. However, according to this conception, the rule of law can be used as an instrument in order to better achieve political goals irrespective of the content or substance of those goals. And courts may find themselves in situations where the adage *dura lex, sed lex* becomes a mere tool for imposing power rather than containing or constraining it.

This possible outcome has been perceived as a weakness of the formal theory on the rule of law and it has been addressed by other scholars[11] via a formal and procedural approach of the concept. In this conception, the rule of law refers not only to formal constraints objectively imposed on power and which make it legitimate, but it also refers to procedural commitments which imply a subjective attitude of the human subject. Namely, human conduct is subjected to rules expressed in formal laws not only because those laws are formally enacted in a valid manner, but also because the human subject is committing her/himself to those laws and may adjust its conduct while being aware of laws and able to challenge them, including in front of neutral and impartial courts through a due process and abiding by formal procedures. Again, courts are an intrinsic element of the rule of law, a component that is able not only to increase the effectiveness of laws, but also to allow the human beings to legally challenge those laws.

In what has been considered as a "thick" or substantive approach of the concept of rule of law, the notion has been defined as not merely a set of formal and/or procedural values, but also as an array of institutional arrangements stemming from normative commitments[12], many of them associated with liberal democracy. Given the fact that even this substantive approach can be distorted or misused for ends which are discriminatory or otherwise unjust, some scholars[13] have appended it with an additional nuance, including a teleological approach to the rule of law. In this conception, the rule of law is a functional notion, defined as a set of arrangements meant to temper power and not only to limit or enable it. However, by tempering power, the rule of law still contributes to enhancing its legitimacy, although such an outcome is relying on context. But by tempering power the rule of law creates the possibility for the human being to manifest itself in the context of power, thus allowing human conduct to become the main purpose of the rule of law. By acknowledging that, if treated superficially, the rule of law can be manipulated and transformed into its contrary, such substantive or teleological approaches require a genuine vision of the concept of the rule of law. At the same time, by accepting that even a substantive conception of the rule of law can be misinterpreted, the teleological approach accepts that it functionally remains dependent on specific social,

[10] J. Raz, *The Rule of Law and its Virtue*, in J. Raz (ed.), *The Authority of Law: Essays on law and morality*, Clarendon Press, Oxford, 1979, pp. 210-229.
[11] J. Shklar, *Legalism: Law, Morals and Political Trials*, Harvard University Press, Cambridge, MA, 1964; J. Waldron, *The Concept and the Rule of Law*, Working paper no. 08-50, 2008, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273005.
[12] T. Bingham, *The Rule of Law*, Allen Lane, London, 2010.
[13] M. Krygier, *Tempering Power*, in M. Adams, A. Meuwese, E. Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge University Press, Cambridge, 2017.

political, historical and/or legal and institutional contexts. As long as the rule of law is not internalised into acts and attitudes in everyday life there is still a danger that it may be present as a superficial form to be formally enforced by the State. The role of courts depends on this contextual and functional approach.

To sum up, the concept of rule of law is an "essentially contestable concept"[14], *i.e.,* a concept with descriptive and prescriptive content over which there is a lack of widespread agreement. However, any attempt to describe rule of law or to identify its main elements or vital characteristics cannot ignore courts and their role for the protection of human rights.

3. *Rule of law and the independence of justice*

Rule of law is valued not only for formal, procedural, or substantive reasons embedded in the Constitution or for the institutional arrangements made in order to guarantee it. Rule of law is valued rather for its main outcome, namely that State power is less arbitrary and can even become less coercive and be more predictable and more impersonal. In other words, rule of law creates a mutual bond among human beings and between them and State power and it allows for the mitigation of the asymmetry that political power intrinsically involves making possible the free manifestation of the human being. The ultimate guarantor of this freedom of the human being is a judicial system able to defend «rights, liberties and legitimate interests». In order to perform this function, the judicial system needs judicial independence.

It is worth noticing that the independence of justice represents a core pillar of the concept of rule of law, irrespective of the thin or thick approach taken with regard to the notion and regardless of the legal tradition in which the abstract concept is implemented and put into practice.

In this context, the independence of justice means rather the independence of the judiciary and it represents a distinct idea from that of the separation of powers, which anyway refers to the division and blending of powers within a State. The independence of the judiciary raises issues such as the ability of the judicial system (courts and judges) to perform their activity free of influence or control by other actors, whether governmental or private. This means that the judiciary is no longer a tool meant to ensure that the division between the legislative and the executive is well functioning, but it represents an empowering instrument in the hands of the human beings who are able both to contribute and to challenge the legislative and the executive, thus contributing to legitimizing power. In other words, the judiciary has the important function of protecting human rights. Therefore, in all enumerations of the characteristic elements of the rule of law an independent justice, both as an institution (judicial system) and as an activity (functioning of the judiciary), remains of outmost importance and is dealt with separately from the issue of the independence of justice as one of the branches of the State power.

Against this background it has to be mentioned that the independence of justice also includes the independence of judges, considered as individuals performing the function of justice within the judicial system. It encompasses their protection and insulation from

[14] «The Rule of Law is a much celebrated, historical ideal, the precise meaning of which may be less clear today than ever before». See R.H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, in *Columbia Law Review*, Vol. 1 No. 97, 1997, p. 1 *et seq*.

any influences that may originate either inside the judicial system or outside it, that is from influences coming from the legislative or the executive. While judges and the judicial system are not and should not be insulated from society and while justice as an activity remains essentially a public service and the judiciary remain accountable ultimately to the human beings whose rights it has to defend, the protection of judges from influences or pressures coming from the political sphere is an integral part of the independence of the judiciary.

4. *Rule of law in the European Union: from value to legal standard*

With this theoretical framework in mind, one has to notice that the transposition of the intellectual concepts into legal norms and everyday practice takes its own path. Various legal instruments at international and national level mention the rule of law as a defining value for the political entities they address, but the content of the rule of law thus referred to is not spelled out in those documents. The third paragraph of the Preamble of the Universal Declaration of Human Rights of 1948 affirms that «it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law». At national level, number of constitutions, particularly those adopted during democratic transitions, identify the rule of law as a fundamental characteristic of the State they govern and stop there, without further detailing the concept.

In the European continent the standard of the rule of law has been developed in various instruments issued by the Council of Europe and particularly by the European Commission for Democracy through Law (Venice Commission). In fact, the Venice Commission was established in May 1990 as an advisory body to the Council of Europe on constitutional matters in order to help States to align with European standards «in the fields of democracy, human rights and the *rule of law*». The most prominent tool developed by the Venice Commission to this date remains the *Rule of Law Checklist*[15] which is not an obligatory legal document, but rather a descriptive list attempting to identify «common features of the Rule of Law/*Rechtsstaat*/*Etat de droit*» and meant as an instrument allowing «to evaluate the state of the rule of law in single States». The case law of the European Court of Human Rights is also relevant for a complete overview of the European legal standard regarding the rule of law.

As for the States which have created an integrated European community, the rule of law has been mentioned for the first time in a legal instrument concomitantly with the birth of the European Union. In 1992 the preamble of the Treaty of Maastricht referred to the confirmation by the Member States of «their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law», whereas the Treaty itself endowed the Court of Justice with «jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers». Article 6 of

[15] Rule of law checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD (2016)007rev.

the Treaty of Amsterdam[16] provided rule of law constitutional ambit both at EU level and at the level of the Member States. Since the Treaty of Lisbon, article 2 of the Treaty on European Union[17] makes the rule of law a core founding value of the European Union, while article 21 TEU[18] declares it a guiding principle that has «inspired its own creation, development and enlargement», which is why the EU is also considering the same values and legal standards for its external action and cooperation and development policies. Likewise, rule of law has been a condition for the accession of new members to the EU since the Copenhagen criteria established in 1993[19].

The case law of the Court of Justice of the European Union (ECJ) starts to mention the rule of law a bit later. Until the beginning of the years 2000 it was mainly the parties or Advocates General who invoked the rule of law[20]. The Court of Justice itself started to refer to the legal standard of the rule of law only in 2007 in Segi[21] and *Gestoras Pro Amnistía*[22].

From all the above it can be safely inferred that rule of law represents a core value for the community of States joined in the European Union, as well as for each individual Member State, and a prerequisite for any enlargement process. This conclusion is supported by the gentle swap undertaken by the rule of law from the preambles of various EU founding treaties into their substantive matter, and further reinforced by the use of the concept in the case law of the ECJ by the Court itself, thus accomplishing an almost un-noticed transformation from a value into a legal standard[23].

[16] Article 6, para. 1, TEU then provided that «the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law, principles which are common to the Member States».

[17] Article 2 TEU: «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».

[18] Article 21 TEU: «The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law».

[19] Detailing articles 6 and 49 TEU, which set out the conditions and principles imposed to any State aspiring to become an EU member, a number of standards known as "Copenhagen criteria" – because they have been established by the Copenhagen European Council in 1993 – are the filter imposed to all enlargement processes since 1993.

[20] S. Platon, *Les fonctions du standard de l'État de droit en droit de l'Union européenne*, in *Revue Trimestrielle de Droit Européen*, Vol. 2 No. 55, 2019, p. 310.

[21] Case C-355/04 P, Segi and Others v. Council of the European Union.

[22] Case C-354/04 P, *Gestoras Pro Amnistía* and Others v. Council of the European Union.

[23] K. Lenaerts, *New Horizons for the Rule of Law within the EU*, in *German Law Journal*, Vol. 21 Special Issue 1, *20 Challenges in the EU in 2020*, January 2020, pp. 29-34, available at: www.cambridge.org/core/journals/german-law-journal/article/new-horizons-for-the-rule-of-law-within-the-eu/C60C39F5025ECD2070A6761EDE79959B.

5. *Rule of law and democratic backsliding within the EU*

However, within the EU, the concept acquired a new function once the phenomenon of rule of law backsliding[24] has been identified towards the beginning of the 2010s, based on developments noticed particularly in Hungary and Poland, but also, to some extent, in Romania especially after 2016[25]. Most relevant were judicial reforms performed in those States, which have been perceived by EU institutions as seeking to reduce the independence of the respective national judicial systems and, in some cases, also to jeopardize the independent functioning of constitutional courts. It has to be mentioned that these are States that have joined the EU after 2004, in a context where article 49[26] of the TEU creates a clear correlation between rule of law and accession conditionalities, which implies that full respect of the rule of law had to be established prior to their EU accession.

Furthermore, for Bulgaria and Romania a special mechanism for cooperation and verification (CVM) has been developed in order to assess *ex-post*, meaning after their accession to the EU, their progress in the areas of judicial reform and the fight against corruption and, in addition in Bulgaria, against organized crime[27]. It is interesting to note that, among the explanations provided for the establishment of this original post-accession arrangement, which – so far – has not been duplicated in subsequent enlargements, the first one refers to the fact that the «European Union is founded on the rule of law» and that implies «for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, inter alia, to fight corruption»[28].

Nevertheless, when confronted with a series of "rule of law crises" in several States that joined the supranational organisation after 2004, the EU could no longer merely refer to the rule of law as core value and founding principle and had to delve into its legal system and devise the rule of law as a mandatory legal standard in order to reflect its functional necessity for the Union.

A precedent existed in the sense that democracy and rule of law had already been challenged even prior to 2004 in one EU Member State. The specific context created by the surprising and momentous results of the 1999 parliamentary elections in Austria brought to power a right-wing coalition government that included a controversial right-

[24] M. Blauberger, R.D. Kelemen, *Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU*, in *Journal of European Public Policy*, Vol. 24 No. 3, 2017, pp. 321-336; D. Kochenov, P. Bard, *Rule of Law Crisis in the New Member States of the EU – The Pitfalls of Over-emphasizing Enforcement*, Working Paper No. 1, July 2018, available at: https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf.

[25] E.S. Tănăsescu, *Criminal Policy or Criminal Politics?*, available at: https://iacl-aidc-blog.org/2017/02/16/analysis-criminalpolicy-or-criminal-politics/.

[26] Article 49 TEU: «Any European State which respects the values referred to in article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account».

[27] See Decision (2006/928/EC) for Romania and Decision (2006/929/EC) for Bulgaria.

[28] See the first and the third whereas of Decision (2006/928/EC).

wing party. Article 7[29] of the TEU proved its limits rather quickly. Initially designed as a political mechanism meant to deal *ex-post* with such situations through the imposition of political sanctions, article 7 refers in a broad manner to breaches to all or any of the values stated in article 2 TEU and it remains a rather formal device. The experiment of 1999 proved the need for the design of an *ex-ante* (preventive) mechanism for the same purpose, but this has been neglected over the following revisions of the EU treaties. The inadequacy of article 7 to a series of "rule of law crises" in some EU Member States, particularly in Eastern Europe, became noticeable upon hesitations and attempts to enforce it against Hungary and Poland during the 2010s[30].

Therefore, the EU developed a range of initiatives in order to address the issue of breaches to the rule of law both from a preventive and a corrective perspective[31]. In order to address what it has considered to be "systemic threats to the rule of law" the European Commission has launched in 2013 an EU Justice Scoreboard[32] as «a tool to promote

[29] Article 7 paragraphs 1-3 TEU provides: «1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in article 2, after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State».

[30] While EU institutions draw the political consequences of the 1999 experiment with article 7 TEU and Austria and preferred to act with significant self-restraint from then onwards, activating it rather late (2017), legal scholarship continued to vigorously support its enforcement with regard to Hungary and Poland. See *e.g.* D. Kochenov, L. Pech, *Better Late Than Never?*, in *Journal of Common Market Studies*, Vol. 24, 2016, p. 1062; L.F.M. Besselink, *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, in A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford University Press, Oxford, 2017, pp. 129-143; S. Carrera, P. Bard, *The European Parliament Vote on Article 7 TEU against the Hungarian Government. Too Late, Too Little, Too Political?*, CEPS, 14 September 2018, available at: www.ceps.eu/ceps-publications/european-parliament-vote-article-7-teu-against-hungarian-government-too-late-too-little/.

[31] Their effectiveness has already been questioned by the doctrine. See *e.g.* D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, Vol. 11 No. 3, 2015, pp. 512-540; M. Waelbroeck, P. Oliver, *La crise de l'Etat de droit dans l'Union européenne: que faire?*, in *Cahiers de droit européen*, 2017, pp. 299-342; *Hague Journal on the Rule of Law* – Special Issue on the Crisis of Constitutional Democracy in Central and Eastern Europe, Vol. 10 No. 1, April 2018; A. Di Gregorio (ed.), *The Constitutional Systems of Central-Eastern, Baltic and Balkan Europe*, Eleven International Publishing, The Hague, 2019.

[32] See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: The EU Justice Scoreboard – A tool to promote effective justice and growth (COM/2013/0160 final).

effective justice and growth» and in 2014 a Rule of Law Framework[33] meant to set out «a new framework to ensure an effective and coherent protection of the rule of law in all Member States […] before the conditions for activating the mechanisms foreseen in article 7 TEU would be met». In an attempt to standardise the concept of rule of law, in 2014 the Commission identified six principles which «define [...] the substance of the rule of law», namely the principle of legality, which essentially presupposes the existence of a transparent, responsible, democratic and pluralist legislative procedure; the principle of legal certainty; the prohibition of arbitrariness of the executive power; the independence and impartiality of the courts; the principle of effective judicial review, including respect for fundamental rights; and finally equality before the law. It then proceeded to implement them in an overall evaluation. As a result, a first annual report on the situation of the rule of law within the EU has been issued in 2020[34]. Last in a long list of legal and institutional attempts to promote and protect the rule of law within the European Union is the recent linking of the EU budget to the respect of rule of law[35], already challenged in front of Court of Justice by Hungary and Poland. All these initiatives have further contributed to the transformation of the rule of law from a value and a legal standard into a fully-fledged legal norm, including deterrent sanctions in case they would be necessary. In a nutshell, at the level of EU, the fortified enforcement of the rule of law became the antidote to democratic backsliding.

Along with other EU institutions, the ECJ has also been involved in the transfiguration of the rule of law from a value into a legal norm and into a corrective to democratic decay. Be it through the infringement procedure or through preliminary questions, the ECJ spread-out its realm as to encompass the judicial protection of rule of law with regard to EU institutions[36] and with regard to Member States[37]. However, it is interesting to note that the relevant case-law of the ECJ does not refer to the legal standard of the rule of law in a comprehensive manner, nor does it take the previous approach that equated rule of law with legality, certainty, predictability, *i.e.* with the emphasis upon «a community of people and States based on the rule of law»[38] as it used to be the case until the democratic backslide knocked in. As of recently, the case law of the ECJ with regard to the rule of law in the context of democratic decay narrows down the concept to one of its elements. For the time being, it is essentially the principle of the independence of justice, under its various forms and shapes, which has been mobilized by the ECJ. This focus stems from the context of the relevant case law: it is essentially this aspect of the rule of law that is

[33] See Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law (COM/2014/0158 final).
[34] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Rule of Law Report. The rule of law situation in the European Union (COM/2020/580 final).
[35] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
[36] See *e.g.,* Case C-583/11 P *Inuit Tapiriit Kanatami* and Others v. Parliament and Council; Case C-72/15, PJSC Rosneft Oil Company v Her Majesty's Treasury and Others.
[37] See *e.g.,* Case C 286/12, Commission v. Hungary; Case C-619/18 R, Commission v. Poland; Case C-192/18, Commission v. Poland; Joined Cases C-83/19, 127/19 C-291/19, C-355/19 and C-397/19 *Asociaţia "Forumul Judecătorilor din România"*.
[38] See *e.g.,* Case 6/44 *Flaminio Costa v. Enel* or Case 294/83, *Parti Ecologiste "Les Verts"* v. Parliament.

currently at issue in Hungary and Poland and that has concentrated a lot of attention in Romania as well, mainly between 2017 and 2019.

6. *Why the independence of justice matters*

Judicial independence is important not only because it is considered a shield against external and internal influences, be they political, social, ideological, financial *etc.*, but also because it is considered a guarantee of the impartiality of justice with a view to the greater and general scope of justice, namely fidelity to law and not to State power or human will. Since the independence of justice stems from the constitutional traditions of EU Member States as one of the core values of any democratic system of government, until the "systemic threats to the rule of law" it was assumed that inside the EU breaches to this foundational principle are not conceivable. Moreover, adjusting the independence of the judicial system to fit a certain political context or to achieve a specific (individual or subjective) goal means tampering not only with the judicial independence, but also with the rule of law. Such approaches were deemed implausible within the EU.

However, the reversal of democratic transitions or the backsliding of established democracies has often started with the systematic and deliberate demolition of independent institutions, among which courts rank first. Indeed, recent alterations of the classical concept of rule of law have questioned the principle of the independence of justice and the very role assigned to courts in constitutional democracies[39]. Courts are supposed to constrain power in order to limit its potential for arbitrary and enable it to manifest itself in legitimate ways. In a State governed by the rule of law the judiciary should protect the separation of powers as enshrined by the fundamental law. That means that courts have to make sure that nor the legislative neither the executive can assume and monopolize popular sovereignty and that both powers have to respect fundamental rights. Therefore, it is a common expectation that courts would be able to act in ways which allow for the survival of the rule of law and prevent the exercise of power from derailing into various harmful transfigurations. If the legislative or the executive manage to impose their views on the judiciary, the impact of courts on democracy is void of meaning and the confidence of citizens in the role, importance and independence of justice is in danger. Although it has been argued that «opposing popular regimes in the long run is not an option»[40] and courts cannot ignore popular beliefs, courts cannot afford to ignore or disrespect law even more than public opinion[41]. The power of the judiciary relies as much in the rationality of the legal arguments which support judicial decisions as in the people's consent to obey the law and that is something which stems from the substantive concept of the rule of law. Therefore, attacks on the independence of the judiciary are a serious threat to the rule of law. The Hungarian and Polish cases being rather well-known by

[39] L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, Vol. 19, 2017, pp. 3-47.
[40] J. González-Jácome, *In Defense of Judicial Populism: Lessons from Colombia*, in *International Journal of Constitutional Law*, 03-05-2017, available at: www.iconnectblog.com/2017/05/in-defense-of-judicial-populism-lessons-from-colombia/2017.
[41] E.S. Tănăsescu, *Can Constitutional Courts Become Populist?*, in M. Belov (ed.), *The Role of Courts in Contemporary Legal Orders*, Eleven International Publishing, The Hague, 2019, pp. 305-320.

now, I will endeavour to quickly examine the Romanian situation, which has its own peculiarities.

7. *Rule of law and independence of justice in Romania*

7.1. *Independence of justice – Romanian legal framework*

According to the Constitution (article 124), in Romania justice shall be rendered in the name of the law and justice shall be one, impartial, and equal for all. Judges shall be independent and subject only to the law. Article 126 of the Constitution provides that justice shall be administered by the High Court of Cassation and Justice, and the other courts of law set up by the law, while the jurisdiction of courts and the procedure shall be stipulated only by law. The Romanian judiciary is regulated through two laws, law no. 304/2004 dealing with judicial organization and law no. 303/2004 dealing with the statute of magistrates. Judicial proceedings are regulated by the civil procedural code and the criminal procedural code. Separately, law no. 317/2004 regulates the Romanian judicial council (Superior Council of Magistracy – CSM), a corporatist autonomous body in charge with the management of human resources and disciplinary procedures against magistrates (judges and prosecutors). These three laws have replaced previous ones adopted early in the democratic transition of Romania (1992) and have been revised significantly rather soon after their coming into force, in 2005, and then again in 2018.

The Constitution only mentions the independence of judges and not judicial independence. However, article 1 of the Constitution declares Romania «a democratic and social State, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed». It also provides that «the State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy». And article 21 of the Constitution guarantees free access to justice, unrestricted by any law, to all persons in the defence of their «rights, liberties and legitimate interests», while all parties are «entitled to a fair trial and a solution of their cases within a reasonable term».

7.2. *Independence of justice – Romanian legal and institutional reforms*

All prerequisites for the respect of rule of law and judicial independence seem to be in place. And, for what it's worth, Romanian judicial reforms initiated in 2017 by a populist majority in Parliament and its supporting Government have not gone as far as those in Hungary or Poland. Nevertheless, the rule of law backsliding which manifested shortly but intensely all along the legislative mandate of 2016-2019, culminated in 2018 with a

general assault on the independence of the judiciary through legislative amendments[42], institutional reforms[43] and the weakening of the criminal or integrity legal framework. In a nutshell, judicial reforms in Romania focused, *inter alia*, on the creation of a special prosecutorial section meant to investigate crimes accomplished by magistrates coupled with the diminishing of powers of the prosecutorial section dealing with the fight against corruption, the personal liability of magistrates for judicial errors as well as the patrimonial liability of the State for miscarriages of justice. Also, the legal procedures for the appointment of the chief prosecutor of the newly created special section meant to investigate crimes accomplished by magistrates have been revised by Government immediately after their approval by Parliament in order to make possible the designation of a specific person. Civil society, an important fraction of the magistrates, parliamentary opposition and the President of Romania used all available instruments in order to stop or limit the damages. Challenging judicial reforms in front of the Constitutional Court, the use of presidential veto, requests for opinions from Venice Commission or GRECO, requests of preliminary rulings by national judges asking the ECJ to clarify the compliance of different national reforms with EU law or pressure made by EU and other regional and international bodies represented complex resilient practices. I have detailed the political and constitutional context of that general assault elsewhere[44]. Following the general elections of December 2020, a different parliamentary majority has set forth to reverse the tide and correct – to the extent where this is still possible – the wrongs already done, so far with mitigated success.

Still, in 2019 Romanian courts have addressed number of preliminary questions[45] to the ECJ concerning the respect of rule of law and judicial independence. Until the cut-off date of this contribution the Advocate General has presented his opinion in most of the cases concerning the independence of justice in Romania. Although some of these cases are still pending, one has been decided by the ECJ on the 18th of May 2021. While the details of each case may be of interest for a seasoned lawyer, this paper will not delve into their specifics, but rather attempt to summarize the main issues at stake.

7.3. *Independence of justice – preliminary questions of Romanian courts*

In short, preliminary questions coming from Romania face the ECJ with two broad types of queries. The first one has to do with the primacy of EU law, an old but still interesting subject. In essence, Romanian judges want to know whether EU law takes precedence over national law not only with regard to the judiciary, but also as far as the legislative and the executive are concerned when they design and implement national policies. And in particular, Romanian judges needed guidance on the nature, legal value and effects of the MCV mechanism and of the periodic reports adopted on its basis,

[42] B. Selejan-Gutan, *Failing to Struggle or Struggling to Fail? On the New Judiciary Legislation Changes in Romania*, in *VerfBlog*, 31-01-2018, available at: https://verfassungsblog.de/failing-to-struggle-or-struggling-to-fail-on-the-new-judiciary-legislation-changes-in-romania/.
[43] B. Selejan-Gutan, *New Challenges against the Judiciary in Romania*, in *VerfBlog*, 22-02-2019, available at: https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/
[44] E.S. Tănăsescu, *Romania: From Constitutional Democracy to Constitutional Decay?*, in V. Besirevic (ed.), *New Politics of Decisionism*, Eleven International Publishing, The Hague, 2019, pp. 177-191.
[45] See in particular cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-379/19, C-397/2019, C-547/19, C-811/19, C-840/19.

especially in the light of a recent case law of the Romanian Constitutional Court. The second question relates to some institutional innovations brought by the recent judicial reforms and validated by the Constitutional Court, particularly to the creation of a special prosecutorial section for the investigation of magistrates, as well as to the composition of courts' panels specialised in the fight against corruption.

The first question is not new in itself, but it allows the ECJ to go beyond its classical case law on issues of validity and interpretation of EU law. Also, its novelty stems from the fact that is has been framed from a perspective that is specific only to Bulgaria and Romania, since they are the only two Member States enjoying a post EU accession mechanism of cooperation and verification (MCV) regarding the rule of law. The second question is not new either, since the ECJ has already dealt with similar issues, within the context of rule of law, be it in relation with judicial reforms undertaken in Hungary or Poland or with regard to the legal status of prosecutors in other Member States. The first answers of the ECJ to the preliminary questions addressed by Romanian courts are expected during the first half of 2021 and, without going into prospective law, it seems reasonable to expect similar responses to those already provided to other national courts in comparable situations.

Thus, from the onset, it has to be mentioned that national institutional arrangements within the judicial systems of Member States are a substantive matter where competences have not been explicitly conferred upon the EU. However, even when Member States exercise their residual competence, they should make certain that their actions do not impede the fulfilment of EU's tasks. In practical terms, this means not only that Member States cannot disregard EU values, but also that they should assist the EU in fulfilling its own competences. Therefore, while in accordance with article 4 TEU the Union has to respect the «fundamental structures, political and constitutional» as well as «their essential State functions», it cannot allow disrespect to core values and foundational principles of article 2 TEU. The more so since the EU system of competences is complex, flexible, teleological, and evolving. In the absence of competence in matters of judicial organisation, the EU action in this area may be based on competence in terms of guaranteeing the rule of law[46]. Therefore, while the principle of conferral governs the limits to EU competences and judicial organisation remains firmly within the remit of Member States, the independence of justice within Member States may have relevance for the EU from several perspectives: the necessary uniform interpretation and application of EU law if it is meant to remain a normative system with precedence over national legal systems, the principle of effective judicial protection of rights bestowed upon European citizens by the EU law, the principle of mutual confidence of courts and, last but not least, the possibility of courts to address preliminary questions to the ECJ without any interference. All these arguments are to be found in the seminal case C-64/16, *Associação Sindical dos Juízes Portugueses*, where the ECJ took the precaution to specify that «in the fields covered by EU law» EU law protects the independence of national courts. Therefore, the ECJ ruled that Member States have to make sure that national courts «meet the requirements essential to effective judicial protection» of which the principle of judicial independence is an integral part. The argument being of general nature, there are

[46] See *supra* K. Lenaerts.

no reasons to believe it will not be continued by the ECJ, including in the answers that will be provided to Romanian courts.

7.3.1. *Primacy of EU and the specifics of the Mechanism of Cooperation and Verification instituted by Decision 2006/928/EC*

With regard to the first issue, iteratively raised in a first batch of preliminary questions[47] addressed by Romanian courts to the ECJ, which relates to the primacy of EU law, the concern was not so much the binding value of the *Commission's Decision 2006/928/EC 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption* but rather the nature and legal effects of the MCV mechanism as such, and particularly of the periodic reports adopted on its basis. The ECJ has been specifically asked whether the recommendations contained in the Commission's yearly reports are binding on Romanian authorities.

In his opinion, delivered in September 2020, the Advocate General Michal Bobek made clear that, while Decision 2006/928/EC and the mechanism of cooperation and verification is compulsory for Romanian authorities, the reports and the recommendations therein do not enjoy binding value although «they are to be duly taken into consideration by that Member State». Thus, according to article 4 of the Decision 2006/928/EC, the addressees of such reports are the concerned Member States and therefore the consequences of non-compliance, «beyond the possibilities to declare and sanction a potential infringement through the ordinary means of EU law, may also lead to important effects on the participation of Romania in the internal market and on the area of freedom, security and justice». However, since the periodic reports issued by the Commission are meant for the attention of the Council and of the European Parliament, they do not enjoy the same status as the Decision 2006/928/EC and the mechanism set forth by it. Therefore, in the opinion of the Advocate General, national judges cannot rely on the recommendations contained in MCV reports in order to set aside the application of provisions of national legislation that they deem contrary to such recommendations.

The decision of the ECJ on this specific question was awaited with great interest particularly against the case law of the Romanian Constitutional Court which, in decisions no. 104/2018 and no. 682/2018, ruled that «since the meaning of Decision 2006/928/EC establishing a Cooperation and Verification Mechanism has not been clarified by the Court of Justice of the European Union as regards its content, character and temporal limit and whether all these are circumscribed to the provisions of the Treaty of accession [...], that Decision cannot be considered as a reference norm for the judicial review». As a result, the Romanian Constitutional Court refused to make any further reference to Decision 2006/928/EC and considered that the legislator is within its margin of appreciation, as provided by the "constitutional identity" corroborated with national sovereignty, whenever it is making laws that regulate the substance matter of topics covered by the MCV.

Such a position seems difficult to be upheld in the future, at least as far as the legal nature and binding value of the Decision 2006/928/EC and the MCV are concerned,

[47] See Joined Cases C-83/19, C-127/19, C-291/19, C-355/19 and C-397/19, *Asociația "Forumul Judecătorilor din România"*.

particularly in the light of the recent ECJ decision *Asociația "Forumul Judecătorilor din România"*, delivered on the 18th of May 2021 and which clearly asserts the binding nature of those EU legal instruments and their direct effect. Nevertheless, the Romanian Constitutional Court may lawfully continue to refuse to refer to these EU legal instruments as norms of reference for the constitutionality review it performs, although if it decided to turn to a substantive approach towards the concept of the rule of law it would have to acknowledge the correlation between article 1 para. 3[48] of the Romanian Constitution, which states that Romania is a State governed by the rule of law, and the substantive matter of Decision 2006/928/EC.

On the other hand, ordinary courts of Romania, which are also ordinary courts implementing EU law, find themselves in a totally different situation. Indeed, in a masterpiece decision, the ECJ has managed not to follow the relativity displayed by the Advocate General with regard to the recommendations formulated in the regular reports of the Commission in the framework of the MCV and, while underlining the guiding value of regular reports and recommendations for legislative, executive and judicial authorities of Romania to establish the mandatory character of both Decision 2006/928/EC and MCV, as well as of the benchmarks they provide[49]. The ECJ also obliged regular courts to ensure the full effect of all above mentioned legal instruments, including by leaving, if necessary, unapplied, on their own authority, any contrary provision of national law, even subsequent, without having to request or await the prior elimination of it by legislative means or by any other constitutional process.

Thus, while avoiding to enter in a blunt conversation with the Romanian Constitutional Court, the ECJ simply made use of its classical teleological method of interpretation and, in paragraph 249 of its decision *Asociația "Forumul Judecătorilor din România"*, established that «as regards Decision 2006/928/EC, which is more precisely referred to by the considerations of the Constitutional Court […], that decision imposes on Romania to achieve as soon as possible the benchmarks it sets out. As long as these objectives are formulated in clear and precise terms and are not subject to any conditions, they have direct effect». The ECJ has managed to reach two objectives with only one strike: it clarified the nature and legal effects of the original legal instrument which is the MVC, and it made binding and enjoined direct effect to the benchmarks fixed by the MCV. By the same token, based on its usual teleological approach, the ECJ has put forward a substantive approach of the rule of law, thus also creating a potential mandatory character

[48] Article 1, paragraph 3 of the Romanian Constitution provides: «(3) Romania is a democratic and social State, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed».

[49] Para. 178 of the ECJ decision *Asociația "Forumul Judecătorilor din România"*: «Decision 2006/928 falls, as regards its legal nature, its content and its effects over time, within the scope of the Accession Treaty. This decision is, as long as it has not been repealed, binding in all its elements for Romania. The benchmarks set out in its annex aim to ensure that this Member State respects the value of the rule of law set out in article 2 TEU and are binding on that Member State, in the sense that the latter is required to take the appropriate measures to achieve these objectives, taking due account, under the principle of sincere cooperation set out in article 4 (3) TEU, of the reports drawn up by the Commission on the basis for the said decision, in particular the recommendations made in the said reports».

for the recommendations made by the European Commission in its regular reports[50]. And without overtly confronting the Romanian Constitutional Court and its *in statu nascendi* doctrine on "constitutional identity", the ECJ has *de facto* succeeded to considerably reduce the margin of appreciation of Romanian authorities and oblige them to comply with the substance matter of the MCV. From now on, benchmarks of the MCV are to be considered as EU *acquis*, irrespective of the various positions that may be held internally by national authorities.

7.3.2. *Judicial organisation and disciplinary regime of magistrates*

The second broad question raised by Romanian courts concerns judicial reforms pertaining to judicial organisation. Among other issues, all relevant for judicial independence, the most sensitive ones touch upon the creation of a special disciplinary regime for magistrates[51] and the composition of panels of courts dealing with the fight against corruption[52]. While the disciplinary regime of magistrates has been seriously altered by the judicial reform of 2018[53], the composition of courts' panels specialised in the fight against corruption is the result of a re-evaluation made by the Romanian Constitutional Court, particularly in decisions no. 685/2018[54] and no. 417/2019, of the *status quo* resulting from a series of previous reforms.

7.3.2.1. *Disciplinary regime of magistrates*

Unfortunately, the disciplinary regime of magistrates is becoming a regular feature in front of the ECJ[55]. The opinion of the Advocate General Michal Bobek brings no news in this area when it states that while EU law does not impose a specific model of judicial organisation or disciplinary regimes, the independence of justice means that the national legislation «must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions». Going into the details of each case, the Advocate General explained why the

[50] With regard to the legal effects of the reports drawn up by the Commission on the basis of Decision 2006/928, the second paragraph of the operative part of the ECJ's decision *Asociația "Forumul Judecătorilor din România"* specifies that they formulate demands with regard to Romania and address "recommendations" to that Member State with a view to achieve the benchmarks. «In accordance with the principle of sincere cooperation, Romania must take due account of the said requirements and recommendations» and must refrain from adopting or maintaining measures in the areas covered by the benchmarks which could compromise the outcome of the requirements and recommendations prescribed.
[51] Cases C-379/19, C-397/2019, C-811/19, C-840/19.
[52] Cases C-357/19, C-547/19, C-379/19, C-811/19, C-840/19.
[53] B. Selejan-Gutan, *New Challenges against the Judiciary in Romania*, in *VerfBlog*, 22-02-2019, available at: https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/.
[54] See E.S. Tănăsescu, *Romania – Another Brick in the Wall Fencing the Fight against Corruption*, in *VerfBlog*, 19-03-2019, available at: https://verfassungsblog.de/romania-another-brick-in-the-wall-fencing-the-fight-against-corruption/.
[55] See Advocate General's Opinion in Cases C-487/19 W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) and C-508/19 *Prokurator Generalny* (Disciplinary Chamber of the Supreme Court – Appointment) and in Case C-791/19 Commission v. Poland (Disciplinary regime for judges).

interim appointment of Romanian Chief Judicial Inspector and the establishment of a specific prosecution section with exclusive competence for offences committed by judges and prosecutors are contrary to EU law. This follows the line already set in cases concerning judicial reforms undertaken in Poland and it may be fair to expect similar decisions with regard to Romania. Needless to say, the Romanian Constitutional Court had previously validated all these reforms, albeit from the perspective of the national Constitution and not from the perspective of their compliance with EU law.

Here as well the ECJ has taken a nuanced and slightly different view than the Advocate General. In the third paragraph of the operative part of its decision *Asociația "Forumul Judecătorilor din România"* the ECJ ruled that «the legal framework governing the organization of justice in Romania, such as the one relating to the *ad interim* appointment to managerial posts of the Judicial Inspectorate and the establishment of a section of the public prosecution responsible for investigating crimes committed against within the judicial system, fall within the scope of Decision 2006/928, so that they must comply with the requirements arising from Union law and, in particular, from the value of the rule of law set out in article 2 TEU». But while the *ad interim* appointment of the chief inspector of magistrates was found to be in breach of EU law (fourth paragraph of the operative part of the same decision), the creation of a special prosecutorial section for the investigation of magistrates was left for the examination of national courts. In particular national courts are required to examine whether such an institutional novelty is justified by objective and verifiable requirements drawn from the good administration of justice and whether it is accompanied by guarantees against its utilisation as an instrument of political control, able to undermine their independence or to prevent them from fulfilling their competence as agents of EU law enforcement (fifth paragraph of the operative part of the same decision).

By placing the legal framework regarding the organization of justice in Romania under the scope of Decision 2006/928 and not acknowledging it as an area where the EU only has residual competences, as it had explicitly done previously, in *Associação Sindical dos Juízes Portugueses*, the ECJ has emphasized once more the specificity of the MCV, its legally binding effects and the limits of the margin of appreciation that Romanian authorities enjoy when legislating in the substantive matter covered by Decision 2006/928. Building upon its own case law pertaining to appointments in the judicial systems of Member States and the disciplinary regime of magistrates[56] the ECJ found that an *ad interim* appointment of the chief inspector of magistrates which appears to have been "custom made" could contradict relevant EU *acquis* but made its judgement dependent on the specific national context (para. 205-206). However, the creation of a special prosecutorial section for the investigation of magistrates could also represent an additional guarantee for the independence of magistrates provided it did not «allow complaints to be introduced in an abusive manner, *inter alia* for the purpose of interfering in sensitive ongoing cases, including complex and high-profile cases related to high-level corruption or organized crime» (para. 218). Since the ECJ noted that «practical examples drawn from the activities of the SIIJ are such as to confirm the realization of the risk […] that this section is akin to an instrument of political pressure» (para. 219) it summoned

[56] See judgements in cases C-216/18 PPU, Minister for Justice and Equality; C-619/18, Commission v. Poland (Independence of the Supreme Court); C-192/18, Commission v. Poland (Independence of ordinary courts); C-824/18, A.B. and others (Appointment of judges to the Supreme Court – Appeal).

national courts to consider that its creation is a breach to EU law unless it is justified by an objective *raison d'être* which it will serve exclusively.

As for the personal liability of judges for damages caused by a miscarriage of justice, the ECJ concurred with the Constitutional Court that it can only be compatible with EU law in so far as it is limited to exceptional cases and framed by objective and verifiable criteria taking into account requirements drawn from the sound administration of justice as well as guarantees aimed at avoiding any risk of external pressure on the content of judicial decisions.

However, on the patrimonial liability of the State for damages caused by a miscarriage of justice, while the ECJ adopted an identical stance with the one pertaining to the personal liability of judges (*i.e.,* it has to be limited to exceptional cases and framed by objective criteria drawn from a sound administration of justice), the Romanian Constitutional Court has recently ruled differently. In a decision taken in March 2021 but expected to be published after the cut-off date of this contribution, the Constitutional Court decided that the State is liable not only in cases of miscarriage of justice, but also in case pre-trial custody has been imposed during criminal proceedings that ended-up through an acquittal, a cessation or a dismissal for any other cause of the criminal prosecution, thus expanding the scope of State liability beyond mere miscarriages of justice[57]. It has to be acknowledged that on the topic of the patrimonial liability of the State a judicial dialogue between the ECJ and the Romanian Constitutional Court was not possible due to the timing of their respective decisions.

7.3.2.2. *Composition of courts specialised in the fight against corruption*

As for the composition of courts' panels specialised in the fight against corruption, an issue which has been raised only in Romania, the Advocate General found, in April 2021, that, in principle, the EU law does not prevent a national constitutional court from observing that judicial panels have not been established lawfully. Nevertheless, if the case involves the financial interests of the EU, the situation should be examined carefully and, in case the requirement is merely formal, fulfilling such a requirement would be superfluous and it would represent a breach of EU law, particularly of article 325 (1) TFEU. In fact, the Advocate General went a step further and noted that the ECJ should find that a particular ruling of the Romanian Constitutional Court (no. 417/2019) does violate EU law (article 325, para. 1, TFEU). Analysing the substantive matter of that decision of the Romanian Constitutional Court he considered it to be unlawful insofar as the composition of the panels would be declared unlawful only due to the formal lack of specialization of those judges in corruption cases while the same judges were acknowledged to be specialised in criminal law. Together with the fact that, as a result of that decision, numerous first-instance corruption cases dealt with between April 2003 and January 2019 would have to be reviewed and retried, the practical consequences of such a decision based on thin formal grounds appeared problematic because of the effects brought upon the financial interests of the EU. A decision of the ECJ on this matter is still awaited.

[57] See press release of 3rd March 2021, available at: www.ccr.ro/comunicat-de-presa-3-martie-2021/.

8. *Conclusion*

Rule of law and independence of justice are core values of the EU and have an important position on the agenda of EU institutions. In recent years the ECJ had to take an active stance in the definition of these legal standards. It is a fact that the recent case law of the ECJ on this subject has been concentrated on judicial independence, most probably because such have been the cases and questions brought in front of it by the Commission and/or the Member States. However, the independence of justice is only one of the elements of the rule of law. It remains to be seen whether the diffusion of the rule of law across the EU and Member States will be followed by its thickening, *i.e.,* whether the relevant ECJ case law will include other constitutive elements and foundational principles of the rule of law than judicial independence. For the time being, the ECJ has made clear that ensuring respect for the rule of law within the EU legal order is not exclusively a judicial task and that it equally concerns EU institutions and Member States, and within these last ones the legislative and the executive as well as the judiciary. Such rulings of the ECJ are to be expected in all areas where the EU has even limited powers. This brings the ECJ closer to the substantive approach of the concept of rule of law, while allowing it to continue to refer to article 2 TEU. Therefore, in order to respond to this requirement and fully transpose the EU *acquis* on the rule of law, Member States cannot simply attempt to fix some of their national "rules" but need to revise the entire rationale of their legal systems and rebalance them as to get attuned to the substantive meaning of this multifaceted concept. It follows that formalistic adjustments of the legal framework pertaining to the organisation and functioning of national judicial systems may not be enough and an entire new legal culture has to be implemented by all national authorities.

Nevertheless, in areas that are not governed by the EU law, the challenge to the rule of law remains wide open and entirely within the remit of concerned Member States. In the case of Romania (and Bulgaria) the unprecedented rule of law monitoring mechanism has long been considered a safeguard against rule of law backsliding, until it has been challenged. Therefore, it has been even more puzzling to observe how backsliding can happen, albeit in a contracted manner, even where safeguards and monitoring are in place. This has been done while concerned national authorities were voicing queries about the long-term effectiveness of MCV, questioning its very continuation since its initial, technical and narrow, objectives had been since long achieved. Indeed, number of regular reports issued by the European Commission before 2017 started to mention the term "irreversible reforms", the main target for both the Commission and Romania on the subject matters that were submitted to this special monitoring. In addition, the uniqueness of the MCV allowed the concerned States to express doubts with regard to the possibility that breaches to the rule of law or independence of justice in other Member States might get out of sight simply because of the lack of an adequate monitoring tool. In that sense, the first annual report on the situation of the rule of law within the EU, which for Bulgaria and Romania has replaced the MCV reports for 2020, has been a useful exercise in order to have a transversal image of the rule of law across all EU Member States. Nevertheless, in order to reach the full lift of the MCV clear safeguards need to be put in place, as the short-lived but intense assault on the rule of law of 2017-2019 has revealed.

From all the above one can infer that the stance taken by the EU with regard to Romania may be alleviated by the fact that the MCV is still technically in place, as well

as by the reality that the dimensions of the backsliding have been lesser than in other Member States, but significant deviations from what it has now become a fully-fledged EU *acquis* in the area of rule of law are and will continue to be sanctioned, including via the case law of the ECJ.