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## To the International Association of Judges – IAJ-UIM

**The Romanian Magistrates' Association (AMR)**, professional and national, apolitical, non-governmental organization, stated to be of „public utility” through the Government Decision no. 530/2008 – with the headquarter in Bucharest, Regina Elisabeta Boulevard no. 53, District 5, e-mail amr@asociatia-magistratilor.ro, tax registration code 11760036 – legally represented by Judge dr. Andreea Ciucă - President, sends the following

### **ANSWERS TO THE THIRD STUDY COMMISSION QUESTIONNAIRE “RESTRICTIONS BY THE CRIMINAL LAW OF THE FREEDOM OF SPEECH”**

*1) Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.*

▶▶ The Romanian Constitution enshrines the "Freedom of Expression". In this regard, it provides: "*Freedom of expression of thoughts, opinions or beliefs, and freedom of creations of any kind, by word of mouth, by writing, by images, by sounds or by other means of communication in public, shall be inviolable*<sup>1</sup>."

At the same time, the Constitution contains provisions that strengthen freedom of expression. Thus, censorship of any kind is prohibited, freedom of the press also implies the freedom to set up publications, providing that no publication can be suppressed<sup>2</sup>.

However, the Constitution also establishes certain limits<sup>3</sup> on the right to free expression:

- Freedom of expression cannot prejudice the dignity, honour, private life of the person, nor the right to one's own image;
- It is forbidden to defame the country and the nation, to urge war of aggression, to national, racial, class or religious hatred, to incite discrimination, to territorial separatism or to public violence, as well as obscene manifestations, contrary to morality.

▶▶ The Civil Code<sup>4</sup> also guarantees the right of any person to free expression and establishes that the exercise of this right can be restricted only in the cases and limits expressly provided by

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<sup>1</sup> Art. 30 par. 1 of the Constitution

<sup>2</sup> Art. 30 para. 2-4 of the Constitution

<sup>3</sup> Art. 30 para. 6, 7 of the Constitution

<sup>4</sup> Art. 70, 75 of Law no. 287/2009 on the Civil Code

law. The violations that are permitted by law or by the international conventions and covenants on human rights to which Romania is a party are not a violation of the right to free expression.

▶▶ The audio-visual law contains provisions that protect fundamental rights and freedoms, including free expression: “The dissemination and retransmission of programme services shall achieve and ensure political and social pluralism, cultural, linguistic and religious diversity, information and education, including in scientific terms, and public entertainment, *with respect for fundamental human rights and freedom*”<sup>5</sup>.

▶▶ The Criminal Code, as well as the legislation indicated in the answer to question 2, also contain important provisions in the field of freedom of expression.

2) *Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.*

The transposition into national legislation of international documents and mandatory specialized regulations on combating certain forms and expressions of racism and xenophobia through criminal law was carried out in three ways:

- by adapting the Criminal Code, in the sense of enshrining aggravating circumstances for the racist or xenophobic motivation of committing any offences and establishing new offences;
- by adopting new normative acts<sup>6</sup>;
- by adjusting existing normative acts that prevented different forms of discrimination<sup>7</sup>.

Article 369 of the Criminal Code entered into force in 2014 criminalized incitement to hatred or discrimination under the title "*Incitement of the public, by any means, to hatred or discrimination against a category of persons*". The offence is punishable by imprisonment from 6 months to 3 years or by a fine. No discriminatory criteria have been laid down in this text for the existence of the crime, which means that there is no limitation of these criteria, as they can be of the most diverse (religion, race, nationality, ethnicity, political affiliation, age, disability, disease, etc.).

Art. 369 of the Criminal Code was amended in 2022<sup>8</sup>. It is currently entitled "*Incitare la violență, ură sau discriminare (Incitement to violence, hatred or discrimination)*" and reads as

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<sup>5</sup> Art. 3 para. 1 of the Audio-visual Law No. 504/2002

<sup>6</sup> Government Emergency Ordinance no. 31/2002 on the prohibition of fascist, Legionnaire, racist or xenophobic organizations, symbols and deeds and the promotion of the cult of persons guilty of committing crimes of genocide against humanity and war crimes.

<sup>7</sup> Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, as amended by Law no. 167/2020

follows: *"Incitement of the public, by any means, to violence, hatred or discrimination against a category of persons or against a person on the grounds that he belongs to a certain category of persons defined on the basis of race, nationality, ethnicity, language, religion, gender, sexual orientation, political opinion or affiliation, property, social origin, age, disability, non-contagious chronic disease or HIV/AIDS infection, considered by the perpetrator as causes of the inferiority of one person in relation to the others, is punishable by imprisonment from 6 months to 3 years or by a fine"*.

Government Ordinance no. 137/2000 defines the term discrimination and contains grounds of discrimination, namely: *"race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, chronic non-contagious disease, HIV infection, belonging to a disadvantaged category"*. However, the enumeration is not exhaustive as it also contains the following wording: *'as well as any other criterion having the purpose or effect of restricting, dislodging the recognition, use or exercise, under conditions of legality, of human rights and fundamental freedoms or rights recognised by law, in the political, economic, social and cultural spheres or in any other areas of public life"*.

By Government Emergency Ordinance nr. 31/2002<sup>9</sup> were forbidden organizations, symbols and deeds with fascist, legionnaire, racist or xenophobic character, as well as the promotion of the cult of persons guilty of committing crimes of genocide against humanity and war crimes and the terms used by this normative act were defined. More specifically, the following terms have been defined:

- fascist, legionnaire, racist or xenophobic organization;
- fascist, Legionnaire, racist or xenophobic symbols;
- a person guilty of committing crimes of genocide against humanity and war crimes;
- holocaust;
- holocaust on the territory of Romania;
- The Legionnaire Movement (a fascist organization in Romania that functioned between 1927–1941).

Also, Government Emergency Ordinance no. 31/2002, amended by Law no. 157/2017, criminalized the following acts as offences:

- ❑ Initiating or setting up an organization of a fascist, racist or xenophobic nature, joining or supporting, in any form, such a group;
- ❑ Making, selling, spreading, as well as possessing for dissemination of fascist, Legionnaire, racist or xenophobic symbols;
- ❑ Public use of fascist, Legionnaire, racist or xenophobic symbols;

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<sup>8</sup> The amendment took place by Law no. 170/3 June 2022.

<sup>9</sup> Government Emergency Ordinance no. 31/2001 was amended by Law no. 157/2018 on certain measures to prevent and combat anti-Semitism.



- Distributing or making available to the public in any way, by means of a computer system, racist and xenophobic material;
- The act of the person to promote, in public, the cult of persons guilty of committing crimes of genocide against humanity and war crimes;
- The act of promoting, in public, fascist, Legionnaire, racist or xenophobic ideas, conceptions or doctrines;
- Denying, contesting, approving, justifying or clearly minimizing, by any means, in public, the Holocaust or its effects;
- Denying, contesting, approving, justifying or clearly minimizing, by any means, in public, genocide, crimes against humanity and war crimes;
- Threatening a person or a group of persons, through an information system, with the commission of a crime for which the maximum penalty provided by law is imprisonment of at least 5 years, on the grounds of race, colour, ancestry or national or ethnic origin or in consideration of religion, if it is used as a pretext for any of the reasons stated.

In order to harmonize and standardize the criminal investigation activity, taking into account the recommendations addressed to Romania by the international institutions and bodies with attributions in the field of combating hate crimes, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice issued Order no. 184/30 October 2020, which approved the Methodology for investigating hate crimes as a working tool.

Through the methodology, the Prosecutor General also made the following recommendation: if the indictment is not ordered, but there are indications of a conduct that may attract a form of liability other than criminal, the prosecutor should notify other competent authorities according to the law, especially the National Council for Combating Discrimination.

*3) Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture of what the legislation is like? Including*

- *Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions;*
- *Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics*

The restrictions provided by the criminal law on freedom of expression were listed in the answer to question no. 2.

In addition, we refer to certain restrictions in the exercise of freedom of expression extracted from case-law:

i) The boundaries between harsh criticism and hate speech have been analysed, mentioning that in Romania hate speech does not have a legal definition and a force binding, generally accepting that of the Committee's Recommendation (97) 20 by ministers of the Council of Europe on hate speech of 30 October 1997. The Annex to Recommendation (97) 20 defines hate speech as referring *“to all forms of expression which disseminate, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of manifestation of hatred, based on intolerance, including intolerance expressed through aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants or immigrants of origin”*.

ii) The Code of Conduct on combating illegal hate speech online adopted by the European Commission on 31 May 2016 and signed by Facebook, Google, Microsoft and Twitter, was specifically indicated as a legal instrument for protection against hate speech and signed by Facebook, Google, Microsoft and Twitter. This code requires signatory IT companies to guarantee, inter alia, the elimination of illegal hate speech in less than 24 hours and the removal or disabling of access to such content if necessary. A reasoned reference was also made to the relevant provisions included in Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.

In the criminal legislation prior to 2022, there was a certain limitation of freedom of expression, in the sense that it criminalized public incitement to violence or hatred against a group of people. However, the criminal law did not refer to instigation against a member of that group of persons. In 2021, the Parliament debated a legislative initiative to amend Article 369 of the Criminal Code, which had the title "Incitement of the public, by any means, to hatred or discrimination against a category of persons".

On February 17, 2021, the Legislative Council gave a favourable opinion to the draft law. It has been specified that, for the sake of clarity of the norm and to transpose Article 1 para. 1(a) of Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, it was proposed to replace the expression 'or of a person' with the words 'or against a person'.

As such, by Law nr. 170/2022, the content of art. 369 of the Criminal Code was modified, the title and the current content of this legal provision being rendered in the answer to question no. 2.

The Constitutional Court rejected the plea of unconstitutionality raised with regard to law no. 170/2022, stating the following: *“Having regard to the provisions of Framework Decision 2008/913/JHA, the Court notes that the legislator has amended the national criminal law in order to criminalise particularly serious forms of racism and xenophobia, defining the criteria for identifying the categories of persons against whom incitement to violence, hatred or discrimination may occur (...) and supplemented the criminalisation with “other criteria”: gender, sexual orientation, opinion or political affiliation, property, social origin, age, disability,*



*chronic non-contagious disease or HIV/AIDS infection, which can also be considered as causes of one person's inferiority in relation to the others and who are likely to determine categories of persons against whom the crime of incitement to violence may be committed, hatred or discrimination”<sup>10</sup>*

4) *If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?*

◆ *Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category;*

- ◆ *In cases where the freedom of speech and the restrictions are to weighed against each other –*
  - *Are there then guidelines on how the balancing should be done?*
  - *If yes, which of the two parameters weighs heaviest, a) the protection of free speech or b) the category that is protected by the legislation? And does this differ from category to category?*
  - *And how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?*

The restrictions on the right to free speech are not absolute. It is therefore intended to strike a balance between the exercise, on the one hand, of the right to freedom of expression and, on the other hand, of the other rights enshrined in the law. This balance is achieved through a punctual analysis of the concrete elements of each case, by the addressees of the legal norm and/or by the courts.

The reference of law, doctrine and jurisprudence to the international conventions and covenants on human rights to which Romania is a party is generous, including both United Nations instruments and regional instruments. Therefore, the European Convention on Fundamental Rights and Freedoms and the interpretation of its provisions by the European Court of Human Rights are of particular importance: the right to free expression (article 10), the right to privacy (art. 8)<sup>11</sup>.

The interpretation of the legal provisions aimed at restricting the right to free expression must be made in the light of Article 20 of the Constitution of Romania, which provides that: *"The constitutional provisions regarding the citizens' rights and freedoms will be interpreted and applied in accordance with the Universal Declaration of Human Rights, the pacts and the other treaties Romania is a party to. If there are inconsistencies between the covenants and treaties*

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<sup>10</sup> Constitutional Court, Decision no. 288/2022, published in the Official Gazette of Romania, Part I, no. 532 of 31 May 2022, par. 42

<sup>11</sup> Centre for Independent Journalism, *Libertatea de exprimare în legislația românească*, 2013, p. 11-12, <https://cji.ro/wp-content/uploads/2020/04/13.-Libertatea-de-exprimare-in-legislatia-romaneasca-Final-2.pdf>

*regarding the fundamental human rights, to which Romania is a party, and the internal laws, international regulations shall prevail, unless the Constitution or the internal laws contain more favourable provisions."*

The Constitutional Court stressed that the constitutional standard of protection of individual freedom requires that its limitation be achieved within a normative framework. On the one hand, the cases for limiting that constitutional value must be expressly determined and, on the other hand, those cases must be laid down in a clear, precise and predictable manner<sup>12</sup>.

The Court held that it is for the legislature, regardless of the field in which it exercises its power to legislate, to show increased attention in observing the principle of clarity and foreseeability of the law. The legislature is in a position which allows it to assess, according to a number of criteria, the need for a certain criminal policy, which enjoys a fairly wide margin of discretion. But its exclusive competence in regulating measures related to the criminal policy of the state is not absolute because it does not exclude constitutional review over the measures adopted<sup>13</sup>.

The incrimination/decriminalization of certain facts or the reconfiguration of the constituent elements of an offence are related to the legislator's margin of appreciation, a margin that is not absolute, being limited by constitutional principles, values and requirements. In this regard, the legislator must dose the use of criminal means according to the social value protected<sup>14</sup>.

The establishment of the objective side of the offence is carried out by the judicial bodies by reference to the legal scope of criteria on the basis of which the elements can be determined according to which the incidence of the criminal law in the respective case can be assessed.

The decision-making power of the judge is part of his legal competence and represents the essence of the independence of the judiciary.

In particular, the independence of judges is provided in the Laws of Justice, as amended in 2017-2018:

✚ Art. 2 par. (3), (4) of **Law 303/2004 on the statute of judges and prosecutors**: *Judges are independent and subject only to the law. Judges must be impartial, having full freedom to settle cases brought before the court, in accordance with the law and impartially, respecting the equality of arms and the procedural rights of the parties. Judges must make decisions without any restrictions, influences, pressures, threats or interventions, direct or indirect, from any authority, even judicial authorities. Judgments in appeals do not fall within the scope of these restrictions. The purpose of the independence of judges also consists in guaranteeing to each person the fundamental right to have his case examined fairly, based*

<sup>12</sup> Constitutional Court, Decision no. 553/16 July 2015, published in the Official Gazette of Romania, Part I, no.707 of 21 September 2015, par. 23

<sup>13</sup> Constitutional Court, Decision no. 561 of 15 September 2021, Published in the Official Gazette of Romania, Part I, no.1076 of 10 November 2021, par. 23, 24

<sup>14</sup> *supra*, 10, par. 43



*only on the exercising of the law. Any person, organisation, authority or institution has the duty of respecting the independence of judges.*

- ✚ Art. 46 par. (2) of **Law no 304/2004 on judicial organisation**: *The presidents and vice-presidents of the courts ensure and verify the compliance of judges to statutory and regulatory requirements. The verification must observe the principles of the independence of judges and of their subjection only to the law, as well as the authority of res judicata. As a result, the decision of the court and the judgement reasoning cannot make the object of these verifications.*
- ✚ Art. 30 par (1) of **Law no 317/2004 on the organisation and functioning of the Superior Council of Magistracy**: *The appropriate sections of the Superior Council of Magistracy have the right, and the correlative obligation to take action ex officio to defend judges and prosecutors against any interference with their professional activity or in relation to it, which might affect the independence and impartiality of judges, and the independence and impartiality of prosecutors in ruling solutions, pursuant to Law no. 304/2004 on the organisation of the judiciary, and against any action which might give rise to suspicion with regard to these. Also, the sections of the Superior Council of Magistracy shall safeguard the professional reputation of judges and prosecutors. Complaints on safeguarding the independence of the authority of the judiciary shall be solved upon request or ex officio by the Plenum of the Superior Council of Magistracy.*
- ✚ Art. 30 par (2) of Law no 317/2004 on the organisation and functioning of the Superior Council of Magistracy: *The Plenum of the Superior Council of Magistracy, the Sections, the president and the vice-president of the Superior Council of Magistracy, either ex officio or upon complain of a judge or a prosecutor, shall call upon the Judicial Inspection to perform verifications, in order to safeguard the independence, impartiality and professional reputation of judges and prosecutors.*
- ✚ Art. 30 par (4) of Law no 317/2004 on the organisation and functioning of the Superior Council of Magistracy: *A judge or a prosecutor who considers that his or her independence, impartiality or professional reputation are being affected in any manner may notify the Superior Council of Magistracy, and the provisions of paragraph (2) shall apply accordingly.*

In relation to these legal provisions, the decision-making power of the judge cannot be called into question. Of course, it must be exercised in accordance with the provisions of the Constitution, according to which: "*Justice is unique, impartial, and equal for all. Judges are independent and obey only the law.*"<sup>15</sup>

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<sup>15</sup> Art. 124 para. 2, 3 of the Constitution of Romania



5) Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?

➤ If it gives cause for doubt, how is it expressed? Does it deter the citizen from making statements? Or does it deter citizens from suing?

It can be considered that the legislation is clear and predictable.

In this respect, for example with regard to art. 369 of the Criminal Code, entitled "*Incitement to violence, hatred or discrimination*", the Constitutional Court held that the legal provision is clear, predictable and respects the principle of legality of criminalization, the quality of the law and individual freedom<sup>16</sup>.

The fact that citizens are not discouraged by the legal provisions on freedom of expression is reflected in the number and diversity of cases brought before the judicial bodies. In this respect, the Control Report drawn up by the Judicial Inspection in 2021 on how to investigate and solve cases concerning the offences of incitement to violence, hatred and discrimination, as well as the various forms of racism and xenophobia, is relevant<sup>17</sup>.

The report results in the classification of cases brought before the judicial bodies by reference to two criteria:

a) The method of committing it, namely:

- via the Internet (posts on online platforms or on social networks);
- the media;
- situations of conflict between individuals;
- acts or measures of an administrative type;
- marking discriminatory messages on fences;
- carrying a placard in public containing discriminatory messages;
- placement in public places of objects with hate speech;
- displaying a flag with fascist insignia in the courtyard of the building.

(b) Grounds of discrimination, namely:

- ethnic origin;
- political affiliation/beliefs;
- social/professional category;
- religion and religious beliefs;
- sexual orientation;
- HIV/AIDS infection.

<sup>16</sup> Constitutional Court, Decision no. 228/2022, published in the Official Gazette of Romania, Part I, no. 532 of 31 May 2022, par. 45

<sup>17</sup> <http://www.inspectiajudiciara.ro/mix-content/assets/inspectia-judiciara/uploads/2021-05/raport-21424-1-637565217578107374.pdf>

6) *Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases?*

See the answers to questions 4 and 5.

In addition, we show that in the control report of the Judicial Inspection, mentioned above, it was recommended to include topics related to the following in the professional training program of judges and prosecutors:

- the issue of hate speech, from the perspective of freedom of expression;
- the use of the Internet as a means of disseminating potentially discriminatory, xenophobic material and messages and fascist symbols and doctrines.

The recommendation was intended to contribute to the unification of judicial practice in this area.

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