"A leading literature to those seeking to understand the most pressing challenges and opportunities of the Romanian judiciary".

Diego Garcia-Sayan

"The present volume truly is a genuine survival manual [...] Just as politicians will never get tired, and a mere reiteration of the anti-justice flagrancies shows us how inventive, perseverant in wrongdoings and determined they are, magistrates must not even for a second let their guard down".

Dan Tăpălagă

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900 DAYS OF UNINTERRUPTED SIEGE UPON THE ROMANIAN MAGISTRACY

KONRAD ADENAUER STIFTUNG
RULE OF LAW · SOUTH EAST EUROPE

900 DAYS OF UNINTERRUPTED SIEGE UPON THE ROMANIAN MAGISTRACY

A survival guide

C.H. BECK

FORUMUL JUDECĂTORILOR DIN ROMÂNIA

900 Days of Uninterrupted Siege upon the Romanian Magistracy

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The volume regards the events unfolding as far as the 5th of May 2020

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A Survival Guide

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Authors' Note

The volume "**900 days of uninterrupted siege upon the Romanian magistracy. A survival guide**" intends to outline a narrative of the Romanian magistrates' actions endorsing the rule of law and the independence of Magistracy during the 2017-2019 interval, analysing the conduct of public authorities and the various reactions displayed by judges and prosecutors.

The book, written by judges and prosecutors, is equally meant for magistrates and, in particular, for the general public, civil society and all those who are able to learn lessons from the entire context. At the same time, the practical example provided is likely to incentivise similar reactions throughout the pools of magistrates in Romania's neighbouring countries, with comparable legislative and judicial scenes, in societies still transitioning after extended dictatorships.

Each author felt the need to mention as much as possible, to describe their own experience, their own perception, their own individual actions and collective or associative episodes, all concerned with the same ideals – probity, independence, integrity, spirit of justice, without which the judge or prosecutor profession cannot exist.

From this standpoint, the 2017-2019 period was enlightening, the conduct of each magistrate, but also that of the jurists' ilk, in general, shaping up around the values individually shared by these persons. For an independent justice and a functional rule of law, certain magistrates chose to be daily targets of slander and libel in the media loyal to the political rulers of the time, ceaseless public or private threats, investigations by the Judicial Inspection and the new Special Section, while others, especially those holding decision-making position, either locked themselves in their offices or settled with the political establishment, also being rewarded with nominations for Government portfolios, in defiance of the entire profession.

Nevertheless, a remarkable moment shall forever live in everyone's memory, namely more than half the magistrates supporting a *Memorandum*, initiated by the Romanian Judges' Forum, demanding the withdrawal of the draft amendments to the justice laws. This gesture, followed by the overwhelming majority votes of the general assemblies organised in that period, is symbolic, showing that Magistracy, both from within, but also with assistance from international bodies, can save the democracy of a state seemingly journeying through an endless transition.

Furthermore, the fact that thousands of people took to the public squares in support of the rule of law and an independent magistracy is relevant for a nation's destiny, for the ability to cleanse a society grafted onto corruption in its recent history.

Attacks targeting the rule of law values will continue to exist, making it critical that the magistracy's efforts to defend its independence remain consistent, principles and

a backbone being the only way forward. A behaviour of this nature will consolidate citizens' trust in the positive development of a justice that can, with time, become more effective and more predictable.

We would like to thank Konrad Adenauer Stiftung Foundation – Rule of Law Programme South East Europe for providing support in the publication of the present volume.

The authors

Preface

I first heard about the idea to write this book back in late 2018, in one of the regular meetings between Dragoș Călin and other judges from the Romanian Forum of Judges (FJR) with me and my colleagues from the RLPSEE of Konrad Adenauer Stiftung (KAS). I was immediately interested, since analyzing and presenting developments in the judiciary in South East Europe, and particularly legal reforms, is something that the Rule of Law Programme South East Europe deals with regularly. To get a view from inside the system by having a number of judges presenting their view of the developments from 2017 to 2019 indeed sounded very promising.

At that time, news about various plans to reform the Romanian judiciary were frequent. Almost every other day some legal reform news items would make it to the front-page of Romanian daily newspapers. Probably, to a large part of the Romanian population this must have had a tiring effect. At least, the stir-up in the legal system that was caused by proceedings, dismissals, allegations, accusations, conflicting announcements, draft reforms, the fable of a so called "deep state" (which is also mentioned by Dan Tăpălagă in his introduction to this book) and even several court disputes between higher state officials – must have had the effect of blurring the public's view.

Yet, to me, being a professional lawyer and a guest in Romania, living and working in Bucharest since 2017, the developments in the judiciary were thrilling. I had arrived to Romania in the very year when the largest mass protests since the fall of the Ceaușescu regime hit the streets. The protests were directed against the infamous "OUG 13" (which is discussed in this book), but actually showed dissatisfaction of a large part of the Romanian population with a government trying to change the norms in a shady and suspicious manner – including the rules how the judiciary should work.

Now that front-page news about legal reforms in Romania have abated, it is helpful to take a sober look at the core of the reform attempts in the period 2017-2019. In hindsight, it is easier to understand the full picture. Therefore, it is to be welcomed that the Forum of Romanian Judges have managed to gather different authors contributing to this book. This allows us readers to understand the point of views of judges as well as prosecutors who were directly affected by the reform measures. With some of the contributors to this book I have had an opportunity to personally speak, among them former Prosecutor General of Romania, Mr Augustin Lazăr, or the UN Special Rapporteur on the Independence of Judges and Lawyers, Mr Diego García-Sayán, upon his visit to Bucharest. Others, including some younger judges who contributed to this book, I know from discussions and roundtables that Konrad-Adenauer-Stiftung has organized. Many others who have contributed to this publication are also taking an

active position to explain the need of a truly independent justice system – and are willing to defend it, be it by public statements or by visible actions. I still hope to meet them in the time to come, in order to keep discussions about the importance of the rule of law alive.

All in all, I recommend reading this book to a large audience. To politicians (in and beyond Romania) in order to not forget that the judiciary is a third power in the state which must not be weakened. To students of law and other disciplines, in and outside Romania to understand how fast it can happen that a functionary judiciary may become pressured and feel "under siege", as the title chosen by the authors of this book shows.

Certainly, I also highly recommend non-Romanian lawyers and non-lawyers to read this book, as it gives a deep insight into the underlying problems of the "reform" plans in the period 2017-2019. Such insight cannot be delivered by digesting a number of short media headlines in our hectic times.

And, last but not least, I recommend reading the full text of this book also to those citizens of Romania, who are sincerely interested in understanding why a large part of the Romanian judiciary itself (and not only politicians from one camp or another) protested against the various changes introduced or planned to be implemented in the period 2017-2019.

The aftermath of these roughly "900 days" is continuing. Some of the decisions taken in Romania back in that time have now already been subject of decisions of the European Court of Human Rights in Strasbourg, including the case of Romanian judges and prosecutors, Laura Codruța Kövesi possibly being the best-known example. It is encouraging to see that in Romania, the judiciary has managed to voice their position and to defend their rights.

In conclusion, I must say that the book's title, using the term "siege", may sound warlike at first glance. But, after reading this book, when looking back at the period of almost three years from early 2017 to late 2019, the usage of such terminology seems justified in hindsight.

Hopefully, this book may also serve as a sort of vaccine against future attempts to peril judicial independence.

Hartmut Rank,
Head of Rule of Law Programme South East Europe
Konrad-Adenauer-Stiftung
Autumn 2020

Preface

I have been honored by the invitation to present this book led by the prestigious Forum of Judges of Romania (*"Forum Judecătorilor din România"*) prepared to promote a necessary discussion on judicial independence in their country. Judicial independence is widely and properly considered to be a foundation of rule of law. Defending this principle and pointing out whenever it is attacked, is precisely the *raison d'être* of the mandate of the Special Rapporteur of the United Nations on Independence of Justice.

Achieving checks and balances, judicial independence and improving rights protection is a common goal for contemporary democracies. In recent years, we have witnessed significant efforts to strengthen this principle in countries transitioning to democracy. This task, however, has not always been easy.

Ideally, a truly independent judiciary should possess, at least, three features. First, it should be impartial. Second, judicial decisions should not be influenced by any external or personal interest in the outcome of the case and should be respected once issued. Finally, judges – and prosecutors – should be free from interference so neither parties to a case, or others external interest, influence outcomes or the judicial decision-making process.

However, over the years, we have observed serious attempts to undermine those characteristics. A nation's justice system depends in a democratic society upon the adherence to the principle of its independence. This principle is essential to achieve proper judicial processes and to maintain other judicial values, such as impartiality, objectivity and public trust in the judicial decision-making process.

The role of judiciaries in modern society has increased in recent decades. The judiciary is a social institution that shapes the life of individuals. As well, there is increasing attention and awareness on how the relationships between the judiciary and the other branches of government are being established so to promote and protect their independence and checks and balances, as is discussed in this book.

The challenges in terms of safeguarding and defending the principle of judicial independence are growing. As a response to that, in 1994, the then UN Commission on Human Rights (now Human Rights Council), in Resolution 1994/41, noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, decided to create the mandate of a Special Rapporteur on independence of judges and lawyers. Since 2016 – when elected by the Human Rights Council – I have been honored to be in charge of that crucial responsibility. Over the past years, I had identified and recorded not only attacks on the independence of the judiciary, lawyers and court officials, but also progresses achieved in protecting and enhancing their independence and making concrete recommendations.

In 2018, for example, I also had the privilege to conduct an academic visit to Bucharest as part of the Program on "Judicial Independence" carried out by the Rule of Law Programmes of the Konrad Adenauer Foundation. On that occasion, I learned directly about the functioning of the Romanian judiciary, the legal profession and the Public Prosecutor's office. During the visit, I also learned about recent judicial developments. The Constitutional Court of Romania, for example, had issued several decisions on judicial organization, status of magistrates and the organization of the Superior Council of Magistracy, especially in 2018, after the Parliament has adopted revised laws for the judiciary.

I closely monitored some threats and challenges as well. As in many democracies in Central and Eastern Europe, Romania began a process of judicial reform and modernization, resulting in a new Constitution in 1991 and new laws oriented to regulate the organization of the judiciary. Due to the major challenges – and even, risks – that judicial reform would represent for the future operation of the judiciary, there was a remarkable moment - as the book describes – when more than half of the magistrates supported a *Memorandum* initiative of the Romanian Judges' Forum, demanding the withdrawal of dangerous draft amendments to the justice laws that attempted against judicial independence. This step, followed by the overwhelming majority votes of the general assemblies demonstrated that the Magistracy, with assistance from international bodies, can protect democracy, rule of law and judicial independence. These efforts should always be acknowledged and supported.

The challenges to judicial independence in the twenty-first century are significant in several areas, as I have been noting in my reports presented before the UN General Assembly and the Human Rights Council. As several authors of this book describe, the attacks targeting rule of law values will continue to exist, making it critical that the magistracy's efforts to defend its independence remain consistent. This book is an example of such consistency and presents a major contribution in two aspects.

First, it outlines a first-hand narrative of the Romanian magistrates' actions endorsing rule of law and the independence of Magistracy. Second, the book also discusses various challenges that the judiciary, members of the legal profession and prosecutors had encountered in their search for an independent and impartial judiciary and a functional rule of law in the country, such as becoming targets of slander and libel in the media loyal to the political rulers of the time; ceaseless public or private threats, investigations by the Judicial Inspection and the new Special Section, just to mention a few of them.

Thus, I would like to take the opportunity to congratulate all the honorable judges, public prosecutors and members of the legal profession who are describing their own professional paths within the Romania legal system, and for this contribution which will turn to be a leading literature to those seeking to understand the most pressing challenges and opportunities of the Romanian judiciary.

Diego García-Sayán,
United Nations Special Rapporteur on the Independence of Judges and Lawyers
October 2020

Introduction

It has probably been the most aggressive, premeditated, coordinated and damaging attack orchestrated by a political power over the past 30 years against justice in Romania. The present volume, comprising the texts of prominent judges and prosecutors, active and brave individuals, has the merit of reiterating, summarising and explaining terrible instances, events and actions difficult to fathom in a NATO and EU member state upholding the rule of law, that marked the nearly 3 years of war declared on the judicial system.

But who declared this war and to what end? The authors of the volume focus in their texts on the technical details and seek to expose how the independence of the judiciary is likely to be affected by the amendments brought to the Penal Code, the Criminal Procedure Code and the justice laws, the operation of the SCM (Superior Council of Magistracy) and the High Court, the appointment of chief prosecutors, setting up the Special Department, the early retirement of magistrates etc.

Nevertheless, the political authors of the plan to annihilate justice in Romania do have first and last names. Even if they are not explicitly mentioned in this volume – and they would have been out of place since technical, not political texts are dealt with – the endeavour would somehow be truncated and unfair to historical truth.

The assault on justice commenced right after the December 2016 elections were won by PSD (Social Democratic Party), with 45% of voter turnout by themselves, which allowed them to form a comfortable majority in Parliament in coalition with ALDE. The PSD leader at the time, Liviu Dragnea, irrevocably sentenced to 3 and half years prison time on May 27, 2019, in the fictitious employment case file, shows the most interest in subordinating justice. Amid all that, he had already been the subject of criminal case files under investigation or undergoing trial.

Dragnea, however, did not act by himself. He was steadily supported by the ALDE leader, Călin Popescu Tăriceanu, and an army of zealous politicians, chief among were relentless Florin Iordache, former Minister of Justice and the president of the Parliament's special department, PSD senator Șerban Nicolae, PSD deputies Eugen Nicolicea and Cătălin Rădulescu and former PSD secretary general, Codrin Ștefănescu, the author of the famous call to the former Minister of Justice, "Tudorel, do something!" Naturally, there were more of them, but the names above were the loudest in their struggle against an imaginary "parallel state".

In addition to highly personal interests, the will to elude justice and remain free, the anti-justice endeavour took the shape of a genuine "revolution" against the rule of law, fuelled by a handful of politicians at odds with criminal justice, which I designated in one of my journalistic texts "The Prowlers' Revolution". Because of this endeavour,

during the Dragnea regime years, Romania joined Hungary and Poland in the category of "liberal" countries disregarding the EU values and institutions, all of which had Brussels concerned.

Dragnea initiated the push for the infamous GEO 13, in January 2017, with covert acquittal and amnesty measures, less than one month from gaining power. As a journalist, I was the first to disclose, to *HotNews.ro*, the Government's intent to adopt this GEO, which came as a wake-up call for both public opinion and the body of magistrates.

The massive street protests in the winter of 2017 forced the PSD Government to withdraw the ordinance, but what followed was an avalanche of measures aimed at paralysing criminal justice in particular, benefitting directly the PSD leader and indirectly several other politician under criminal investigation or prosecuted against by NAD (National Anticorruption Directorate).

As stated by judge Ciprian Coadă in the text on GEO 13, "harmful attempts to alter the Penal Codes had taken place in previous years, as well, many of which were invalidated by the Constitutional Court, however, this time, what brings the unpleasant surprise is the extreme expediency of the new changes brought to the criminal laws, which, over a very brief period of time, was implemented via a series of harmonised cascading actions that were carried out in the shadows and baffled justice and the entire civil society in Romania by mimicking the public survey process".

Politicians within PSD, ALDE and UDMR had, however, accomplices among magistrates, who joined the "reflection hubs" around the party. Former Minister of Justice Tudorel Toader partially served the interests of politicians, Liviu Dragnea being the most prominent of them, while constantly avoiding to promote the acquittal/amnesty GEO, which was actually the reason for his dismissal from office. One the one hand, Toader caused damage while, on the other hand, he attempted to mitigate that damage.

UNJR (National Union of Romanian Judges) and Dana Gîrbovan became among the most fervent defenders of this political endeavour. The latter would later be endorsed as Minister of Justice by former Prime Minister Viorica Dăncilă. An even more vocal support was shown by certain SCM members such as Lia Savonea, Evelina Oprina, Simona Camelia Marcu, Nicoleta Țînț and Gabriela Baltag. They all backed some of the changes that mutilated the judicial system, despite the overwhelming majority of magistrates who had voted for them within SCM and opposed those changes.

Throughout the 900-day siege, besides having the legislation taken to the slaughterhouse, annoying magistrates were harassed, investigated, intimidated or subject to long media or institutional lynching campaigns. Such pressures and intimidation attempts were extensively depicted by prosecutors Bogdan Pîrlog and Sorin Lia. Most relevant is the case of Laura Codruța Kövesi, former head of NAD, dismissed from office as per an outrageous Constitutional Court decision, pursuant to which the Romanian state was reprobated by ECHR. In her turn, Kövesi was harassed with Special Department investigations, in the failed attempt to stop her from running for the European Parliament top spot.

The special department lead by Adina Florea, mimicked by the Judicial Inspection under the leadership of Lucian Netejoru, acted as genuine maces handles by politicians against brave magistrates. For instance, the special department filed suit against SCM

members Cristian Ban, Nicolae Andrei Solomon, Bogdan Mateescu and Florin Deac, who had openly opposed the changes to the justice laws.

The texts comprised in this volume make up a useful reading, mandatory for young magistrates. Their colleagues' rough experience reveals that the independence of the judiciary is not something definitively gained and guaranteed by law. It is gained every day and true character is revealed, also in the case of judges and prosecutors, at times of crisis. We then find out whom we can and cannot rely on, how many are left standing, how many make themselves readily available on account of opportunism or fear and how many look elsewhere behind the cowardly excuse that magistrates have no business protesting in the streets.

Judge Dragoș Călin mentions that, as per the Declaration on judicial ethics, adopted by the General Assembly of the European Network of Councils for the Judiciary in London (June 2-4, 2010), "when democracy and fundamental freedoms are in peril, a judge's reserve may yield to the duty to speak out". And judge Cristi Danileț, in his turn, finds out that Rudolf von Ihering's words, "The struggle for law is on a daily basis", are fully relatable.

From this standpoint, the present volume truly is a genuine survival manual, as designated by its authors. It analyses in detail the operation of the major institutions (SCM, the High Court, the Ombudsman, the Constitutional Court, the Public Ministry, the Judicial Inspection) during turbulent times, under constant pressure. Some of them failed, others soldiered on, despite the immense pressures, managing to save, owing to a few brave men, the honour of the Romanian magistracy. Hard as they tried for those nearly three years, the politicians failed to have justice enslaved as it once was in the '90s, kneeled before political or group interests.

"Unfortunately, the Superior Council of Magistracy failed to demonstrate either stability or an active role and swiftness when it came to defending the pool of magistrates against actions likely to be detrimental to their independence, impartiality or professional reputation, during the 2017-2019 interval, with the exception of certain specific situations, some of which dealt with attacks against the very image of the Superior Council of Magistracy members, particularly that of its president, in 2019", mentions judge Dragoș Călin in a text concerning the operation of SCM.

Nevertheless, the magistracy in Romania passed the stress test. Just as the authors of the political assault had first and last names, the authors of the resistance distinguished themselves either individually or within professional associations during the final harsh years. I was always impressed by judge Dragoș Călin's never-ending energy, the Herculean efforts made by him, in person, and by those in the Romanian Judges' Forum Association to defend the independence of justice in Romania.

Then, there are many others who showed a lot of bravery fighting for their jobs, on behalf of the entire profession. Some of these you will find among the authors of the articles in the present volume, while others are still waging the battle for justice from within the system: Cristi Danileț, Ionuț Militaru, Anca Codreanu, Bogdan Pîrlog, Alexandra Lăncrănjan, Sorin Lia, Augustin Lazăr, Laura Codruta Kövesi and a few other names of magistrates who continue to do credit to the Romanian magistracy, in the country or abroad.

But in support of justice in Romania came regular citizens, as well, the hundreds of thousands that took to the streets in January 2017 or whenever they felt the need

to express their solidarity to magistrates, to support the independence of justice or institutions such as NAD.

A crucial part was played by international bodies, as shown by authors Anamaria Lucia Zaharia and Anca Gheorghiu. The European Commission via CVM reports, the Venice Commission, GRECO and CJEU drastically limited leeway for Politicians in Bucharest and curtailed their destructive momentum.

Just as politicians will never get tired, and a mere reiteration of the anti-justice flagrancies shows us how inventive, perseverant in wrongdoings and determined they are, magistrates must not even for a second let their guard down.

I shall conclude with a textual quote from judge Dragoș Călin: "Although the endeavours required a struggle out of the ordinary, and results are yet to emerge, we have to imagine that Sisyphus will, someday, be happy, as well". These words should represent a motto for all honest magistrates in the country, a sound way of thinking and a call to action for when difficult times are back.

Dan Tăpălagă

Changes Brought to the "Justice Laws" during the 2017-2019 Interval. The Serious Impairment of the Rule of Law Principles. Remedies

Dragoş Călin*

Motto:
"La lutte elle-même vers les sommets suffit à remplir un cœur d'homme.
Il faut imaginer Sisyphe heureux".
Albert Camus, The Myth of Sisyphus and other essays

1. Introduction

Within the context of Romania's accession to the European Union, the justice of the former communist state has claimed to have changed and aligned to those of the Western Europe democratic states. On the one hand, a significant number of young magistrates have entered the judicial system, the National Anticorruption Directorate has constantly had solid results, whereas hundreds of politicians have already received definitive sentences. On the other hand, the Mechanism for cooperation and review of the progress made by Romania in terms of attaining certain specific benchmarks concerning the judicial system reform and the fight against corruption has not been lifted not even 10 years after accession to the European Union[1], with the charge against those fighting the corruption curse seemingly still in full swing[2].

Although in a society still festering with corruption there is a need to enhance the institutions' capacity to counteract it, also in order to recover the losses, so as to deter this phenomenon, the Romanian politicians proposed in January 2017 the acquittal or shortening of penalties applied to certain offenses, corruption ones included[3]. More

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[1] See, in detail, *D. Călin, I. Militaru, C. Drăguşin*, Romanian Judicial System. Organization, Current Issues and the Necessity to Avoid Regress, in Tsukuba Journal of Law and Politics, 75/2018, p. 1-14.

[2] (*http://themis-sedziowie.eu/materials-in-english/disciplinary-procedures-against-uncomfortable-members-of-the-judiciary-in-romania/*), last accessed on April 13, 2020.

[3] The reaction of the Romanian Judges' Forum Association was swift (*https://rlw.juridice.ro/11226/the-romanian-judges-forum-association-ref-the-projects-of-emergency-government-*

than 600.000 people took to the streets, a related draft emergency ordinance, enacted during a frosty winter night, being permanently abandoned[1].

On a different path, the Ministry of Justice (led at the time by the future PSD senator Robert Marius Cazanciuc) and the Superior Council of Magistracy proposed the amendment of the justice laws, sparking off, **as early as the summer of 2015**, the protest of 2.000 magistrates[2]. Among others, the points touched upon were reinstating the direct appointment to the positions of judge or prosecutor for court attorneys and lawyers with at least 18 years of seniority in office, exclusively interview-based, within local courts and the prosecutor's offices attached to them [art. 33[1] parag. (2) in Law no. 303/2004], changing the method of taking the examination for advancement to executive offices, by instituting, as an examination test, a so-called assessment of one's professional activity over the past 3 years (turning an exam-taking requirement into an exam-passing grade) (art. 46 in Law no. 303/2004), but also reintroducing the provision on appointing former magistrates with at least a 10-year length of service on vacancies within courts or prosecutors' offices of the same tier as those they served in [art. 33[1] parag. (1) in Law no. 303/2004][3].

These changes were suggested under obscure conditions, without consulting the magistrates, representing a return to certain provisions the removal of which had been supported by the entire judicial body during the 2007-2009 period and which were strongly criticised in the reports on the judicial system as part of the justice monitoring efforts via the Cooperation and Verification Mechanism (CVM) agreed upon between the European Union and Romania.

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ordinances-concerning-the-collective-pardon-and-the-amendments-of-the-criminal-code-and-the-procedural-criminal.html), last accessed on April 13, 2020.

[1] (*https://www.nytimes.com/2017/02/09/world/europe/romania-corruption-coruptie-guvern-justitie.html?mcubz=3*), last accessed on April 13, 2020. *"Do not revamp with a criminal tinge! A call for an independent judicial power"* – The Romanian Judges' Forum Association reacted towards the public position statements regarding the need for a new law on the magistrates' substantive liability, as well as for a law on the acquittal of severe offenses, the acquittal and shortening of certain offenses, and also regarding the countless ill-considered statements about Romanian magistrates.

[2] See the *Memorandum* adopted at the time by the Romanian judges and prosecutors (*http://www.forumuljudecatorilor.ro/index.php/asociatia-fjr/comunicate/14-08-2015-memoriu-protest-modificare-legi-justitie*), last accessed on April 13, 2020.

[3] The shortcomings of recruiting magistrates strictly based on an interview emerge from the mere examination method. As such, from 2004 to 2008, former magistrates wishing to return to the profession were subject to an interview the questions of which can be very gingerly deemed formal by any graduate of law faculties. The examples are known: *"What do you say when entering the court room? How do you react when a litigant wears a cap in the court room? What is the judges' jurisdiction?"* (*http://www.juridice.ro/32213/interviuri-intrare-magistratura-concurs.html*), last accessed on April 13, 2020.

2. The "August 23, 2017" moment in time

Left on *stand-by*, **the changes were, however, reiterated in 2017**[1], precisely on August 23, the former national holiday of the Romanian socialist state 28 years before, a time of parades and personality cult, in a PowerPoint document, during a press conference, by the Minister of Justice at the time, Univ. Prof. Dr. Tudorel Toader, a former Constitutional Court Judge[2].

The proposals focused, among others, on ***placing the Judicial Inspection under the control of the Ministry of Justice***, although asserting and guaranteeing the independence of judicial inspectors entailed excluding any involvement of political factors, including that of a Minister of Justice, a member of a political government, ***disposing of the merit-based advancement into law courts and prosecutor's offices*** (replacing the difficult advancement contest with an extremely non-transparent and subjective procedure of assessing certain legal acts), ***diminishing the duties of the National Institute of Magistracy on training the young generations of magistrates*** (coupled with setting the minimum 30-year-old age for enrolment in magistracy), ***creating within the Prosecutor's Office attached to the High Court of Cassation and Justice a specialised directorate focused on the criminal prosecution of magistrates***[3], but also ***separating the decision-making powers regarding the magistrates' careers between the two departments of SCM*** ("separation of careers"). Other proposals were to increase the length of service for the office of prosecutor, for appointment within DIOCT and NAD, the possibility for a prosecutor to switch to the office of judge, and for a judge to switch to the office of prosecutor, but only within a local court or a prosecutor's office attached to a local court, ***the introduction by the state, ex officio, of the action for damages against the judge or the prosecutor who committed the clerical error entailing damages***, but also ***the extension of the grounds on which the hierarchically superior prosecutor can invalidate the solutions adopted by the prosecutor, and the possibility to invalidate for lack of judicial grounds***. Moreover, it was requested that the Romanian President be excluded from the procedure of appointing prosecutors in main leading positions within prosecutor's offices, excepted as an expression of the constitutional principle of the separation of powers, with the attribute of the powers' mutual control.

In addition to these proposals, there were inserted aspects already legislatively regulated for many years, which proves the chaos, the lack of the initiators' coordination (for example, the introduction of the second HCCJ vice-president office).

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[1] (*http://english.hotnews.ro/stiri-top_news-21966904-opinion-romanian-minister-tudorel-toader-39-counter-reform-the-judiciary-why-proposals-announced-justice-minister-are-poisonous.htm*), last accessed on April 13, 2020.

[2] (*http://www.just.ro/principalele-modificari-propuse-la-legile-justitiei-legea-nr-3032004-legea-nr-3042004-si-legea-nr-3172004/*), last accessed on April 13, 2020.

[3] A measure conveying throughout the community a feeling of distrust while concurrently proving to be an instrument of pressure upon magistrates in case the guarantees for setting up such a structure are not transparent and real.

The PowerPoint initiative was met by the outright refusal of most within the magistracy[1]**.** The Public Ministry, to their surprise and concern, took note of the announced changes regarding which the prosecutors had not been consulted beforehand (setting up a specialised directorate for investigating magistrates, which suggested that the corruption issue lay among the magistrates, and not outside their ranks, subordinating the Judicial Inspection to the politically appointed Minister of Justice, dismissing the proposal to appoint individuals on top positions of the Prosecutor's Office attached to the High Court of Cassation and Justice via a transparent candidate selection procedure, conducted by SCM, the body which would make the proposal, endorsed by the Minister of Justice, followed by the appointment by the Romanian President). DIOCT stated that the viewpoints of anti-mafia prosecutors were absent in the new draft, which did not reflect the results of previous talks. NAD reacted in full measure.

The Romanian Judges' Forum Association submitted **Memoranda to the Superior Council of Magistracy, the Minister of Justice, as well as to all the general assemblies of judges and prosecutors**, requesting a vote to dismiss the proposals to alter "the justice laws" without impact studies and prior consultations on critical legislative issues, so as to ensure transparent decision-making towards magistrates (judges and prosecutors) and civil society, something unacceptable against the rule of law. FJR stated that such changes would affect the magistrates' careers and activity over a long period of time and trigger imbalances within the judicial system, reprobated by the European Commission on several occasions, with the added risk of a wave of discontent within the entire profession[2].

During September 2017, **the law courts and prosecutor's offices overwhelmingly dismissed the proposed core changes**: reorganising the Judicial Inspection as an incorporated structure within the Ministry of Justice, the appointments to the top judicial positions (HCCJ, the general prosecutor of the Prosecutor's Office attached to HCCJ, their first deputy and deputy, the NAD Chief Prosecutor, their deputies, chief-of-department prosecutors of the Prosecutor's Office attached to HCCJ and of NAD, as well as the DIOCT Chief Prosecutor and their deputies), the magistrates' liability, the changes to the magistrate recruitment system – the age limit (30 years old) for admission into the National Institute of Magistracy and the mandatory 5-year minimum length of service in a different judicial profession, as well as setting up within PICCJ a specialised directorate with the exclusive jurisdiction of conducting criminal prosecution for deeds committed by judges and prosecutors, regardless of their nature and severity.

The draft was swiftly condemned by the independent press, civil society (the Romania 100 Platform, among others)[3], as well as the opposition parliamentary

[1] (*https://evz.ro/raspunsul-judecatorilor-ministru.html*), last accessed on April 13, 2020.

[2] *A small number of magistrates also reacted on their own account* (*https://republica.ro/reforma-justitiei-facuta-in-power-point-e-o-greseala-o-spune-un-judecator* or *https://republica.ro/judecatorul-cristi-danilet-despre-trecerea-inspectiei-judiciare-in-subordinea-ministerului-justitiei-zeste*), last accessed on April 13, 2020.

[3] See the independent analysis conducted by *Funky Citizens* (*https://funky.ong/analiza-a-proiectului-noilor-legi-ale-justitiei/*), last accessed on April 13, 2020.

parties[1]. The President of Romania reprimanded Minister Toader's proposals: "The changes to the justice laws are an attack against the rule of law and the fight against corruption"[2].

An insignificant number of otherwise extremely forthright judges, rallied under the National Union of Romanian Judges, an association the president of which would be proposed as the Minister of Justice two years later, as part of the PSD-ALDE cabinet led by Viorica Dăncilă, supported the proposal, made by the Minister of Justice, Tudorel Toader, to set up a prosecutor's office specialised structure set to exclusively investigate magistrates, "so as to secure the protection of judges, and even prosecutors, against any pressures exerted by other prosecutors, on the one hand, but also to avoid cases where local affinities or, conversely, aversions among prosecutors and judges might impair the impartiality of investigations into magistrates"[3]. Additionally, on the same August 23, 2017, the Judicial Inspection praised the intent of the Minister of Justice to strengthen the independence of this institution from SCM, only to later cast a few nuances over their position[4].

On September 28, 2017, **the Superior Council of Magistracy Plenum issued an adverse opinion on the entire draft**, taking into account the votes expressed during numerous general assemblies of judges and prosecutors within law courts and prosecutor's offices[5].

Considering that the reaction towards the general public display was to relentlessly and persistently promote the draft, within three days, nearly 4.000 judges, prosecutors, court attorneys and judicial auditors signed the **Memorandum for withdrawing the proposed amendment to the "justice laws"**[6], launched by the Romanian Judges' Forum, which became a true manifest of the Romanian magistracy's resilience against the ongoing subordination attempt.

The memorandum was addressed to Prime Minister Mihai Tudose and Minister of Justice Tudorel Toader.

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[1] (*https://www.bursa.ro/update-tudorel-toader-a-anuntat-propunerile-de-modificare-a-legilor-justitiei-presedintele-romaniei-exclus-din-procedura-de-numire-a-procurorilor-sefi-88349239*), last accessed on April 13, 2020.

[2] (*https://www.news.ro/politic-intern/iohannis-modificarile-legilor-justitiei-reprezinta-un-atac-asupra-statului-de-drept-si-a-luptei-anticoruptie-19244011230020170816171657 03*), last accessed on April 13, 2020.

[3] (*http://www.unjr.ro/2017/08/31/pozitia-unjr-cu-privire-la-infiintarea-unei-structuri-specializate-de-parchet-care-sa-investigheze-numai-magistrati/*), last accessed on April 13, 2020.

[4] (*https://www.news.ro/justitie/inspectia-judiciara-apreciaza-intentia-ministrului-justitiei-de-a-consolida-independenta-acestei-institutii-fata-de-csm-19224023234820170814171651 83*), last accessed on April 13, 2020.

[5] The vote within SCM is criticised by UNJR (*http://www.unjr.ro/2017/09/29/justitia-are-nevoie-de-imbunatatiri-pentru-a-o-aduce-la-standarde-democratice/*), last accessed on April 13, 2020.

[6] (*https://www.juridice.ro/538255/memoriul-magistratilor-romani-pentru-retragerea-proiectului-de-modificare-a-legilor-justitiei.html*), last accessed on April 13, 2020. The number of endorsements was estimated by a group of judges within the Romanian Judges' Forum Association (Dragoş Călin, Sorina Marinaş, Anca Codreanu, Claudiu Drăguşin).

It was argued that, *"at a time when Romania, 10 years after its accession to the European Union, is still subject to a Cooperation and Verification Mechanism (CVM), precisely in order to align its justice system to those of states with a traditionally democratic history, one can no longer accept going back in time, to legislative regulations current before 1989, by replacing justice under political control and unreasonably extending the duties of the Minister of Justice.*

All these core changes proposed by the Minister of Justice are blatant infringements on the Cooperation and Verification Mechanism, its constant reports and the foundations of a sound magistracy in a democratic state. These proposals, once they have come into effect, will affect magistrates' careers and professional activity over a long period of time and trigger imbalances within the judicial system, aspects that have been repeatedly reprimanded by the European Commission.

As per Decision no. 2 of January 11, 2012, the Constitutional Court of Romania considered that the Romanian state, given its status of member of the European Union, is bound to apply this mechanism and implement the recommendations set forth within this framework, in line with as per the provisions of art. 148 parag. (4) in the Constitution, according to which «the Parliament, the Romanian President, the Government and the judicial authority guarantee the fulfilment of the obligations derived from the accession documents and the provisions of parag. (2)». Therefore, although the opinion from the Superior Council of Magistracy is, according to the law, not mandatory, it can neither be overruled, ignored, the recent case-law of the Constitutional Court of Romania particularly developing and emphasizing a new dimension for the provisions of art. 1 parag. (5) in the Constitution («In Romania, compliance with the Constitution, its supremacy and laws is mandatory»), in the sense of attaching to its statutory content the principle of loyal collaboration among the state institutions and authorities. Consequently, with the inclusion of the legislative norms stipulating the opinion of the Superior Council of Magistracy, shall be construed in the spirit loyalty towards the Fundamental law and the public authorities' obligation to run the Cooperation and Verification Mechanism and implement the recommendations set forth within this framework.

Even if the draft also comprises proposals from the Superior Council of Magistracy, the magistrates or professional associations, formulated over the course of time, they are mere adjustments of the current system, the trivial preparation of a true «judicial experiment», in the absence of any studies and forecasts, with the potential to trigger consequences either very severe or impossible to rectify.

Accordingly, considering the will of the vast majority of magistrates, and to eliminate any doubts on the misuse this draft to the magistracy's detriment, we kindly request, that you withdraw it (its dismissal by the Government, as the case may be, avoiding any forwarding to the Parliament), by urging the Minister of Justice to initiate and develop an actual and effective dialogue with the magistrates, the Superior Council of Magistracy, the professional associations of judges and prosecutors, so as to enhance the legislative framework, after performing the due impact studies and presenting solid and credible grounds for the proposed changes, with a view to modernising justice, in line with the Cooperation and Verification Mechanism".

The gesture of the approximately four thousand magistrates seemed, at the time, out of the ordinary. Magistracy is customarily quiet, magistrates mostly express themselves within their own forum, and naturally, via the orders or documents they issue, and less in the agora. Still, the content of the changes brought to the "justice laws" triggered an almost unanimous dismissal reaction, whereas Minister Tudorel Toader's inflexible stance added to that firm position, which meant more than reiterating the SCM's message of issuing an adverse opinion.

We were talking about "**a genuine public declaration of independence by the magistracy**"[1], not necessarily a change of attitude, given that dismissing any changes proposed for the "justice laws" has been a permanent avenue taken by Romanian judges and prosecutors.

A leaflet including a symbolic caricature was published the following days by the Judges' Forum. The brochure, in its presentation, states that "the materials collected should not exist in a state upholding the rule of law, with democratic reinforcements, a member of the European Union, however, in Romania, the reform of a judicial system inherited from the communist era never seems to succeed in becoming an irreversible process. (...) As the assault of the executive and legislative functions upon the judicial function has become commonplace, the recent events cannot have any other explanations, either, the reality showing not a justice overhaul as a visible evolution, at least in the sense of the consecutive reports of the Cooperation and Verification Mechanism, but backward attempts at settling it within a realm of the not so distant past in which the fight against corruption was sublime, but lacking altogether, and the achievements of justice were hardly any different from those during the communist dictatorship"[2].

3. The Romanian Parliament comes into its own

In late October 2017, **the original amendment idea presented by Minister Tudorel Toader was abandoned, not without him having sent to the Parliament a draft, regarded as a draft initiated by the deputies and senators of PSD-ALDE majority coalition**, to be later on debated upon and adopted under an urgency procedure.

On October 31, 2017, the Romanian Judges' Forum, via a press release, iterated that the legislative proposals submitted to the Chamber of Deputies are groundless, retrogressive and impair the independence of justice. It included the summoning of the general assemblies of law courts and prosecutors' offices. It informed the community on the legislative initiative submitted to the Chamber of Deputies by a group of 8 deputies, on October 31, 2017, without a proper statement of reasons or impact studies, without considering a recent opinion issued by the Superior Council of Magistracy and the

[1] See *D. Călin*, interview for *Ziare.com*, October 6, 2017 (*http://www.ziare.com/stiri/justitie/cod-rosu-in-justitie-urmeaza-ani-dificili-sprijinul-comisiei-europene-va-fi-esential-interviu-cu-judecatorul-dragos-calin-1483992*), last accessed on April 13, 2020.

[2] (*https://www.juridice.ro/files/Brosura-magistratii-romani-v-modificarea-legilor-justitiei.pdf*), last accessed on April 13, 2020.

magistrates' firm position, by undermining a legislative procedure not owned by the Government as a result of the public reaction, something unacceptable in a state upholding the rule of law. Advancing retrogressive drafts, very hastily drawn up, with visible disconnections and gaps, lacking a proper statement of reasons, has nothing to do with revamping justice as a palpable positive progress, praised by the consecutive Cooperation and Verification Mechanism reports, being merely an episode of the *"Judicial experiment"* series run round the clock.

The new draft proposed, for instance, **placing the Judicial Inspection under the control of a paraconstitutional body (the *Romanian Council for the Integrity of Judges and Prosecutors*)**, non-existent, but which would later be set up via a separate law (without any known legislative layout, while knowing its institutional structure, financing policies, jurisdiction, rules on the decision-making process, guarantees of independence etc. is essential), neglecting countless Reports of the European Commission as part of CVM, as well as the constitutional role of the Superior Council of Magistracy as justice independence endorser. The legislative initiative comprised a large number of changes able to influence the magistrates' careers and professional activity and cause **imbalances within the judicial system**. The draft mentioned changing the duration of the professional training courses hosted by the National Institute of Magistracy, which could trigger in time **extensive dysfunctionalities in the operation of law courts and prosecutor's offices**, freezing the activity of approximately 1000 future magistrates over 4 years, given the wave of retirements expected over the short and very short term. Moreover, holding simple competence interviews with trainee judges and prosecutors, before the leading colleges of the Court of Appeal and the prosecutor's offices attached to these, respectively, **nullified the role of the National Institute of Magistracy in securing the early training of judges and prosecutors at high standards** and disposed, at least in principle, of the candidates' hopes to be objectively assessed upon completing their studies, as is the case with the current process.

PICCJ, NAD and DIOCT reacted swiftly and dismissed the proposed amendments. The High Court of Cassation and Justice issued an adverse opinion on a significant portion of the proposals. The Romanian President criticised the draft harshly, calling it a justice "slasher". Around 35.000 Romanians took to the streets on the Sunday of November 5, 2017, in Bucharest, Cluj-Napoca, Brașov, Timișoara, Galați, Tîrgu-Mureș, Iași and Sibiu[1].

On November 6, 2017, the Romanian Judges' Forum publicly announced that judges' and prosecutors' general assemblies dismissed the entire string of core changes in the drafts submitted to the Chamber of Deputies, on the justice laws, calling them a mere episode of the "Judicial experiment" series run round the clock over the past year.

The western countries' embassies in Bucharest reacted and expressed their concern.

[1] (*http://www.ziare.com/klaus-johannis/presedinte/iohannis-despre-modificarile-legilor-justitiei-de-la-a-corecta-legislatia-pana-la-a-o-ciopati-este-cale-lunga-1487720*), last accessed on April 13, 2020.

The Senior vice president of the European Commission, Frans Timmermans, suggested, on November 8, 2017, that the changes to the "justice laws" be conducted upon consultations with international experts (the Venice Commission)[1].

On November 8, 2017, the Romanian Judges' Forum Association wrote a ***Public letter*** to the elected members of the Superior Council of Magistracy, requesting that they take into account the will of thousands of judges and prosecutors that has elected them, indubitably expressed during the general assemblies held during the November 3-7, 2017 interval, and issue an adverse opinion for the entirety of the three drafts on amending the "justice laws", filed with the Chamber of Deputies on October 31, 2017.

The Brașov Court of Appeal, the Administrative and Fiscal Litigation Department, as per ruling no. 171/2017 of November 8, 2017, delivered as part of case file no. 524/64/2017, ascertained the lack of a public regarding the draft on amending the "Justice laws", proposed by the Minister of Justice. It is acknowledged that "complying with the minimal rights regulated by art. 7 in Law no. 52/2003 is an imperative duty to be fulfilled by the public authorities and, implicitly, an essential duty for a democratic society. In conjunction with this, and in relation to the imperative nature of this duty of the general government, the civil society's correlated right to take part in this decision-making process is a vital right the impairment of which makes it necessary and compulsory for the administrative litigation court".

As per the Superior Council of Magistracy Decision no. 1148/November 9, 2017, adverse opinions were issued for the legislative proposals to amend the "justice laws".

The European Commission's Report under the Cooperation and Verification Mechanism, made public on November 15, 2017, stated that "the firm negative reaction from the judicial system and certain tiers of civil society focused primarily on the matter of the judicial system's independence (...) A process in which the independence of the judicial system and its viewpoint are esteemed and taken into account accordingly and the Venice Commission's opinion is kept in mind is a prior requirement for reform sustainability and a major element in terms of meeting the benchmarks set forth in CVM"[2].

Despite all these position statements, the draft was quickly brought forward to the Parliament, as part of the purposely set up *"Joint special commission of the Chamber of Deputies and the Senate on organising, consolidating and securing legislative stability in the field of justice"*, the changes being adopted in December 2017. The two associations that supported the changes at length, the Association of Romanian Magistrates and the Union of Romanian Judges, were invited[3]. On November 27, 2017,

[1] (*http://www.ziare.com/tudorel-toader/ministrul-justitiei/bruxelles-ul-vrea-ca-modificarile-la-legile-justitiei-sa-fie-facute-de-experti-internationali-1488437*), last accessed on April 13, 2020.

[2] (*https://ec.europa.eu/info/sites/info/files/comm-2017-751_ro.pdf*), last accessed on April 13, 2020.

[3] Deputy Stelian Ion said that, *"at one point, the UNJR female representative went to the computer and tried to help the PSD staff write"*. For more details, see the interview published on the web page (*http://www.ziare.com/stiri/justitie/acum-vor-incerca-sa-faca-raul-cel-mai-mare-si-nu-se-vor-da-in-laturi-de-la-nimic-cu-pumnii-si-picioarele-interviu-1500089*), last accessed on April 13, 2020. The UNJR representatives have never denied this information.

the Romanian Judges' Forum Association revealed the inadequate way of conducting the parliamentary "debates" on amending the "justice laws"[1]. The public were informed that their representatives had not been invited to take part in the debates of the Joint Special Commission, although the Memorandum to withdraw the draft on amending the "justice laws", issued by FJR, had been supported in October 2017 by approximately 4.000 Romanian judges and prosecutors, that is more than half their entire number, and also embraced by hundreds of general assemblies of judges and prosecutors of law courts and prosecutor's offices, as well as by the Superior Council of Magistracy, upon the issuance of the second adverse opinion on the drafts submitted to the Joint Special Commission for analysis.

It was iterated that "the summons submitted by the president of the Joint Special Commission appear to have been issued based on affinities or misconceptions, and not to serve an actual and comprehensive debate. The explanation provided, in the sense that only entities/persons that submitted amendments within the officially set forth deadline were invited, is not pertinent, given that they take part not only in defending their own amendments, but also in the debates on the amendments proposed by other entities/persons. Even if the Romanian Judges' Forum Association did not propose amendments in the form considered by the Joint Special Commission, requesting that the entire collection of drafts be dismissed, the observations underpinning the request to resume the draft law elaboration procedure, as well as those that underpinned the adverse opinion expressed by the Superior Council of Magistracy, are solid arguments that must be considered during the debate, as more important than the mere verbalisation of opinions by certain guests selected according to a non-transparent procedure or, at times, than their mere silence".

By means of a joint statement, issued on December 8, 2017, the Romanian Judges' Forum and the Association of Romanian Prosecutors iterated that "the only solution to overcome the critical situation was to resume dialogue, based on the principles or institutional transparency, so that the amendment of these laws, fundamental to the operation of the rule of law, should be done only following impact studies, real consultations with civil society, the Superior Council of Magistracy, the magistracy, the Venice Commission, and their adoption should benefit from the Romanian citizens' trust, aid the proper operation and revamping of the judicial system and not impair justice independence, a fundamental guarantee of democracy".

The statement mentioned that "the parliamentary pseudo-debate, without an actual right to support the amendments with arguments, which ignores the overwhelming standpoint of the magistracy and the recommendations in the European Commission's Report under the Cooperation and Verification Mechanism, on the independence of the judicial system, cannot be held (nor can it be masked by a semblance of legitimacy) with the mere presence of certain professional associations, represented in small numbers

[1] As there were loud, emblematic voices, both among the magistrates and society on the whole, who challenged the process of drawing up these drafts and their content, *Konrad Adenauer Foundation* and *its Program on the Rule of Law in South-Easters Europe*, together with *Funky Citizens* and *Expert Forum*, organised on November 20-21, 2017 the conference entitles *Consensus: the Justice Laws*.

and failing to take into account the firm position of the magistracy, also expressed in hundreds of general assemblies".

On December 18, 2017, thousands of Romanian judges, prosecutors and judicial auditors held a silent protest in front of the institutions where they worked, holding in hands their robes or the Constitution and, most of them, displaying the oath they had taken early in their career. The protests were triggered by the Parliament having adopted certain major amendments to the three main laws concerning the magistrates' status and organisation, without taking into account the firm opposition of more than half the Romanian magistrates. Moreover, the silent protests targeted the changes on the Penal Code and the Criminal Procedure Code, proposed for adoption, which would have extensively limited the powers of the Police and the prosecutors, as well as their capacity to protect victims and identify criminals, regardless of the nature of the crime (murder, theft, rape, corruption etc.)[1].

4. Endeavours at the Constitutional Court of Romania and relevant international entities

In December 2017, from the 21st to the 23rd, the Romanian Judges' Forum made public certain remarks on the unconstitutionality of the laws, requesting that the High Court of Cassation and Justice notify the Constitutional Court on an unconstitutionality objection, but also on conducting correspondence with the Venice Commission. Some of these remarks were carried forward into the texts of unconstitutionality objections that would be submitted to the Constitutional Court by the High Court of Cassation and Justice, the Parliamentary Group of the National Liberal Party in the Chamber of Deputies (56 deputies) and the Parliamentary Group of the National Liberal Party in the Romanian Senate (29 senators). They would be, almost in their entirety, owned by the Romanian President and 51 deputies, 50 of which belonging to the parliamentary groups of Save Romania Union, People's Movement Party, the National Liberal Party and the national minorities, as well as a non-affiliated deputy.

On December 28, 2017, the Romanian Judges' Forum requested that the Romanian President notify the Constitutional Court on the changes brought to the "justice laws", also suggesting that he notify the Venice Commission on formulating an opinion about essential matters or any endeavour that would ensure the observance of the statute of magistrates, namely to guarantee the independence and impartiality of justice. It was argued that more than 6.000 Romanian judges and prosecutors rejected this draft law, their will being ignored and any dialogue with them being avoided. The drafts were harshly criticised by tenths of western embassies in Romania, the United States of America's State Department, countless non-government

[1] On inexplicable grounds, the president delegate of Bucharest Court of Appeal, Elisabeta Roșu, advanced by SCM to HCCJ in 2019, separated herself, the same evening, from the magistrates' protest on the law court steps. The highlighted matter was "the need to observe the legal provisions regulating the statute of magistrates, the separation of powers and the exclusive use of levers deemed the law and regulations adequate in expressing opinions".

organisations in Romania and other states, the entire civil society and hundreds of thousands of regular citizens, by means of street demonstrations.

In early 2018, more than 2.000 magistrates separated themselves, on an individual basis, from the participation of professional associations (UNJR, AMR) within the parliamentary Joint Special Commission on amending the "justice laws"[1].

On January 4, 2018, in their capacity of *amicus curiae*, the Romanian Judges' Forum Association submitted to the Constitutional Court arguments to support the unconstitutionality objections to the provisions of the Law on amending and supplementing Law no. 303/2004, the Law on amending and supplementing Law no. 304/2004 and the Law on amending and supplementing Law no. 317/2004.

On January 18, 2018, five Romanian judges and prosecutors, representing the Romanian Judges' Forum Association, took part in a technical debate, in Bruxelles, with European Commission officials, on the evolution of the judicial system in Romania. On January 24, 2018, in a Joint statement, the president of the European Commission, Jean-Claude Juncker, and senior vice president Frans Timmermans stated the following: *"We are following the latest developments in Romania with concern. The independence of Romania's judicial system and its capacity to fight corruption effectively are essential cornerstones of a strong Romania in the European Union. The irreversibility of the progress achieved so far under the Cooperation and Verification Mechanism is an essential condition to phase out the Mechanism. In its latest Report under the Mechanism in November 2017, the Commission highlighted that the Government and the Parliament should ensure full transparency and take proper account of consultations in the legislative process on the justice laws. The Commission also made clear that a process in which judicial independence and the opinion of the judiciary is valued and given due account, also drawing on the opinion of the Venice Commission, is a prerequisite for sustainability of the reforms and an important element in meeting the CVM benchmarks. The Commission's assessment was supported by Member States in Council Conclusions adopted in December 2017. The latest CVM Report identified the justice laws as an important test of the extent to which the legitimate interests of judicial and other stakeholders are given an opportunity to be voiced, and are taken sufficiently into account in the final decisions. Events since then have done nothing to address these concerns.* ***The Commission calls on the Romanian Parliament to rethink the course of action proposed, to open up the debate in line with the Commission's recommendations and to build a broad consensus on the way forward. The Commission reiterates its readiness to cooperate with and support the Romanian authorities in this process. The Commission again warns against backtracking and will look thoroughly at the final amendments to the justice law, the penal codes and laws on conflict of interest and corruption to determine the impact on efforts to safeguard the independence of the judiciary and combat corruption****".*

As per Decision no. 33 from January 23, 2018 on the unconstitutionality objection to the provisions of the Law on amending and supplementing Law no. 304/2004 on the judiciary organisation, Decision no. 45 from January 30, 2018

[1] (*http://www.forumuljudecatorilor.ro/index.php/archives/3846*), last accessed on April 14, 2020.

on unconstitutionality objection to the provisions of the Law on amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors and Decision no. 61 from February 13, 2018 on the unconstitutionality objection to the Law on amending and supplementing Law no. 317/2004 on the organisation and operation of the Superior Council of Magistracy, the Constitutional Court ascertained the unconstitutionality of numerous provisions newly introduced in the "justice laws".

On February 15, 2018, the Romanian Judges' Forum Association published a *White Paper on the Changes brought to the "justice laws" – a potential collapse of magistracy in Romania*. It was argued that the combined effects of certain regulations included in the provisions adopted in Parliament regarding the "justice laws", while not being declared unconstitutional (as they were challenged or the unconstitutionality objections were not comprehensive and arguments were essentially absent), can be disastrous for magistracy in Romania: the body of magistrates would decrease by at least 25% (over the very short term), would have its professional standards lowered through the elimination of merit-based advancement exams, would be overworked with the increased amount of activity and controlled by the head of the Judicial Inspection and through the special Judicial Crime Investigation Department.

On February 21, 2018, representatives of the Romanian Judges' Forum took part in a meeting with representatives of GRECO (Group of States against Corruption), a structure set up in 1999 by the Council of Europe to monitor compliance with the organisation's anti-corruption standards.

As per Decisions no. 65, 66 and 67 from February 21, 2018 on the unconstitutionality objection, the Constitutional Court rejected as inadmissible the unconstitutionality objections filed by 51 deputies, 50 of which belonging to the parliamentary groups of Save Romania Union, People's Movement Party, the National Liberal Party and the national minorities, as well as a non-affiliated deputy, on the grounds that three deputies had successively signed two unconstitutionality notifications, meaning that the number of those who had validly signed the unconstitutionality objections pending before the constitutional law court was only 48 instead of 50 deputies. Later on, as per Decisions no. 357 from May 30, 2018, no. 385 from June 5, 2018, the Constitutional Court would dismiss the unconstitutionality objections filed by the Romanian President, for exceeding the deadlines allowed to exert the right to notify the Constitutional Court, the Court acknowledging that "these deadlines began on the date when the law was filed with the secretaries general of the Chambers of Parliament in order to have this right exerted (December 21, 2017 – the law in its initial form, and March 28, 2018, respectively – the form resulted after review) and ran out on the date when the 20- or 10-day enactment deadline, as the case may, stipulated by art. 77 parag. (1) and parag. (3), respectively, in the Constitution, would have expired, a deadline interrupted following the prior filing of the unconstitutionality notifications. In other words, the deadline for exerting the right to notify the Constitutional Court always begins right after the procedure to adopt the law in Parliament is completed and is the same for all matters of law which, according to the Constitution, have the authority to vest the Court with conducting the constitutionality review".

Therefore, numerous unconstitutionality matters remained unsettled, as a result of the Romanian President not having met court-ordered deadlines or the failure to meet the minimum number of parliamentarians required to validly notify the Constitutional Court. The unconstitutionality exceptions subsequently filed with law courts remained unresolved even two years later. The Ombudsman refused to notify the Constitutional Court.

On March 7, 2018, the Romanian Judges' Forum requested once again that the Romanian President and the Romanian Parliament consult with the Council of Europe's European Commission for Democracy through Law (the Venice Commission) on current matters related to the amendment of the "justice laws" in Romania, as well as on related regulations.

Two days later, on March 9, 2018, the Romanian President, Klaus Iohannis, replied to the Romanian Judges' Forum Association, in the sense that he did not see it fit to notify the Venice Commission on the changes brought to the "justice laws"[1]. The reasoning stated the following: *"At this time, Decisions no. 33/2018, 45/2018 and 61/2018 having been delivered, the Constitutional Court handled certain aspects regarding the constitutionality of the changes brought to these laws in relation to the grounds iterated in the filed notifications. In the arguments of these decisions, the Constitutional Court deemed not necessary to request an «amicus curiae» opinion from the Venice Commission, which does not exclude requesting an opinion from the Venice Commission by other institutional players (the Parliament, the Government or the head of state). Given that the Romanian Parliament is about to reconcile the provisions declared unconstitutional with the provisions of the fundamental law, they could request an opinion from the Venice Commission right before commencing the debates, all the more that the legislator is not encumbered by any deadline to finalise the decision-making process. When the laws have been submitted to the Romanian President for enactment, they shall be reviewed for 20 calendar days, as per art. 77 parag. (1) in the Romanian Constitution, or 10 calendar days, as per art. 77 parag. (3) in the same fundamental law, from their receipt. The Romanian President cannot postpone the enactment of a law beyond these deadlines, regardless of the present or absent filing of a notification with the Council of Europe's European Commission for Democracy through Law (The Venice Commission). Considering the procedure that the Venice Commission has to follow for a request of this nature,* ***we are unable to estimate whether o notification of this kind could be taken advantage of within the enactment deadlines set forth in the Constitution for the Romanian President****".*

In the absence of any availability for an internal referring party[2], on March 11, 2018, the Romanian Judges' Forum requested assistance from various European

[1] (*https://media.hotnews.ro/media_server1/document-2018-03-9-22332675-0-raspuns-klaus-iohannis-pentru-forumul-judecatorilor.pdf*), last accessed on April 14, 2020.

[2] *The only attempt in that respect came from the President of the High Court of Cassation and Justice, Mrs Iulia Cristina Tarcea*, however, due to not being a referring party, the Venice Commission could not reply to a request filed by a supreme court of a member state. The Venice Commission recommended, as early as January 11, 2018, that the actual Constitutional Court of Romania would be fit for such an endeavour.

bodies (the European Commission, the Council of Europe – the Committee of Ministers, the Council of Europe – the Parliamentary Assembly, the Council of Europe – the Secretary General) in consulting with the Council of Europe's European Commission for Democracy through Law (The Venice Commission) on current matters related to the amendment of the "justice laws" in Romania[1]**.**

On March 26, 2018, the Romanian Judges' Forum Association made a request to the Romanian President for the latter to submit the "justice laws" to the Parliament for review. It was argued that, although he had outright rejected that variant in his reply to the Association, the Romanian President could still call for the Venice Commission's technical assistance, as it had been requested, on December 22, 2017, by the Council of Europe Secretary General, Mr Thorbjorn Jagland, given that an *"opinion from the Venice Commission would bring clarity upon the compatibility of these texts with the rule of law fundamental standards".*

On April 11, 2018, GRECO published its extremely critical *ad hoc* Report on the impact of the amendments brought to the justice laws upon the anti-corruption policies in Romania. Acknowledging in detail all the public statements of the Romanian Judges' Forum Association, this report expressed serious concerns towards numerous changes brought to the justice laws, recently adopted in Parliament and under *a priori* review by the Constitutional Court, as well towards certain proposals to amend the criminal and the procedural criminal legislations. GRECO, after taking note of all the relevant players in relation to the judicial system, acknowledged that the risks related to massive departures from among the magistracy ranks, the extension of the judicial auditors' study period with the National Institute of Magistracy and arbitrary advancements demanded the performance of prior impact studies concerning the staff structure of law courts and prosecutor's offices and keeping the merit-based advancement of judges and prosecutors. The legislative process ran at a pace often described as particularly rapid and lacking transparency, which left no room for debating a lot of aspects. On several occasions, it was requested that Romania ask the Venice Commission for an opinion, as GRECO once again emphasized. The Report **recommended abandoning the creation of a new special judicial crime investigation department** within PICCJ (proposed and backed by certain SCM members, who should tender their honorary resignation) and ensuring the fact that prosecutors' independence is – to the greatest possible extent – guaranteed by the law, while adopting additional guarantees to protect the prosecutors. It would also be crucial to avoid creating new sources of conflicts of interests and incompatibilities,

[1] Pursuant to art. 3 item 1 and 2 in the Statute of the European Commission for Democracy through Law, adopted by the Committee of Ministers on February 21, 2002, during the 78th Reunion of Deputy Ministers, without prejudice to the competences of the Council of Europe bodies, the commission can conduct investigations, unsolicited, and draw up, as the case may be, drafts for laws, recommendations and international agreements. Any proposal by the Commission can be debated upon and adopted by the statutory bodies of the Council of Europe. The Commission can issue opinions at the request of the Committee of Ministers, the Parliamentary Assembly, the Council of Europe's Congress of Local and Regional Authorities, the Secretary General, as well as at the request of a state, an international organisation or an international body taking part in the Commission's work.

disheartening magistrates included, by refraining from any sort of denigrating gestures or words towards the other state powers – and to analyse the changes that affect the judges' and the prosecutors' rights and obligations, as well as their liability for judicial errors, so as to ensure the predictability and clarity of the rules in the field and, thus, equally avoid witnessing them become a threat to the independence of the judicial system. GRECO believed that the changes proposed for the Criminal Procedure Code, discussed by the Parliamentary Special Joint Commission in relation to the EU directive on the presumption of innocence, exceed the scope of the Directive and introduce serious concerns, both domestically and worldwide, towards the possible negative effects upon mutual judicial assistance and the criminal justice system's capacity of tackling serious crimes, including corruption-related offenses. Romania should refrain from adopting criminal legislation amendments that are contrary to its international commitments and can undermine its domestic corruption-fighting capabilities.

GRECO also prompted, in quite an ironic manner, that, under the CVM mechanism, although the European Commission repeatedly insisted on the adoption of measures against attacks, verbal or otherwise, and intended to protect the magistrates' activity against such attacks by political leaders or other individuals, the draft laws were utterly ignorant to this recommendation. The Romanian Judges' Forum Association believed, at the time, that the only solution to upgrading justice rested in developing a real, concrete dialogue with the magistrates, the Superior Council of Magistracy, the professional associations of judges and prosecutors, exclusively after conducting the due impact studies and after presenting solid and credible statements of reasons for the proposed legislative amendments, in line with the Cooperation and Verification Mechanism set up by the European Commission.

The Romanian Judges' Forum Association requested that the President of the Superior Council of Magistracy, Simona Camelia Marcu, support the notification of the Venice Commission by the Council of Europe Parliamentary Assembly. It was argued that, in the inexplicable absence of the Romanian public authorities, which can be referring parties, the Romanian Judges' Forum Association, together with other national entities, notified the Council of Europe Parliamentary Assembly for the latter to notify the Venice Commission on the matter[1]: *"As a result of these endeavours, on Thursday, April 26, 2018, Strasbourg will host consultations with the relevant authorities, the Superior Council of Magistracy, via its president, being invited, as well. Given the lack of any public information on the limits of the mandate granted by the SCM Plenum to its president on this matter, as part of the SCM Plenum's assemblies, the Romanian Judges' Forum Association requests that judge Simona Camelia Marcu observe the will expressed in the fall of 2017 by the absolute majority of general assemblies of law courts and prosecutor's offices, by the 4.000 magistrates who signed the Memorandum from withdrawing the justice laws, as well as the two consecutive opinions issued by the SCM Plenum, and support the PACE's notification to the Venice Commission. Any other viewpoint would implicitly ignore the will of the overwhelming majority of Romanian magistrates to strengthen the rule of law, to*

[1] (*http://www.forumuljudecatorilor.ro/wp-content/uploads/Letter-to-Mr.-Michele-Nicoletti-President-of-the-Parliamentary-Assembly-request-to-consult-the-Venice-Commission.pdf*), last accessed on April 14, 2020.

maintain a judicial system legislation anchored in the constitutional traditions of the EU member states and the values promoted by the Council of Europe"[1].

On April 26, 2018, at the initial request of the Romanian Judges' Forum Association, which found an ally in the National Liberal Party, the Council of Europe Parliamentary Assembly notified the Council of Europe's European Commission for Democracy through Law (The Venice Commission) on certain current aspects regarding the amendment of the "justice laws" in Romania.

On May 2, 2018, following the refusal of March 9, 2018, the Romanian President, Klaus Iohannis, announced that he would file with the Constitutional Court an unconstitutionality objection on the changes brought to the "justice laws" and notified the Venice Commission on the matter. Surprisingly, the notification was neither tardy, nor futile...

On **May 19, 2018, hundreds of Romanian judges and prosecutors held a protest on the steps of Justice Palace in Bucharest. 1911 magistrates signed "The Romanian magistrates' resolution on defending the rule of law"**. *"1. We strongly urge policy makers to halt at once their attacks against the rule of law and against Romanian judges and prosecutors. Romania is and must remain a member state of the European Union and the Council of Europe, and not a realm of corruption and wrongdoing. Hands off justice! 2. We request that the Romanian President, the President of the Senate and the President of the Chamber of Deputies urgently consult with the Council of Europe's European Commission for Democracy through Law (the Venice Commission) on certain current aspects in Romania regarding amendments to the Penal Code, the Criminal Procedure Code and the Civil Procedure Code, as well as on certain related aspects, being critical to have the debates of the Joint Special Commission immediately suspended until the Venice Commission Opinion date of receipt. 3. We request that all competent authorities postpone making any decisions regarding the «justice laws» until the Venice Commission Opinion date of receipt and until the said laws have been reconciled with the requests of the European Commission and GRECO. The judicial power has to be independent, which entails the existence of certain guarantees in relation to the other state powers, in order to consolidate the magistrates' independence and impartiality. 4. We request that the body of magistrates be effectively consulted in relation to sets of laws pertaining to their activity, via the General Assemblies within law courts and prosecutor's offices. The Superior Council of Magistracy fails to represent the magistracy if they ignore the viewpoint of thousands of Romanian magistrates. The legislative proposals of the Superior Council of Magistracy should not be obscurely promoted and should not represent the will of 5-6 members. We request that an actual consultation of civil society take place, as its reactions must be kept in mind during legislative debates. 5. We request dignified working conditions. Conducting a quality act of justice entails a minimum time spent to study the cases, analyse the questions*

[1] Deputy Ionuț-Marian Stroe, in regards to Simona Marcu's viewpoint: "Madam president of SCM publicly expressed viewpoints in Romania, therefore, here opinions are known" (*http://www.ziare.com/stiri/justitie/sesizarea-comisiei-de-la-venetia-pe-legile-justitiei-s-a-decis-in-unanimitate-la-consiliul-europei-ce-urmeaza-si-cand-am-putea-avea-o-opinie-de-la-expertii-internationali-1511325*), last accessed on April 14, 2020. Despite these opinions, it was unanimously decided to notify the Venice Commission.

of law and the continuously changing legislation, and not delivering solutions that might be affected by inadequate working conditions, insufficient time and overloading. 6. We request that the Minister of Justice refrain from measures that intimidate prosecutors and damage the rule of law and the independence of justice. 7. We request the Ratification of Protocol no. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, whose content was adopted by the Committee of Ministers on July 10, 2013 and opened for signing on October 2, 2013, in Strasbourg. Protocol no. 16 stipulates that highest jurisdictions of the contracting parties are able to request an advisory opinion from the European Court of Human Rights when they ascertain that a particular case on their docket raises serious issues regarding the interpretation or implementation of the Convention or its protocols. 8. We request that the Superior Council of Magistracy members promptly and firmly condemn the attacks against the rule of law and against Romanian judges and prosecutors. The implementation, by the magistracy, of interactive criteria for the annual assessment of the current activity conducted by the SCM members, as well revising the procedure to dismiss them are urgently necessary. 9. We request that the legislative power and the Superior Council of Magistracy take immediate steps to provide adequate support to magistrates facing criticism that undermines the independence of justice. 10. We encourage all the general assemblies of law courts and prosecutor's offices to gather at once and decide upon the forms of protest they deem necessary. 11. We invite all the citizen of Romania to join this Resolution, in their capacity of carriers of hopes for and aspirations of nationwide moral recovery and staying the course of civilised Europe"[1].

On June 3, 2018, approximately 1000 Romanian prosecutors adopted the *Declaration of Independence*, supported by numerous judges and judicial auditors[2]**.** All the dully qualified institutions and all the decision-makers were requested to observe the operating principles of the European Union, facilitate the fulfilment of international obligations undertaken by Romania and remember the fact that complying with the rule of law and the judicial system independence is a critical item within the framework of international cooperation and for Romania's ability to be a dialogue partner in relation to the other member states, in terms of cooperation on both criminal and civil matters[3].

[1] (*http://www.forumuljudecatorilor.ro/index.php/archives/3240*), last accessed on April 14, 2020.

[2] (*https://www.juridice.ro/584185/declaratie-de-independenta-formulata-de-procurori.html*), last accessed on April 14, 2020.

[3] As part of the CDL (1995)073 Opinion, rev., expressed on the fundamental principles of the Hungarian Constitution [chapter 11, parag. (16)], the Venice Commission ruled that "the fundamental principle which should govern the Public Ministry in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have faith in the system, which is essential in any healthy society". One cannot conceive a judge as truly independent without the guarantee of an equivalent independence associated to the prosecutor, able to keep unaltered the requisites of enforcing the law on a state of affairs upon which the former is called upon to deliver a ruling, and which must not be impaired beforehand by means of an interference that is unjustified and non-compliant with the international standards in the field.

On July 12, 2018, **the Romanian Judges' Forum Association called upon the Constitutional Court to capitalise on the Venice Commission's opinions** regarding the changes brought to the justice laws, the Penal Code and the Criminal Procedure Code. FJR believed that, in all respects, the Constitutional Court has the constitutional loyalty obligation to wait upon and capitalise on the Venice Commission's opinions, therefore, also in regard to changes brought to the justice laws, the Penal Code and the Criminal Procedure Code, so as not to hinder the Romanian state's journey as a Council of Europe member. "Considering Romania's statute of party to the European Convention on Human Rights and a Council of Europe member state, the Venice Commission's recommendations cannot be left with no applicable effects, being employed to enhance the regulatory framework, without this being equivalent to an infringement upon the principle of primacy of the Romanian Constitution" (see, for instance, Constitutional Court Decision no. 334 of June 26, 2013). The fulfilment by a state of international obligations resulting from a treaty in force is the duty of all the state authorities, including its Constitutional Court. If the constitutional provisions are contrary to the treaty, a treaty already embedded in the national judicial regulations, all the authorities of that state are bound to find adequate solutions to reconcile those treaty provisions with the Constitution (for instance, by way of interpreting or even revising the Constitution), otherwise the international liability of the state shall be entailed, with all the consequences derived from this, sanctions included [*see The Venice Commission, Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, parag. 47, CDL-AD (2016) 005*]*".*

5. "To do list" for the Romanian legislator

On July 13, 2018, the Council of Europe's European Commission for Democracy through Law (the Venice Commission) published Opinion no. 934 of July 13, 2018, CDL-PI(2018)007, the proposals of the Romanian Judges' Forum being carried forward to an overwhelming extent.

The Venice Commission suggested that Romania "re-consider the system for the appointment/dismissal of high-ranking prosecutors, including by revising related provisions of the Constitution, with a view to providing conditions for a neutral and objective appointment/dismissal process by maintaining the role of the institutions, such as the President and the Superior Council of Magistracy (SCM), able to balance the influence of the Minister of Justice; remove or better define the provisions enabling the superior prosecutors to invalidate prosecutors' solution for groundlessness; remove the proposed restriction on judges and prosecutors freedom of expression; supplement the provisions on magistrates' material liability by explicitly stating that, in the absence of bad faith and/or gross negligence, magistrates are not liable for a solution which could be disputed by another court; amend the mechanism for recovery action in such a way as to ensure that the action for recovery only takes place once and if liability of the magistrate has been established through the disciplinary procedure; reconsider the proposed establishment of a separate prosecutor's office structure for the

investigation of offences committed by judges and prosecutors (the recourse to specialized prosecutors, coupled with effective procedural safeguards appears as a suitable alternative in this respect); re-examine, with a view to better specifying them, the grounds for the revocation of SCM members; remove the possibility to dismiss elected members of the SCM through the no-confidence vote of the general meetings of courts or prosecutors' offices; identify solutions enabling more effective participation, in the work of the SCM, of SCM members who are outside of the judiciary; abandon the proposed early retirement scheme unless it can be ascertained that it will have no adverse impact on the functioning of the system; ensure that the proposed «screening» measures of magistrates are based on clearly specified criteria and coupled with adequate procedural guarantees and a right of appeal to a court of law, and identify ways to strengthen oversight mechanisms of the intelligence services"[1].

The Romanian Judges' Forum argued that the viewpoint of the Venice Commission experts is enlightening on how to observe the rule of law standards in Romania, in numerous respects concerning the changes brought to the justice laws. One reiterated idea was that the recommendations made by the Venice Commission are useful not only to the legislator, as part of the parliamentary procedure of drawing up or amending the legislative framework, but also to the Constitutional Court, when conducting a check on the compliance of a normative adopted in Parliament with the Fundamental law, taking into account the provisions of art. 11 parag. (1) in the Romanian Constitution and the case-law of the constitutional litigation court.

According to the Venice Commission Opinion of July 13, 2018, the legislative power and the executive power in Romania are bound to **immediately re-consider the system for the appointment/dismissal of high-ranking prosecutors**, with a view to providing conditions for a neutral and objective appointment/dismissal process, by maintaining the role of certain institutions, such as the President and the Superior Council of Magistracy (SCM), able to balance the influence of the Minister of Justice. So long as a Chief Prosecutor can be dismissed at the discretionary will of a politician, albeit the Minister of Justice, one can lose any hope of independence, being created an excessive political influence. According to Annex IX to the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union, Romania was bound to ensure the actual independence of the National Anticorruption Directorate, which is denied by the discretionary dismissal, by the Minister of Justice, of the Chief Prosecutors of this prosecutor's office unit. Moreover, the Venice Commission suggested that, in the context of a broader reform, the principle of independence should be added to the list of principles governing the prosecutors' activity[2].

One must eliminate the regulated limitations concerning **the judges' and prosecutors' freedom of expression** and revise the provisions on **the magistrates'**

[1] On September 12, 2018, the Romanian Judges' Forum Association published the Romanian translation of the interim Opinion issued on July 13, 2018 by the Venice Commission on the amendments brought to the justice laws. It is the only existing translation to date, as the state authorities failed to take care of the matter.

[2] CDL-AD(2014)010, parag.185.

material liability, by amending the mechanism for recovery action. As per Opinion no. 924 of July 13, 2018, the Venice Commission, in relation to the magistrates' freedom of expression, acknowledged that *"(...) the new obligation imposed on Romanian judges and prosecutors appears to be unnecessary at best and dangerous at worst. It is obvious that judges should not make defamatory statements with respect to anyone, not only with respect to state powers. It seems unnecessary to specify this by law. 129. On the contrary, it seems dangerous to do so, especially as the notion of defamation is not clearly defined and this obligation relates specifically to other state powers. This opens the way for subjective interpretation: what is meant by «defamatory manifestation or speech» for a member of the judiciary «in the exercise of their duties»? What are the criteria to assess such conduct? What is, for the purpose of this prohibition, the meaning of the notion of «power»? Does it refer to persons or to public institutions? What is the impact of the new obligation on the SCM task of defending judges and prosecutors, by publicly expressed statements, against undue pressure by other state bodies?"*.

The legislator has failed to meet the obligation, set forth by the Constitutional Court, to identify and regulate substantive law and procedural law infringements falling under the judicial error notion, in the sense of the rationale of Decision no. 252/2018, having instead kept a general, basic definition of the judicial error, making references to other required regulations to round up the definition. Even if, following the reconciliation of the law with Decision no. 45/2018, the legislator regulated a procedure by which the recourse action is not automatically triggered – stating that the recourse action is commenced after the submission of an advisory report by the Judicial Inspection and after the Ministry of Public Finance has conducted "its own assessment" – omitting the law-mandated regulation of a clearly defined procedure for conducting this "own assessment" can potentially introduce unpredictability in enforcing the rule. This is also highlighted in the Venice Commission's Opinion, which states that no criteria are provided for the individual assessment by the Ministry of Public Finance, a central government body, and that an institution of this kind, unrelated to the judicial system, is not the best solution towards including the said assessment into this procedure, as the latter cannot have a say in assessing the existence of causes of judicial errors. These could be established via a disciplinary procedure.

The legislative power and the executive power need to **reverse the establishment of a separate prosecutor's office structure for the investigation of offences committed by judges and prosecutors**. The Judicial Crime Investigation Department was set up within the Prosecutor's Office attached to the High Court of Cassation and Justice, intended to allow forwarding tens of grand corruption case files, pending before the National Anticorruption Directorate, via the simple filing of fictitious complaints against a magistrate, literally deleting a significant part of NAD's activity, constantly praised in the CVM Reports. Although, as per Decision no. 33/2018, the Constitutional Court dismissed as groundless the unconstitutionality objections to the effects the creation of this new prosecutor's office structure generates upon other already existing structures – the introduction of rules on the statute of prosecutors, the emergence of a discriminatory regime, underpinned by other than objective and rational objectives, the method of regulating the office of Chief Prosecutor of this department or the

competence of general prosecutor within the Prosecutor's Office attached to the High Court of Cassation and Justice to settle competence-related conflicts occurring among the Public Ministry structures, in its Opinion from July 13, 2018, the Venice Commission did suggest reconsidering the establishment of a special department for the investigation of magistrates. As an alternative, it was suggested to use specialised prosecutors, concurrently with efficient procedural safeguarding measures. The Venice Commission iterated that "The use of special prosecutors in such cases [corruption, money laundering, influence peddling etc.] has been successfully employed in many countries. The offences in question are specialised and can better be investigated and prosecuted by specialised staff. In addition, the investigation of such offences very often requires persons with special expertise in very particular areas. Provided that the special prosecutor is subject to appropriate judicial control, there are many benefits to and no general objections to such a system". *CDL-AD (2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, parag. 17, 18 and 23*[1].

The legislator in Romania shall have to **abandon the provisions that double the training period within the National Institute of Magistracy (to four years from the current two-year period)**. In the Venice Commission's opinion, published on July 13, 2018, doubling the training period within the National Institute of Magistracy, coupled with other changes (such as changing the composition of panels of judges, early retirement etc.) can significantly affect "the effectiveness and quality of the judicial process". Moreover, the institutional lockdown that could be generated by the above-mentioned provisions damages the actual enforcement and independence of justice, as in both its institutional component, dealing with the proper operation of the judicial system, and its personal component, dealing with judges' independence.

As per the new provisions, **meritocracy has been ousted from magistracy**, for instance, the actual advancement to higher law courts and prosecutor's offices shall take place based on subjective criteria, namely "the assessment of one's activity and conduct over the past 3 years", to the High Court of Cassation and Justice also including a formal interview held before the Superior Council of Magistracy Plenum, whereas the written examination tests of a theoretical and/or practical nature are eliminated and a visible advancement control system is introduced. The written examination included in the contest for advancement to a judge seat within the High Court of Cassation and Justice was eliminated. By keeping strictly the interview test for candidates, professional standards become relative, with an impact on the quality of the Supreme Court judges' activity and an increased degree of subjectivity. On the other hand, the topic of the interview, as defined in art. 52^4 parag. (1) in Law no. 303/2004, is identical to that of the verifications conducted by the Judicial Inspection as part of the procedure provided in the Regulation on advancing to judge seats within the High Court of Cassation and Justice. In other words, all the data comprised in the interview topic appear in the Report drawn up by judicial inspectors following the verifications.

[1] (*http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)041-e*), last accessed on April 14, 2020.

These provisions equally display a gross disregard of the international documents highlighting the fundamental principles regarding the judges' independence – the significance of their selection, training and professional conduct, as well as of the objective standards that have to be observed both when welcoming new magistrates and implementing the means to advance. The Council of Europe Committee of Ministers has constantly recommended that the governments of member states adopt or strengthen all the measures required to promote the role of judges individually, but also that of magistracy on the whole, and to promote their independence, by applying, in particular, the following principles: "(...) all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency" (see the Committee of Ministers within the Council of Europe, *Recommendation no. 94/12 of October 13, 1994, on the independence, efficiency and role of judges*). Any "objective criteria" trying to guarantee that the selection and career of judges rely on merits, taking into account professional training, integrity, capacity and effectiveness" can only be defined in broad terms. The focus lies primarily on rendering palpable general aspirations towards "merit-based appointment" and "objectivity", aligning theory to reality. Objective standards are mandatory not only to keep out political influences, but also to prevent the risk of witnessing favouritism, conservatism and "nepotism", which exist to the extent to which appointments are carried out in a non-systematic manner. Although adequate work experience is a significant requisite for advancement, length of service, in the modern world, is no longer generally accepted as a dominant principle crucial for advancement.

Romanian magistrates will be allowed to retire at the age of 42-43. The change made it possible for this retirement of judges or prosecutors with a length of service in magistracy between 20 and 25 years to take place even earlier than the age of 60. A massive number of retirements among magistrates[1] would automatically lead to law court overloads and actual stoppages in the operation of the judiciary. Consequently, the regulations in question would directly impact upon exerting the fundamental right of access to justice and the citizens' right to having their cases settled within a reasonable timeframe, being contrary to art. 21 in the Romanian Constitution (delays in settling case files due to the need to redocket them, following the retirement of judges that directly supervised submissions of evidence or took part in judicial investigations or debates, rejections of case files due to having reached their statute of limitations

[1] See The Romanian Judges' Forum – White paper: Changes brought to the justice laws – a potential collapse of magistracy in Romania, a study available of the web page (*http://www.forumuljudecatorilor.ro/index.php/archives/3137*). The replies received from various judicial authorities are available on the web pages: *http://www.forumuljudecatorilor.ro/wp-content/uploads/Raspuns-Alina-Palancanu.pdf*; *http://www.forumuljudecatorilor.ro/wp-content/uploads/ICCJ-date-statistice.pdf*; *http://www.forumuljudecatorilor.ro/wp-content/uploads/Raspuns-MJ-DOC-2018-02-27-161342.pdf*; *http://www.forumuljudecatorilor.ro/wp-content/uploads/Raspuns-CSM-4260.pdf*; *http://www.forumuljudecatorilor.ro/wp-content/uploads/Raspuns-CSM-1594.pdf*; *http://www.forumuljudecatorilor.ro/wp-content/uploads/Raspuns-PICCJ-499-2018.pdf*; *http://www.forumuljudecatorilor.ro/wp-content/uploads/Vechime-peste-20-ani.pdf*, all these web pages were last accessed on April 14, 2020.

etc.). The Venice Commission considers that a change of this nature poses a real threat to the continued efforts to strengthen the fight against corruption in Romania. The amount of the pension calculated for retired judges and prosecutors currently exceeds the amount of the indemnification received by acting judges and prosecutors, by up to 30%, owing to more favourable fiscal provisions.

The introduction of three-judge panel of judges (instead of two-judge ones) for the settlement of appeals has a direct impact upon the sound operation of law courts and their overload levels and entails a significant shortening of the time spent by judges in formulating grounds for their rulings, given that the number of judges in this courts stays unchanged, which indirectly hinders the settlement of case files within a reasonable timeframe. Moreover, by missing an impact study on the effects of such a provisions upon the law courts' human resources and the settlement of case files within the reasonable timeframe, and particularly upon the courts' overload levels, the legislative solution associates a risk of stoppage law courts are subject to.

Changes were operated in the role and duties set forth in the Constitution for the Superior Council of Magistracy, as a collegiate body, although the redistribution of roles and duties between the SCM Plenum and the SCM Departments damages the constitutional role of SCM and causes the constitutional duties specific to the Departments to be exceeded, contrary to art. 125 parag. (2), art. 133 parag. (1), as well as art. 134 parag. (2) and (4) in the Romanian Constitution. If one were to accept the possibility of having the duties of the Superior Council of Magistracy Plenum, that is those of the Superior Council of Magistracy as a collective and representative body, distributed among the two departments of the Superior Council of Magistracy, that would mean the *de facto* operation of structures mirroring the Superior Council of Magistracy – one for judges and one for prosecutors. Even if the Venice Commission's opinion converges towards the separation of careers in magistracy, the only way to strictly separate the judges' careers from the prosecutors', without the risk of having such a change deemed unconstitutional, is a constitutional revision. Moreover, the members representing civil society are denied any contribution to most decisions, with particular regard to the new distribution of duties between the departments, even if the Superior Council of Magistracy is a collective body that needs to operate, as a rule, not as an exception, with a complete number of members.

The Judicial Inspection reorganisation has unreasonably reinforced the chief inspector's duties, who appoints, from among judicial inspectors, those who would hold top positions (following a basic assessment of the management projects specific to each leading position), essentially controlling the selection of judicial inspectors, the inspection and the disciplinary investigation activities, becomes the primary budget holder and is the only owner of the disciplinary measures. All these amendments are aspects indicating a relativisation of the professional standards imposed to the management of the Judicial Inspection, with the outcome of dispensing with its operating independence. This tendency brings unfavourable effects upon the quality of the work carried out by the Judicial Inspection in terms of magistrates' liability and could consequently jeopardise the independence of justice and the Superior Council of Magistracy's actual constitutional role of justice independence endorser.

The establishment, by law, of a provision which, on the one hand, promotes the chief inspector's subjectivity in appointing the management of the Judicial Inspection and, on the other hand, enforces a total dependence of all the managing mandates within the Inspection upon the chief-inspector's mandate constitutes an infringement on the principle of securing the legal relationships in the exercise of their managing mandates by the respective judicial inspectors.

6. The saga of emergency ordinances issued by the Romanian Government

In regard to these changes brought to the "justice laws", and particularly given the regulatory insufficiency, the gaps, the contradictory provisions, inadequate to the judicial system's requirements, the Romanian Government issued, in 2018 and 2019, five emergency ordinances (GEO no. 77/2018; GEO no. 90/2018; GEO no. 92/2018; GEO no. 7/2019; GEO no. 12/2019).

On August 29, 2018, the Romanian Judges' Forum Association challenged the Government's opportunity to adopt an emergency ordinance that would have benefitted the current interim management of the Judicial Inspection, automatically and indefinitely, by driving SCM out of the decision-making process of delegation into management positions. The Romanian Judges' Forum Association requested that the Romanian Government not act on a potential initiative to adopt an emergency ordinance concerning the legal extension, by operation of law, of the mandate held by the Judicial Inspection's chief inspector, as an interim position to be held until a new contest is organised, at an uncertain.

Government Emergency Ordinance no. 77/2018 was adopted a few days later, with *intuitu personae* effects, to secure the continuity of offices such as chief inspector or, as the case may be, deputy chief inspector of the Judicial Inspection, as inferred from the recitals[1]. Since the date of issuance (September 5, 2018) and to the date of the present paper, GEO no. 77/2018 has not been passed by Parliament. Although, in a viewpoint submitted to the Parliament on February 11, 2020, the Romanian Government stated that it no longer supported GEO no. 77/2018, that normative still has legal effects[2].

On September 6, 2018, asked, to no avail, the Ombudsman to immediately notify the Constitutional Court on the provisions of GEO no. 77/2018 supplementing art. 67 in Law no. 317/2004 on the Superior Council of Magistracy.

Government Emergency Ordinance no. 90/2018 was issued so as to render operational the Judicial Crime Investigation Department (newly created to exclusively investigate crimes committed by judges and prosecutors), considering that "(...) the National Anticorruption Directorate and the other prosecutor's offices will no longer have the

[1] See the recitals of this normative: "Considering the need to secure the interim management by individuals who proved their professional and managerial skills, by already performing the functions in question, having a thorough knowledge of the Judicial Inspection's activity and taking an examination both at the time of their initial appointment, as well as at the time of being vested with a new mandate, as provided by the law".

[2] (*https://www.senat.ro/legis/PDF/2018/18L633APV.pdf*), last accessed on April 14, 2020.

jurisdiction to conduct the criminal investigation of the crimes committed by these individuals, a state of affairs that would seriously impair the judicial procedures carried out in the case files under the jurisdiction of the department, and could lead to an institutional blockage, and also taking into account that the law in effect does not include transitional provisions on how the Judicial Crime Investigation Department is actually rendered operational, whereas if the deadline set forth by Law no. 207/2018 is exceeded, this entails adopting urgent legislation intended to regulate a simple procedure", as well as "in order to provisionally appoint the Chief Prosecutor, the deputy Chief Prosecutor and at least one third of the department's prosecutors, which will allow rendering the department operational within the timeframe provided by the law, namely October 23, 2018"[1]. *Government Emergency Ordinance no. 90/2018* was approved by Parliament, as per *Law no. 239/2019, published on December 19, 2019 in the Official Gazette of Romania, Part I*. The Constitutional Court delivered Decision no. 137 of March 13, 2019, ruling that, whether or not "Decision 2006/928/EC and the CVM reports met the clarity, accuracy and undeniability requirements, their meaning being established by CJEU, the respective documents are not rules circumscribing to the constitutional relevance level required to conduct the constitutionality review in relation to them. Given the failure to meet the collective constitutionality requirements stipulated in the permanent case-law of the constitutional law court, the Court acknowledges that they cannot substantiate a possible Constitution infringement by the national law, as a single direct reference standard as part of the constitutionality review".

Government Emergency Ordinance no. 92/2018 was adopted in order to postpone, until January 1, 2020, enforcing the provisions regarding the early retirement of magistrates, after merely 20 years of service, as well as the provisions on the settling of appeals by 3-judge panels of judges. It was argued that not adopting these legislative measures could potentially impair the proper operation of law courts, lead to the extension of trial timeframes, with severe outcomes on the compliance with the principle of settling case files within reasonable (optimum and predictable) deadlines, as well as the fact that this early retirement system would predictably have a major impact upon the operation of law courts and prosecutor's offices, the effectiveness and quality of the judicial process, entailing the risk of a massive decrease in the number of active magistrates, as the new law also regulates increasing the training period for enrolment in magistracy, but also the length of service required to advance to law courts and prosecutor's offices.

The participation of civil society representatives, with voting rights, in the works of the Superior Council of Magistracy Plenum was regulated; however, the provision had to be reconciled with redefining the duties of departments assigned to judges and prosecutors, who took over nearly all of the Plenum's jurisdiction, rendering this participation rather symbolic.

Additionally, and seemingly to comply with the Venice Commission's opinion, the authors eliminated the legislative relief on the dismissal of an elected member of

[1] The Venice Commission suggested reconsidering the creation of a special department for investigating magistrates; the Government issued GEO no. 90/2018 to render this department operational, clearly not to end it.

Superior Council of Magistracy when the individual in question loses the trust placed in them by most of their judges or prosecutors, as the case may be, who actually work within the law courts or prosecutor's offices represented by this individual. Nevertheless, a dismissal requires some sort of *probatio diabolica*, which would make it impossible to use the procedure, as it links any dismissal attempt to the discovery, by the corresponding department within the Superior Council of Magistracy, based on the report drawn up by the Judicial Inspection, that the person in question has failed to fulfil or has inadequately fulfilled, in a critical, repetitive and unreasonable manner, their own duties according to the law.

In regard to all the other harmful aspects acknowledged in the Venice Commission's Opinion from July 13, 2018, GEO no. 92/2018 has no specific provision. Conversely, although the Venice Commission suggested reconsidering the creation of a special department for investigating magistrates, the Government issued GEO no. 90/2018[1], to render this department operational, and clearly not to dismantle it.

At the same time, GEO no. 92/2018 contained provisions that were new to the legislation, unrelated to the Venice Commission's Opinion from July 13, 2018.

On September 16, 2018, the Romanian Judges' Forum stated their support of the hundreds of fellow judges and prosecutors who had protested on the steps of Bucharest Court of Appeal, backing the rule of law and publicly sending a quasi-unanimous message of the Romanian magistracy.

On October 4, 2018 and October 24, 2018, the Romanian Judges' Forum Association requested that the Ombudsman immediately notify the Constitutional Court in regard to the provisions of Law no. 234/2018 on amending and supplementing Law no. 317/2004 on the Superior Council of Magistracy, and the provisions of the Law on amending and supplementing Law no. 234/2018 on amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors, all of which hinder, according to the Venice Commission, the independence of justice. The attempts were futile. On November 5, 2018, the Romanian Judges' Forum published the refusal issued by the Ombudsman concerning the memoranda submitted in order to notify the Constitutional Court on the unconstitutionality of certain provisions in Law no. 207/2018 on amending and supplementing Law no. 304/2004 on the judiciary organisation.

7. Express requirements of the European Commission, the European Union Council and the European Parliament

On November 13, 2018, the European Commission's Report under CVM. The European Commission underlined that several problematic changes brought to the justice laws impair the independence of magistrates and limit the role held by the Superior Council of Magistracy as an endorser of the judicial system's independence, such as: the new system for appointing and dismissing Chief Prosecutors and the role of the Minister of Justice within this procedure; limitations regarding the freedom of

[1] Published in the Official Gazette no. 862 from October 10, 2018.

expression and information, materialised as the magistrates' obligation to refrain from "any kind of denigrating gestures or words towards the other state powers"; the magistrates' material liability, perceived as leaving room to be used as a means to exert pressure upon magistrates, considering that it makes it possible for the Minister of Finance to launch, based on their own assessment, a recourse action against a magistrate who committed a judicial error, playing an advisory part for the Judicial Inspection. The decisive role in selecting the course of action is granted to the Judicial Inspection and the Minister of Finance, but not to the Superior Council of Magistracy; a new department set to investigate crimes committed by magistrates, perceived as a (supplementary) tool to put judges under pressure, whereas no reasoning was provided for allowing magistrates special treatment in comparison with other public servants the importance of NAD's experience in investigating and pursuing corruption cases among magistrates was ignored; the dismissal of the Superior Council of Magistracy members, via a motion of no confidence/a petition filed by law courts and prosecutor's offices, which would risk disturbing the balance among the SCM members' liability, stability and independence; removing from the prosecutors' statute the previous reference to their independence, which, coupled with other measures, and given Romania's current complex political context, tends to strengthen even more, in the eyes of the Commission, the too-down control and authority of the Minister of Justice and entails the risk of witnessing political interferences into criminal case files; fostering early retirement, coupled with the increased training period for enrolment in magistracy, are deemed sources of major risks in the sense of disrupting human resource management within the judicial system, with dire consequences on its effectiveness and quality.

The European Commission formulated several recommendations, among which: implementing a solid and independent system for appointing high-ranking prosecutors, based on clearly-defined and transparent criteria, with assistance from the Venice Commission, which argued that the impact of the Constitutional Court's Decision of May 30, 2018 could have broader outcomes on the prosecutors' statute in general, fortifying the capacities of the Minister of Justice in relation to the prosecutors, whereas, in contrast, it would be significant, especially in the current setting, to enhance the prosecutors' and uphold or increase the roles of institutions, such as the Romanian President or SCM, likely to counterbalance the minister's influence, also recommending revising the provisions of art. 132 parag. (1) in the Romanian Constitution and amending Law no. 303/2004, so that SCM's opinion should become mandatory; embedding in the Code of conduct for members of Parliament, currently under development in Parliament, concrete provisions on the mutual respect among institutions and a clear indication that both parliamentarians and the parliamentary process observe the judicial system's independence; finalising the Penal Code and the Criminal Procedure Code reforms during this phase, in line with the concern expressed by the Venice Commission about the fact that, "analysed individually, but especially considering their cumulative effect, numerous changes will seriously impair the effectiveness of the Romanian criminal justice system in the fight against various forms of crime, including corruption-related offences, violent crimes and organised criminality"; the Government and the Parliament need to demonstrate full

transparency, that they consult with the relevant authorities and stakeholders as part of the decision-making process and the legislative activity pertaining to the Penal Code and the Criminal Procedure Code, the anti-corruption laws, the laws on integrity (incompatibilities, conflicts of interests, illicit wealth), the justice laws (regarding the justice system organisation), as well as the Civil Code and the Civil Procedure Code, taking inspiration from the decision-making process transparency implemented by the Government in 2016; adopting objective criteria in making and justifying decisions to waive the immunity of parliamentarians, to make sure that immunity is not used as a means to elude the criminal investigation and prosecution of corruption offenses; SCM should draw up a collective program for its mandate, to include measures designed to foster transparency and accountability, an outward-oriented strategy, with periodic open reunions with judges' and prosecutors' assemblies from all tiers, but also with civil society and professional organisations.

Still on November 13, 2018, the European Parliament adopted the Resolution on the rule of law in Romania, stating the following: [*"(...) 2. Is deeply concerned at the redrafted legislation relating to the Romanian judicial and criminal legislation, regarding specifically its potential to structurally undermine the independence of the judicial system and the capacity to fight corruption effectively in Romania, as well as to weaken the rule of law; (...) 7. Urges the Romanian Parliament and Government to fully implement all recommendations of the European Commission, GRECO and the Venice Commission, and to refrain from conducting any reform which would put at risk respect for the rule of law, including the independence of the judiciary; urges continued engagement with civil society, and stresses the need to address the issues referred to above on the basis of a transparent and inclusive process; encourages proactively seeking evaluation by the Venice Commission of the legislative measures at stake before their final approval; 8. Calls on the Romanian Government to cooperate with the European Commission, pursuant to the principle of sincere cooperation as set out in the Treaty; (...) 10. Advocates strongly a regular, systematic and objective process of monitoring and dialogue involving all Member States, in order to safeguard the EU's basic values of democracy, fundamental rights and the rule of law and involving the Council, the Commission and Parliament, as proposed in its resolution of 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (the DRF Pact)(7); reiterates that this mechanism should consist of an annual report with country-specific recommendations (...)"*].

On November 18, 2018, the Romanian Judges' Forum Association **called on the Superior Council of Magistracy, the Parliament and the Government to comply with the obligations undertaken by the Romanian State within the European Union and the Council of Europe**. The Association disavowed SCM's statement of position, reminding the general public that, regardless of the statements strictly individually owned by SCM members and, as per Decision no. 974 from 28.09.2017, the Plenum ruled, at an institutional level, that *"the draft (amending the justice laws) falls under a visibly retrogressive tendency"* and *"the serious substantive flaws of the draft demand a negative opinion on it"*. SCM's seemingly "positive" attitude towards these draft laws is contradicted by the actual penultimate paragraph of the annex to this ruling,

stating that *"on the whole, the unconstitutionality flaws revealed and the dysfunctionalities many of the draft provisions could cause in the organisation and operation of the judicial system do not allow issuing a favourable opinion, with remarks".* In regard to the evolution of the institutional position expressed by the Superior Council of Magistracy regarding the establishment of the Judicial Crime Investigation Department, as per SCM Plenum Decision no. 974 from 28.09.2017, upon the issuance of the adverse opinion, it was acknowledged that the creation of said department had not even been preceded by consultations with law courts and prosecutor's offices, whereas the president of SCM at the time, judge Mariana Ghena, firmly advertised on 9.12.2017, during an interview granted fresh off the parliamentary debates, this adverse opinion towards the special department set to investigate the magistrates, deeming its existence unnecessary and unjustified. Concerning the conclusion of the report on the need for the Superior Council of Magistracy to promptly appoint the Judicial Inspection interim management team, and the need to appoint, within 3 months, based on a competitive selection process, a new management of the Judicial Inspection, SCM stated that "we are currently deploying the decision-making transparency procedure prior to adopting the new Regulation for the appointment of the Judicial Inspection chief inspector, which impairs the expediency of the procedure", while not giving any clear explanation for not running this procedure at a prior time, for not making any amendment proposals during the legislative process of amending Law no. 317/2004 (certain provisions actually regarding the case of the Judicial Inspection management) so as to avoid similar future contexts, being known that the enforcement of an administrative document of a normative nature, such as the Regulation adopted by SCM, can be suspended, unlike the status of organic laws. In terms of eliminating the status of disciplinary measure owner the Minister of Justice previously had in relation to magistrates, without denying the repealing of these provisions by the Parliament, it is baffling why, as per Government Emergency Ordinance no. 92/2018, it was deemed necessary to reintroduce in the legislation, for the Minister of Justice, the duty of notifying the Judicial Inspection to conduct inspections focused on disciplinary offences committed by prosecutors, given that such referrals are construed by the general public as inherent forms of pressure.

On November 28, 2018, the Romanian Judges' Forum Association published remarks on unconstitutionality aspects in the Law for the approval of GEO no. 92/2018 on amending and supplementing certain justice-related normatives, as well as arguments for submitting certain preliminary questions to the Court of Justice of the European Union.

On December 13, 2018, the Conclusions of the European Union Council from December 12, 2018, on the cooperation and verification mechanism, were published: *"6. Recalling the significant positive performance of Romania under the Mechanism in previous years, the Council stresses the absolute importance of safeguarding and further consolidating the progress already achieved. The Council notes that the Commission's report highlights* ***a number of serious concerns and negative steps which have called into question the irreversibility and sustainability of reforms****. In order to pave the way for a successful conclusion of the Mechanism for Romania in the near future, the negative steps and the concerns set out in the report need to be fully and decisively addressed, including through the adherence to the recommendations of the Council of*

Europe Venice Commission and GRECO, and the fulfilment of all the key recommendations set out by the Commission. 7. ***Romania needs to restore the positive momentum on reforms and take prompt action****, notably on the additional key recommendations set out by the Commission related to the independence of the judiciary and judicial reform, to the fight against corruption at all levels, as well as on other integrity issues highlighted in the report. In this context, the Council reiterates the importance of an unequivocal, sustained and broad-based political commitment to meet the objectives set out by the Mechanism, notably including a political consensus to respect the independence of judiciary in line with the key recommendations set out by the Commission. In this context, the Council also emphasises the importance of the National Anti-Corruption Directorate (NAD). 8. The Council continues to expect Bulgaria and Romania to fully meet all their respective remaining key recommendations set out in the Commission reports, the fulfilment of which will lead to the provisional closing of individual benchmarks, except if developments in the respective countries clearly put in question or reverse the course of progress. Recalling that the speed of the process will solely depend on the respective progress made by Bulgaria and Romania, the Council notes that,* ***provided all the respective benchmarks are fully met in an irreversible and sustainable way in the near future, the Mechanism should subsequently be concluded****. In this context, the Council emphasises that all related key recommendations by the Commission should be fulfilled in order for benchmarks to be closed. 9. The Council reiterates that the Cooperation and Verification Mechanism continues to be instrumental for progress. It remains an appropriate tool to assist Bulgaria and Romania in their respective reform efforts, in order for each of them to achieve a record of concrete and lasting results required to fulfil the objectives of the Mechanism. The Council recalls its continued readiness to support efforts of Bulgaria and Romania in this regard through EU and bilateral assistance.* ***Pending the satisfactory fulfilment of all respective benchmarks through a substantial and lasting reform process, which the Council expects in this framework, the Mechanism stays in place.*** *Until then, the Council invites the Commission to continue its reporting and looks forward to its next reports on Bulgaria and Romania foreseen in the second half of 2019. The Council welcomes the Commission's intention to continue monitoring the situation in Bulgaria and Romania closely and to keep the Council regularly informed".*

8. Referrals submitted in waves to the Court of Justice of the European Union by the Romanian law courts

On January 29, 2019, at the request of the Romanian Judges' Forum Association, Olt County Court decided to refer the matter to the Court of Justice of the European Union, with a request for a preliminary decision (the appointment, via a GEO, of the Judicial Inspection's interim leadership), a first for the "justice laws". The Judicial Inspection's chief inspector attempted to halt this endeavour by filing a motion for change of venue. It was the first referral of this nature, which would determine several other law courts to emulate the measure[1]**. There**

[1] Author' note: When I drew up, one night, the first preliminary motion to refer, I had not expected so many preliminary questions submitted by Romanian law courts, however,

are currently 15 such motions pending before CJEU, with rulings being expected throughout 2020. For the first six referrals, the Grand Chamber has already hosted a session of statements.

On February 6, 2019, in the context of the informal meeting of ministries of justice and ministries of internal affairs of the European Union member states, held in Bucharest, the Romanian Judges' Forum Association, the *Movement for the Defence of Prosecutors' Statute* Association and the *Initiative for Justice* Association launched a **Call on the Ministries of Justice of the European Union member states**, requesting that they include in the agenda the state of justice independence observance in Romania, in light of the fact the Romanian state representatives ignore the European Commission Reports issued under the Cooperation and Verification Mechanism, the Venice Commission's opinions and the GRECO Reports.

On February 7, 2019, at the request of the Romanian Judges' Forum Association, Pitești Court of Appeal decided to refer the matter to the Court of Justice of the European Union with a request for a preliminary decision (regarding SIIJ). SCM president Lia Savonea attempted to halt this endeavour by filing a motion for change of venue and a motion to disallow the CJEU court ruling. The same was attempted by judge Florica Roman and the Romanian Community Coalition (Coaliția Românilor), an NGO controlled by a PSD MEP, Chris Terheș, both having filed main, as well as ancillary motions to intervene in favour of SCM.

In several case files where the Romanian Judges' Forum Association acts as plaintiff, but also independently of these, **Romanian law courts notified CJEU on matters of EU law interpretation, in the context of legislative amendments or decisions by the Constitutional Court** [interpretation of the Cooperation and Verification Mechanism content, nature and temporal extent; the member states' obligation to establish the measures required for effective legal protection within the areas regulated by the Union law, namely guarantees of an independent disciplinary procedure for judges in Romania, removing any risk entailed by politics influencing how disciplinary proceedings are run, such as the direct appointment of the Judicial Inspection leadership, albeit interim, by the Government, or the establishment and organisation of the Judicial Crime Investigation Department as part of the Prosecutor's Office attached to the High Court of Cassation and Justice, by way of indirectly exerting pressure on magistrates; the interpretation of legal relationships security and effectiveness principles in the sense that they oppose instances such as a litigation in the field of consumer rights protection in which the procedural rules can be changed, after the consumer has referred the matter to the law court, via a legally binding decision by the Constitutional Court, enforced by the legislator by means of a law

the Judicial Inspection's and SCM's attempts to change the venue of the case files in which they were inquired triggered the individual chain reactions of several Romanian judges, the motion of Romanian Judges' Forum being unconditionally owned. Both in regard to the "justice laws" and, later on, in relation to CCR's decisions, the vast majority of preliminary referrals to CJEU followed the template set by the Romanian Judges' Forum, an association that basically originated all referrals, the published materials being carried over in various law courts' statements of reasons.

intended to amend the Civil Procedure Code, by introducing a new legal recourse that can be used by a professional, the outcomes being a longer timeframe for the trial and higher costs to finalise it; the interpretation of art. 19 parag. (1) in TEU, art. 325 parag. (1) in TFEU, art. 1 parag. (1) let. a) and b) and art. 2 parag. (1) in the Convention drawn up pursuant to article K.3 in the Treaty on the European Union, on the protection of the European Communities' financial interests, and of the principle of judicial security, in the sense that they would oppose a decision delivered by a body outside the judiciary – the Constitutional Court of Romania, a decision that would assess the legality of the composition of certain panels of judges, thus creating the requisites for granting extraordinary legal recourses against conclusive judicial orders delivered over a period of time; the interpretation of art. 47 parag. (2) in the European Union's Charter of Fundamental Rights, in the sense that it opposes cases in which a body outside the judiciary ascertains the absence of independence and impartiality of a panel of judges that includes a leading judge who was appointed not randomly, but pursuant to a transparent rule, known and unchallenged by the parties, a rule applicable to all the case files handles by the said panel of judges, whereas ruling is legally binding according to the domestic law; the interpretation of art. 2, coupled with art. 4 parag. (3) in TEU, in the sense that, a member state's obligation to abide by the rule of law principles also covers the need for Romania to meet the requirements imposed in the reports under the Cooperation and Verification Mechanism, also the refrainment of a constitutional court, a structure with partially political jurisdiction, from interfering, from interpreting the law and setting forth, for law courts, concrete and mandatory means to enforce it – the exclusive jurisdiction of the judicial authority, and from issuing new legislation – the exclusive jurisdiction of the legislative authority; the interpretation of the judges' independence principle in relation to domestic standards that define judicial error as the delivery of a conclusive judicial order visibly opposite to the law or the issue in fact resulting from the evidence submitted for the case file, without ruling to initiate a procedure to find inconsistencies and without defining *in concreto* the meaning of such inconsistencies of the judicial order with the applicable legal provisions and the issue in fact, possibly blocking the judge's and the prosecutor's chance to interpret the law and examine the evidential basis or by means of which the magistrate's substantive civil liability towards the state is entailed, exclusively based on the state's own assessment and, possibly, based on the Inspection advisory report regarding the magistrate's intent or gross negligence towards committing the said clerical error, whereas the magistrate is unable to publicly exert their right to a defence, giving way to arbitrarily engage and disengage the magistrate's substantive liability towards the state; the interpretation of art. 2 and art. 19 parag. (1) in TEU, as well as of art. 47 in the European Union's Charter of Fundamental Rights, in the sense that they oppose the intervention of a constitutional court (a body not qualifying, as per the domestic law, a court of law) on the manner in which the Supreme Court construed and enforced the infraconstitutional legislation in the endeavour to set up panels of judges][1]. I am referring to C-83/19, C-127/19 and

[1] See, for more details, *D. Călin*, Ten motions for a preliminary ruling filed by Romanian law courts in order to maintain the rule of law, a common value of all the European Union member states, in Revista Română de Drept European (Romanian Review of European Law) no. 4/2019, p. 97 and the following.

C-195/19 colligated cases, *The Romanian Judges' Forum Association et al.*, case C-291/19, *SO*, case C-355/19, *The Romanian Judges' Forum Association et al.*, case C-357/19, *Euro Box Promotion*, case C-379/19, *NAD Prosecutor – Oradea Territorial Service*, case C-397/19, *The Romanian State – The Ministry of Public Finance*, case C-547/19, *The Romanian Judges' Forum Association*.

The recommendations and requirements mentioned in the reports drawn up by the European Commission, pursuant to art. 2 in Decision 2006/928 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, focus on meeting the benchmarks. The attainment of these benchmarks is a result-producing obligation undertaken by Romania, whereas the CVM reports are built around these benchmarks that Romania has to meet, being integral parts of the decision and entailing concrete and clearly defined duties and commitments. Therefore, the recommendations made by the Commission on addressing the benchmarks, pursuant to the loyal cooperation principle, stipulated by art. 4 parag. (3) in the Treaty on the European Union, have to be taken into account by the Romanian authorities, precisely in order to meet the benchmarks set forth in the Annex to Decision 2006/928/EC and refrain from any measure that might infringe them or endanger their implementation.

Even if the theory of judicial effects legally binding for Romania, provided in CVM and the consecutive reports issued under it, were to be dismissed, Decision 2006/928/EC, coupled with the loyal cooperation principle, resulting from art. 4 parag. (3) in TEU, demand that Romania fulfil a series of specific obligations within CVM, as the benchmarks implement precisely the requirements set forth in the accession treaty, in line with the European Union values and principles defined by art. 2, 6 and 19 parag. (1) in TEU and by art. 47 in the charter, including therefore Romania's obligation to take into account the recommendations made by the Commission in the CVM reports for cases when it adopts legislative or administrative measures in areas falling under the benchmarks set forth in the annex to the CVM decision, a corollary of the rule of law principle (art. 2 in TEU) and the justice independence principle (art. 19 in TEU).

In this given situation, not even CCR would be able to ignore the recommendations made by the European Commission under CVM, by means of the loyal cooperation principle, namely art. 4 parag. (3) in TEU, by way of analogy with the directives according to which, at the level of constitutional courts of the European Union's member states, as per the case-law, it was accepted that a constitutional court can control the validity of a national provision that transposes an EU law standard. Consequently, and also in the case of specific obligations under CVM, depending on the requirements provided in the accession treaty, in line with the EU law values and principles [art. 2, 6 and 19 parag. (1) in TEU and art. 47 in the charter], ignoring them when legislative or administrative measures are adopted in areas falling under the benchmarks mentioned in the annex to CVM will lead to finding the provisions of the national constitution to be infringed.

9. The spring of 2019. All over the steps in Bruxelles!

Government Emergency Ordinance no. 7/2019 was adopted to allow taking temporary measures regarding the contest for admission into the National Institute of Magistracy, the initial training of judges and prosecutors, the National Institute of Magistracy graduation exam, the internship and proficiency exam of trainee judges and prosecutors, as well as to amend and supplement Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on the judiciary organisation and Law no. 317/2004 on the Superior Council of Magistracy.

On February 19, 2019, the Romanian Judges' Forum, the Movement for the Defence of Prosecutors' Statute and the Initiative for Justice expressed their extreme concern about the changes brought to the "justice laws", by means of GEO no. 7/2019, without ensuring decision-making transparency within the proposed legislative amendments and without the endorsement of the Superior Council of Magistracy. The three associations encouraged massive protests from Romanian magistrates. Hundreds of law courts suspended or halted their work, thousands of judges and prosecutors took over once again the steps of their palaces of justice.

The changes adopted via GEO no. 7/2019 managed to freeze institutions of the judiciary, namely prosecutor's offices, being for that matter swiftly amended by *Government Emergency Ordinance no. 12/2019*, after a series of adverse reactions towards certain legislative solutions included in GEO no. 7/2019, authored mainly by representatives of the judicial system institutions – the Superior Council of Magistracy, the High Court of Cassation and Justice, the Public Ministry, as well as by professional associations of judges and prosecutors, discontents that impair the sound operation of law courts and prosecutor's offices attached to them and stir the danger of dividing the society. From their date of publication (February 20, 2019 and March 7, 2019, respectively) to the completion date of the present paper, GEO no. 7/2019 and GEO no. 12/2019 have not been approved by the Romanian Parliament.

On February 24, 2019, the Romanian Judges' Forum, the Movement for the Defence of Prosecutors' Statute and the Initiative for Justice replied to Prime Minister Viorica Vasilica Dăncilă: "**The independence of justice is not negotiable!** Any dialogue concerning adoption of GEO no. 7/2019 should have been opened prior to its issuance, not *post factum*, the only solution to the legislator (albeit a delegated one) being the repealing of said normative in its entirety, at once". The talks were, however, attended by the Association of Romanian Magistrates, the National Union of Romanian Judges and the Association of Romanian Prosecutors, the last one with a new leader, taking opposite stands to their previous constant ones. On March 4, 2019, the Romanian Judges' Forum, the Movement for the Defence of Prosecutors' Statute and the Initiative for Justice deemed the latest proposal to amend GEO no. 7/2019 ignorant to the votes of thousands of magistrates, expressed in the general assemblies of law courts and prosecutor's offices.

La March 5, 2019, "IUSTITIA" Polish Judges' Association expressed their solidarity towards the Romanian magistrates opposing the justice changes that infringe upon

the justice system independence. One Polish judge, Darius Mazur, actually took to the steps of Bucharest Justice Palace, joining his colleagues in Romania!

On March 6, 2019, at the request of the Romanian Judges' Forum, the Council of Europe Parliamentary Assembly ruled to notify the Venice Commission on GEO no. 7/2019.

In a gesture beyond comprehension, on March 10, 2020, 30 county courts presidents and vice presidents requested SCM to stop the magistrates' protests. The request was reiterated by presidents and vice presidents of certain courts of appeal[1]. The next day, the Romanian Judges' Forum, the Movement for the Defence of Prosecutors' Statute and the Initiative for Justice reacted strongly: "**The separation from protests of the 31 presidents or vice presidents of courts of appeal, and 30 presidents or vice presidents of county courts, representing 1.3% of the local courts in Romania and 0.8% of the Romanian magistrates, respectively, without having representation mandates from their colleagues, is an insignificant effort, with no influence on the majority of judges and prosecutors in Romania**". The magistrates' protests on the steps of law courts and prosecutor's offices continued.

The Romanian Judges' Forum, the Movement for the Defence of Prosecutors' Statute and the Initiative for Justice disapproved the manner in which the management of Bucharest Court of Appeal and the Gendarmerie officers vested with the security of the said law court premises chose to intervene, on March 19, 2019, on the collective of magistrates protesting freely against the legislative changes that severely damage the rule of law foundations.

On April 3, 2019, the Romanian Judges' Forum firmly requested once again that the legislative power immediately dissolve the separate prosecutor's office structure, set up to investigate crimes committed by judges and prosecutors.

On April 4, 2019, representatives of the Romanian Judges' Forum, the Movement for the Defence of Prosecutors' Statute and the "Initiative for Justice" Association met in Bruxelles cu high-ranking officials of the European Commission and the European Parliament, including the Senior Vice President of the European Commission, Mr Frans Timmermans, as part of an unique endeavour regarding the state of justice in Romania. During the same event, for the first time in history, magistrates of different European Union member state than Belgium protested in Bruxelles, on the Justice Palace steps, for the rule of law. 30 Romanian judges and prosecutors in Bruxelles!

On April 25, 2019, at the request of the Romanian Judges' Forum Association, the Consultative Council of European Judges (CCJE) issued an opinion on the status of justice independence in Romania. Among others, CCJE condemned any statements, comments or remarks going beyond the form of legitimate criticism and attempting, in reality, to attack, intimidate, exert any other kind of pressure upon Romanian judges or to humiliate them, by resorting to basic, irresponsible

[1] (*http://www.ziare.com/stiri/proteste-magistrati/30-de-presedinti-si-vicepresedinti-de-tribunale-cer-csm-sa-opreasca-protestele-magistratilor-1552961*), last accessed on April 14, 2020.

or demagogic arguments, as well as to otherwise disregard the judicial system in Romania or judges on an individual basis. Concerning the judges' right to protest against policies or actions likely to affect their independence, CCJE expressly acknowledged the legitimate right of judges in Romania or elsewhere to protest against such actions, within a climate of mutual respect and in a manner that facilitates maintaining judicial independence and impartiality. This opinion was followed by a similar one, issued by the Consultative Council of European Prosecutors (CCPE), at the request of the Movement for the Defence of Prosecutors' Statute[1]**.**

With a new Opinion, issued on June 19, 2019, the Venice Commission recommended that the Romanian Government drastically reduce the use of emergency ordinances and underlined the fact that the Special Department risked becoming an obstacle in the fight against corruption. In regard to SIIJ, the Venice Commission argued that it risked becoming an obstacle in the fight against corruption. The Venice Commission regretfully ascertained that that the most disputable elements of the 2018 reforms, identified in the Opinion from October 2018, either stayed unchanged or worsened. The Venice Commission quoted claims worded by the Romanian Judges' Forum, the Movement for the Defence of Prosecutors' Statute and the Initiative for Justice.

On June 24, 2019, approximately 1150 judges and prosecutors supported, on an individual basis, the **Call of the Romanian Judges' Forum, the Movement for the Defence of Prosecutors' Statute and the Initiative for Justice on the executive power and the legislative power for the latter to advance/adopt a draft law designed to promptly amend the justice laws** (in line with the opinions issued by the Venice Commission and the Consultative Councils of European Judges and Prosecutors and the European Commission's and GRECO reports).

On June 24, 2019, the Romanian Judges' Forum requested that the Romanian Government authorise the immediate publication of GRECO's updated Report on the impact of the changes brought to the justice laws upon the anticorruption policies in Romania. No earlier than July 9, 2019 did the Romanian Government publish the GRECO Reports, which borrow many of the claims constantly expressed by the Romanian Judges' Forum. It was acknowledged that Romania made insufficient progress towards fighting corruption, and SIIJ was a point of concern. The Romanian Judges' Forum: "The lack of any response of compliance with the GRECO recommendations, from either the legislative or the executive power, as well as the attitude of certain members of the Superior Council of Magistracy, led by their chairman, elected on an interim basis for 2019, of rejecting claims from international and/or European bodies on core aspects, are unacceptable in a state upholding the rule of law and can jeopardise the entire journey Romania is taking as a Council of Europe member state".

[1] For more details, *D. Călin*, The Opinions the Consultative Council of European Judges Bureau and of the Consultative Council of European Prosecutors Bureau, issued in 2019 on the status of independence of judges and prosecutors in Romania, in "Pro Lege" Magazine, Issue 2-3/2019, p. 149 and the following, an article available on the web page (*http://revistaprolege.ro/wp-content/uploads/2019/09/Pro-Lege-2-3_2019.pdf*), last accessed on April 14, 2020.

In July 2019, the Romanian Judges' Forum challenged in court administrative normatives issued by SCM on the manner of holding the contest for advancement to the seat of High Court of Cassation and Justice seat, and the Methodology for appointing judges, via an interview, as provided by art. 33[1] in Law no. 303/2004 on the statute of judges and prosecutors, republished, which disregarded the European Commission's Reports issued under CVM.

On August 24, 2019, the Romanian Judges' Forum and the Initiative for Justice requested that the Romanian President observe the independence of justice, as well as the separation of powers, and not to act on the proposal of the Romanian Government (PSD plus ALDE) to appoint a judge (Dana Gîrbovan, president of the National Union of Romanian Judges) as the Minister of Justice. The Constitutional Court of Romania, as well, as per Decision no. 45/2018, ascertained that the *"the Minister of Justice office is incompatible with that of judge/prosecutor, two titles that cannot coexist according to neither the Constitution, not Law no. 303/2004".* As such, the Government's proposal to the Romanian President, that the latter appoint as the Minister of Justice an acting magistrate, a judge within Cluj Court of Appeal, blatantly and unapologetically disregarded the provisions of the Romanian Constitution, as well as the basic recommendations of relevant international organisations.

On October 22, 2019, the European Commission published its Report on the status in Romania, under the Cooperation and Verification Mechanism, a report that reiterates the claims expressed by the Romanian Judges' Forum. The Commission noticed a visible involution in comparison to the progress made during previous years, a reason for major concern, regretting the fact that Romania failed to implement the additional recommendations expressed in November 2018. The same day, the Romanian Judges' Forum and the Initiative for Justice demanded that all the parties culpable for that very critical CVM Report promptly take responsibility for the string of successive failures ascertained by the European Commission.

10. Conclusions. For an entire profession, a handful of people fight to uphold the European values

According to the *Declaration on judicial ethics*, adopted by the General Assembly of the European Network of Councils for the Judiciary in London (June 2-4, 2010), *"When democracy and fundamental freedoms are in peril, a judge's reserve may yield to the duty to speak out".*

Therefore, the judges' responses, by means of their representatives or the professional associations they have set up, are legitimate and expected when dealing precisely with the proper operation of the judicial system.

But can there be any more courage within the Romanian magistracy in such a context?

Most definitely, institutions are managed by people, not by robots, and the sins of the communist era have not been decisively wiped out from the perception and conduct of public authorities in Romania.

However, the Romanian magistracy, as well, seems to have evolved, at least the example made by a few judges, in the first line of the Romanian Judges' Forum Association (Dragoș Călin, Lucia Zaharia, Ionuț Militaru, Ciprian Coadă, Georgeta Ciungan, Anca Gheorghiu, Gabriel Mustață, Florina Ionescu, Alina Palancanu, Alexandru Bălășanu, Anca Codreanu, Claudiu Drăgușin, Sorina Marinaș, the final three over a shorter period of time), aided by a number of prosecutors (Bogdan Pîrlog, Alexandra Lăncrănjan, Sorin Lia), who were critical in the struggle of an entire profession to uphold the European values.

The public protests, on the steps of law courts or by way of countless memoranda and public letters, the almost daily dialogue carried out by representatives of the Romanian Judges' Forum with relevant European and international entities (the European Commission, the Venice Commission, the Consultative Council of European Judges, GRECO, the European Parliament, the Consultative Council of European Prosecutors, the European Network of Councils for the Judiciary, MONEYVAL), including the official meetings with high-ranking officials of the latter (for instance, Mr Frans Timmermans)[1], but also the motions to submit preliminary questions to the Court of Justice of the European Union, coupled with the domestic endeavours (tens of unconstitutionality exceptions pending before the Constitutional Court, tens of ongoing lawsuits, nearly daily calls on all the national decision-making public authorities), all of these are legitimate forms of resistance and struggle to uphold the European values[2].

Additionally, by means of tens of interviews granted by Romanian judges and prosecutors (Dragoș Călin, Bogdan Pîrlog, Cristi Danileț, Laura Codruţa Kövesi, Augustin Lazăr, Lucia Zaharia, Sorin Lia) to highly prestigious newspapers or radio/TV stations in Western Europe and the United States of America (Euronews, ARTE, Financial Times, La Croix, Frankfurter Allgemeine Zeitung, ARD, ZDF, BR.de – Der Bayerische Rundfunk, SRF, RTBF, Sverige Radio, New York Times, France 3, ORF, Le Monde etc.)[3], the international public opinion professionals explained the unfavourable status of legislative changes affecting the Romanian magistracy.

[1] The European Commission took upon itself the role of rule of law defender, as per art. 2 in the Treaty on the European Union (TEU), and the dialogue with the Romanian magistrates was essential in that respect for a technical appraisal of the entire context, magistrates exclusively being technical experts, within the limits of their statute. This meeting was attended by Dragoș Călin, Alexandra Lăncrănjan, Anca Codreanu, Bogdan Pîrlog și Claudiu Sandu. A statement of one of the participants is available on the web page (*http://www.ziare.com/stiri/justitie/exclusiv-din-culisele-intalnirii-magistratilor-romani-cu-frans-timmermans-cea-mai-profunda-consideratie-pe-care-ne-a-aratat-o-cineva-vreodata-interviu-1557184*), last accessed on April 14, 2020.

[2] Unfortunately, only a small number of journalists reported nearly daily on the magistracy's efforts and presented actual steps taken towards the independence of justice (Dan Tăpălagă, Ionel Stoica, Alex Costache, Virgil Burlă, Andreea Georgescu, Cristian Pantazi, Liviu Avram, Ioana Ene Dogioiu, Mona Hera, Ovidiu Oanță, Ionela Arcanu, Andreea Pavel, Ondine Gherguț), certain actions remaining less known to the general public.

[3] FJR and AIJ representatives were invited and held lectures on the rule of law topic at international conferences that took place in Bruxelles, Frankfurt, Sofia and Bucharest. Specialised magazines from Germany, Japan, Belgium, Switzerland or France published the FJR materials.

In the absence of a truly engaged Superior Council of Magistracy, even hostile in many respects (it even failed to support the referral submitted to the Venice Commission, quite the opposite, not to mention the motion to dissolve one of the preliminary referrals signed by Lia Savonea, former SCM chairman, in 2019), the involvement of a handful of colleagues gave hope to an entire field of professionals.

Although the endeavours required a struggle out of the ordinary, and results are yet to emerge, we have to imagine that Sisyphus will, someday, be happy, as well.

Changes Brought to the Penal Code and the Criminal Procedure Code. Avoiding a Heralded Disaster

Ciprian Coadă*

Motto:
"You delight in laying down laws, yet you delight more in breaking them.
Like children playing by the ocean who build sand-towers with
constancy and then destroy them with laughter".
Khalil Gibram, The Prophet

Over the past three years, the legislative events still found in the public limelight in Romania have been described, to a large extent, by the changes brought to the justice laws and the attempts to alter the criminal laws.

These events have caused lively debates not only within the legal environment, but also throughout the civil society in our country, being vigorously publicised even at a European scale and experiencing a dramatic progression that can be structured into three stages.

Throughout this study we shall attempt to summarise an entire factual situation, with profound ramifications within the activity of judicial bodies and public order stability in Romania, with the added mention that this presentation, which cannot be deemed comprehensive, intends to follow the exact chronology of events.

First and foremost, however, we must undoubtedly highlight one aspect that cannot be easily overlooked.

Particular amendments brought to our criminal legislation, not strictly during this period, but also during other relatively recent historic moments, were marked by improvisation, conjecture and populism, whereas this legislative instability has led to numerous inconsistencies and contradictions, making certain laws extremely difficult to be understood even by an experienced lawyer and sending justice in Romania on a mission difficult to carry out.

Additionally, certain attempts at reform, though demanded by eternally changing social relations, were also motivated by the need to transpose within the domestic law certain provisions pertaining to Romania's accession to the European Union, however, without being accompanied by complementary measures designed to ensure a

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better way to enforce them by the judicial system, which is why a number of these provisions existed for rather demonstrative purposes, without enjoying the intended effectiveness.

The fact that the results of an extensive reform process are literally long-awaited is also due to the repeated amendments brought to our criminal legislation, amendments that have established a record difficult to beat even by states deemed not too advanced in terms of law and democracy. As early as 2006, when Law no. 278/2006 came into effect, the Penal Code had been amended 23 times – eight times by way of a government ordinance, whereas the old Criminal Procedure Code had been amended 27 times – six times by way of a government ordinance.

Harmful attempts to alter the Penal Codes had taken place in previous years, as well, many of which were invalidated by the Constitutional Court, however, this time, the unpleasant surprise is the extreme expediency of the new changes brought to the criminal laws, which, over a very brief period of time, were implemented via a series of harmonised cascading actions that were carried out in the shadows and baffled justice and the entire civil society in Romania by mimicking the public survey process.

As a matter of fact, the parliamentary debates conducted during this historic period turned out to be equally fragile, devoid of any firmness and consistency that should characterise a legislative process of this magnitude, aspects actually highlighted by the shared opinion towards Decision no. 466 from July 29, 2019, delivered by the Constitutional Court of Romania on the unconstitutionality objection to the Law on amending and supplementing the Penal Code, Law no. 78/2000 and the Criminal Procedure Code and which, as we shall see, points out the lack of two major features of the parliamentary debate: dialog and exchange of ideas.

The early attempts at altering the criminal laws and the procedural criminal laws took place in 2017 and ended in repealing or withdrawing the draft normatives issued by the Romanian Government as two emergency ordinances, whereas other changes brought by the Romanian Parliament to the Penal Code, Law no. 78/2000 and the Criminal Procedure Code were equally invalidated, following a constitutionality review performed *a priori*, by the Constitutional Court, before the law could be enacted by the Romanian President.

We shall analyse them in turns.

"If it is Tuesday, it is Criminal, or About amending the Penal Code via Government Emergency Ordinance no. 13/2017"[1]

In early 2017, under technical conditions still left unclarified to the general public, two draft emergency ordinances were brought forward for public debate, on the topic of amending the Penal Code and the Criminal Procedure Code and pardoning certain

[1] This is the title of the article published on 21.02.2017 on *juridice.ro* online platform by Univ. Prof. Lect. *Valerian Cioclei*, within the Law faculty of Bucharest University – Criminal Law Department (*https://drept.unibuc.ro/Departamentul-de-drept-penal-s18-ro.htm*).

criminal offenses and sentences, of which the latter normative was never adopted by the Romanian Government and was left in a "sufficient" draft form.

The content of the statements of reasons underpinning the two normatives iterated that the overcrowding of Romanian penitentiaries and the inhuman detention conditions are major issues of our country, whereas the lack of immediate action, but also of a medium-term plan, was already causing the payment of considerable damages to sentenced individuals, damages imposed as per decisions of the European Court of Human Rights, as well as a highly possible issuance of a pilot decision. Additionally, both in this context, as well as in a related statement, the Ministry of Justice reminded that the Constitutional Court's decisions are legally binding and the failure to enforce them would diminish the levels of predictability and quality for the criminal laws currently in effect. Indeed, certain amendments brought to the Penal Code focused on reconciling the definitions of offenses with some of the Constitutional Court's decisions, as also indicated by the brief statement of reasons commencing Ordinance no. 13. However, there were also changes that exceeded the boundaries imposed by the respective decisions, as well as changes completely unrelated to them.

Both draft normatives triggered tensions and lively debates throughout the Romanian society and the entire legal environment in Romania due to the ineffective manner of regulating judicial aspects and the faulty adoption method, in the absence of actual public debates and critical social need that would call for urgency, but also by not observing the Parliament's functional jurisdiction in its capacity of supreme legislative body.

It was argued at the time that, "beyond the constitutionality, legislative technique and legislative hierarchy aspects, the alteration of the Penal Code using «delegated legislator» procedure can lead to criminal policy or legislative technique errors with particularly severe consequences in the area of criminal justice.

As such, consultations with the concerned professions, the experts and, ultimately, public and parliamentary debate represent not only a guarantee of compliance with the democratic rules, but also a guarantee for drawing up normatives that are legally accurate and coherent in terms of criminal policy". For that reason, and along the same lines, it was argued that "the attempt to alter the Penal Code via GEO no. 13/2017 was equally flawed, and having it repealed before it could come into effect was welcome"[1].

These draft normatives triggered a severe disapproval response from the judicial system and the academia in Romania[2] – a response expressed as opinions, viewpoints

[1] *V. Cioclei*, If it is Tuesday, it is Criminal, or About amending the Penal Code via GEO no. 13/2017, published on *juridice.ro* online platform on 21.02.2017

[2] The Council of the Law Faculty within the West University of Timișoara adopted at the time a statement in which it condemned the Romanian Government's decision to amend the justice laws.

According to a press release by the West University of Timișoara, the Law Faculty firmly condemned the adoption of Government Emergency Ordinance no. 13/2017 on amending and supplementing Law no. 286/2009 on the Penal Code and Law no. 135/2010 on the Criminal Procedure Code, the following being iterated in the said release: "The Romanian Government has chosen to use, for individual and collective purposes, the powers it received

and statements issued through various channels – but also a heated debate both in the Romanian media and on the various online platforms, all of which were accompanied

for managing public matters for the greater good of the people. Being in charge with the judicial education of our youth, we hereby publicly disavow the misuse of said powers. In our capacity of defenders of Romania's sound constitutional traditions, we shall warn that Law does not equate to deploying legislative procedural rules against their own purpose. On the contrary, in liberal democracies, to the values of which Romania, too, has subscribed, Law means primarily the rule of law, namely the supremacy of the law", as mentioned in declaration adopted by the Law Faculty. The representatives of this faculty within the West University of Timișoara argue that, by means of the normative in question, our leaders in the Government chose to place themselves above Law itself.

"Those who won a term in Government, by popular choice decided to use a normative to place themselves above the Law. By opposing a normative to Law, their action strikes at the very foundations of the Romanian judicial system, the Romanian Constitution. By choosing this path, the members of the Romanian Government waived the offices they were granted, losing the legitimacy of managing the nation's political matters", also according to the document. "At the same time, and in conclusion, the Law Faculty within the West University of Timișoara invited members of the academia within the other law faculties in Romania to join this endeavour".

In its turn, the Law Faculty within the "Babeș-Bolyai" University in Cluj-Napoca, joining the viewpoint expressed by the Law Faculty within the West University of Timișoara, firmly opposed the adoption of Emergency Ordinance no. 13/2017 on amending the Penal Code and the Criminal Procedure Code.

The content of a press release issued on 2.02.2010 stated as follows: "Even if the unwarranted use of emergency ordinances, also in criminal matters, has characterised the activity of all governments over the past two decades, the adoption of the respective ordinance, under the now familiar conditions, goes beyond any tolerable limit of this practice. The decriminalisation – either total or partial – by way of an emergency ordinance, in the absence of an actual public debate where legal practitioners, the academia and civil society are involved, of certain deeds that generated a complex and extensive caseload, is an unacceptable procedure in a state upholding the rule of law. We are highlighting the fact that decriminalisation set forth by way of an emergency ordinance is irreversible by nature for all the deeds committed until it has come into effect, rendering totally ineffective, in regard to the respective deeds, both the parliamentary review and the constitutionality review performed *a posteriori*. That is specifically why the choice to waive, or to diminish, the criminal-law protection associated to social values can only be done, in a rule of law context, by Parliament, as the nation's supreme representative body. To an equal extent, the method of adoption and content of this normative arise suspicions that its provisions might have been intended to benefit the interests of a small circle of policy makers, and in no way a social need, an action that is inconsistent with either the text or spirit of a Constitution proclaiming the supremacy of the law and the citizens' equality before the law".

Finally, the academia of the Law Faculty within Bucharest University supported the efforts made by the Law Faculty within the West University of Timișoara and the Law Faculty within "Babeș-Bolyai" University in Cluj-Napoca, by firmly condemning the adoption, by the Romanian Government, of Emergency Ordinance no. 13/2017 on amending the Penal Code and the Criminal Procedure Code. As such, in their opinion, "in regard to the totally non-transparent manner in which it was adopted, without any real consultations with experts within the judiciary, and considering the entangled judicial outcomes it can generate, the above-mentioned ordinance infringes not only upon the constitutional principles that are supposed to underpin the rule of law, but also on the moral values that must characterise a regulatory system, values that we are trying to pass down to our students".

by ample protests of the civil society in our country. All of these endeavours ultimately lead to the abandonment of the two legislative proposals, advanced under obscure conditions by the Romanian Government, Emergency Ordinance no. 13/2017 being expressly repealed by Emergency Ordinance no. 14/2017, but not before being also challenged at the Constitutional Court by the Ombudsman.

The viewpoints made public by the various professional associations of magistrates in Romania, the main structures of the Public Ministry and certain law courts converged towards highlighting the major shortcomings of the two normatives, relevant in expressing the critical reaction of the pool of judges being the two press releases issued in January 2017 by the Constanța Court of Appeal and *The Romanian Judges' Forum* Professional Association.

As such, the draft Government emergency ordinance on granting collective acquittal was criticised due to its failure to meet particular essential structural requirements, as acquittal cannot be the subject of an emergency ordinance and is an act of clemency deemed the exclusive duty of Parliament, according to art. 73 parag. (3) let. i) in the Constitution and art. 2 in Law no. 546/2002, on acquittal and the acquittal granting procedure.

Considering that, as per the above-mentioned legal and constitutional regulations, collective acquittal **is only granted by Parliament** and **strictly by way of an organic law**, it could not have been a subject of legislative delegation, as the Government would have been unable to unilaterally grant themselves a duty not granted to them by law or the Constitution.

It was argued that this conclusion was unequivocally supported by the express provisions of art. 2 in Law no. 546/2002, on acquittal and the acquittal granting procedure, which designate both the body qualified to decide upon collective acquittal, as well as the normative pursuant to which acquittal could be granted, whereas an act of collective clemency cannot qualify as a subject of an ordinary law or normatives that the Government can issue.

Therefore, the issuance of an emergency ordinance, which disregards the duties of the legislative power, interfering in the area of organic laws, is contrary to the Constitution and the specialised in the field, given that collective acquittal cannot operate as a subject of legislative delegation, by way of the executive power claiming an act of clemency exclusively available to the legislative power[1].

[1] In the doctrine, it was argued that, from a constitutional standpoint, the powers of granting acquittal are split between the Romanian President and the Parliament. The Romanian President has the prerogative of granting individual pardons [art. 94 let. d) in the Constitution], whereas Parliament can exclusively grant collective pardons [art. 73 parag. (3) let. i) in the Constitution]. In regard to collective acquittal, it was argued that it is granted by Parliament via an organic law [art. 73 parag. (3) let. i) in the Constitution] and both forms of acquittal are gestures of will by the Romanian President or the Parliament, followed by the exemption from carrying out the sentence, in full or in part, or downgrading the sentence to an easier one, in the form of constitutionally regulated legal acts (*M. Basarab, V. Pașca, G. Mateuț, C. Butiuc*, The Penal Code, with comments, Vol. I. General part, Hamangiu Publishing House, Bucharest, 2007, p. 622-623). In the same line, it was argued that the constitutional

In regard to the changes brought to the Penal Code via the second emergency ordinance, it was ascertained, from a formal standpoint, that this regulatory area, as well, fell under the Parliament's exclusive duties, in accordance with art. 73 parag. (3) let. h) in the Romanian Constitution, since criminal offences, sentences and the procedures to enforce them are strictly regulated via organic laws.

The provisions of art. 73 parag. (3) in the Constitution are imperative by nature, meaning they cannot be a subject of legislative delegation, in the absence of a special empowering law issued by Parliament, an aspect backed by the provisions of art. 115 parag. (1) in the fundamental document, according to which the Government can be empowered, via a special law issued by Parliament, to issue ordinances, but strictly in areas not referenced by organic laws.

The opposing opinion, supported by means of various preceding laws and certain interpretations contrary to the spirit of the Constitution, foster an unconstitutional lawmaking manner, given that the Government, not benefitting from the citizens' vote of confidence, replaces the Parliament as the main legislative authority, by issuing emergency ordinances whose immediate effects, running as of their publication in the Official Gazette of Romania, can no longer be retroactively discarded should they be rejected by the Parliament.

It was argued that, at the time, there was no special empowering law that would allow the Government to issue emergency ordinances in the relevant areas and would also mandatorily state the date by which ordinances can be issued, a prerequisite for both mentioned normatives.

As such, via the regulatory framework in the Constitution, the emergency ordinance, as a normative issued by the Government, appears in the content of art. 115, entitled *"Legislative delegation"*, thus forbidding the Government to exercise a duty not delegated to it by the Parliament, by simply invoking an extraordinary case whose regulation cannot be postponed.

According to art. 108 in the Constitution, normatives that the Government can adopt are decisions and ordinances, the latter of which can be issued, without distinction, pursuant to a special empowerment law and strictly within the boundaries and requirements it stipulates.

If, for those areas that cannot be subject to organic laws, a special empowerment law issued by Parliament is required, it is unacceptable that, in an area of critical significance, such as that of organic laws, the Government should be able to issue emergency ordinances, in the absence of an empowerment law, simply due to the urgency of an extraordinary circumstance.

provisions set forth the bodies qualified to grant pardons, whereas the Penal Code provisions regulate the effects this measure entails. Regarding the state bodies qualified to grant pardons, the Constitution separates individual pardon, granted via a decree by the Romanian President (art. 94 let. d), at the convict's request, from collective pardon, which the Parliament grants *ex officio*, by law [art. 73 parag. (3) let. i)] (*A. Boroi*, Criminal law, General part, 2nd edition, C.H. Beck Publishing House, Bucharest, 2008, p. 436).

Although art. 115 parag. (5) in the Constitution allows an emergency ordinance to include provisions such as organic laws, to be submitted to Parliament for approval with the majority stated in art. 76 parag. (1), that does not mean that an emergency ordinance could be issued in areas falling under the Parliament's exclusive duties, as is the area of granting collective acquittal.

The opposite interpretation would turn the current regulation into a highly risky precedent, as any government faced with a situation like this would be able to grant collective acquittals by means of emergency ordinances, the effect of which could take place upon their mere publication in the Official Gazette of Romania, to the benefit of individuals or groups of interests, which would constitute a genuine attack against democracy and the rule of law, with irreversible outcomes on national security, the credibility of Romania as a country and the citizens' faith in the institutions in charge with delivering justice.

By invoking legislative precedent, it was argued that it was precisely the reason why, concurrently with the adoption of the new Constitution, the measures of collective acquittal became the regulatory subject of organic laws adopted by Parliament, as a supreme legislator, such as Law no. 137/1997 and Law no. 543/2002, whereas the adoption of an emergency ordinance was outside the scope of the Constitution and Law no. 546/2002.

As such, granting pardons after 1990 (with the exception of Decree-Law no. 3/1990, issued during a distinct historical context) became the subject of organic laws (Law no. 137/1997 and Law no. 543/2002), in compliance with the Constitution, which nowadays makes the adoption of an emergency ordinance in the field of collective acquittal a dangerous precedent, considering that art. 73 parag. (3) let. i) in the Romanian Constitution stipulates that *"An organic law shall regulate: (...) i) the granting of amnesty and collective acquittal"*.

Besides the aspects pertaining to the issuing body' functional responsibility, in the content of the two government ordinances, the matter of urgency the regulation of which is critical is insufficiently substantiated, as the overcrowded prison system, the removal of certain unconstitutionality flaws present in the two Codes, the amendment of certain criminalisation procedures and the introduction of new substantive or procedural provisions are not dictated by grounds that invoke urgency.

For that matter, there are no grounds to waive the public and legislative debate process, under conditions devoid of transparency, by means of adopting emergency ordinance that is not underpinned by an extraordinary circumstance the regulation of which cannot be postponed.

Consequently, it was argued that, in the case of the acquittal-related ordinance, had it been backed by a matter of urgency, it would have been natural for this normative to produce effects as of its date of publication in the Official Gazette of Romania, whereas the fact that February 18, 2017 is stipulated as the date for the emergency ordinance to come into effect did nothing but contradict the urgency of the invoked grounds and even undermine them.

Additionally, to the extent to which the Romanian state had been at risk to bear a conviction in the very near future, the content of the emergency ordinance should have made reference to the expiration of the deadline imposed via a decision by the European Court of Human Rights, such as the one delivered in the case of Iacov Stanciu (July 24, 2012), however, the absence of this risk does not demand adopting an emergency ordinance, albeit with no actual measures taken by the Romanian state to lower overcrowding within the prison system or improve detention conditions.

It was also argued that the emergency ordinance on acquittal **was not accompanied by an impact study on crimes that generate the overcrowding of detention premises in Romania**, either, as subjects of collective acquittal actually become crimes with an adverse impact on economic and social life. As a matter of fact, it was deemed as completely missing any opportunity and extremely criticisable the provision to include within the scope of partial pardon sentences of any nature applied to certain categories of convicts, such as those stipulated by art. 2, according to art. 3 parag. (4) in the ordinance, based on the age criterion.

Beyond the *"urgency"* of drawing up a normative, present on the Government's agenda, in a non-transparent manner, in the absence of a public debate and without publishing the content of the said document on the official web page of the Ministry of Justice, the author of the draft, a noticeable concern was to set a maximum imprisonment limit of, and including, 5 years as a requirement of full pardon for applied sentences, regardless of how the courts ruled that they be enforced.

In the same context, the draft originator was noticeably interested including in the scope of acquittal crimes in the case of which the New Penal Code and some of the special, amended criminal laws proved to be more favourable towards defendants and allowed enforcing sentences of up to 5 years in prison, being identified, first and foremost, the abuse of office offences, criminalised by both Codes and which, against the background of previous acts of clemency, were not or were only partially subject to acquittal.

In the case of these latter offences, **the ordinance authors' option did not rely on criminal policy grounds**, since in Romania, over the past years, the abuse of office crime has witnessed unprecedented recrudescence, the acquittals granted to sentences applied for such crimes doing nothing but encourage the continued infringement of the law by various public servants and other officials.

As a matter of fact, the interests underpinning this legislative initiative stem not only from the fact that a crime such as the *abuse of office* is no longer exempt from the benefit of pardon, but also from it being redefined in the Penal Code, next to the *conflict of interests* offence, whereas the *dereliction of duty* offence was about to be repealed.

The draft normative on granting acquittal for certain sentences was also criticised due to the fact that it failed to mention how the acquittal would be enforced, in the case of non-custodial sentence enforcement methods stipulated in the New Penal Code, such as postponing the enforcement of a sentence and the stay of execution under supervision.

As such, art. 1 parag. (2) in the draft emergency ordinance stipulated that *"The provisions of parag. (1) apply regardless of the manner to enforce the imprisonment ordered by the court"*.

If, in the case of a conditioned stay of execution, according to art. 81 in the 1969 Penal Code, there was a regulation stipulated in art. 5 parag. (2) (*"Pardon has effect also upon penalties that are under a stay of execution. In such cases, the part of the rehabilitation term that represents the duration of the penalty ruled by the court will be reduced accordingly. If the stay of the execution is revoked or cancelled, only the part of the penalty which has been not pardoned will be enforced"*), for cases in which the ruling is to postpone enforcing the sentence, according to art. 83 in the Penal Code or a stay of execution under supervision, according to art. 91 in the Penal Code, the 2-year supervision term would be fixed, according to art. 82 in the Penal Code (if the sentence enforcement is postponed) or it would be 2 to 4 years, according to art. 92 parag. (1) in the Penal Code (if there is a stay of execution under supervision), without including in the supervision term calculation the duration of the ruled sentence, as it is the case with conditioned stays of execution according to art. 82 in the 1969 Penal Code.

Therefore, it was fairly ascertained that no regulation is mentioned for the way in which acquittal produces effects in the case of a postponed sentence enforcement, a stay of execution under supervision, both stipulated in the New Penal Code, or for cases when such enforcement methods are revoked. Moreover, the draft equally failed to mention the case of sentences for which the stay of execution under supervision was ruled according to art. 86^1 in the 1969 Penal Code.

The provision stipulated in art. 2 let. a) in the draft emergency ordinance, on pardons that reduce by half sentences enforced upon convicts supporting minors of up to 5 years old was similarly met with unconstitutionality claims in the form of discriminations, pursuant to the provisions of art. 4 parag. (2) in the Romanian Constitution (*"Romania is the common and indivisible homeland of all its citizens regardless of race, ethnic origin, language, religion, sex, opinion, political allegiance,* ***wealth****, or social origin"*) and art. 16 parag. (1) in the Romanian Constitution (*"Citizens are equal before the law and before public authorities, with no privileges and with no discrimination"*), considering that there can be convicted individuals that support other persons (minors older than 5 years, elderly people, disabled people).

The extent of the same claims also covered the draft originator's surprising concern with including in the crowd of pardon beneficiaries persons who committed tax evasion, an offence stipulated by art. 8 and 9 in Law no. 241/2005, subject to the enforcement of a 5-year or shorter penalty, despite the fact that these offences, within the context of special limits for penalties, are more severe than those stipulated by art. 3-5 and art. 7 in Law no. 241/2005, which the acquittal ordinance exempts.

Along the same lines, there are equally no explanations for the fact that the *fraud* offence, stipulated by art. 215 parag. (1) in the 1968 Penal Code, was not exempted from the benefit of pardon, whereas the offences stipulated by art. 244-245 in the current Penal Code actual were exempted, although the latter were sanctioned with

milder penalty limits, which confirms the conclusion that the benefit of pardon only targets particular categories of convicts.

In the same vein, it was argued that non-exempted from pardon were a series of offences in the case of which the law allowed enforcing an imprisonment conviction shorter than 5 years but which, very often, are fraudulent means of committing more serious criminal wrongdoings, namely offences of forgery, that even Law no. 543/2002 exempted from the benefit of pardon.

The benefit of pardon also covered offences for which the criminal laws do not stipulate very high penalty limits, but which can display an elevated degree of actual social danger, as are obstructions of justice, those related to weapons and ammunition, those affecting the safety and integrity of computer systems and data or the remaining offences punishable as per Law no. 78/2000, different than those stipulated by art. 5 parag. (1) and (3), particularly those hindering the interests of the European Communities.

This draft normative would have also allowed granting pardons for serious offences against persons, such as involuntary manslaughter or involuntary bodily injury, which would have had far-reaching implications in terms of disregarding human life as a fundamental social value, defended both by the domestic legislation and the foreign legislation, to which Romania has subscribed, the most recent and emblematic example being the case which, at the time, had received among the general public the generic designation of *"Colectiv"*.

In addition, an unexpected provision referred to the fact that, in the case of convicts stipulated by art. 2 in the emergency ordinance, there was no imposed prerequisite of pardon for them to pay the compensations set forth in the conclusive criminal case decision, which meant that there were no reasonable grounds for these persons to benefit from pardon under more favourable conditions than other persons, according to art. 3 parag. (3) in the ordinance.

Similarly, the provision stipulated at art. 3 parag. (2) in the same ordinance would have lacked any immediate practical usefulness, as it conditioned the pardon on the payment of said compensations, while allowing the convict to be promptly released, even if this requisite could have been disregarded along the way, and to enjoy for 1 year the immediate pardon effects.

It was rightfully argued that, to the extent to which the main focus was to recover the losses, the granting of a pardon could have been enjoyed by persons who paid the damages over the course of the trial or by those who paid them after the delivery of the conclusive decision, prior to being released as the outcome of being pardoned, the solution proposed by means of the emergency ordinance causing the act of clemency to produce its effects earlier than the fulfilment of the imposed requisite.

As such, the content of the pardon-focused document revealed numerous elements that can point out persons targeted by the act of clemency, although these elements are specific to the penalty judicial individualisation process, and in no way to pardoning, which should not be able to generate discriminating circumstances or reveal glimpses of heightened subjectivity.

By also mentioning in its content the date by which the provisions of the present ordinance were going to apply, the draft originator was under the reasonable suspicion of attempting to have the ordinance adopted during the cabinet meeting of January 18, 2017, an endeavour that would encourage committing criminal offences over the time span between making the ordinance public and its date of adoption, any possible criminals knowing they would elude punishment should they commit offences that would be subject to pardon.

The lack of accuracy in the process of drawing up the said normative was also highlighted by the order of the offences that would not be subject to pardon, given that an early version listed the deeds as per their order of criminalisation provided in the two Penal Codes, a criterion that was later on waived in favour of a random listing, as the omitted offences were being reviewed, some of them providing exemption from pardon due to the abstract social danger they expressed.

On the matter of changes brought to the new Penal Code, separate from the changes operated on certain criminalisation provisions, intended to reconcile them with decisions delivered by the Constitutional Court in their exercise of the constitutionality review, a series of changes were introduced for art. 297 and art. 301 parag. (1) in the Penal Code, changes that would have unreasonably limited the scope of criminalisation, conditioning these offences strictly on the presence of a prejudice in excess of 200.000 lei or on gaining undue pecuniary benefits for oneself, for the spouse or for a relative or an in-law up to, and including, the 2nd degree.

So long as the two deeds are criminalised as service offence, instead of offence against property, it is difficult to see the reason for which *abuse of office* could not have applied in the case of an actual damage, different than a loss in excess of 200.000 lei, the requisite of this loss encouraging individuals to commit crimes that can entail smaller losses doing nothing but cast a shadow of disbelief upon the legality of criminalisation.

As per Constitutional Court Decision no. 405/15.06.2016 on the unconstitutionality exception concerning the provisions of art. 246 in the 1969 Penal Code and art. 297 parag. (1) in the Penal Code, it was found that the provisions of art. 246 in the 1969 Penal Code and of art. 297 parag. (1) in the Penal Code are constitutional to the extent to which the phrase *"poorly fulfils"* in their content is understood as *"fulfils in violation of the law"*.

To substantiate this decision, it was acknowledged that the term *"poorly"* could be deemed adequate for use in the field of criminal law (item 53), that neither was the term *"poorly"* defined in the Penal Code, nor was there any mention of the tool to analyse the poor nature, which depicted the said term as lacking clarity and predictability (item 54).

To substantiate the decision, it was ascertained that the Venice Commission Report on the relationship between ministerial responsibility and political responsibility argued that *"the provisions forbidding abuse of office"*, *"the inadequate use of powers"* and *"misuse of power"* or similar offences are present in numerous European judicial systems and there may be a need for such general clauses (item 71); the Venice Commission considered that the national criminal-law provisions regarding *"abuse of office"*, *"misuse*

of power" and similar phrases have to be interpreted in a narrow sense and applied at a high level, so that they may be invoked strictly in cases where deeds are of a serious, such as serious offences against national democratic processes, violation of fundamental rights, undermining the general government impartiality etc.

Moreover, one must introduce additional criteria, such as the requirement on the existence of intent or gross negligence.

As a result, it is ascertained that, although the substantiation note on amending the structural content of the *abuse of office* offence, stipulated by art. 297 parag. (1) in the Penal Code, makes reference to Constitutional Court Decision no. 405 from June 15, 2016, the substantiation of this decision recommended the criminalisation of more than strictly *abuse of office* deeds that caused a material loss, in order to justify that way the removal from the structural content of this offence deeds that led to infringements of legitimate rights or interests of physical persons or legal entities.

In that respect, one should take into account the aspects expressed to substantiate this Constitutional Court decision, at item 84, based on which it was ascertained that the phrase *"infringements of legitimate rights or interests of physical persons or legal entities"* does not lack clarity, as the doctrine states that this phrase should be understood as *to the moral, physical or material detriment or prejudice* affecting the legal interests of such persons, the Constitutional Court stating at item 85 in the decision substantiation that *"causing a detriment to a person's legal interests entails any infringement, any infliction, be it physical, moral or pecuniary, brought upon the interests protected by the Constitution and laws in effect, according to the Universal Declaration of Human Rights, while still being mandatory that the deed have a certain degree of severity, otherwise the social danger degree of an offence being absent"*.

Along the same lines, the fact that certain phrases in the content of art. 301 parag. (1) and art. 308 parag. (1) in the Penal Code had been declared unconstitutional did not justify in any way the restriction of the legal criminalisation scope to a series of circumstances not subject to the unconstitutionality decisions, as the assumptions regulated via the initial criminalisation rules should have been explained instead of eliminated from the scope of criminal illegality.

As a matter of fact, as per Decisions no. 603/2015 and no. 405/2016, the Constitutional Court ruled that the criminalisation rules included in art. 301 and art. 297 parag. (1) in the Penal Code, as well as art. 246 in the 1969 Penal Code, must meet the clarity, accuracy, predictability and accessibility requirements, but this does not mean that the *abuse of office* and *conflict of interests* offences should have been circumscribed to certain assumptions or conditional upon a certain loss, as only the legislator has the power to set forth criminalisation requisites.

As such, the fact that, as per Decision no. 603 from October 8, 2015, published in the Official Gazette no. 845/13.11.2015, on the unconstitutionality exception of the provisions of art. 301 parag. (1) and art. 308 parag. (1) in the Penal Code, the phrase *"trading relations"* in the text of art. 301 parag. (1) in the Penal Code was deemed unconstitutional, given that the *"trading relation"* notion is no longer expressly defined

in the legislation in force, an aspect that melts the clarity and predictability of the phrase comprised in the criminal rule, and that the phrase *"or within any legal entity"* in the text of art. 308 parag. (1) in the Penal Code is unconstitutional – being considered that the criminalisation of *conflict of interests* within the private sector cannot be justified, since the social value protected by criminalising the *conflict of interest* offence is the ensurance, by the public servant, of correctness and integrity in the exercise of their duties, and the criminalisation of *conflict of interests* within the private sector represents an unjustified infringement upon economic freedom – would have justified strictly the regulation of these provisions in line with the Constitutional Court decision, and not the removal from the structural content of the *conflict of interest* offence of other means of the material element of committing these offences, reference being made to persons who gained asset-type benefits following the public servant's deed (persons having worked with that public servant over the past 5 years or from whom that public servant has received or receives any sort of benefits).

At last, **conditioning the commencement of criminal proceedings on the prior complaint of the aggrieved party, in the case of *abuse of office*, would have decreased the effectiveness of the criminalisation rule**, since in the case of legal entities aggrieved by the deeds of public servants with management duties it is highly unlikely to have a prior complaint filed, in the absence of any benefit for the culprit to incriminate themselves.

In relation to deeds that highlight the culpable non-fulfilment, by a public servant or official, of an occupation duty, which caused losses for or was detrimental to the legitimate rights or interests of a physical person or legal entity, the regulation authors' concern to repeal the *dereliction of duty* offence, stipulated by art. 298 in the Penal Code, was equally groundless, so long as such deeds are numerous and, in terms of their typology, can cause major losses to the aggrieved parties, whereas their elimination as offences can help certain servants gain a privileged status in relation to other categories of salaried whose deeds committed voluntarily are still criminalised as offences in the Penal Code or various special laws.

Justifiably, another argument presented was that, in certain cases, an official's culpability for not fulfilling his/her occupational comes close, in terms of severity, to direct intent, which does not justify eliminating, as offences, deeds lacking special criminalisation but which could be subject to the provisions of art. 298 in the Penal Code, as a framework criminalisation rule, fit to cover a wide range of cases while also currently contributing to the accountability of persons holding a public office or carrying out tasks in the service of any other individual.

In regard to the introduction of parag. (3) within art. 290 in the Criminal Procedure Code, a paragraph regulating *denunciation* as a means to notify the criminal prosecution body, it was accurately asserted that this regulation would deter the filing of denunciations and make it impossible to investigate several other criminal wrongdoings.

In this respect, it was argued that, although filing a denunciation after more than 6 months from the date when the deed subject to the criminal law was perpetrated

would no longer cause the cancellation of criminal liability in the cases stipulated by the law, the whistleblower could, nevertheless, benefit from the grounds to halve the punishment limits, provided by art. 19 in Law no. 682/2002 or art. 15 in Law no. 143/2000.

In conclusion, the drafts to amend and supplement the Penal Code and the Criminal Procedure Code, as well as to grant pardon for certain sentences, via two Government emergency ordinances, in a non-transparent manner, as a matter of urgency, in the absence of a thorough, targeted and accurate substantiation, as well as in the absence of an objective assessment, which would assert a current, concrete and critical social need, were deemed unwarranted, given that criminal legislation must foster a balance between the society's needs to entail criminal liability for people who perpetrated offences and the fundamental rights of defendants and people carrying out sentences, a balance at risk of being altered by these legislative amendments.

Considering the above-mentioned constitutional and legal provisions, as well as the extent of the consequences should these regulations be adopted, it was, therefore, concluded that the urgency of advancing these normatives by means of two Government emergency ordinances, visibly suffering from a lack of prior and transparent consultation of the general public and the entities involved in their implementation, cannot be justified, which is why Government Emergency Ordinance no. 13/2017 was also challenged before the Constitutional Court by the Ombudsman and, following the repealing of this normative as per Government Emergency Ordinance no. 14/2017, the referral was dismissed as devoid of purpose.

On the attempts to amend the Criminal Procedure Code, with direct implications upon strengthening presumption of innocence and the suspect's or the defendant's right to attend the criminal proceedings

In late 2017, a new legislative initiative was issued for parliamentary debate, its main purpose being to alter the Criminal Procedure Code, by introducing new provisions intended to *guarantee the presumption of innocence and the suspect's or the defendant's right to attend the criminal proceedings*, rules that were largely underpinned by Directive (EU) 2016/343 of the European Parliament and the Council from 9.03.2016 (hereafter called *the Directive*), on strengthening certain aspects of presumption of innocence and the suspect's or the defendant's right to attend the criminal proceedings.

These legislative initiatives were massively criticised both by the professional associations of magistrates and through various official channels by the main structures within the Public Ministry or various law experts.

By means of a *statement by the Prosecutor's Office attached to the High Court of Cassation and Justice*, issued on 14.12.2017, it was argued that the proposed amendments transposing Directive (EU) 2016/343 of the European Parliament and the Council from 9.03.2016 severely deviate from the meaning of the directive, with negative outcomes

on the criminal proceedings, the requirement to transpose the Directive being a pretext to alter the layout of the criminal proceedings, as in impairing the criminal prosecution efforts to the brink of ineffectiveness. That is, according to the statement, the only way to explain the introduction of texts deemed in total opposition to both the European standards in the field and the national provisions, validated by the Constitutional Court.

The content of the statement mentions that the analysis of the proposals submitted for parliamentary debate points towards an attempt to limit the application of certain fundamental principles of the criminal procedure (finding out the truth and the fair nature of the criminal proceedings) and certain critical concepts of the criminal proceedings (evidential basis, the start of criminal prosecution, preventive measures), the risk being that adopting these changes would also lead to limiting the prosecutor in the exercise of their primary criminal law duties and their constitutional role of representing, by way of judicial activity, the general interests of society, but also in defending the rule of law and the citizens' fundamental rights and freedoms.

Attention is drawn towards the fact that some of the amendments brought to criminal legislation – limiting the scope of evidentiary means; removing from among offences that can be subject to remand custody acts of corruption, tax evasion, money laundering, as well as offences for which the law stipulates prison sentences of, and in excess of, 5 years (for instance, the establishment of an organised crime group); restricting the prosecutors' quick access to information so that they may act efficiently towards uncovering the facts, and others – will consequently lead to slowing down or halting, in certain cases, the criminal prosecution activity.

Not in the least, it is pointed out that instituting a criminal liability for legal authorities, in the sense of denying the communication of relevant information within the criminal prosecution activity, contradicts the European Court of Human Rights case-law, which acknowledges the need to keep the public informed on all matters of public interest, but also the provisions of art. 31 in the Romanian Constitution, according to which a person's right to have access to any information of public interest may not be curtailed.

At the same time, it is obvious that the meaning of the amendments under debate indicates an exclusive concern with the observance of the defendants' rights in the proceedings rather than those of the aggrieved parties, which violates the principle of ensuring a fair trial.

Indeed, in regard to the changes brought to the criminal legislation, even the *doctrine* at the time acknowledged those fears coming from the fact that the new provisions marked for implementation significantly departed from the content and objectives of the European Directive[1].

[1] In relation to this, see *C. Coadă*, Brief considerations on the initiatives to amend the Criminal Procedure Code, with direct implications upon strengthening presumption of innocence and the suspect's or the defendant's right to attend the criminal proceedings, published on December 20, 2017 (*https://www.juridice.ro/553453/scurte-consideratii-asupra-initiativelor-de-modificare-a-codului-de-procedura-penala-cu-incidenta-directa-asupra-consolidarii-prezumtiei-de-nevinovatie-si-dreptului-suspectului-sau-acuzatului-de-a-fi.html*).

As such, it was argued that art. 4 parag. (1) in the European Directive, entitled "Public references to guilt", stipulates that the member states shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty.

The term "public statements" should be understood, according to parag. (17) in the Directive recitals, as any statements which refer to a criminal offence and which emanate from an authority involved in the criminal proceedings concerning that criminal offence, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials, it being understood that this is without prejudice to national law regarding immunity.

Therefore, the Directive sets forth a conduct standard for public authorities and judicial bodies, instead of an interdiction, demanding from them a reserved public behaviour that would leave an objective observer the impression that the suspect or the defendant is treated as if their guilt had been established prior to the delivery of a conclusive judicial order.

This standard applies to any type of public statements, regardless of the authors it emanates from, as well as to any judicial decisions issued as part of the investigated cases, these authorities and judicial bodies being bound to use, in the content of their statements of decisions, adequate language and, during the proceedings they carry out, refrain from any sort of behaviour that might compromise the presumption of innocence enjoyed by the suspect or defendant.

In any case, however, the Directive does not forbid that, in relation to the goal in mind, the public should be completely ignored and, in particular, misinformed, concerning the launch of certain proceedings, the stages gone through and the activities carried out by the competent bodies, since the Directive's purpose is to obstruct neither justice, nor the public's access to information, but to defend the presumption of innocence, as well as other fair trial guarantees, by eliminating certain mechanisms that might compromise them.

This state of affairs is evidenced by art. 4 parag. (3) in the Directive, which stipulates that the obligation laid down in parag. (1) not to refer to suspects or accused persons as being guilty shall not prevent public authorities from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest.

However, from a practical standpoint, the proposed amendment significantly departed from this provision, by instituting the utterly secret nature of the criminal prosecution and the pre-trial chamber procedure, by denying any type of public communications or public statements, as well as by directly or indirectly supplying other information, coming from public authorities or any other physical persons or legal entities, related to the deeds and persons that are the subject of these procedures.

Such an interdiction affects the public's right to the informed on how criminal justice is being delivered, as a service in the public interest, defined both in the ECHR case-law,

as well as in the European and the national legislation in the field, this interdiction having nothing in common with the objectives pursued via the Directive, while actually being in the interest of uncovering the truth and accurately informing the general public to provide certain information to the people and keep defending the freedom of the press.

The very content of the Directive recitals mentions the possibility that the authorities publicly disseminate information on the criminal proceedings where this is strictly necessary for reasons relating to the criminal investigation, such as when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence, or to the public interest, such as when, for safety reasons, information is provided to the inhabitants of an area affected by an alleged environmental crime or when the prosecution or another competent authority provides objective information on the state of criminal proceedings in order to prevent a public order disturbance.

The idea permeating through the Directive recitals is that the manner and the context in which the information is released should not make the public believe that the person suspected or accused of having committed a crime is guilty prior to having their guilt proved according to the law, the goal pursued being in no way setting forth a new form of classifying the activity of justice by fully securing this data and denying the citizens access to information of public interest, also by means of the press.

Consequently, the fact that, according to art. 351 and art. 352 in the Criminal Procedure Code, the trial alone is public and takes place in session, verbally, at first hand and with opposing arguments, does not mean that the criminal prosecution and the pre-trial chamber procedure would be secretive by nature, but conversely, that these trial phases prior to the trial are not public, something that does not equate to being characterised by secret activities entirely hidden to the general public, highlighting the fact that this type of justice would be completely obsolete and rather specific to an era of sorrowful memories.

In regard to the right to remain silent and the right to not incriminate oneself, these are acknowledged, as per art. 7 in the Directive, for persons suspected or accused of committing an offence, meaning that the extension of these rights in favour of persons to be heard as witnesses, who are legally bound to tell the truth, was utterly unjustified, particularly given the witness' expressly defined right to be assisted by a defender and communicate with them during hearings.

Thus, according to the amendment brought to art. 88 parag. (1) in the Criminal Procedure Code, the lawyer can assist witnesses called by the judicial bodies, and the latter are allowed to consult with the lawyer both prior to and during the hearing.

Besides the fact that the introduction of this amendment is by no means substantiated, as the witness is aware of certain deeds and circumstances by virtue of their own life experience and less by virtue of their relationship with the lawyer, to motivate somehow the usefulness of consulting a defender during the hearing, this new legislative solution would have made it possible for the witness to elude their legal obligation to state the truth, a purpose the Directive has neither ever pursued, nor included in its regulatory scope.

As indicated by the content of art. 2 in the Directive, its scope covers all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive. At the same time, the present directive applies to natural persons who are suspects or accused persons in criminal proceedings.

Starting from the fairly rich caseload provided by the European Court of Human Rights case-law, the status of *suspect* or *charged* entails a notification, a rebuke officially addressed to a person, in relation to them having committed deeds of a criminal nature, regardless of the manner in which it is worded, so that those guarantees offered to the suspect or accused pursuant to the Directive may not be invoked earlier than that moment.

As the European court ruled in a representative decision on 27.02.1980, for a long time quoted in the subsequent case-law, namely *Deewer vs. Belgium*, the *charge* is defined as the official notification given to an individual by the competent authority of an allegation that they have committed a criminal offence, with the added mention that the term "charge" referred to by art. 6 in the Convention is standalone, ignoring the definitions advanced by the domestic law. As such, the charge must not take a particular form, this nature being associated to any implicit act, originating from a state authority and producing significant effects upon the state of a person, as it comprises a criminal charge by default.

Accordingly, the minimum common rules on certain aspects of *presumption of innocence* in the context of criminal proceedings cannot be extended in favour of other subjects or participants in the criminal trial, for purposes opposing those of the Directive, nor can they be invoked as a pretext to alter criminal laws in such a manner that the proposed legislative solution would conflict with the essential principles of uncovering the truth and the fair and reasonable nature of criminal proceedings, provided by art. 4 and art. 8 in the Criminal Procedure Code.

Naturally, by not being comprised in the scope of the Directive, the changes intended to be brought to art. 83 in the Criminal Procedure Code were all the more prone to criticism because they introduced new rights in favour of the defendant, who would have been allowed to attend the hearing of any person and become aware of the performance of any criminal prosecution endeavours by the justice of peace, being therefore able to obstruct the entire criminal prosecution, despite this phase not being public or hosting opposing arguments.

In addition to the fact that a provision of this nature would have discriminated, as well, against the remaining participants in the proceedings, towards which the authors of the legislative amendments did not display the same degree of concern, it would have managed to dramatically lower the investigators' chances of success, in the sense that it would have diluted the confidential nature of certain criminal investigation steps, such as searches, hearings of threatened or vulnerable persons, special surveillance or investigation methods and others.

Contrary to the provisions of art. 8 in the Directive were also the provisions covered by the amendment brought to art. 364 in the Criminal Procedure Code, in the form of parag. (7) and (8), which not only instituted cumulative conditions for a person to be judged *in absentia*, but also imposed a series of requirements that are not provided by the European Directive and render nearly impossible the enforcement of a conviction decision delivered in absentia, when the person sought cannot be located.

As such, art. 8 parag. (2) in the Directive stipulates that member states may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that certain requirements are met, requirements that are not stipulated cumulatively, but as two alternative assumptions, namely the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance, or when the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. According to parag. (3) in the same article, a decision which has been taken in accordance with parag. (2) may be enforced against the said suspect or accused person.

However, the proposed amendment stipulated three cumulative requirements, to which were added a number of additional requirements, not mentioned *per se* in the Directive, being provided that the person can be sentenced in absentia only if he or she has been legally summoned for *each phase* of the trial or has otherwise managed to receive information on the trial venue and date, has been informed on the possible delivery of a decision in absentia and has been represented by a lawyer selected or appointed *ex officio* and *has benefitted from proper defence during the trial*.

This last requirement, in addition to the one concerning the legal summoning of the person for each trial phase – which, in the domestic law could become grounds for an ordinary or an extraordinary remedy at law – is not only prone to interpretations, but also not stipulated in the Directive as a distinct requirement for in absentia judgement of the suspect or accused person.

This once again emphasizes the intent of these amendments to depart as far as possible from the purpose and spirit of the Directive, an aspect also pointed out in relation to the requirements for the enforcement of a decision delivered *in absentia*.

According to the proposed amendment, the procedure to enforce a conclusive decision delivered to the defendant in absentia could only be commenced if they had been informed on the said decision and strictly after they had been expressly informed on the right to a retrial or a remedy at law, which they would have had the right to attend and would have allowed another appraisal of the case merits, including the examination of new evidence that might lead to altering the initial decision, as well as if the said person had expressly declared that he or she did not challenge the decision or did not request a retrial or did not file an extraordinary remedy at law within 30 days from receiving the information related to the decision.

Contrary to the proposed requirements, art. 8 parag. (4) in the Directive allows the member states to enforce a decision, when the requirements to be met in the case

of judgement *in absentia* cannot be met because a suspect or accused person cannot be located despite reasonable efforts having been made, provided that this person is informed of the decision and, in particular when he or she is apprehended, of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with art. 9.

As can be seen, all the alternative assumptions stipulated in the Directive had been transformed, as per the drawn up amendments, under cumulative legal requirements, and most of the derogations made available to the nation states had been eliminated and turned into mandatory requirements, almost impossible to meet for a conviction decision to be delivered and enforced in absentia, being imposed earlier than the conclusive delivery of the judicial order and the apprehension of the convicted fugitive.

Therefore, if, in the case of circumstances regulated by the Directive, enforcing the decision is only possible to the extent to which the requirements pertaining to the right to information could not be met due to the suspect or accused person eluding the procedure commenced against them, in accordance with the proposed amendment, in order to be enforced, the decision delivered *in absentia* would have to be communicated to the defendant in any case, even if he or she cannot be located, with the single exception of the case when that person expressly declares that he or she does not challenge the decision or does not request a retrial or does not file an extraordinary remedy at law within 30 days from receiving the information related to the decision.

In other words, although the Directive allows enforcing a decision delivered *in absentia* when the requirements stipulated by the law could not be met due to the impossibility to locate the suspect or accused person, forcing the information requirement to the met at a later date, and particularly after the respective person has been apprehended, according to the amendment in question, a requirement of this nature would have had to be met earlier than that moment, a 30-day deadline being stipulated, as well, separate from the appeal deadline, during which the convict should be able to expressly state their intention on whether to challenge the decision or reopen the trial, a possibility not granted to the other parties judged *in absentia*.

Similar claims were also issued via the *statement of the Directorate for Investigating Organized Crime and Terrorism from 23.02.2018*, the focus being from the very beginning on the idea that the directive intended to be transposed, and which sets forth a series minimal standards regarding the presumption of innocence at a community level, is to a very significant extent implemented within the Romanian criminal legislation.

Additionally, mention is made of a particular example regarding the DIOCT prosecutors' activity, with a highly severe impact, in the form of the request to eliminate fact-finding reports from among the evidentiary means provided by art. 97 in the Criminal Procedure Code.

Going past the fact that there are frequent cases where there are no experts for particular fields or laboratories providing proper conditions for conducting investigations, in case files concerning illegal trafficking of various drugs, the technical and scientific

finding report is the only criminal prosecution act certifying, at the earliest opportunity, the existence or absence of prohibited substances within the materials subject to investigation.

Lacking this evidentiary means, the Directorate's activity, tackling the investigation of around 1.200 anti-drug case files a month, would have been halted right after the amendment.

Another particular aspect was highlighted in relation to the amendment of art. 267 in the Criminal Procedure Code, by limiting the criminal prosecution bodies' capacity to access the information comprised in the electronic databases owned by state government bodies.

It is mentioned that the arguments invoked to support the respective amendment reflect a totally improper understanding of the nature of criminal investigations and the role of criminal investigation bodies, since these databases provide information instead of evidence, whereas the principle of equality of arms concerns evidence and how it is submitted, the only elements based on which presumption of innocence can ultimately be defeated.

The changes proposed for art. 83 in the Criminal Procedure Code, regarding the defendant attending the hearings of various litigants, during the criminal prosecution phase, are highlighted, as well, as they contradict the express provisions related to the hearing of individuals on a confidential basis, which rules out the possibility of having the defendant attend, for instance, the hearing of human trafficking victims.

In other words, the defendants' rights must not violate the witnesses' rights or the victims' rights.

Moreover, a *statement of the National Anticorruption Directorate* mentioned that the European Directive was being used as a pretext to eliminate the criminal prosecution bodies' capacity to uncover and substantiate criminal offences, whereas the purpose of those changes had nothing in common with the presumption of innocence.

To that end, attention is drawn towards the fact that the amendment of art. 307 parag. (2) in the Criminal Procedure Code would compel prosecutors, right after filing a referral related to a person of interest, to inform that person on the matter and allow them to attend the proceedings carried out. That way, it would no longer be possible to submit evidentiary means entailing confidentiality, such as phone records or ambient sound recordings, residential or computer searches or apprehensions in the act.

It is also argued that the amendments to art. 83 in the Criminal Procedure Code, which allow suspects and defendants attend evidentiary hearings, are likely to impair the criminal prosecution process, considering that, in numerous circumstances, witnesses will be intimidated by the presence of the crime culprit, particularly in cases where the former are subordinated to the latter, as is the case with abuse of office and corruption offences. This amendment was all the more criticisable as the law currently stipulates the lawyer's right to attend these hearings, an absolutely sufficient guarantee for investigated individuals' right to legal counsel.

Another justified claim was the one concerning the amendment to art. 267 parag. (2) in the Criminal Procedure Code, which would have deprived prosecutors of an important tool in investigating criminal offences, namely quick access to information in order to act effectively towards uncovering the facts.

For that matter, any institution is bound to communicate to the criminal prosecution bodies any information required as part of an investigation and, by being able to access databases, the response time for quickly identifying the perpetrators of a crime. That is why the prosecutors' and the police officers' access to investigation tools cannot be conditional upon granting the same right to offenders, as well. The right to legal counsel entails guarantees for the person under investigation, and not a shortage of tools the criminal prosecution body should be able to access in order to prevent the former from discovering the crimes committed.

A particular aspect discussed upon related to the amendment to art. 273 in the Penal Code, which would have basically decriminalised the false testimony offence, with implication upon all the pending case files centred around this offence, since the principle of the more favourable criminal law would have applied. Within the new legislative context, it would have been extremely difficult, or outright impossible, to uncover the truth, considering that witnesses would know they could lie with now repercussions whatsoever, enjoying impunity.

In cases of recourse action filed by the State against a magistrate for exercising their powers in bad faith or with evidence of gross negligence, the amendment brought to art. 542 in the Criminal Procedure Code would have introduced an objective liability of the magistrate, in all cases, since the recourse action would have no longer been conditional upon the substantiation of bad faith or gross negligence, as is the case with the regulation in force.

Additionally, the introduction of art. 542 parag. (1^1) in the Criminal Procedure Code regulated a new form of the abuse of office offence, exclusively for magistrates, and also criminalised the involuntary perpetration of deeds, regardless of the nature of the breached duty.

This form of the abuse of office offence is a visible discrimination towards all the other social and professional categories, which are sanctioned only if they act with intent and only if they violate provisions of a law.

It is also shown that, in line with the above-highlighted aspects, the amendment to art. 364 in the Criminal Procedure Code basically renders sentencing a person *in absentia* impossible, as per the amendment to art. 335 in the Criminal Procedure Code, an initial case file dismissal ruling can no longer be reversed 6 months later, even if there were to emerge new evidence indicating that the person actually committed the crime they had been investigated for – despite the existence of numerous circumstances where new evidentiary means are uncovered after the delivery of a case file dismissal ruling, in case files on some of the most severe offences, and respective offenders would no longer be subject to criminal prosecution, as per the amendment to art. 223 parag. (2) in the Criminal Procedure Code, there would be no more remand custodies

for corruption offenders, tax evaders and money launderers, even if their release were to pose a danger for public order and, moreover, there could no longer be remand custodies not even for perpetrators of offences against Romania's defence capability, of genocide, crimes against humanity and war crimes, provided that they commit such crimes without recourse to violence, thus occurring a visible discrimination between the perpetrators of such deeds and those of less severe offences (currency counterfeiting), with the outcome of generating a state of insecurity within society.

Other changes, too, are stigmatised, along the same lines – those brought to art. 139 in the Criminal Procedure Code, which could have led to the removal, from among evidentiary means, of records generated in compliance with the law, to art. 168 in the Criminal Procedure Code, which could have led to the inability to use, as part of a different case file, the results of a computer search and could have hindered the substantiation of certain offences, without an objective argument and, making it impossible to dismiss certain evidentiary means submitted according to the law and pursuant to a judge's clearance.

At last, it was shown that the introduction of art. 4 parag. (3), (4) in the Criminal Procedure Code entails an obvious discrimination between the perpetrators of certain crimes and the right of the people to be informed and to have access to information of public interest. This variety of regulations are contrary to the European Court of Human Rights (ECHR) case-lay, to Recommendation (2003) 13 of the Council of Europe Committee of Ministers, to Resolution no. 428/1970 adopted by the Council of Europe Parliamentary Assembly on the nations' duty grant any person concerned and the media access to information of public interest, the arguments in favour of the above being that investigations conducted in corruption, money laundering, tax evasion etc. case files are all information of public interest, such a restriction being equivalent to a violation of the people's right to access information of this nature.

In regard to these legislative changes, similar comments were also made by the Romanian Judges' Forum Association, and we chose to make reference in this paper to those with a far-reaching impact upon the judicial activity.

It was thus shown that, from the angle of aggrieved parties and in relation to the purpose of criminal proceedings, setting forth a 1-year deadline for any of the remedies presented upon completion of criminal prosecution is insufficient in case files of vast complexity, being against any principles that, in the absence of thorough investigations intended to lead to a definitive issue in fact and the uncover the truth, a remedy to commence criminal prosecution *in personam* or to dismiss the case file should be imposed due to the mere passing of time.

This remedy virtually defeats the principle of uncovering the truth, stipulated by art. 5 in the Criminal Procedure Code, and the principle of a fair trial, stipulated in the European Convention on Human Rights and defined by art. 8 in the Criminal Procedure Code, given that a reasonable deadline is estimated, pursuant to ECHR case-law, on a per-case basis, depending on the case file peculiarities, the parties' conduct and other criteria, among which fairly important ones are the evidentiary basis complexity and submission difficulties.

It was argued that a provision of this kind cannot be soundly substantiated in relation to the remaining changes introduced by the draft normative, which adds for judiciary bodies, among others, the obligation to carry out investigation of certain evidentiary means, such those in art. 97 parag. (2) let. f) in the Criminal Procedure Code, or to submit assessments intended to counter fact-finding reports.

However, it is obvious that, to the extent to which the case file particulars do not allow drawing a firm conclusion towards one of the remedies to commence criminal prosecution or to dismiss the case file, the passing of a 1-year interval appears too excessive to allow formulating a remedy along the lines pursued by the legislator, simply to have an ongoing criminal investigation shut down and ignore learning the truth.

In light of the same reasons, the introduction of the absolute nullity sanction, in cases of violation of the provisions of art. 307 parag. (1) in the Criminal Procedure Code, is in blatant contradiction with the principles of art. 281 in the Criminal Procedure Code, a legal provision of this nature being set forth to cater for the protection of a particular interest and not a general one.

The party may choose not to invoke these mischiefs and may as well expressly waive them, whereas compromising the other criminal prosecution acts utterly lacks any reason, especially in cases where, becoming aware of the possible omission left in the protocol informing on the suspect status, the concerned party does not choose to make use of the respective mischief.

In this case, there is no subsequent interest for the law court, the prosecutor or the other parties to be able to invoke the violation of a provision that defends a particular interest, likely to determine, as per the legislator's will, the dismissal of criminal prosecution, in the absence of the aggrieved party's desire to act.

The legislative solution on the interdiction to use statements given by a defendant admitting their guilt conflicts with the principle of free assessment of evidence, stipulated by art. 103 parag. (1) in the Criminal Procedure Code, but also with the principle of the judge's independence, stated in the Romanian Constitution and the judicial organisation standards, breached by the countless limitations in terms of free evidence assessment for decision-making.

Moreover, such a legislative solution conflicts even with the new amended provisions of art. 103 parag. (3) in the Criminal Procedure Code, that allow using as evidence, to support the decision to convict, to discontinue or to postpone the enforcement of a penalty, the statements of those who benefit from favourable legal provisions in exchange for statements made before the judiciary bodies, if such evidence colligates with further evidence legally submitted to the case.

On a different note, there is no reasoning behind not being able to use the statements made by a defendant admitting their guilt during a summary judgement procedure against defendants who do not use the same procedure in the same case file or who are investigated in other case files. As a matter of fact, this acknowledgement, while in a different form, can also take place when the defendant does not use this procedure

or when this procedure is not allowed by the law or resorting to it has been denied by a judge. Unless such an interdiction applied in these cases, there is no reason for an acknowledgement of this kind, expressed in the procedure at art. 375 in the Criminal Procedure Code, not to be employed as an evidentiary means, all the more as this statement has to be, in its turn, colligated with further evidence, in order to facilitate establishing the culpability of the other defendants.

Another unwarranted interference with the duties of the judiciary is the introduction of new grounds for revision at art. 453 parag. (1) let. g) in the Criminal Procedure Code, grounds deriving from the judge in charge with the court proceedings failing to sign the decision and violating the *res iudicata* authority, given that this fact equates to neither a judicial error due to circumstances unknown to the law court when carrying out the court proceedings, nor a procedural error impossible to rectify otherwise.

On the other hand, to the extent to which a judicial order would have to be revised on these grounds, the grounds for revision should consider all decision categories, not just the conviction ones, for the prosecutor and the parties to enjoy the same judicial treatment, and in order not to sacrifice the legal security principle exclusively in favour of the defendant.

The failure to sign the decision by the judge ruling in the case is not, in reality, a reason to revise underpinned by ECHR case-law, since, once it has been drawn up by that judge, the said judicial order is the result of their own will, which takes the form of the verdict expressed at an earlier date, whereas the signature of the judicial panel president or the presiding judge of the court does nothing but certify an official, and completed, judicial procedure.

Finally, the transitional provisions in the draft law are unconstitutional, in the sense that they apply retroactively, making it possible to challenge decisions delivered prior to their coming into effect date, on grounds regulated by the new Law, contrary to the constitutional principle pursuant to which the new Law can only allow for future cases the more favourable criminal law.

Since only the new criminal law can produce retroactive effects, whereas the procedural law cannot, the possibility provided to parties concerned to challenge, on new procedural grounds, judicial orders delivered prior to the coming-into-effect date of the new law, violates the legal security principle and all the principles complied with during the elaboration of all the transitional rules, within the field of civil and criminal proceedings.

As a matter of fact, this principle was constantly abided by during the implementation of both the Criminal Procedure Code and the Civil Procedure Code, whereas the procedural law was never allowed to apply retroactively, regardless of the law matter it applied to. In the current Romanian criminal proceedings law, this principle also received an express mention in the provisions of art. 13 in the Criminal Procedure Code, according to which the criminal proceedings law applies, within the criminal trial, to the acts performed and measures taken from the date it comes into effect to the date it ceases to have effects, except for the cases stipulated in the transitional provisions.

In the case of conclusive judicial orders, a remedy at law cannot apply retroactively, regardless of the favourable or unfavourable nature of the new trial provisions, due to the fact that, if it is acceptable for the provisions comprised by the law on implementing the Criminal Procedure Code to apply strictly in cases entailed by the Code coming into effect, the generally applicable provisions of the Civil Procedure Code, also applicable to criminal matters, according to art. 2 in this latest Code, stipulate that the provisions are still subject to the remedies at law, the grounds and deadlines provided by the law under which the trial commenced (art. 27).

Other identified issues are related to repealing art. 175 parag. (2) in the Penal Code, on the public servant statute, which contradicts European Directive 1371/2017 on the fight against fraud to the Union's financial interests by means of criminal law[1], repealing the *dereliction of duty* offence, which would have led to the loss of any accountability from these servants, and the addition of a new incompatibility case, such as that of pre-trial chamber judge, which could have hampered the activity of criminal departments and excessively overload specialised judges.

The Constitutional Court ruled: the changes brought to the Penal Code and the Criminal Procedure Code are unconstitutional. The review of a heralded demise

1. As a result of the expressed claims, the amendments intended to transpose Directive (EU) 2016/343 of the European Parliament and the Council from 9.03.2016 no longer had the desired effect and the endeavours commenced on that date were

[1] In regard to disregarding the internal obligations undertaken, the repealing of art. 175 parag. (2) in the Penal Code was deemed groundless, as the public servant statute cannot be exclusively linked to the respective person being a member of one of the entities, or holding one of the offices at parag. (1), but also to rendering certain public services which are performed by a diverse range of persons upon whom public authorities exercise a form of control.

This change comes to support a series of professional groups conducting their activity in the private sector or under liberal professions, in relation to which setting forth a preferential criminal-law treatment is not justified. This legislative proposal can violate Directive 1371/2017 on the fight against fraud to the Union's financial interests by means of criminal law, which explicitly states at item 10 that "As regards the criminal offences of passive corruption and misappropriation, there is a need to include a definition of public officials covering all relevant officials, whether holding a formal office in the Union, in the member states or in third countries".

The content of the Directive recitals states that natural persons are becoming ever more involved in the management of Union funds.

In order to adequately protect the Union funds against corruption and misappropriation, the "public official" definition needs to include persons who do not hold an official title, but who were entrusted and exercise, in a similar fashion, a public service function in regard to Union funds, such as the contractors involved in the management of these funds.

As such, art. 4 parag. (4) let. b) in the Directive includes in the *public official* definition any other person entrusted and exercising a public service function entailing the management of the Union's financial interests within member states or third countries or making decisions in regard to said interests. Consequently, in order to comply with the European legislation, the *public official* definition should not be narrowed down but, on the contrary, extended so that it may include, among others, private contractors managing EU funds.

partially abandoned. Some of the changes brought to the Penal Code and the Criminal Procedure Code were, however, resurrected and adopted, being quashed following the constitutionality review conducted by the Constitutional Court, after the Parliament passed the draft law.

Thus, the Constitutional Court, as per Decision **no. 466** from **July 29, 2019**, on the unconstitutionality objection to the Law on amending and supplementing Law no. 286/2009 regarding the Penal Code and Law no. 78/2000 on the prevention, discovery and sanctioning of corruption acts, by unanimous consent, admitted the unconstitutionality objection and ascertained that the Law on amending and supplementing Law no. 286/2009 on the Penal Code and Law no. 78/2000 on the prevention, discovery and sanctioning of corruption acts, is, as a whole, unconstitutional.

In that respect, the Court essentially acknowledged that, during the law review process, the Parliament failed to fully transpose the Constitutional Court's decisions applicable to criminal matters, leading to a breach of the provisions of art. 147 parag. (2) in the Constitution.

As per the same decision, the Constitutional Court, by unanimous consent, admitted the unconstitutionality objection and ascertained that the law which amends and supplements Law no. 135/2010, on the Criminal Procedure Code, and amends Law no. 304/2004, on the judiciary organisation, is, as a whole, unconstitutional.

The Court essentially acknowledged that, as part of the law review process as a result of Constitutional Court Decision no. 633 from October 12, 2018, the Parliament did not comply with the review process limits, as it failed to transpose all the Constitutional Court decisions according to which certain criminal procedure rules were found unconstitutional, during the *a posteriori* constitutionality review. On these grounds, the Court ascertained that the law subject to review violated art. 147 parag. (2) in the Constitution.

The importance of the constitutionality review carried out in this case justifies, in our opinion, the detailed rendering of the most significant aspects examined by the Constitutional Court, in order to understand the main claims that certain unconstitutionality objections being admitted and others being dismissed, the main judicial outcomes produced by this decision, in relation to other decisions according to which a law intending to amend normatives was deemed unconstitutional in its entirety, but also the legislative journey taken by the law subject to review.

2. In the context of this case, from an *amicus curiae* position, the Romanian Judges' Forum Association submitted a memorandum regarding the issued unconstitutionality objection, many of the comments made being carried over as worded by the authors of the referrals, following the fact that the respective claims were presented as part of a distinct memorandum during parliamentary consultations attended by the association.

The extent of the present study does not allow for a detailed presentation of the contribution brought by the Romanian Judges' Forum Association during the debates occasioned by the adoption of these laws, particularly given that some of the objections it issued no longer became the subject of review by the Constitutional Court,

the normatives in question being declared unconstitutional mainly in light of grounds underpinned by non-compliance with previous unconstitutionality-related decisions.

However, as it had done in the past, the Romanian Judges' Forum Association warned on the fact that most of the proposed amendments were solutions intended to hamper the activity of law courts and prosecutor's offices, solutions whose effects had not even been analysed subsequent to an impact study and would be able to throw, after a relatively short period of time, were they to be adopted, the activity of judicial bodies into disarray, inevitably weakening the rule of law.

The Association's opinion is that these legislative amendments should not have been brought forward, in the absence of solid and thorough strategies in the area of logistic and human resource management, as they violated the law predictability and accessibility standards, they set forth unequal standards in relation to the rights of participants in the criminal proceedings, they defined a privileged status of suspects and defendants throughout the criminal proceedings, they invoked principles not entirely aligned to the Romanian criminal legislation, principles that, in relation to other participants, do not grant the same benefits.

3. Returning, however, to the substantive and formal aspects taken into account by the Constitutional Court, it must be mentioned that, in order to deliver this decision, the Court acknowledged, in relation to the *legislative journey of the reviewed law*, that the legislative proposal had been initiated by 179 deputies and senators, being registered with the Senate on April 18, 2018.

On July 3, 2018, the Joint Special Commission of the Chamber of Deputies and the Senate on organising, consolidating and securing legislative stability in the field of justice adopted an admission report, with amendments.

On the same date, the Senate passed the legislative proposal, which was also submitted to the Chamber of Deputies.

On July 3, 2018, the Joint Special Commission of the Chamber of Deputies and the Senate on organising, consolidating and securing legislative stability in the field of justice adopted an admission report, with amendments.

On July 4, 2018, the Chamber of Deputies passed the legislative proposal.

On the same date, this law was submitted to the secretary general so that they may exert their right to seize concerning the constitutionality of the law, then submitted for enactment on July 6, 2018.

On July 5, 2018 and on July 25, 2018, respectively, 110 deputies, the High Court of Cassation and Justice – the United Departments and the Romanian President notified the Constitutional Court, as per art. 146 let. a) first sentence in the Romanian Constitution.

The Constitutional Court colligated the case files opened as such and admitted, in part, the unconstitutionality objections filed, as per Decision no. 650 of October 25, 2018, published in the Official Gazette of Romania, Part I, no. 97 from February 7, 2019.

In the process of reconciling the law with the Constitutional Court Decision, as per art. 147 parag. (2) in the Constitution, the first Chamber notified was the Senate, according to the Constitution.

On April 17, 2019, The Joint Special Commission of the Chamber of Deputies and the Senate on organising, consolidating and securing legislative stability in the field of justice adopted an admission report, with amendments.

On the same date, the Senate plenum passed the law, which was then submitted to the Chamber of Deputies, in its capacity of decision-making Chamber.

On April 23, 2019, the Joint Special Commission of the Chamber of Deputies and the Senate on organising, consolidating and securing legislative stability in the field of justice adopted an admission report, with amendments.

On April 24, 2019, the Chamber of Deputies plenum passed the law.

On April 25 and May 10, 2019, the Constitutional Court of Romania was notified on two unconstitutionality objections filed by 78 deputies and the Romanian President.

4. In regard to the *extrinsic unconstitutionality claims*, the Constitutional Court acknowledged the following:

4.1. *The first claim* points to the fact that the reviewed law was adopted in breach of art. 69 parag. (2) in the Chamber of Deputies Regulation, which is contrary to art. 1 parag. (3) and (5) and to art. 69 in the Constitution. It was argued that this imperative regulatory provision was breached in relation to the law subjected to the constitutionality review, as it had been endorsed by the special rapporteur commission on April 23, 2019 and was debated upon and approved, the following day, in the Chamber of Deputies session. As such, the deputies that were not members of the commission were unable to form an opinion on the legislative proposal adopted with amendments by the special commission.

By examining the unconstitutionality claim, the Court ascertained that, as per Decision no. 650 from October 25, 2018, parag. 215 and 216, regarding an identical unconstitutionality claim, art. 69 parag. (2) in the Chamber of Deputies Regulation, approved as per Chamber of Deputies Decision no. 8/1994, republished in the Official Gazette of Romania, Part I, no. 481 from June 28, 2016, stipulates that "(2) the Report [drawn up by the commission notified on the merits] shall be printed and distributed to the deputies at least 3 days prior to the date set forth for debating upon the draft law or the legislative proposals in the Chamber of Deputies plenum, in the case of draft laws and legislative proposals for which the Chamber of Deputies is the first Chamber notified, and at least 5 days beforehand in the case of those for which the Chamber of Deputies is the decision-making Chamber".

By means of the same decision, the Court acknowledged that the Chamber of Deputies Regulation is not a benchmark rule in the exercise of the constitutionality review (Decision no. 137 from March 20, 2018, published in the Official Gazette of Romania no. 404 from May 11, 2018, parag. 36) and that, in line with its own case-law (see Decision no. 250 from April 19, 2018, published in the Official Gazette of Romania

no. 378 from May 3, 2018, parag. 45), non-compliance with the deadline for submitting the report represents an issue in enforcing the regulations of the two Chambers.

In other words, the subject of the unconstitutionality claim is, in fact, the way in which, after the presentation of the report by the Joint Special Commission of the Chamber of Deputies and the Senate on organising, consolidating and securing legislative stability in the field of justice, the law-adoption parliamentary rules and procedures were complied with.

However, to the extent to which the regulatory provisions invoked to support the claims have no constitutional relevance, as they are not defined expressly or by default in any constitutional rule (see, in that respect, Decision no. 730 from November 22, 2017, published in the Official Gazette of Romania no. 1043 from December 29, 2017), the aspects invoked by the referral authors do not represent constitutionality issues, but issues in enforcing regulatory rules (also see, in that respect, Decision no. 307 from March 28, 2012, published in the Official Gazette of Romania no. 293 from May 4, 2012).

Accordingly, the Court ascertained that the criticised law did not violate the provisions of art. 1 parag. (5) in the Constitution, as far as the principle of legality is concerned.

The Court acknowledged that the above-mentioned aspects apply mutatis mutandis in the matter at hand, as well, considering that the criticism highlights, in the law review procedure, a breach of the sale regulatory provision allegedly ignored during the initial law-adopting procedure. Therefore, the violation of art. 1 parag. (3) and (5) and art. 69 in the Constitution cannot be acknowledged.

4.2. *The second extrinsic unconstitutionality claim* points out the breach of the provisions of art. 147 parag. (2), in relation to those of art. 147 parag. (1) and parag. (4) in the Constitution, and refers to the removal, from the content of the law subject to review, of the provisions of art. I item 5 [in regard to art. 35 parag. (1)], item 6 [in regard to art. 39 parag. (1) let. e), in reference to let. c)], item 22 [in regard to art. 112^1 parag. (2)], item 28 (in regard to art. 159^1) and item 50 [in regard to art. 297 parag. (1)] in the law with its drawn up version ad adopted on July 4, 2018.

Concerning the provisions of art. 147 parag. (2) in the Constitution, as per Decision no. 515 from November 24, 2004, published in the Official Gazette of Romania, Part I, no. 1195 from December 14, 2004, the Court acknowledged that they made reference to the review of a law or of legal provisions the unconstitutionality of which had been ascertained via a decision of the Constitutional Court, delivered following the a priori constitutionality review and that they limit the resumption of the legislative review process strictly in relation to the provisions deemed unconstitutional by the Constitutional Court.

Further on, The Court made reference to the permanent case-law (see Decision no. 1.177 from December 12, 2007, published in the Official Gazette of Romania no. 871 from December 20, 2007, Decisions no. 872 and no. 874 from June 25, 2010, published in the Official Gazette of Romania no. 433 from June 28, 2010, Decision no. 975 from July 7, 2010, published in the Official Gazette of Romania no. 568 from August 11, 2010, Decision no. 33 from January 23, 2018, published in the Official Gazette of Romania

no. 146 from February 15, 2018, parag. 187, or Decision no. 45 from January 30, 2018, published in the Official Gazette of Romania no. 199 from March 5, 2018, parag. 240), regarding to the parliamentary law-reviewing procedure, pursuant to art. 147 parag. (2) in the Constitution, from the standpoint of the lawmaking limits imposed to the Parliament by means of the decision to partially admit the unconstitutionality objection.

As part of this procedure, the Parliament does not possess the constitutional power to amend either legal provisions that were not challenged in regard to their constitutionality or those that were challenged, but the constitutionality of which was already ascertained via the Court's jurisdictional act.

Therefore, the Parliament has the power to legislate strictly in the sense of reconciling the provisions found to be unconstitutional with the Constitutional Court decision.

On the other hand, in order to ensure the consistent nature of the regulation, the Court ruled that the legislator can amend other legal provisions, as well, but only if they are undividedly linked to the unconstitutional provisions and, insofar as it becomes necessary, shall reconcile the other provisions of the law, as a legislative technique operation.

In regard to the claims issued in the present matter, pointing out a breach of the law review limits, the Court ascertains that they can be placed into two categories: the first category concerns the removal of provisions that were the subject of referrals to the Court and were found to be unconstitutional or partially constitutional, whereas the second category concerns the removal of provisions that were the subject of referrals to the Court and were found to be unconstitutional, but the adoption of which was justified by the legislator as the need to reconcile the amended provisions previously found to be unconstitutional with Constitutional Court decisions issued as part of the a posteriori review.

Concerning the first category of rules, namely those comprised in art. I item 6 [in regard to art. 39 parag. (1) let. e), in reference to let. c)], item 22 [in regard to art. 112^1 parag. (2)] and item 28 (in regard to art. 159^1) in the law adopted on July 4, 2018, the Court deems the unconstitutionality claims filed pursuant to art. 147 in the Constitution as substantiated.

As such, concerning the removal of art. I item 6 [in regard to art. 39 parag. (1) let. e), in reference to let. c)] in the original form of the law, the Court accepts the fact that this operation can be considered as one that reconciles with art. I item 6 found to be unconstitutional [in regard to art. 39 parag. (1) let. b) and let. e), in reference to let. b)] in the original form of the law.

Moreover, art. 39 parag. (1) let. e), as drawn up in the original form of the law and in the law in effect, expresses the same legislative solution; accordingly, whether or not it is expressly regulated in the content of the law, the legislative solution is worded similarly.

The Court ascertains that, in the original form of the law, art. I item 22 [in regard to art. 112^1 parag. (2)] stipulated that "(1) Seizure shall also be ordered on other property items than those mentioned at art. 112 when a person is sentenced for a deed likely to

provide them with monetary benefits and their sentence, as provided by the law is 4 years or more in prison, and the law court believes, based on the case circumstances, including factual elements and submitted evidence, that the respective goods originate from criminal activities. The law court's belief may also rely on the discrepancy between the illicit incomes and that person's wealth. (2) Extended seizure is ruled if the following requirements are cumulatively met: a) the value of the goods acquired by the sentenced person, over a 5-year period prior to and, as the case may be, after they have committed the crime, until the law court referral date, visibly exceeds the income legally obtained by them; b) the submitted evidence reveals that the said goods originate from criminal activities of the nature of those stipulated in parag. (1)".

The Court, as per Decision no. 650 from October 25, 2018, ascertained that art. I item 22 [in regard to art. 112^1 parag. (2) let. b), the phrase "submitted evidence"] is unconstitutional, the other provisions being deemed constitutional. However, this was the critical amendment and, as a matter of fact, the only one brought to parag. (2) of art. 112^1 in the Penal Code. Consequently, the amendment brought to parag. (2) was abandoned and the one brought to parag. (1) was maintained, the latter being deemed constitutional by the Constitutional Court.

As a result, no changes were brought to parag. (2) currently in effect, the text of which stipulates that: "(2) Extended seizure is ordered if the following requirements are cumulatively met: a) the value of the goods acquired by the sentenced person, over a 5-year period prior to and, as the case may be, after they have committed the crime, until the law court referral date, visibly exceeds the income legally obtained by them; b) the law court is entitled to believe that the respective goods originate from criminal activities of the nature of those stipulated in parag. (1)".

Given the aspects detailed above, having a single phrase, the one at the core of parag. (2) let. b), considered unconstitutional, it became obvious that the paragraph could no longer be amended as initially desired, the amendment of parag. (2) let. b) being abandoned.

Moreover, since no change was performed on parag. (2) let. a), the legislator abandoned carrying out any amendment to parag. (2), in perfect compliance with the decision of the Constitutional Court.

Consequently, the breach of art. 147 parag. (2) in the Constitution cannot be acknowledged.

Concerning the fact that, in the form adopted by the criticised law, the provisions of art. I item 28 [in regard to art. 159^1 – unconstitutional in regard to the phrase "until a conclusive ruling is delivered"] are no longer present in the criticised law – following the review, the Parliament removing in its entirety the regulation on the mediation agreement – the Court believes the Parliament had objective reasons to take that. As such, attempting to transpose Decision no. 397 from June 15, 2016, published in the Official Gazette of Romania no. 532 from July 15, 2016, a decision setting forth that the provisions of art. 67 in Law no. 192/2006 on mediation and the profession of mediators, according to the interpretation rendered as per Decision no. 9 from April 17, 2015 of the High Court of Cassation and Justice – the Panel for settling criminal law matters, are

constitutional to the extent to which the conclusion of a mediation agreement on the offences in the case of which reconciliation can be resorted to produces effects only if it takes place before the law courts reads the indictment document, the Parliament introduced a new article in the Penal Code, namely art. 159^1, according to which the mediation agreement produces effects if concluded before a conclusive ruling is delivered. Consequently, the Court, as per Decision no. 650 from October 25, 2018, ruled that, to be in line with Decision no. 397 from June 15, 2016, published in the Official Gazette of Romania no. 532 from July 15, 2016, as well as with the provisions of art. 147 parag. (4) in the Constitution, the provisions of art. 159^1 in the Penal Code must provide as a deadline for concluding the mediation agreement the moment when the law court reads the referral. These being said, the provisions of art. I item 28 (in regard to art. 159^1, the phrase "until a conclusive ruling is delivered") in the reviewed law, in its form adopted on July 4, 2018, were found to conflict with the provisions of art. 124 parag. (2) and of art. 147 parag. (4) in the Constitution. Regarding this aspect, the Court ascertains that, as per Law no. 97/2018 on certain measures intended to protect victims of criminal offences, published in the Official Gazette of Romania no. 376 from May 22, 2018, art. 67 in Law no. 2/2006 was added parag. (2^2), stipulating that the conclusion of a mediation agreement subject to the criminal side of an offence is a sui-generis cause that removes criminal liability and can occur before the court reads the referral. In other words, the regulation of this assumption was no longer necessary within the Penal Code, as it already appeared in Law no. 192/2006.

Accordingly, the breach of art. 147 parag. (2) in the Constitution cannot be acknowledged.

Concerning the second category of provisions mentioned in parag. 150, the Constitutional Court ascertains that they were referred to it and were found to be unconstitutional, considering their adoption was justified by the legislator by means of the need to reconcile the amended provisions previously found to be unconstitutional with Constitutional Court decisions delivered as part of the *a posteriori* review.

From its coming-into-force date, February 1, 2014, to date, the Penal Code has received several unconstitutionality claims, reviewed and resolved by the Constitutional Court as part of the *a posteriori* review. Some of the provisions in the normative were found to be unconstitutional, a circumstance that stemmed the legislator's obligation, pursuant to art. 147 parag. (1) and (4) in the Constitution, to commence the lawmaking procedure aimed at reconciling these provisions with the Court's decisions and the Constitution, respectively.

In this context, the authors of the reviewed law mentioned in its Statement of reasons that, "from the adoption of the Penal Code to date, the Constitutional Court has ruled that some of the texts fail to meet the constitutionality requirement, meaning that, by declaring them unconstitutional in relation to the provisions of art. 147 parag. (1) in the Fundamental Law, the Parliament has the duty to reconcile the texts in the law in force with the Court's decisions.

In that respect, mention is made of Decision no. 265/2014 in regard to art. 5, Decisions no. 68/2017 and no. 405/2016 related to art. 17, Decision no. 368/2017

related to art. 35, Decision no. 11/2015 related to art. 112[1], Decision no. 508/2014 related to art. 159, Decision no. 224/2017 related to art. 335 and Decision no. 732/2014 related to art. 336".

Based on all of the above, the Court ascertains that the reviewed law, in its form adopted on July 4, 2018, pursued reconciling with the Constitution the Penal Code provisions previously deemed unconstitutional via the Constitutional Court decisions mentioned in the previous paragraph. As per Decision no. 650 from October 25, 2018, the Court ascertained that the legislator, by means of the reviewed law, in its form adopted on July 4, 2018, failed to reconcile with the Constitution the provisions of art. 35 parag. (1) and of art. 297 parag. (1) in the Penal Code, deemed unconstitutional as per Decision no. 368 from May 30, 2017 and Decision no. 405 from June 15, 2016.

In the review the two amending provisions were subject to, the Court ascertained in relation to both, as grounds for the unconstitutionality law, the breach of the provisions of art. 147 in the Romanian Constitution, which defines the general mandatory nature of the Constitutional Court decisions.

As such, concerning the change brought to art. 35 parag. (1) in the Penal Code, the Court found that, after Decision no. 368 of May 30, 2017 was ruled, the differentiator between *crime on an ongoing basis* and *concurrent offences* is exclusively, criminal intent unit instead of the sanctioning procedures or the typology of social relations protected by the criminalisation rule, meaning that the legislator's option, set forth in the law adopted on July 4, 2018, to acknowledge the continued form of the offence when the deeds are committed against the same passive subject in the case of crimes against persons, is in breach of Decision no. 368 from May 30, 2017.

Concerning art. 297 parag. (1) in the Penal Code, the Court ascertains that the legislator failed to implement Decision no. 405 from June 15, 2016, in the sense that it omitted, on the one hand, to determine that the non-fulfilment or the inadequate fulfilment of an act must be seen in relation to occupation duties provided in a normative acting as a law and, on the other hand, to regulate, pursuant to the *"ultima ratio"* principles in criminal matters, the degrees of magnitude and severity, of the impairment cast upon the protected social value, justifying the criminal penalty, which leads to the persistence of the same issues regarding the difficulty of separating the various forms of liability from the criminal liability, forms present prior to Decision no. 405 of June 15, 2016, an aspect also pointed out by Decision no. 650 from October 25, 2018. As a matter of fact, in relation to this final ascertainment, the Court, also as per Decision no. 392 from June 6, 2017, published in the Official Gazette of Romania no. 504 from June 30, 2017, parag. 56, ruled that, given the nature of the legislative omission in question, it lacked the jurisdiction required to adjust for that regulatory flaw, as it would exceed its legal duties by acting within the exclusive jurisdiction of the primary or delegated legislator.

As a consequence, keeping in mind the constitutional provisions of art. 142 parag. (1) and of art. 1 parag. (5), the Court underlined the fact that the legislator is bound to regulate the monetary threshold of the loss and the severity of the damage incurred upon the legitimate right or interest by the deed committed, in the content

of the criminal-law rules on the *abuse of office* offence, whereas its passivity may lead to the occurrence of new cases of incoherence and instability, contrary to the legal security principle, namely its provisions concerning the clarity and predictability of the law.

In other words, the Court ascertains that the legislator's efforts to transpose in the procedural criminal legislation the considerations and operative parts of the two Court decisions (Decision no. 368 from May 30, 2017 and Decision no. 405 from June 15, 2016, respectively) did not meet the mandatory nature of the Court rulings, the adopted rules cancelling the effects of these jurisdictional acts, in breach of art. 147 parag. (4) in the Constitution.

Within the law review procedure, the Parliament, bound to observe the limits imposed by Constitutional Court Decision no. 650 from October 25, 2018, should have amended those rules expressly declared as unconstitutional in full or in part. Considering that the legal standards declared unconstitutional were underpinned, as grounds for adoption, by the need to reconcile the criminal-law trial provisions previously found to be unconstitutional with Constitutional Court decisions, delivered as part of the *a posteriori* review, the law was going to be reconciled by taking into account these decisions, whose erroneous transposition was sanctioned by the Court as per Decision no. 650 from October 25, 2018.

Basically, as part of a procedure of reconciling a law/rule deemed unconstitutional with a Constitutional Court decision, the Parliament is free to decide whether to alter that law/rule strictly in the sense of the Court rulings or to abandon the intervention upon the text in question by removing the rule or even rejecting the law. This complete power available to the Parliament is, however, restricted when there is an interposing Constitutional Court decision, delivered during the *a posteriori* review, stating that the rule in effect, subject to a legislative intervention, has been declared unconstitutional.

Within an assumption as such, once the law amendment procedure aimed at reconciling it with the Constitution has commenced, the Parliament is bound to adopt the rules that transpose the Court's jurisdictional act, eliminating the ascertained unconstitutionality flaws. This obligation stems directly from the text of art. 147 in the Constitution and sets forth the Parliament's active role in rendering legal standards constitutional, in line with the constitutional court's decisions.

In an opposite interpretation, it would mean that, by enforcing art. 147 parag. (1), (2) and (4) in the Constitution, the legislator, as part of the procedure of reconciling the law with the Constitutional Court decisions, has a right of selection in relation to them and, by means of its decision, can actually keep within the legislation rules affected by unconstitutionality flaws.

From this perspective, reviewing a law under the provisions of art. 147 parag. (2) in the Constitution is fundamentally different from the same review under the provisions of. 77 parag. (2) in the Constitution, the difference being the expression of the Constitutional Court's constitutional role.

As such, if, in the case of a review demanded by the Romanian President, the Parliament's appraisal margin regarding the regulatory content of the rule whose review

has been requested is absolute, the only limitation being its inability to intervene on other texts than those subject to the review request, in the case of a review underpinned by art. 147 parag. (2) in the Romanian Constitution, the Parliament's appraisal margin is limited, being bound to reanalyse the regulatory content exclusively in relation to the Constitutional Court decision, whereas its solutions to amend, supplement or eliminate/repeal must be in agreement with the considerations in the decision.

In other words, compliance with the obligation stipulated by art. 147 parag. (2) in the Constitution entails an intervention permanently limited to the considerations and operative part of the Constitutional Court decision. Moreover, provided that, during the *a priori* constitutionality review there is an interposition of a Constitutional Court decision according to which the rule in force, which is subject to legislative intervention, has been deemed unconstitutional, the reconciliation of the law, as part of the review procedure, shall be done both in regard to the decision delivered during the a priori constitutionality review, and to the decision delivered during the *a posteriori* constitutionality review.

Consequently, the legislator's subsequent intervention cannot be limited to removing from the content of the amending law the texts deemed unconstitutional, as this would equate to maintaining the legislative solution declared unconstitutional as per the a posteriori constitutionality review and, by default, depriving of judicial effects the Court decision that underpinned the amending legislative initiative. Such a conduct displayed by the Parliament would nullify its duty to reconcile the legislation with the Constitutional Court decisions.

During this phase of the parliamentary procedure regarding the amendment to art. 35 parag. (1) and art. 297 parag. (1) in the Penal Code, abandonment equates to non-compliance with the Parliament's constitutional duty to reconcile with the Constitution any legal provisions in force found to be unconstitutional, which can be considered in breach of the provisions of art. 147 parag. (2) corroborated with parag. (1) and parag. (4) in the same constitutional rule.

As such, the Court ascertains that, by ignoring the purpose of the legislative decision and the Constitutional Court Decision, the Parliament cancelled said purpose of the legislative decision, as it had been formulated in the statement of reasons accompanying the normative, as well as the effects of the Constitutional Court's acts. Since the unconstitutionality flaw is the legislator omission to craft laws in line with the constitutional duties provided by art. 147 in the Fundamental Law, the Court ascertains that it impairs the normative in its entirety.

5. *In regard to the intrinsic unconstitutionality claims, the Constitutional Court acknowledges the following:*

5.1. The unconstitutionality claims towards the provisions of art. I item 3 [in regard to art. 39 parag. (1) let. c)] and item 4 [in regard to art. 39 parag. (2)] in the reviewed law concern in the fact that these provisions are in breach of art. 1 parag. (5) in the Constitution, since, following the removal of the regulatory solution proposed for the amendment to art. 39 parag. (1) let. b) in the Penal Code, during the review process,

a new mismatch emerged around the procedures to sanction *concurrent offences* depending on the nature of the enforced penalty – imprisonment or fine.

It was also argued that art. I item 4 [in regard to art. 39 parag. (2)] in the law – stating that, by enforcing the provisions that sanction *concurrent offences* one cannot exceed the cumulated penalties ruled by the law court for the concurrent infringements – is no longer useful, given the removal of the sanctioning procedures against *concurrent offences*, set forth in the original form of the law.

Examining the filed unconstitutionality claims, the Court ascertains that, as a result of this legislative option, art. 39 in the Penal Code shall regulate the legal overlapping system with a mandatory fixed increase of the main imprisonment penalty (the legislative solution in force) and an optional and variable increase for the main fine penalty (a new legislative solution).

A legislative solution of this nature, strictly derived from the amendment to art. 39 parag. (1) let. c) in the Penal Code, is a matter of legislative option that cannot be censored by the Constitutional Court. Moreover, in its own case-law, the Court ruled that reviewing the constitutionality of a law takes into account its compatibility with the allegedly breached constitutional provisions, and not a comparison among the provisions of several laws and an analysis on the possible conclusion revealed by the comparison in relation to provisions or principles of the Constitution. In this manner, it would inevitably be concluded that, although each of the legal provisions is constitutional, only their coexistence would challenge the constitutionality of one of them. Ultimately, in this case, one does not identify a constitutionality issue, but an alleged opposition among legal standards in the same field; yet, coordinating the legislation in force is the legislator's duty (Decision no. 81 of May 25, 1999, published in the Official Gazette of Romania no. 325 of July 8, 1999, or Decision no. 304 of May 4, 2017, published in the Official Gazette of Romania no. 520 from July 5, 2017, parag. 28).

Therefore, *taking into account art. 2 parag. (2) and (3) in Law no. 47/1992, the unconstitutionality claim filed as such is inadmissible*.

Additionally, concerning art. I item 4 [in regard to art. 39 parag. (2)] in the law, the Court ascertains that it expresses a general truth on how *concurrent offences* is sanctioned by means of ruling prison sentences, meaning that removing or maintaining said item, for this assumption, is a choice for the legislator to make. Moreover, the item applies in regard to the new text of art. 39 parag. (1) let. c) in the Penal Code – sanctions for *concurrent offences* when prison sentences are ruled – whereas the added increase shall not exceed the cumulative fines set forth by the law court for the concurrent infringements.

The fact that the given legislator did not make reference strictly to art. 39 parag. (1) let. c) and let. e), in relation to let. c) in the Penal Code, is a matter of legislative technique.

However, the Court lacks the power to review the constitutionality of certain aspects pertaining to legislative technique, without them having any constitutional relevance, which is a claim of this nature is, likewise, inadmissible.

5.2. In regard to the unconstitutionality claims of the provisions of art. I item15 [in regard to art. 100 parag. (1) let. b)-d)] in the reviewed law, they essentially state that the

rules in question conflict with the provisions of art. 147 parag. (2) and of art. 1 parag. (5) in the Constitution.

As per Decision no. 650 from October 25, 2018, the Constitutional Court ascertained the unconstitutionality of art. I item 21 in regard to art. 100 parag. (1) let. d).

Following the review, art. I item 15 in the criticised law stipulates that art. 100 is amended. During the review, in contradiction to art. 59 parag. (1) and (2) in Law no. 24/2000 on legislative technique rules for the elaboration of normatives, the Parliament chose to replace the provision deemed unconstitutional with the form in effect of the legal standard, meaning that, in reality, no legislative change actually took place. Moreover, enforcing the provisions in effect was also resumed for let. b) and let. c) in parag. (1) of art. 100 in the Penal Code.

Examining the filed unconstitutionality claim, the Court ascertains that art. 100 in the Penal Code in force comprises 6 paragraphs and the present law amends the regulatory solutions comprised in parag. (1) in relation to let. a) and parag. (2)-(5).

Consequently, the Court believes it is the legislator's duty to decide whether the actual amending provision was included in a single item and was worded using the phrase "Art. 100 is amended and shall have the following content" or the actual amending provision was covered by two items and was worded using the phrases: "At art. 100 parag. (1) let. a) is amended and shall have the following content" and "At art. 100 parag. (2)-(5) are amended and shall have the following content".

The Court emphasizes that fact that the amendment to let. a) in the content of parag. (1) of art. 100 in the Penal Code is a legislative solution that actually amends parag. (1), since the requirements stipulated at let. a)-d) have to be cumulatively met in order to reach the outcome regulated in the introductory sentence of art. 100 parag. (1) in the Penal Code.

Moreover, the legislator can, naturally, render in the amendment provision actual letters and paragraphs in force from the article subject to amendment, precisely due to the fact that, according to art. 59 parag. (3) in Law no. 24/2000, to express an amendment, one should not render only certain fragments or phrases from a text, as the amendment needs to comprise the entire text concerned, comprised in an article, a paragraph or the marked element of an enumeration.

It thus becomes obvious that the legislator decides, in terms of the legislative technique, how to execute these changes, at a single item (which includes the new form of the article in question) or at several items (which sequentially amends the article in question).

Considering all of the above, one cannot point out the violation of art. 1 parag. (5) in the Constitution in relation to art. 59 in Law no. 24/2000.

In regard to the fact that the Parliament allegedly chose to replace the provision declared unconstitutional with the form in effect of the legal standard, meaning that no legislative amendment actually took place, the Court ascertains that, as per Decision no. 650 din October 25, 2018, it only established the unconstitutionality of the change

brought to art. 100 parag. (1) let. d) in the Penal Code, leaving the legislator to decide on the legislative solution for the replacement of the provisions deemed unconstitutional.

The fact that, under these conditions, the legislator returned to the legislative solution in force and chose to limit the review strictly to the amendment of let. a), does not reveal non-compliance with the Constitutional Court decision, but, on the contrary, a selected solution that raises no constitutionality claims in relation to art. 147 parag. (2) and (4) in the Constitution.

Also, it is mentioned that the return to the provisions in force was also chosen in relation to let. b) and c) of parag. (1) of art. 100 in the Penal Code, which would appear to the unconstitutionality claim author as grounds for unconstitutionality.

This unconstitutionality claim cannot be reviewed in relation to art. 1 parag. (5) in the Constitution, given that these provisions comprise a legislative solution that also existed before the start of the review procedure, meaning that they could have been challenged when the unconstitutionality claimed was filed in regard to the originally drawn up version of the law adopted on July 4, 2018.

5.3. The unconstitutionality claims about the provisions of art. I item19 [in regard to art. 155 parag. (1) and (2)] in the reviewed law state that, in the law variant resulted from reconciling it with the Constitutional Court decision, they were not correlated with those of parag. (2) – which regarded the persons, not the deed, in contradiction to Decision no. 650 from October 25, 2018, parag. 414-423.

In that respect, the criminal liability statute of limitation is considered interrupted by the fulfilment of any step in the case file proceedings, which has to be communicated to the suspect or defendant, any reference to the person in question being unnecessary.

Moreover, it is considered that art. I item19 [in regard to art. 155 parag. (2)] in the law does not comply with the legislative technique rules which stipulate that, in cases where the texts resulted from reconciling with the Court decision are identical to those already in force, the Parliament shall remove from the regulatory content of the law the respective interventions.

Consequently, maintaining these redundant provisions, also contrary to the legislative technique standards, is believed to equate to breaching the provisions of art. 1 parag. (5) and of art. 147 parag. (2) in the Constitution.

Examining the filed unconstitutionality claim, the Court ascertains that it is substantiated, in the sense that art. I item 19 [in regard to art. 155 parag. (1)] in the law is contrary to art. 1 parag. (5) in the Constitution.

Art. I item 19 [in regard to art. 155 parag. (1) and (2)] in the stipulates that: "(1) The criminal liability statute of limitation is interrupted for each deed and person by way of fulfilling any step in the case file proceedings, a step which has to be communicated to the suspect or defendant, according to the law, as part of the criminal trial. (2) After each interruption, a new statute of limitation shall commence".

Parag. (2) in the original form of the law from July 4, 2018 stipulated that "(2) After each interruption, a new statute of limitation shall commence, for the person in favour

of whom the statute of limitation runs, from the time when the step in the proceedings was communicated" and practically embedded parag. (2) and (3) in the text in force of art. 155 in the Penal Code, whereas the new legislative solution was, accordingly, correlated with art. 155 parag. (1) in the Penal Code.

The outcome of merging, in the original form of the criticised law, the two paragraphs in force took into account the fact that interrupting the statute of limitation consequently leads to the start of a new statute of limitation related to the person, not the deed, an aspect correlated via the adequate amendment to the provisions of art. 155 parag. (1) in the code. The Court, as per Decision no. 650 of October 25, 2018, ascertained, however, that a legislative solution as such, based on which a new statute of limitation will run in relation to the person, not the deed, does not alter the statute of limitation notion and ignores the general mandatory effect of a decision by the constitutional court (Decision no. 443 of June 22, 2017, published in the Official Gazette of Romania no. 839 of October 24, 2017) and therefore deemed it unconstitutional.

After the review procedure, the legislator returned to the form of the law in effect, in line with Decision no. 650 of October 25, 2018, but omitted to make the required correlation with parag. (1) in art. 155.

Although the Constitutional Court did not ultimately ascertained, by enforcing art. 18 parag. (1) in Law no. 47/1992, the unconstitutionality of the phrase "and person" in the text of art. I item 27 [in regard to art. 155 parag. (1)] in the law adopted in its original form, the legislator was bound to remove the unconstitutional legislative solution introduced, on grounds of actual legislative techniques, in parag. (1) of art. 155, as stipulated in parag. 149 of the present decision.

The Court acknowledges that the legislative solution in art. I item 19 [in regard to art. 155 parag. (1)] is contrary to Decision no. 650 of October 25, 2018, especially considering that the new parag. (2) regulates on a general basis – not circumscribed to the deed – and, by corroboration with parag. (1), one might understand that the statute of limitation can be interrupted for each deed and person by means of fulfilling any step in the case file proceedings, a step that, according to the law, must be communicated to the suspect or defendant during the criminal trial.

It is also acknowledged that the legislative solution in force, from art. 155 parag. (1), though not expressly concerning the deed, correlates with parag. (3) in effect, which stipulates that "(3) The statute of limitation interruption generates effects upon all the participants in the criminal offence, even if the interrupting step concerns only some of them".

Therefore, the wording of the text in effect indicates that statute of limitation produces effects *in rem*, in relation to the criminal offences committed, and not *in personam*, differently for each individual participant; thus, a statute of limitation interruption produces effects on all the parties committing the same crime, and not strictly in relation to the person for whom the statute of limitation runs starting from the steps in the proceedings communication date.

Regarding the unconstitutionality claims raised against art. I item 19 [in regard to art. 155 parag. (2)] in the law – according to which they do not comply with the legislative

technique standards stating that, if the paragraphs resulted from reconciliation with the Court decision are identical to the ones in effect, the Parliament shall remove from the regulatory content of the amending law the respective legislative intervention – the Court ascertains that art. 155 in the Penal Code in force comprises 5 paragraphs, and 4 paragraphs were subject to legislative changes, as follows: parag. (1) was amended, parag. (3) was removed, parag. (4) was amended and parag. (5), following the removal of parag. (3), was re-numbered.

It is therefore obvious that the legislator is the one to decide the manner in which, in terms of legislative technique, these changes operate, either at a single item (which includes the new form of the article in question) or at several items (which entails sequential changes within the various paragraphs of the article in question).

Consequently, the unconstitutionality claim is deemed inadmissible.

5.4. The unconstitutionality claims about the provisions of art. II (in regard to the repealing of art. 132 in Law no. 78/2000) in the reviewed law acknowledge that, although, as per Decision no. 650 from October 25, 2018, the Constitutional Court, in relation to the extrinsic unconstitutionality claims, ruled that the adoption of art. III (in regard to the repealing of art. 13^2 in Law no. 78/2000) in the law – that became art. II upon completion of the law review process – is constitutional, as the provisions of art. 1 parag. (3) and of art. 64 parag. (4) in the Constitution were not breached, acknowledged a complementarity relationship between the provisions of art. 13^2 in Law no. 78/2000 and those of art. 297 in the Penal Code, on the *abuse of office* offence.

To that end, it is argued that, due to the complementarity relationship ruled by the Constitutional Court between art. 13^2 in Law no. 78/2000 and art. 297 in the Penal Code, concerning the *abuse of office* offence, considering that the latter article incurred no changes, in order to secure an enhanced protection of social values, corroborated with the need for regulatory legal levers designed to deter the infringement of such values (the aggregated considerations in parag. 621-626 of Decision no. 650 from October 25, 2018), the solution of repealing art. 13^2 in Law no. 78/2000 is contrary to art. 147 parag. (2), from the perspective of paragraphs 1 and 4 of the same article in the Constitution.

Examining the filed unconstitutionality claim, the Court ascertains that, as per Decision no. 650 from October 25, 2018, it ruled the constitutionality of the criticised text on grounds of claims that focused on the Joint Special Commission's lack of jurisdiction when it amended Law no. 78/2000. The Court acknowledged that "the repealing of art. 13^2 in Law no. 78/2000 is, in reality, in a complementarity relationship with the amendments brought to art. 297 in the Penal Code concerning the *abuse of office* offence. As such, on grounds of legislative correlation, to the extent to which a particular legislative solution in the Penal Code is amended, and that solution is directly linked to a criminalisation standard in a different criminal law, the Joint Special Commission may take the respective measure.

Consequently, the Court ascertains that the adoption of art. III [in regard to art. 13^2 in Law no. 78/2000] in the law did not breach the provisions of art. 1 parag. (3) and art. 64

parag. (4) in the Constitution". The criticism brought to the repealing text of art. 13^2 in Law no. 78/2000 stems from the assumption that, since no amendments were brought to art. 297 in the Penal Code, the repealing performed is no longer needed, precisely due to its complementary nature.

It is true that art. 297 in the Penal Code was no longer amended, an omission by itself unconstitutional, however, in this case, we are not dealing with a correlation, but a complementarity relationship, as in a completion of the change carried out. The fact that the amendment was not applied to the fundamental text [art. 297 in the Penal Code], although it should have been applied, does not mean one should automatically eliminate the additional/complementary element of the legislative policy concerned, considering that the latter can exist all by itself. However, this is precisely the situation at hand, where the repealing of art. 13^2 in Law no. 78/2000 is not an effect of the amendment to art. 297 in the Penal Code, but a complementary element thereof which, even in the unconstitutional assumption of not amending art. 297 in the Penal Code, can exist by itself, therefore not rendering the repealing null and void/devoid of purpose/uncorrelated.

Accordingly, the Court underlines that the wording employed in Decision no. 650 of October 25, 2018 indicates the fact that there is, in the matter at hand, a "complementarity relationship" between the initial changes brought to art. 297 in the Penal Code and art. 13^2 in Law no. 78/2000 instead of a correlation one. Given all of the above, the Court ascertains that the provisions of art. II (on repealing of art. 13^2 in Law no. 78/2000) in the law are constitutional.

6. *In regard to the effects of this decisions, the Constitutional Court* acknowledges that, as part of the procedure of reconciling a law or rule declared unconstitutional with a Constitutional Court decision, the Parliament, is basically free to decide whether to alter that law or rule strictly in the sense of the Court rulings or to abandon the intervention upon the text in question by removing the rule or even rejecting the law.

This freedom of Parliament is, however, restricted when there is an interposition of a Constitutional Court decision delivered as part of the *a posteriori* constitutionality review, according to which the rule in force, subject to the legislative intervention, has been declared unconstitutional.

Within an assumption as such, once the law amendment procedure aimed at reconciling it with the Constitution has commenced, the Parliament is bound to adopt the rules that transpose the Court's jurisdictional act, eliminating the ascertained unconstitutionality flaws. This obligation stems directly from the text of art. 147 in the Constitution and sets forth the Parliament's active role in rendering legal standards constitutional, in line with the constitutional court's decisions.

In an opposite interpretation, it would mean that, by enforcing art. 147 parag. (1), (2) and (4) in the Constitution, the legislator, as part of the procedure of reconciling the law with the Constitutional Court decisions, has a right of selection in relation to them and, by means of its decision, can actually keep within the legislation rules affected by unconstitutionality flaws, which is unacceptable.

In other words, as part of the law review procedure, compliance with the obligation stipulated by art. 147 parag. (2) in the Constitution entails, on the one hand, a legislative intervention permanently limited to the considerations and operative part of the Court decision and, on the other hand, the fact that, if one has commenced the procedure of amending the law in order to reconcile it with a Constitutional Court decision delivered during the *a posteriori* constitutionality review, the legislator can no longer abandon its subsequent intervention, being bound to adopt the rules that transpose the Court's jurisdictional act. The admission of an opposing solution, which would allow the legislator to opt for abandoning the legislative procedure on such grounds would equate to maintaining the legislative solution deemed unconstitutional as per the a posteriori constitutionality review and, by default, to cancelling the legal effects of the Court decision that underpinned the amending legislative initiative.

This display of conduct by the Parliament would nullify the actual legislating purpose, that of harmonising legislation with the Constitutional Court decisions, by violating the constitutional duty defined at art. 147 parag. (2) in the Fundamental Law. However, according to the Constitutional Court's role and the constitutionality review facets, the law review process would mandatorily require the Parliament's loyal conduct and a proper applied analysis of all the texts declared unconstitutional, in relation to the considerations of the decision.

In its previous case-law, concerning the interpretation of art. 147 parag. (2) in the Constitution, the Court essentially ruled that, if it ascertained the unconstitutionality of a law as a whole, and of only certain provisions within it, "the decision to be delivered in the matter would be conclusive in relation to that normative, the outcome being the cessation of the legislative process surrounding that regulation".

At the same time, in relation to the provisions of art. 61 parag. (1) in the Constitution, stipulating that "the Parliament is the Romanian people's supreme representative body and the country's sole legislative authority", the Court also acknowledged the following: "Its lawmaking jurisdiction in relation to a particular field cannot be limited unless the law adopted as such complies with the Fundamental Law requirements".

Therefore, the legislator's option to legislate in the field in which the Constitutional Court admitted an unconstitutionality claim against a law on the whole entails going through all the phases of the legislative process stipulated by the Constitution and the regulations of the two Chambers of Parliament (see, in that respect, Decision no. 308 din March 28, 2012, published in the Official Gazette of Romania no. 309 of May 9, 2012, Decision no. 1 of January 10, 2014, published in the Official Gazette of Romania no. 123 from February 19, 2014, Decision no. 619 from October 11, 2016, published in the Official Gazette of Romania no. 6 from January 4, 2017, parag. 50, or Decision no. 432 from June 21, 2018, published in the Official Gazette of Romania no. 575 din July 6, 2018, parag. 35).

Additionally, as per Decision no. 619 from October 11, 2016, parag. 50, the Court ruled that the review or, to be more precise, the reconciliation of a decision only applies when the Court has ascertained the unconstitutionality of a provisions thereof, and not when said unconstitutionality regards the normative on the whole, otherwise inviting

a breach of art. 147 parag. (2) in the Constitution (see, in that respect, Decision no. 581 from July 20, 2016, published in the Official Gazette of Romania no. 737 of September 22, 2016, parag. 45-48).

Concurrently, as per Decision no. 432 of June 21, 2018, parag. 36, the Court ruled the fact that art. 147 parag. (2) in the Constitution is not incidental, given that the Constitutional Court decision ascertained the unconstitutionality of the law on the whole, and not of only certain provisions included in it. Thus, as it is ruled with a principle status in the Constitutional Court case-law, if the unconstitutionality of a law on the whole is ascertained, the delivery of such a decision is conclusive in nature in relation to that normative, the outcome being the cessation of the legislative process surrounding that regulation. The Parliament is bound to ascertain the *de jure* cessation of the legislative process, following the identified unconstitutionality of the law in its entirety and, if a new legislative endeavour is launched within the same regulatory field, to comply with the stipulations of the Constitutional Court decision (see, in that respect, Decision no. 76 from January 30, 2019, published in the Official Gazette of Romania no. 217 from March 20, 2019, parag. 42, Decision no. 139 of March 13, 2019, published in the Official Gazette of Romania no. 336 from May 3, 2019, parag. 88, Decision no. 140 of March 13, 2019, published in the Official Gazette of Romania no. 377 from May 14, 2019, parag. 86, or Decision no. 141 of March 13, 2019, published in the Official Gazette of Romania no. 389 from May 17, 2019, parag. 96).

The Court acknowledges that its case-law concerns, on a general basis, the legislative initiatives regulated by art. 74 in the Constitution (see, in that respect, Decision no. 383 of May 29, 2019, published in the Official Gazette of Romania no. 549 of July 4, 2019, parag. 26). However, concerning the particular assumption of law aimed at reconciling certain unconstitutional provisions with the provisions of the Constitution, the Court acknowledges the incident constitutional provisions of art. 147 parag. (2), according to which "In cases of unconstitutionality regarding the laws, prior to their enactment, the Parliament is bound to re-examine the respective provisions in order to reconcile them with Constitutional Court decision", and of art. 147 parag. (4), according to which "The Constitutional Court decisions are published in the Official Gazette of Romania. As of their publishing date, the decisions are generally binding and can only produce effects in the future".

As such, by applying the Constitutional Court's basic case-law regarding the effects of the decision that ascertains the unconstitutionality of a law on the whole upon the specific situation of the laws designed to transpose Constitutional Court decisions, legally binding for the Parliament pursuant to art. 147 parag. (4) in the Constitution, it is obvious that, if such a law is found to be unconstitutional on the whole, *the Court's decision cannot lead to the cessation of the legislative process surrounding that regulation*, since a consequence of this nature attached to the jurisdictional act would be able to hamper the Parliament in fulfilling the constitutional duty expressly provided by art. 147 parag. (2).

Moreover, the legislator is equally unable to choose to abandon the initiated legislative procedure, since this option, as mentioned before, would lead to maintaining the legislative solution declared unconstitutional as per the a posteriori constitutionality

review and losing the judicial effects of the Court decision that underpinned the amending legislative initiative.

Therefore, in regard to the effects produced by the decision which ascertains the unconstitutionality of a law on the whole, the specific difference between the law which transposes Constitutional Court decisions, declared unconstitutional on the whole, and the other types of laws declared unconstitutional on the whole lies in the express regulation from art. 147 in the Constitution, which places under the Parliament's prerogatives the duty to render legal standards constitutional, in agreement with the Constitutional Court decisions.

In relation to these arguments, as an effect of this decision, according to the provisions of art. 147 parag. (2) and (4) in the Fundamental Law, the Parliament still has the duty to re-examine the law subject to review and, as part of this procedure, to comply with both the rulings in the present decision and those in the previous decisions referred to by the Constitutional Court.

7. *In the converging opinion of the decision*, it is acknowledged that the unconstitutionality claims should have also been admitted in relation to the extrinsic unconstitutionality claim, regarding the adoption of the law in breach of the provisions of art. 69 parag. (2) in the Chamber of Deputies Regulation, which violates the provisions of art. 1 parag. (3) and (5) in the Constitution.

In this respect, the authors of the converging opinion acknowledge that the Parliamentary Joint Special Commission report, drawn up during the procedure within the Chamber of Deputies, was issued to the deputies on the actual day of the vote, therefore, in disregard of the deadline of at least 5 days before the date set forth to debate on the draft law or legislative proposal in the Chamber of Deputies plenum, rendering the law unconstitutional on the whole.

In regard to this extrinsic unconstitutionality claim, it was argued that according to art. 69 parag. (2) in the Chamber of Deputies Regulation, approved as per Chamber of Deputies Decision no. 8/1994, republished in the Official Gazette of Romania no. 481 from June 28, 2016: "(2) The Report (drawn up by the commission notified on the merits – AN) shall be printed and issued to the deputies at least 3 days prior to the date set forth to debate on the draft law or legislative proposal in the Chamber of Deputies plenum, in the case of draft laws and legislative proposals for which the Chamber of Deputies is the first Chamber notified, and at least 5 days beforehand in the case of those for which the Chamber of Deputies is the decision-making Chamber".

However, analysing the procedure of adopting a law subject to the constitutionality review, it can be ascertained that the Law on amending and supplementing Law no. 286/2009 on the Penal Code and Law no. 78/2000 on the prevention, discovery and sanctioning of corruption acts was re-examined and adopted on April 17, 2019 by the Senate plenum and forwarded to the Chamber of Deputies, in its capacity of decision-making Chamber.

On April 23, 2019, the law was submitted, for reporting purposes, to the Parliamentary Joint Special Commission, which drew up a new admission report, with amendments, later on submitted on April 24, 2019.

The same day, the Chamber of Deputies plenum, pursuant to art. 75 and art. 76 parag. (1) in the Constitution, debated upon and adopted the law, which they then submitted for enactment to the Romanian President on May 22, 2019.

As such, it was ascertained that the report drawn up by the Parliamentary Special Joint Commission was submitted on April 24, 2019, and the law was adopted the same day, given that the form of the law adopted by the Senate was submitted to the Chamber of Deputies on April 23, 2019.

In its case-law (Decision no. 209 of March 7, 2012, published in the Official Gazette of Romania no. 188 from March 22, 2012), the Court ruled that:

"Regulatory autonomy is an expression of the rule of law, of the democratic principles, and can operate exclusively within the limits set forth by the Fundamental Law.

Regulatory autonomy cannot be exercised in a discretionary and abusive manner, by infringing upon the Parliament's constitutional duties.

As such, between the constitutional principle concerning the Parliament's autonomy to set forth its own internal organisational and operating rules [art. 64 parag. (1)] and the constitutional principle concerning the Parliament's role, within the global picture of the state's public authorities exercising, according to the Constitution, duties specific to constitutional democracy (lawmaking, granting the vote of confidence, based on which the Government is appointed, withdrawing the confidence granted to the Government by adopting a motion of no confidence, declaring the state of war, approving the national defence strategy etc.), the Court sees a means/tool to purpose/interest relationship.

As such, parliamentary regulations rally under a cluster of legal standards designed to organise and discipline the parliamentary activity focused, among others, on procedures for the appointment or vestiture of the state's most important public institutions or authorities (the Government, some of the Constitutional Court judges, some of the Superior Council of Magistracy members, the Court of Accounts members, the Ombudsman, directors of intelligence services), as well as on organisational and operating rules of each Chamber.

Regulatory rules are the judicial instruments that allow conducting parliamentary activities, so that the Parliament should be able to fulfil its constitutional duties, being the flagship authority by means of which the Romanian people exercises is national sovereignty, in line with the provisions of art. 2 parag. (1) in the Constitution.

As any normative designed to regulate a particular field of activity, the parliamentary regulation has to meet requirements on the clarity and predictability of the rules, be a streamlined regulatory element which, on the one hand, grants freedom of action to parliamentarians or parliamentary groups, in compliance with the provisions of art. 69 in the Constitution, concerning the representative nature of the parliamentary mandate and, on the other hand, guarantees that the legislating authority is able to fulfil its constitutional role.

However, the legal instrument intended to ensure the fulfilment of the Parliament's duties cannot constitute a stumbling block on the path to achieve its purpose.

The parliamentary regulation must be interpreted and applied in good faith and in the spirit of loyalty towards the Fundamental Law".

In the present case, the Court is not called upon the verify strictly whether the Chamber of Deputies Regulation was observed, but also whether the Chamber of Deputies, through its own conduct, infringed upon the procedural guarantees available to a deputy in order to exercise their mandate in the service of the people, namely to be aware of the submitted amendments, to file their own amendments and to vote on the law proposal/draft law in full knowledge of the matter. For that reason, the reference rules acknowledged are art. 69 parag. (1) and art. 74 in the Constitution, in relation to art. 1 parag. (3) and 5 in the Constitution, concerning the rule of law, democracy and the duty to observe the supremacy of the Constitution.

Running the legislative process in the case under analysis reveals the fact that non-compliance with the 5-day deadline in the Regulation (AN – the deadline is 5 days due to the Chamber of Deputies having been the decision-making Chamber) – an aspect which, by itself, does not entail the extrinsic unconstitutionality of a normative – managed, however, to make it impossible to exercise the deputy mandate in plenum, in the sense that one could not be informed on the amendments adopted by the commission notified on the and said amendments could not be actually discussed upon, the deputies were unable to submit amendments, or their efforts to do so were seriously hampered and the vote was not expressed in full knowledge of the matter.

Practically, the legislator disregarded the guarantees the Chamber of Deputies Regulation provides to define the representative mandate stipulated by the Constitution, the 5-day deadline, available to the parliamentarians in the decision-making Chamber, being cancelled.

This kind of conclusion derives from the complexity of the amending document and the magnitude of the changes carried out, from the fact that the issues that would have required discussions refer to the actual Romanian Penal Code, and the aspects changed in relation to various substantive law institutions are extremely sensitive to the society and its evolution.

Thus, it's not merely a matter of violating a procedural deadline, but of outcomes that such a violation produces or might produce, given the importance of the issues raised.

The state's criminal policy and criminal procedural policy cannot be debated upon and voted on in a Chamber of Parliament in a single day; they reflect the state and evolution of society within the context of crime, they entail making a legislative decision with significant repercussions upon the development of society, without reflecting a momentary necessity. They must not be contradictory or benefit the will of a particular political side, but satisfy the society's requirements, protecting its general interests. However, to that end, the deputy must enjoy the guarantee of being informed on the draft law/legislative proposal, any amendments made, the standing commissions'

report and opinions, but also of getting informed or consulting with other political or institutional players; only under these conditions can they form an opinion on the matter raised whereas their vote, purely political, can be expressed in full knowledge of the matter.

Therefore, it is ascertained that the deputies were prevented from physically taking part in the parliamentary debate, which was lost into oblivion and appeared as borderline pretence.

Considering the arguments presented, the legislator displayed an intentionally arbitrary conduct, by constantly ignoring the regulatory standards, the Constitutional Court's recommendation comprised in Decision no. 250 from April 19, 2018, published in the Official Gazette of Romania no. 378 from May 3, 2018, parag. 48-49, according to which "members of Parliament, whether from among the majority or among the opposition, must refrain from the abusive exercise of procedural rights and observe a proportionality rule, intended to make sure that decisions are adopted following a prior public debate", as well as, by default, the principle of exercising parliamentary procedural rights in good faith and in the spirit of loyalty towards the constitutional values.

The failure to observe the deadlines stipulated by its own organisational and operating regulations prevents Parliament from effectively exercising its legislating function, turning the decision-making act of voting into a formality that cancels the judicial effects of the rule stipulated at art. 69 in the Constitution. The legislative process carried out in relation to the law subject to the constitutionality review in the present case did not entail an actual debate on the legislative initiative, in the sense that no exchange of ideas took place concerning its regulatory content. Moreover, in the absence of debates, the participation of the members of Parliament in the legislative process was devoid of substance, the vote on the legislative proposal being left to happen while lacking any familiarity with its content, truly inconceivable in a state upholding the rule of law.

However, the actual requirements of the rule of law and the principles underpinning democracy oppose a paradigm that tries to elevate to constitutional principle the semblance or impression of a parliamentary debate.

That is why, whenever, by not complying with the procedural deadline related to the parliamentary debate, the exercise of the parliamentary mandate in plenum is infringed upon, the Court is entitled to intervene and ascertain the extrinsic unconstitutionality of the respective normative, in relation to art. 69 parag. (1) and art. 74 in the Constitution, subject to the infringement of art. 1 parag. (3) and (5) in the Constitution, as would have been appropriate in the case at hand.

Instead of conclusions

In the context of this decision and the countless legislative events that preceded it, but also in light of certain cases that were investigated and intensely covered by the

media, on July 29, 2019, the Romanian Judges' Forum Association issued a press release the content of which can only summarise the multiple warnings issued over the course of time in relation to the changes brought to the criminal legislation in Romania.

For that reason it is natural to conclude this presentation by reminding our readers a series of considerations made public at the time:

*"**The Romanian Judges' Forum Association** reminds you the fact that, over the past years, it has constantly criticised the changes brought to the justice laws and the penal codes, showing that, the legislator's exclusive concern with the persons prosecuted and/or sentenced for criminal offences led to a disregard for the crime victims' rights and, generally speaking, the citizens' right to be provided protection by the state authorities. By means of these legislative amendments, the criminal prosecution bodies' capacity to conduct efficient investigations via fast submission of evidence has been considerably hampered, whereas magistrates have been exposed to criminal and disciplinary investigations run by the Judicial Crime Investigation Department and the Judicial Inspection. All these legislative changes have been added the regulation of compensatory second appeal, which allowed the immediate release of thousands of convicts sentenced for acts of corruption, but also for violent offences.*

*We have also highlighted a lack of reaction from the legislator which, after the Constitutional Court, as per Decision no. 51/2016, excluded the Romanian Intelligence Service, **the only body possessing technical means fit to quickly intercept and locate telephone communications**, from collaboration with the criminal prosecution bodies, failed to provide the latter with sufficient technical means to conduct expedient and efficient investigations. At last, we have also warned on the dire underfinancing of the judicial system, the effect of which is, among others, depriving the criminal prosecution bodies of the funds required to carry out judicial technical assessments, essential both in investigating corruption cases, as well as cases of violent offences. All these amendments to the justice laws and the Penal Code and the Criminal Procedure Code, adopted under the pretext of rectifying imaginary abuses within the judiciary created by «the parallel state», «the binomial» or «protocols», have led to advantages benefitting persons sentenced for acts of corruption and **weakened, at the same time, the rule of law foundations by depriving criminal prosecution bodies of the critical technical and legislative tools required in their activity, thus endangering the life and safety of all Romanian citizens**. We have expressed these critiques via statements addressed to the general public, by means of the protests we set up on the steps of law courts and via the memoranda signed by thousands of magistrates. Our concerns were acknowledged by the reports drawn up by European bodies, to be more precise, by the Venice Commission and GRECO. Unfortunately, the legislator chose to ignore all these warnings, whereas the magistrates that voiced them were ridiculed and reprimanded for allegedly not being able to point out any legal provision that might hamper the independence of justice or the rule of law. We are regretfully witnessing, after the tragedy in Caracal, how certain public opinion influencers continue to issue basic value judgements («the parallel state and the formed NAD prosecutor have ruined justice» or «magistrate X signed memoranda of protest»), which cannot justify whatsoever the severe effects of the systemic shortcomings caused by the amended legislative framework of these past years.*

Under these conditions, we request that the Parliament promptly repeal all the legislative amendments it brought over the past two years to the justice laws, the Penal Code and the Criminal Procedure Code, able to hamper the independence of justice and the quick and efficient fight against crime, and that the Government provide the criminal prosecution bodies with necessary finances and technical means in the absence of which uncovering and investigating severe violent or corruption offences are not possible. *These measures could ensure the real effectiveness in the activities of the criminal prosecution bodies, instead of setting up a costly and useless referendum unable to actually support the investigation of serious crimes, given that, in any case, penalties for severe violent offences can only increase by way of a law, which the parliament can adopt at any moment".*

Beyond the findings inevitably attached to the legislative events they are referring to, all these observations also include a serious red flag, as well as strongly highlight the role that any legislative change or reform has within the rule of law.

In Romania, it is very difficult to estimate the extent to which legislative interventions have managed to render general wellbeing throughout society, a moral drain so necessary to all of us, considering the general picture of our society has stayed almost unchanged for more than 30 years, being quite evocatively depicted in the preface of a reference work comprising the recent memories, as well as the dramatic experiences of a former policeman engaged against organised crime in Romania:

"Nowadays, in Romania, truth and justice seem to have been rendered meaningless, being obvious that they meddle and stir aggressive defence responses. The law is changed at the pleasure of the ruling party to the needs of the contemporary mighty ones, enforcing and observing it being mandatory only for some. And when they become mandatory for all, they become unconstitutional, as well"[1].

Faced with such a warning, we should not be surprised at the sorrowful words of law experts and, precisely for that reason, these messages have to be taken for what they are worth and in no way misinterpreted or seen as criticism against any attempt to reform or adapt our criminal laws to the other mundane realities.

The conclusion exuded by these texts is, however, that a legislative experiment of utmost importance can only serve social progress needs and the general interests of society, and in no way some conjectural needs, which can vary from one year to the next, or criminal impunity aspirations various groups of interests at odds with criminal law try to make real, by rendering legislative acts insignificant.

Along the same lines, legislative amendments cannot be the source of difficulties in enforcing the law and cannot lay traps to law practitioners, contrary to the goals pursued by a normative endeavour of such magnitude, as only legislative stability can make it possible for practitioners of and experts in judicial professions to enhance and construe the law as accurately as possible, by literally contributing to case-law consolidation and valuable doctrine analyses.

[1] *T. Berbeceanu*, Radiography of a judicial foul play, Curtea Veche Publishing House, Bucharest, 2019, p. 13.

In addition to these, legislative amendments and reforms cannot be sources of social experiments, cannot be sources of judicial affairs and cannot hide behind obsessive intents of revenge from individuals living in conflict with the state authorities, since such blunt interventions could otherwise have a boomerang effect.

On the contrary, legislative events have to be managed in all seriousness, not as mere historical accidents or random occurrences, especially since they take place within a set of circumstances that will most certainly influence the evolution of society one way or another. That is why, events of this nature should enjoy our attention, as the next phase in history will include not only technological and institutional changes, but also fundamental transformations of human consciousness and identity which, to quote a contemporary author, could intense and fundamental enough to challenge the very definition of the term "human"[1].

Accordingly, it would be beneficial to learn from what history has taught us and remember the tale of doctor Frankenstein, as well. Ultimately, the future is unknown and it would be a pity to let law crafting become a monster by capitalising on lapses of reason.

[1] *Y.N. Harari*, Sapiens. Brief history of mankind, Polirom Publishing House, Iași, 2017, p. 348.

Prosecutors' Independence and the Rule of Law. On Character and Professionalism in Justice

Augustin Lazăr*

The rule of law and *prosecutors' independence* are two closely related concepts. The independence of prosecutors is an acknowledged value within the rule of law, this being the only way to prosecute serious criminal offences, allowing the judges to rule on the defendants' culpability or innocence[1].

1. *The national context.* Romania has had a complicated journey over the past few years, with frequent attacks against the magistracy and the rule of law foundations, actions carried out in manners incompatible with the constitutional standards. The general public has been witnessing serious and unprecedented threats against the independence of justice in a state upholding the rule of law. The changes brought to the justice laws have integrated the interests of politicians subject to court proceedings and resentments against judges and prosecutors, the will to quickly, obscurely and profoundly change the balance that should exist among the powers of a constitutional state[2].

This period has witnessed the cascading efforts to *amend and re-amend the justice laws, the Penal Code, the Criminal Procedure Code* and other normatives impacting upon the judicial system. The Government persisted and managed to *dismiss* the Chief Prosecutor of the National Anticorruption Directorate. Against SCM's adverse opinion, it then initiated and attempted the procedure of revoking the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, and, at the end of its mandate, *vitiated the selection procedures* for appointing high-ranking prosecutors. The Constitutional Court issued a decision so as to place within *a new paradigm the prosecutors' relationship with the Minister of Justice*, setting forth a *sui-generis* procedure to dismiss high-ranking prosecutors and turning the proposal to dismiss the Minister of Justice into a genuine vital administrative act for the Romanian President.

In this context, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice was forced to issue, numerous times, *public*

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[1] The independence and autonomy of prosecutor's offices is defined as a corollary of the judges' independence, the Rome Charter, adopted following Opinion no. 9/2014 of the Council of European Prosecutors, issued to the Council of Europe Committee of Ministers, item IV and V.

[2] For more details, see the Romanian magistrates' call from 29.11.2019 (*https://www.juridice.ro/666420/apelul-public-al-magistratilor-romani-adresat-presedintelui-prim-ministrului-si-ministrului-justitiei.html*).

and institutional messages as judicial clarifications for the issues and defence of the prosecutors' independence. By means of warnings to the general public, the Prosecutor General expressed their concern towards certain legislative amendments or initiatives, the manner in which they were promoted and adopted, emphasizing the lack of transparency, the dialogue shrouded in obscurity and a disregard for the justified opinion of the magistracy's entire professional body.

In regard to the legislative process transparency and predictability specific to normatives dealing with the judicial system reform and the fight against corruption, the *CVM report* from October 2019 clearly revealed the importance of a constitutional legislative process. Changing the justice laws via five Government emergency ordinances was firmly criticised by the Venice Commission experts in terms of impact upon legislation quality, legal security, the external control upon the Government and the "division of powers" principle. Regarding the justice system independence, the report reminded the recommendations to implement a robust and independent system for appointing high-ranking prosecutors, based on clear and transparent criteria, with the Venice Commission's support. It stressed that independence would be effective by securing the inclusion in the Code of conduct for parliamentarians – currently being very slowly drawn up in Parliament – of clearly-defined provisions on the mutual respect among institutions and firmly stated that parliamentarians and the parliamentary debate process should observe the justice system independence.

The Prosecutor General warned on the fact that harassing prosecutors, forcing them into defence, *threatening them with judicial liabilities disproportional* to possible professional errors committed, assimilating *ipso facto* a judicial order to pardon a defendant with a professional culpability means turning the prosecutor's office into a weak link between the police and court laws. Similarly, subjecting prosecutors to the review of a purely political executive body, as is the Ministry of Justice, led by a politically appointed Minister of Justice with a political agenda, means, in short, severely breaching fundamental principles of the rule of law[1].

The fairness of position statements from the Public Ministry was confirmed by the European bodies called upon to assess the reforms. *The Venice Commission* highlighted that the changes brought to the justice laws undermine the prosecutors' independence and the public trust in justice. It was also stressed there was a need to reassess the process of appointing and revoking Chief Prosecutors, so that a neutral and objective system would be ensured, by maintaining the duties of the Romanian President and the Superior Council of Magistracy (SCM), aimed at balancing the weight attached to the role of the Minister of Justice.

Similarly, in Opinion no. 930 on the penal codes, adopted in October 2018, the Venice Commission argued that, taken separately, but also by means of their cumulated effect, the amendments would severely affect the judicial system's effectiveness in combating serious crime, such corruption, violent and organised crime offences. Moreover, some

[1] The message of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, from December 7, 2017, The independence and autonomy of prosecutor's offices, a corollary of judges' independence (*http://www.mpublic.ro/sites/default/files/PDF/mesaj_al_procurorului_general_referitor_la_independenta_procurorilor.pdf*).

of the amendments are contrary to Romania's international obligations or go beyond the requirements derived from the Constitutional Court decisions. The warnings issued by the High Court of Cassation and Justice and the Chief Prosecutors on the negative effects were ignored, in a context where dialogue was not only necessary, but also desirable.

On January 10, 2019, the International Association of Prosecutors (IAP), with its office in the Hague (Holland), submitted an official letter to the Romanian President and the Government, expressing its concern towards the impact of the changes within the judiciary upon the independence of prosecutors, as well as towards the attempts to remove the Prosecutor General from office. IAP quoted, in the latter, the Venice Commission's viewpoint on the changes brought to the judicial legislation, as well as on the procedure to dismiss and appoint Chief Prosecutors[1].

Along the same lines, the report drawn up by the GRECO experts, adopted during the 79th plenary reunion in Strasbourg, published on April 11, 2018, highlighted the need to strengthen SCM's role in the procedure of appointing Chief Prosecutors, to guarantee, by law, prosecutors' independence and the fact that amendments concerning the magistrates' substantive liability must reveal clear and predictable rules and pose no threat to their independence.

The rule of law relies on the *law supremacy principle*, but it also entails the *idea of responsibility* – moral, ethical, political and judicial. Responsibility does not only mean liability, but more, an attitude of involvement in setting up an institutional framework where subjects of constitutional law are able act fully aware, for the common good, own the decisions they make and be respectful towards the citizens they govern. Responsibility means sound governance[2].

2. *The judicialisation of public life, the need to strengthen faith in the judicial system* and to defend the rule of law, in this context, have been the topics of recent studies[3]. The new issues faced by the rule of law are described by Professor Pierre Rosanvallon in his book, "Counter-Democracy: Politics in an Age of Distrust"[4]. The paper concerns a new aspect of the current-era democracies, which has generated a lot of debate, having been ascertained a shift of the public debate towards criminal offences and law, which indicates the need for a greater involvement of the judicial power in public life, in more accurate words, a *judicialisation of public life*[5]. The French professor argues that we are facing a

[1] (*https://cdn.g4media.ro/wp-content/uploads/2019/01/20190110-Letter-to-PM-Viorica-Dancila_PID.pdf*).

[2] In regard to the rule of law and good governance, Francis Fukuyama argued that: *"Judicial institutions must be seen as equally armed with legitimacy and authority not only by common people, but also by the elites that hold power in society"*.

[3] *A. Lazăr*, Faith in the judiciary in the context of the judicialisation of public life, ECHR, Opening of the Judicial Year, Strasbourg, 25 January 2019 (*https://www.echr.coe.int/Documents/Dialogue_2019_ENG.pdf*, p. 21).

[4] *P. Rosanvallon*, professor at Collège de France and director of studies at École des Hautes Études en Sciences Sociales in Paris, Counter-Democracy: Politics in an Age of Distrust, Nemira Publishing House, Bucharest, 2010, p. 241.

[5] In relation to the judicialisation of public life, also see *Ov. Predescu*, Montesquieu and the criminalisation of public life, in Legal Point no. 2/2016.

complex, shapeshifting phenomenon, with multiple causes. He acknowledges that one of numerous factors determining it is the leaders' capacity to adapt and meet the citizens' requirements, thus increasing the rigors of responsibility in relation to the constituents. As such, the author points out the phenomenon of switching "from the universe of *competitive and representative democracies*" to that of *"democracies of imputation"*[1].

Significant for this observation are the circumstances in Romania, where the citizens' trust in the judicial power is higher in relation to the other powers. The perception is that comprehensive public programs and projects are lacking, whereas election candidates are designated in disregard of skill and integrity criteria. These are added to the decision-making shortcomings within the Government and the red-tape complexity of government structures. For example, there are visible flaws in acquiring and spending European funds or in relation to extensive foreign investments, especially in order to create an adequate infrastructure, raise the standard of living etc. All of the above stand as reasons for the wish of regular citizens, living a modest life, to find out who is (primarily criminally) liable for the leaders' lack of performance in the sound management of public money, in the sense of building the common good.

Consequently, mention should be made that, after Romania joined the EU, the National Anticorruption Directorate has investigated and prosecuted a significant number of high-ranking public figures, who were conclusively sentenced for corruption offences. For a moment, this triggers a shock that *disturbs the balance among the three powers of the state*, the judicial power appearing, in the eyes of the less versed, to set forth the public agenda within the context of a difficult practical implementation of the pre-election promises. The matter called into question is the balance within the constitutional relationships among the public authorities. There are visible "mutual interferences of some with the areas of activity of others, indicating balance via collaboration and control"[2]. Thus, the general public's opinion focuses ever more on increasing the magistrates' role and the power of law in our young democracy. The close analysis is made in the hope that the decision delivered by the law courts, in each criminal case, will also bring along the much awaited public decisions serving the greater good of the Romanian society.

3. *Separation and balance of powers in a state.* Analysing the matter of strengthening trust in the Romanian judicial system, expert studies[3] revealed that, with the 2003 amendments to the Constitution, "the separation of powers was expressly embedded in the text of art. 1 parag. (4) in the Romanian Constitution: the separation and balance of powers are fundamental principles a state is organized upon, «within the framework of constitutional democracy». The most important breakdowns on the separation of powers came from the Constitutional Court"[4]. As such, the Court stressed, "For the

[1] *P. Rosanvallon*, op. cit., p. 241.

[2] See *I. Muraru, E.S. Tănăsescu*, Separation and balance of powers (Article 1. The Romanian state – Comments), in *I. Muraru, E.S. Tănăsescu* (*coord.*) et al., The Romanian Constitution. Per-article comments, C.H. Beck Publishing House, Bucharest, 2008, p. 16-17.

[3] *B. Selejan-Guțan*, Romania: the risks of a "perfect European model" of the Judicial Council, Vol. 19 German Law Journal No. 7 (2018) (*https://www.germanlawjournal.com/*) (current issue devoted to judicial self-governance).

[4] CCR, Decision no. 63/2017.

proper operation of the rule of law, it is important that the powers collaborate in the spirit of constitutional loyalty standards, loyal conduct being a guarantee for the principle of separation and balance of powers"[1].

The close monitoring of the practical relationship among the powers, over the past years, reveals that the Parliament and the Government, running under the strict command of populist political groups[2], to satisfy their interests, have often claimed prerogatives, duties or powers delegated, as per the Fundamental Law, to other public authorities. There are evocative case files in which judicial disputes of a constitutional nature were carried out between the Romanian Parliament and the Public Ministry or the High Court of Cassation and Justice. Thus, the Court was requested, among others, *"to force the Public Ministry to promptly submit to the parliamentary inquiry commission a copy of Case file no. (...), and the NAD Chief Prosecutor to answer the question formulated by the commission"* to ascertain the lack of loyal collaboration via *the refusal of the Prosecutor General al The Prosecutor's Office attached to the High Court of Cassation and Justice "to sanction" the NAD's Chief Prosecutor's "failure to appear" before the special inquiry commission*[3]. In regard to the aspects of the alleged sanctioning measures and the submission of the said case file copy, the Court clearly ascertained that *there was no judicial dispute of a constitutional nature* between the Romanian Parliament, on the one hand, and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, generated by the refusal of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice to take disciplinary actions against the Chief Prosecutor of the National Anticorruption Directorate for the latter's non-appearance before the special inquiry commission of the Senate and the Chamber of Deputies, for the investigation of aspects related to how the 2009 elections were organised, to the result of the presidential elections, to the refusal of the Prosecutor's Office attached to the High Court of Cassation and Justice to submit to the special inquiry commission a *copy of the criminal prosecution file* on the prosecutor's office docket. To deliver this decision, the Court argues that "the loyal collaboration principle operates so long as «the law keeps quiet» and sound inter-institutional practices become applicable, but not when the law expressly regulates the disputed field, setting forth clear interdictions which, if it were to give way to the requests received, the public authority would knowingly violate, exposing themselves to legal penalties".

4. *Reform and the judicial counter-reform attempt, the evolution of faith in justice.* The 2004 judicial reform helped elevate the levels of faith in justice, being conceived as a departure of SCM from political influences. In the meantime, public trust has experienced variations. In that respect, in several occasions, *ECHR highlighted the special role in society held by the judicial system*, which, in its capacity of *justice endorser* – a fundamental value in a state upholding the rule of law – must enjoy public trust in order to fulfil its duties[4].

[1] CCR, Decision no. 972/2017.

[2] On populist evolutions in public life and their consequences, also see *J.-W. Muller*, Populist Constitutions: a Contradiction in Terms?, in the Republic of Moldova Constitutional Court Bulletin, no. 1/2017 (2), p. 47.

[3] CCR, Decision no. 611/ 2017, published in the Official Gazette of Romania no. 877 of November 7, 2017.

[4] ECHR, *Baka vs. Hungary* [GC], no. 20261/12, § 164, June 23, 2016.

The foundation and reform of SCM have influenced the values of judicial performance: efficiency, access, effectiveness, competence, fairness etc. The quality of the magistrate selection process, as well, influences the level of public trust in the judicial system. The National Institute of Magistracy ensures the selection and training of young judges and prosecutors, very good quality basic subject matters and the observance of the fundamental rights. Public trust in NAD is due to the greater institutional transparency in regard to high-level corruption. The National Anticorruption Directorate is seen as the main vector for draining corruption away from society, especially following the repeated attempts to amend legislation and weaken the strength of anti-corruption policies, against a background of high-ranking officials involved in court proceedings. Evocative in that respect is the examination of NAD statements on the settlement of certain case files according to its jurisdiction.

"The defendant allegedly helped a high-ranking official to claim and receive monetary benefits (...) from representatives of foreign IT company, in relation to the adoption of government decision by means of which green light was given for the conclusion of three additional instruments to a commercial contract performed by the company, their scope of delivery being the lease of IT licences to the Romanian state. (...). Based on this agreement, the defendant allegedly received the amount of USD 2.581.519 via an offshore company, corresponding to 10% of the first two additional instruments concluded (...). From the amount allegedly received as detailed above, the defendant allegedly transferred USD 800.000 to the said official for the latter to partially extinguish a debt they might have had to a company that had provided them with political advice during the years 2007-2008"[1].

A particular part of the *media* has played a major role in preparing the counter-reform, fuelling distrust by spreading the idea that a significant portion of the judiciary might be corrupted, also by way of outreach among political figures. According to the literature, many of these media debates were initiated by *press organisations belonging to individuals involved in court proceedings* concerning corruption or other serious offences (money laundering, tax evasion, blackmail etc.)[2].

Among the critical factors that have influenced public trust in the judicial system are: the independence and impartiality of judges and of the judicial system as a whole, the long duration of proceedings, the enforcement of judicial orders[3], political pressures via media channels and a show of resilience towards them. Other internal

[1] (*https://www.pna.ro/comunicat.xhtml?id=9668*).

[2] *B. Selejan-Guțan*, op. cit.

[3] ECHR acknowledged that flaws in enforcing judicial orders can undermine judicial authority and, implicitly, public trust in the judicial system. As such, in the case *Broniowski vs Poland* [MC], no. 31443/96, § 176, ECHR 2004-V, the Court found a breach of art. 1 in Protocol no. 1 and argued that "such conduct by State agencies, which involves a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention".

challenges for the public image of judicial institutions, nonetheless manifested periodically, are appointments of high-ranking prosecutors and SCM elections[1]. In the context of a deteriorated sense of civic responsibility shown by officials involved in court proceedings, we see that the Romanian judicial self-governing system turned out not sufficiently prepared and resilient to effectively defend the system's independence against systematic attacks from the political fronts.

As such, a *media campaign* was launched, *followed by legislative actions* aimed at adjusting the Romanian judicial Euro-model, on the grounds that "the total independence of the judicial system from the remaining Romanian state architecture, also from the citizens – which it supposedly serves – raises serious doubts and fuels ever more the deep fragmentation of social cohesion in Romania"[2]. *The claims* filed by the civil society, the HCCJ president, the PICCJ Prosecutor General, SCM and the magistrates' associations *forced the authors to abandon or postpone some of the changes harmful* to the justice system independence, such as subordinating the Judicial Inspection to the Ministry of Justice or magistrates' early retirement[3]. The adopted laws, despite the serious concerns expressed by the European Commission, still kept new provisions on extending substantive liability, setting up the department specialised in investigating magistrates, appointing high-ranking magistrates etc., all of which threaten the justice system independence, particularly the effectiveness of the fight against corruption.

Civil society witnessed in surprise the attempt to subdue justice by resorting to a *legislative inflation deployed using emergency ordinances*[4]. The PICCJ Prosecutor General requested that the SCM president (who did not respond), pursuant to art. 146 let. e) in the Constitution, to notify CCR for the latter to settle the judicial dispute of a constitutional nature between the Romanian Government, on the one hand, and the Romanian Parliament, the Superior Council of Magistracy and the Public Ministry, on the other hand, a dispute caused by the manner in which the Government exercised its duty of delegated legislator in the matter of "the justice laws"[5]. He invoked the Government's sabotaging his relationship with Parliament in terms of lawmaking, namely *undermining the latter's role of sole legislating authority*, evidenced by concrete and objective aspects in the Government's lawmaking activity. Although the Government acted while exercising its own constitutional duties (legislative delegation), to remain within the limits of constitutional legality, it should have met the requirements stipulated by art. 115 in the Romanian Constitution (hereafter called the Constitution). As per to art. 115 parag. (4), (6) in the Constitution, the Government can adopt *emergency ordinances only in extraordinary cases*, the regulation of which cannot be postponed, with the duty to justify the urgency in their content. Emergency ordinances *cannot be adopted in the field*

[1] *B. Selejan-Guțan*, op. cit.

[2] *B. Dima, E.S. Tănăsescu*, Constitutional reform: analysis and projections (2012) 142.

[3] (*https://www.digi24.ro/stiri/actualitate/justitie/augustin-lazar-cere-sesizarea-ccr-pentru-modul-in-care-guvernul-a-modificat-legile-justitiei-prin-oug-7-1094596*).

[4] The Government issued 4 emergency ordinances within 6 months: July 23, 2018/the entry-into-force date of the first law that amended the justice laws – February 20, 2019/ the entry-into-force date of GEO no. 7/2019.

[5] For the grounds of the judicial dispute of a constitutional nature, see the letter of the PICCJ Prosecutor General (*http://www.mpublic.ro/sites/default/files/PDF/adresa_csm_08032019.pdf*).

of constitutional laws, cannot affect the procedures of the fundamental state institutions. The Government's actions, however, did not abide by the requirements of the said text and, accordingly, eluded the principle of the separation of powers, claiming the Parliament's sole legislator duty. Thus, the emergency ordinances concerned were not justified by extraordinary situations, totally or partially lacking substantiation. This violation of the requirements set by the Constitution is also stressed by the Legislative Council's opinions issued on the emergency ordinances in question[1].

As time passed, the media campaign and other external actions took advantage of character frailties, causing *vulnerabilities* within the judicial system: political influences upon the conduct of SCM members, internal tensions occurring among various categories of magistrates or institutions, trust decline, mass retirement trends, a lack of transparency and lowered levels of accountability for certain magistrates. The Romanian magistrates remembered their teachers' warnings: "Learning enlightens you, but, in order to elevate oneself, character has always been and will be in need (...). As such, only with time did we find out that character can be learnt, as well, through experience and continuous schooling, facing the waves and hardships of life with patience, kindness and whole lot of generosity"[2]. Expert analyses highlighted the risk that these threats, stemmed from consistent political attacks, can turn the Romanian judicial system into a "perfect" model on paper, initially recommended for exchanges of best practices, within a European experiment, but ultimately possibly failed in practice, unable to lay down the supremacy of the law. Conversely, with support, it would endure and strengthen its stand as guardian of judicial independence, and also of the fight against corruption[3]. As of January 2017, despite all the warnings in the CVM reports, the Romanian judicial system has been constantly subject to constant pressures, aided to a significant extent by the duplicitous political players. The close relations with the European institutions have shown us, despite the revealed flaws, the resilience of the judicial system, its ability to self-adjust and keep playing its constitutional role. As also argued by the Constitutional Court, dialogue between the powers and the *principle of loyal cooperation* (genuine, not mimicked by politicians) might provide the optimal method to harmoniously implement the principle of separating and balancing the powers in a state[4].

We should briefly mention that the *independence of judges* is a prerequisite for the rule of law to exist and the fundamental guarantee of a fair process. In their turn, law courts

[1] Item 2 of the Legislative Council Opinion no. 963/10.10.2018 on GEO no. 90/2018 states as follows: "As per the recitals, the regulatory urgency is justified by the need to adopt a derogatory procedure that would allow the Judicial Crime Investigation Department to be rendered operational, thus avoiding the hampering of judicial procedures in the case files falling under the department's jurisdiction, as well as the occurrence of an institutional blockage. *Considering the provisions of art. 115 parag. (4) in the Constitution, as well as the related Constitutional Court decisions, the Substantiation note and the recitals must develop upon the de facto and de jure elements of the extraordinary situation that called for the advancement of the present draft as a matter of urgency*".

[2] Univ. Prof. Lect. Liviu Pop, "Babeș-Bolyai" University in Cluj-Napoca, corresponding member of the Romanian Academy (*https://www.universuljuridic.ro/seniorii-dreptului-pasionatii-i-prof-univ-dr-liviu-pop/*).

[3] *B. Selejan-Guțan*, op. cit.

[4] CCR, Decision no. 972/2012

must operate independently of the executive power and the legislative power. They must also be *resilient*, as the case may be, to pressures coming from the other powers or even from society[1]. At a close inspection, it is visible that these pressures sometimes originate from the judicial system's actual dysfunctionalities. In the doctrine, it was argued that judicial power's independence from the legislative power means the latter can only intervene in the judicial process by way of issuing laws to be implemented by law courts. Moreover, the European Court of Human Rights analysed the independence of law courts by placing it *in relation to the actual power of pressure groups*, to put it generically, in particular relation *to the media*. As such, the Strasbourg Court revealed that, in order to assess how well the law court independence requirement has been met, several factors have to be analysed. These are: the method of appointing the law court members and the mandate duration, the existence of adequate protection against external pressures, as well as the possibility of checking whether the court only displays a semblance of independence. In the Romanian law, as per art. 124 parag. (3) in the Romanian Constitution, republished, and art. 2 parag. (3) in Law no. 303/2004 on the statute of judges and prosecutors, republished, as subsequently amended and supplemented, judges are independent, only answer to the law and must be impartial. Likewise, in the activity they carry out, judges are bound to be impartial and decide objectively, free from any biases. It is critical that the judges' impartiality be absolute, given that public trust and respect towards the judicial system are the guarantees of its effectiveness[2].

5. *Sound governance and the Romanian tradition of prosecutors' independence.* Sound governance equally stands as a *guarantee* of outlining the proper judicial framework allowing *criminals to be held accountable for the offences committed*, from the less severe to the extremely serious ones. The Romanian state institution in charge with making sure that judges can rule on the criminals' culpability is, undoubtedly, the Public Ministry, understood as the entire body of prosecutors in Romania. This is not merely a ministry in the executive sense of the term; it also comprises prosecutors who exercise, in a firm and fully aware manner, their constitutional duties, pursuant to a *"vocation"*, a mandate granted by society. In their duties, prosecutors serve the public interest, they represent society. In regard to *the prosecutor's statute in Romania*, from a diachronic perspective, we must stress the fact that, as per the Law on the judiciary organisation from August 22, 1938 and the Law on the High Court of Cassation and Justice from September 14, 1939, the General Prosecutor's Office attached to the High Court of Cassation and Justice comprised one Prosecutor General and 10 department prosecutors, all of which being *non-removable under the same conditions and the Supreme Court members*[3].

The Romanian Constitution cannot be skewed not even by Parliament, and not by a freely elected Government. The Romanian Constitution is the supreme law. *The*

[1] On resilience in justice, also see *Ov. Predescu*, Resilience – victimology – criminal justice or a brief introduction in judicial resilience, in "Dreptul" (Law) no. 4/2014, p. 213-230.

[2] In regard to the judges' independence and impartiality, as well as the references in text concerning the doctrine and the ECHR case-law related to this topic, see in detail, *M. Udroiu, O. Predescu*, European protection of human rights and criminal proceedings in Romani, C.H. Beck Publishing House, Bucharest, 2008, p. 572-593.

[3] *A. Lazăr, M. Duțu, O. Predescu* (*coord.*) et al., The Public Ministry – history and prospects, Universul Juridic Publishing House, Bucharest, 2017, p. 53.

prosecutors' role and place within the state power system, as defined in the Constitution, is unquestionable and non-negotiable, being provided in Section 2, entitled *"The Public Ministry"*, which comprises art. 131 and 132, as part of chapter 6 entitled *"The judicial authority"*. Therefore, *the Romanian Constitution considers prosecutors as elements of the judicial authority, and not of the executive authority*. *Independence* represents the specificity of judges' authority.

Art. 132 parag. (1) in the Constitution makes no reference whatsoever to any subordination of prosecutors to other state authorities, and in no way to the Minister of Justice. Prosecutors are not subject to the *"control of the Minister of Justice"*, as they, according to the Fundamental Law, carry out their activity *"under the authority of the Minister of Justice"*. *Control* and *authority* are two different notions. The entire Romanian constitutional doctrine post-1991 has analysed this distinction, seeing it as emblematic in keeping the prosecutors' independence in the Romanian society. The Minister of Justice has evident duties in the field of elaborating the state criminal policy, the crime prevention policy, duties that grant him or her a certain authority on the general policies of the Public Ministry, in order to achieve institutional coherence in the implementation of the general criminal and crime prevention policies. For that reason, the Constitution mentions that prosecutors carry out their activity *"under the authority of the Minister of Justice"*. A distortion of this picture and the claim that prosecutors are *"under the control of the Minister of Justice"* would only help subordinate the prosecutor's office to a minister, that is, to the executive power. What reason would have then been behind placing in the Romanian Constitution art. 131 and 132, which regulate the activity of the Public Ministry, within the context of chapter 6 in the Constitution developing upon the *"the judicial authority"*?

Still in chapter 6 in the Constitution, section 3 is dedicated to the Superior Council of Magistracy. Art. 133 clearly and positively states the fact that this Council guarantees the independence of the judiciary. Justice in Romania is the one described in chapter 6, as it does not limit strictly to section 1 of this chapter, reserved for law courts, but explicitly and irrefutably refers to section 2 of the same chapter, entitled *"The Public Ministry"*.

6. *Prosecutor's office magistrates and their statute within the French judicial system.* An identical constitutionality matter was settled by the French Republic Constitutional Council, as per Decision no. 1017-680 from December 9, 2017. As such, the Constitutional Council was notified by the State Council on a preliminary constitutionality matter. It was filed by the Magistrates' Trade Union and concerns the compliance of the provisions of art. 5 in Ordinance no. 58-1270 of December 22, 1958, acting as an organic law on the statute of magistracy, with the rights and freedoms guaranteed by the Constitution[1].

Art. 5 in the above-mentioned ordinance stipulates that: *"The prosecutor's office magistrates are placed under the management and control of their hierarchical superiors and under the authority of the Keeper of the Seals, the Minister of Justice. In court, they speak freely"*.

The trade union that raised the preliminary issue, as well as the interveners in the case, criticised these provisions for disregarding the principle of the judicial authority's

[1] *A. Lazăr*, The independence and autonomy of prosecutor's offices, a corollary of judges' independence (*http://www.mpublic.ro/sites/default/files/PDF/mesaj_al_procurorului_general_referitor_la_independenta_procurorilor.pdf*).

independence, stipulated by art. 64 in the French Constitution, the reason being that it hierarchically subordinated the prosecutor's office magistrates to the Minister of Justice, given that those magistrates represented the judicial authority and should have enjoyed, on those grounds, similar to judges (bench magistrates), the constitutional guarantee of independence. On the same grounds, art. 5 above was criticised, as well, for breaching the principle of the separation powers in a state, as it damages the judicial authority's independence principle. One of the interveners argued, on the same grounds, that the respective article in the ordinance also violates the right to a fair trial, as well as the defence-related rights.

The Constitutional Council's judicial rationale led to the conclusion that the challenged provisions ensure a *fair conciliation between the judicial authority's independence principle and the prerogatives the Government enjoys* according to art. 20 in the French Constitution. These violate neither the separation of powers in a state, nor the right to a fair process, the defence-related rights or any other right or freedom stipulated in the French Fundamental Law. However, to reach this conclusion, the Constitutional Council performed a thorough analysis of the constitutional and legal provisions and ultimately identified that *the Minister of Justice only has administrative* and operative *duties, of an utmost general nature*, such as communicating to the prosecutors *general criminal policy instructions*, primarily for the purpose of ensuring, throughout the territory of the Republic, citizens' equality before the law.

It is true that, in the world, there are constitutional systems in which prosecutors are part of the executive power, but neither Romania, nor the French Republic belongs to this constitutional family. As we already mentioned, in Romania, prosecutors are magistrates and considered by the Constitution, in regard to their professional status, as part of *"the judicial authority"*, and not the executive one. All the more in France, where the two professions are even more deemed equal: *"magistrats de siège"* and *"magistrats debout"*.

7. *Prosecutors' independence in international documents.* Numerous international documents reveal the crucial independence of the prosecutor's office. The recommendations, conventions, opinions, studies and other types of international documents, drawn up under the oversight of the elaborate by the United Nations, the Council of Europe or the European Union, make distinct reference to cases where the prosecutor is part of the executive, as well as cases where the prosecutor is part of the *"judicial authority"*.

Recommendation Rec(2000)19 of the Council of Europe Committee of Ministers from October 6, 2000 stipulates at item 14: *"In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law"*. Item 16 in the same recommendation states that: *"Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law"*.

A major concern of prosecutors in terms of safeguarding public order by fighting against crime is the protection of crime victims' legitimate rights and interests. As such, item 33 in the recommendations states that: *"Public prosecutors should take proper*

account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure".

The true *mission of prosecutors in society* is *acting in the service of crime victims*, keeping in mind, before all else, their rights. These, too, are human rights and, more than that, they are rights of the innocent whose legitimate rights and interests were attacked, destroyed or harmed by criminals. *The Public Ministry's obligation to observe the human rights also concerns person accused of or prosecuted for* committing crimes, but strictly in regard to *providing guarantees* on the performance of a fair trial, the observance of the right to freedom, insofar as this right justifies its existence during the criminal prosecution and the actual criminal trial stages and, not in the least, on the presumption of innocence. *The defendants' rights shall never be more important than the victims'.* We would otherwise live in an unfair world, where the person suffering due to a crime should also bear the humiliation of a judicial procedure placing them in inferiority in relation to their aggressor.

The Rome Charter (adopted pursuant to Opinion no. 9 from 2014 of the Consultative Council of European Prosecutors, issued to the Council of Europe Committee of Ministers) stipulates at items IV and V: *"The independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged. Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability".*

The explanatory note for the Rome Charter comprises, in section 3.1., extended provisions on the independence of prosecutors. Thus, item 33 in the said document stipulates that: *"Independence of prosecutors – which is essential for the rule of law – must be guaranteed by law, at the highest possible level, in a manner similar to that of judges".* Item 34 states as follows: *"The European Court of Human Rights considered it necessary to emphasise that «in a democratic society both the courts and the investigation authorities must remain free from political pressure*[1]*». It follows that prosecutors should be autonomous in their decision making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interferences from the executive power or the parliament, having regard to the principles of separation of powers and accountability*[2]*. The European Court of Human Rights referred to the issue of independence of prosecutors in the context of «general safeguards such as guarantees ensuring functional independence of prosecutors from their hierarchy and judicial control of the acts of the prosecution service*[3]*»".*

[1] Decision of the European Court of Human Rights (the Grand Chamber), no. 14277/04, § 86, *Guja vs Moldova*.

[2] Decisions of the European Court of Human Rights in case *Kolevi vs Bulgaria*, no. 1108/02, from February 5, 2010, §148-149, *Vasilescu vs Romania*, no. 53/1997/837/1043 from May 22, 1998, § 40-41, *Pantea vs Romania*, no. 33343/96 from September 3, 2003, § 238, *Moulin vs France*, no. 37104/06 from February 23, 2011, § 57.

[3] Decision of the European Court of Human Rights in the case *Kolevi vs Bulgaria*, no. 1108/02 from February 5, 2010, § 142.

"The independence of prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned" (item 35). *"States must ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability*[1]*"* (item 36). *"Prosecutors should, in any case, be in a position to prosecute, without obstruction, public officials for offences committed by them, particularly corruption, unlawful use of power and grave violations of human rights*[2]*"*.

The Roma Charter (item XVI) also stipulates that: *"Prosecutions should be firmly but fairly conducted".* Prosecutors' firmness is a feature specific to their social role, and society welcomes examples of firmness and indomitability towards criminals and an enhanced defence of crime victims.

8. *Conclusions*. *The Public Ministry committed to the independence* it should benefit from according to the Romanian Constitution, as well as to the international documents, some of them having become, via ratification, part of the domestic law, as per the provisions of art. 11 in the Romanian Constitution. The Prosecutor General thus reacted to the attempts of stealing the Romanian prosecutors' independence, by means of vitiated draft laws and parliamentary procedures or by means of fraudulent tactics conceived by politicians with interests opposed to criminal justice being served.

Throughout this period, the Public Ministry has ruled on numerous *grand corruption case files*[3], as well as on the *historical case files* for the delaying of which Romania was reprobated by ECHR[4] and for the review of which the Public Ministry leaders were scrutinised by the politicians concerned. The Ministry has manifested independence and determination, *defending the rule of law and* avoiding the risk of witnessing the European Parliament take, against Romania, measures in the sense sanctioning departures from the rule of law, namely the *infringement procedures*[5] *or the enforcement of art. 7 in the EU Treaty (the nuclear option)*[6].

[1] See Guidelines on prosecutors' role, adopted during the 8th United Nations Congress on the prevention of crime and treatment of offenders, Havana, Cuba, August 27 – September 7, 1990, § 4.

[2] Recommendation Rec(2000)19 of the Council of Europe Committee of Ministers on the role of public prosecution in the criminal justice system, October 6, 2000, § 16.

[3] (*https://www.pna.ro/bilant_activitate.xhtml?id=40; https://www.pna.ro/comunicat.xhtml?id=9470*).

[4] The completion of investigations proved that the delays in the settlement of historical case files were outcomes of deliberate actions guided from within the political. Consistent with these actions, stakeholders among policy makers continue to generate a negative press campaign, pressuring judicial procedures in order to delay and discredit them.

[5] This procedure entails several steps: from notifying on the disregard of EU directives, to presenting the case before the Court of Justice of the European Union (CJEU) and enforcing a fine (a flat-rate amount or a penalty in the form of pending damages) on the member state.

[6] Art. 7 in the Treaty on the European Union stipulates a mechanism for strengthening the EU values. As per art. 7 parag. (1), the Council may determine there is a clear risk of a serious infringement upon the EU values by a member state, preventing an effective infringement by way of particular recommendations directed at the member state concerned. Art. 7, often designated an institutional "nuclear weapon", may ultimately lead to suspending

The young generation of prosecutors must employ the numerous skills upgrade opportunities, considering that the guarantee of independence is provided by the law, but is strengthened by *competence, character and the observance of ethical* and professional integrity *standards*. The elite within the academia constantly warn on the fact that *"a proper jurist must be a man of great character*. Intellect, legal and general knowledge, courage, involvement and whatever the qualities of an exceptional lawman might be called, are undoubtedly to be desired (...). Character without intellect or professionalism can do a lot, however, *intelligence without character is not worth much* (...). Learning enlightens you, but, in order to elevate oneself, character has always been and will be in need"[1]. Magistrates must abide by the constants of law, avoid uneven practices resulted from breaching the criminal proceedings *axiom*, according to which *the same issue in fact is subject to the same criminal judicial procedures, falling into a single and accurate judicial category*, without discriminating against persons involved in criminal proceedings.

Via relevant *lege ferenda* proposals, the young generation of prosecutors, including the professional associations, must contribute actively and considerably to the public debates regarding the *Romanian judicial system reform*, of the justice codes and laws, *in line with the Venice Commission's opinions, the opinions of the Consultative Councils* of European Judges and Prosecutors, the European Commission and the GRECO reports. Young magistrates must consolidate and trust the *collective spirit* of the magistrates and the ability of the Public Ministry to fulfil its constitutional role in the service of society's general interests; they must trust justice, as a decisive factor for the modernisation of Romanian society and the strengthening of the rule law, and demonstrate they can rise without hesitation at the Romanian' expectations.

The independence granted by the Romanian Constitution materializes itself into a *state of mind of the magistrates* best described by way of competence, character and the observance of the ethical and professional integrity standards. This state of mind (the *sacred flame* of the magistracy) is handed over unaltered to the next generation and, in order to be passed down, it must defended with dignity, steadfastness and using the legal tools provided by the law.

certain rights of a member state, especially its right to vote in the EU Council, a body whose 27 members finalise European legislations.

[1] Univ. Prof. Liviu Pop, "Babeș -Bolyai" University in Cluj-Napoca, corresponding member of the Romanian Academy (*https://www.universuljuridic.ro/seniorii-dreptului-pasionatii-i-prof-univ-dr-liviu-pop/*).

Justice versus Politics: from Inability to Independence

Judge Dr. ***Cristi Danileţ***

The Romanian justice has, for a long time, been subject to political control. Under the pressure of accession to the European Union, the relationship between the political and the judiciary has been reassessed. In this equation, a decisive factor was the institutional position of the Ministry of Justice, which varied in time: if, in the early years, the minister was an all-powerful leader of a multi-component justice system, their duties were narrowed down first according to the new Constitution, and once again with the legislative reform from 2004-2005, only to reach again top tier over the past two years. Still, a 2020 decision of the Strasbourg Court has reopened the debate on the minister's role and influence within the justice system and has, for the first time, generated discussions on the Constitutional Court's role and influence. Basically, the journey of justice towards genuine independence has gone through the barriers raised by the line minister as a champion of a political class who has not wanted for one second to relinquish control over the magistrates' activity and decisions.

1. Laws and rights

The 1989 Revolution marked the end of a terror regime that had towered above the Romanian society for half a century following the end of the Second World War. There were intentions to re-establish the state on new foundations, resuming the democratic ideas from a time preceding the global conflict, when Romania enjoyed a booming period. Concurrently, there were intentions to swiftly implement the international standards present for decades within the European space, where we were going to integrate as soon as possible. The construction of a new society would thus be done via ample legislative changes, set to allow market economy, eliminate the establishment's abuses and overhaul the judiciary, so that social and economic prosperity would be doubled by a suitable human rights defence system.

Therefore, turning the communist justice system into a democratic one was one of the urgent matters following the communist dictatorship overthrow. The reform concerned primarily outlining a new systemic architecture: the new Constitution was approved and revised (1991, revised in 2003), the Ministry of Justice was reorganised on several occasions (1990, 1992, 1994, 1997, 2001, 2003, 2005, 2009); the Constitutional Court was set up (1992, extensively revamped in 2004); the law on organising the judiciary was approved, replacing the prosecution with the Public Ministry, the courts

of appeal reappeared, as did the Superior Council of Magistracy, suspended during the communist era (1992), and the law was later on replaced with the set of laws on justice reform (2004); the law on the court of accounts was issued (1992); changes were brought to the main codes, such as reintroducing appeal as legal remedy (1993) or increasing sentences (1996), to be ultimately replaced by new codes (2011, 2012, 2014); judges were granted immovability (1993); the Supreme Court of Justice law (1993) and the law on military courts and prosecutor's offices were issued (1993); the law on community wardens was issued (1993), the structure later becoming the community police (2004) and, finally, the local police (2010); several laws were issued – on the organisation and statute of lawyers (1995); on notaries public (1995); on insolvency practitioners (1999); on bailiffs (2000); on probation counsellors (2000); on technical assessments (2000); on forensic experts (2000); on industrial property counsellors (2000); the border police law was issued (2001); the laws on the organisation and operation of the demilitarised Romanian Police and on the statute of policemen, respectively, were issued (2002); other laws issued – on anti-corruption prosecutors and police (2002); on legal advisors (2003); on prosecutors and police fighting against organised crime (2004); on judicial police (2004); on the gendarmerie (2004); on prison guards (2004), later becoming the prison police (2019); on mediation and mediators (2006); on integrity counsellors (2007).

We do remember that, in 1955, Romania joined the United Nations, an organisation that had adopted the Universal Declaration of Human Rights in 1948. In 1966, the UN General Assembly adopted the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Romania signed the two covenants two years later, but our country would only ratify them in 1974. The human rights system was utterly ignored during the communist rule. In 1993, Romania joined the Council of Europe and signed the European Convention on Human Rights. The entire legislation then started changing. At present, there are 10.000 laws, ordinances and emergency ordinances in effect in Romania.

Right after the Revolution the implementation of the new human rights system commenced: capital punishment is repealed and criminalisation of abortion was waived (1989), provisions were issued on holding public gatherings (1990), lands collectivised by the communists are returned (1991), rights were granted to people persecuted by the former communist regimes in Romania (1999), nationalised properties were returned (2001), the press law was repealed (2000), the criminalisation of homosexuality was waived (2001), the law on public information was issued (2001), the law on the fight against corruption and conflicts of interests is approved (2003), the power and task of making arrests were lifted from prosecutors and granted to judges (2003), the labour code was approved (2003), the whistleblower's function was created (2004), the criminalisation of insult and libel were repealed (2006), the law on administrative litigation was launched (2004), the new civil and civil procedure codes (2011 and 2012), as well as the penal and criminal procedure codes (2014) were issued, the administrative code was approved (2019).

2. Politically controlled justice

Until the 2004-2005 reform, the Minister of Justice was al-powerful: magistrates were recruited and promoted via the Ministry of Justice, always led by a political figure; appointments and removals from office within law courts were performed by the Superior Council of Magistracy at the minister's proposal[1], and by the actual minister within prosecutor's offices; the presiding judge was the absolute ruler of the court, as they distributed case files among judges, set forth the composition of judicial panels and recommended judges for promotion; the principle of an unchanged judicial panel during the entire settlement of the case file was unknown, case files being switched from one panel to another during settlement; there were no expert fields for judges; the minister's intelligence service – called the Independent Protection and Anti-Corruption Service – collected information on magistrates' private lives, to be then used to support them in or oust them from various office or even blackmail them; the Central Judicial Inspection was integrated in the Ministry of Justice and could examine how case files were being investigated, also on the merits, unimaginable nowadays; the Romanian Prosecutor General was appointed by the chief of state, on the direct recommendation of the Minister of Justice, which also explains certain actions for annulment brought following indirect orders given by the chief of state on the restitution of nationalised housing[2]; the prosecutor was the one deciding on the a person's remand custody; the supreme court judges were appointed for a single 6-year mandate by the president of the country and, as president of this court, a non-judge jurist could be appointed, as well[3]; the

[1] To illustrate the power of the minister at the time, we will mention that 39 of the 41 presiding judges were changed during the 2001-2003 mandate of the Minister of Justice Rodica Stănoiu.

[2] *"None of the decisions delivered by judges have any legal cover in order to reinstate ownership so long as no law stipulates under which conditions, how to reinstate ownership for an owner with nationalised properties or legally entitled to them. This is the substantive issue. I also hear that trials are started in Bucharest, as well, and ICRAL (Constructions, Repairs and Housing Administration Enterprise), representing the public interest, fails to appear in court. Here, too, abuses and hirelings undoubtedly exist. They are paid. They, the servants in these institutions, no longer strive, as people, to defend tenants' interest and the public interest. The law court then only has the party pleading in favour, and gives in. It should not give in as it lacks lack legal cover".* After this 1994 speech held in Satu-Mare by the country president at the time, Ion Iliescu, the Romanian Prosecutor General, Joiţa Tănase, brought action for annulment of all the case files where courts ruled in favour of former owners whose properties had been seized by the communist regime. The supreme court, comprising judges with a 6-year mandate who were naturally waiting to be re-appointed by the chief of state, abruptly switched lanes and ruled in favour of the former tenants that had become owners pursuant to a post-revolutionary law. The Prosecutor General was rewarded by the President by being appointed ambassador. As of 2000, the European Court of Human Rights reproved Romania for violating the property rights once conclusively ruled by law courts, but reversed by the will of the Prosecutor General (*see the first case of this kind, Brumărescu vs Romania, petition no. 28.342/95, decision of August 31, 2000*).

[3] For example, from 2004 to 2009, the Supreme Court president was Nicolae Popa, a former jurist and former advisor of the country president, Ion Iliescu, who subsequently appointed him Constitutional Court judge, then Supreme Court president. Popa had not been judge with any law court a single day in his life.

supreme court and military courts employed separate laws, though justice is declared as one and only by the Constitution; SCM was a formal body viewed as an appendage of the Ministry of Justice and was led by the Minister of Justice, and SCM magistrates – coming solely from courts of appeal and the supreme court – were selected by the Romanian Senate from among those selected by magistrates; to discipline prosecutors, within the General Prosecutor's Office ran a special council the Minister of Justice was a member of[1].

At the same time, the Minister of Justice was the one who could order prosecutors to mandatorily start criminal prosecution (eliminated in 2004) and endorse criminal prosecution, to take preventive measures and take legal action against magistrates, notaries and bailiffs. Therefore, they would decide whether a magistrate was subject to criminal penalties.

In early 2004, the results of organising the judiciary in this manner were disastrous: a single case file on a political figure sentenced for corruption, only a few magistrates sentenced for corruption, but with conditioned stay of execution, the judicial system's total lack of transparency, a 22% level of public trust in justice. The control levers pulled on magistrates' careers and the activity of law courts and prosecutors deprived Romanian justice from independence. Basically, for a certain category of persons, justice failed to serve. An inactive justice fuelled systemic corruption, the state itself thus becoming captive. The greatest issue of magistracy was an entire generation of magistrates lifted from communist justice and granted immovability automatically in the '90s with no screening at all, plus a massive hiring within the law court system of jurists from the former Agricultural Cooperatives for Production and State-owned Agricultural enterprises following the increase in the number of law courts in 1993 (when courts of appeal re-emerged) and 1997 (when local courts re-emerged in most small towns).

3. Judicial reform

Evidently, the most critical element of the judiciary is the magistracy, which had to be thoroughly reformed. In terms of legislation, the reform was started in 2004-2005. It had already been foreseen by syndication through the emergence of professional associations (1993), by a sedition from within, featuring the whistleblowing of pressures from the Ministry of Justice upon prosecutors and even a prosecutors' strike (in 1997)[2], sending to European authorities or foreign embassies in Romania warning letters on the absent independence of the judiciary (2003, 2004) and external political and diplomatic support.

[1] See *C. Danileț*, Passage through time, a posting from 27.11.2014 (*www.cristidanilet.ro/blog*).

[2] To exemplify such pressures, we shall mention the case of Cristian Panait, a prosecutor who committed suicide in 2002 during a criminal investigation in which he refused to execute the orders of the Prosecutor General; or the case of Ovidiu Buduşan, a prosecutor who investigated high-ranking political figures involved in money laundering and misappropriation of funds during a presidential election campaign, ousted from magistracy in 2001. Buduşan won the sanction cancellation trial and returned to the system, which he then left via resignation.

Therefore, the magistracy reform commenced with extensive legislative changes, in the form of the set of laws adopted in 2004 and amended in 2005, on the judiciary organisation, the statute of magistrates and the Superior Council of Magistracy[1]. It was finalised with the substantial legislative reform consisting in the new codes coming into force. Given that, in Romania, normatives are drawn up by the Parliament and, in legislative delegation cases, by the Government, we can conclude that political will was essential in the justice reform. The only thing left to decide was the degree of independence the judicial system should be granted. Clearly, a politically controlled justice would have been the guarantee of impunity for the law broken by officials, servants and even magistrates. And that was precisely the state of affairs in Romania early into the reform.

Justice was only granted the necessary independence following foreign pressures, namely the obligations in the TO DO LIST undertaken by the Government to prepare Romania to join the European Union. Romania's pre-accession negotiations with the EU completed, the only chapter left to conclude was *Chapter 24 – Justice and Internal Affairs*. Following a round table organised rather secretly by the magistrates' associations and the non-government associations (February 11, 2014)[2], the Minister of Justice was changed and the new minister drew up in record time the drafts for the three justice laws upon actually consulting the magistrates and civil society. The laws were approved and came into effect in fall 2004. The purpose was to transfer to SCM, conceived as an institution independent of the Ministry of Justice, all the duties concerning the careers of judges and prosecutors.

The new Government, instated in December 2004, having set the fight against corruption as a priority, received the task of removing five "small red flags" jeopardising Romania's accession to EU for another year: enhancing the justice laws, an independent audit report for the National Anticorruption Prosecutor's Office, the random distribution of case files, drawing up the Justice Reform Strategy and the related Action Plan, drawing up the Strategy on Fighting Corruption and the related Action Plan. The new minister – politically independent, lawyer by profession – started working on all of the above, involving the magistrates: they relocated magistrates within their own cabinet, organised meetings with magistrates (Alba-Iulia, Bacău, Iași, Cluj-Napoca), initiated an unprecedented public debate, thereby asking magistrates "to stop listening to anyone", as of that moment being independent.

In 2005, the Government took responsibility for yet another change brought to the legal framework, the situation improving over the following years. As such, the justice laws now stipulated a new type of lustration, forbidding magistrates who had been collaborators,

[1] Reference is made to Law no. 303/2004 on the statute of magistrates, Law no. 304/2004 on the judiciary organisation and Law no. 317/2004 on the Superior Council of Magistracy.

[2] It was the first debate concerning the justice status organised in Romania by the magistrates and civil society. The only Parliament member taking part was Antonie Iorgovan, representing the ruling Parliamentary majority. No Ministry of Justice representative was present. An informal body was then set up, the Alliance for a European Justice in Romania, which coordinated the completion of draft normatives on justice the following year.

informers or agents of security services to hold leading or SCM member offices[1] and all magistrates to be collaborators, informers or agents of current intelligence services (2005)[2]. SCM is removed from under the Ministry of Justice authority and conceived as an independent institution (2004): its members were elected from among magistrates now representing all tiers of law courts and prosecutor's offices; candidates for those offices had to own a plan of objectives to be presented before voters during a real election campaign; SCM primarily comprised magistrates, whereas the leadership of that body could belong to the minister, but to a magistrate. Recruitment and progress, within magistrates' career, ran under SCM's authority (2004), except for appointments on leading positions within the General Prosecutor's Office, carried out by the country President at the minister's proposal and based on the advisory opinion of SCM's prosecution department (2005)[3] appointments on leading positions within the supreme court, carried out by the country President at the proposal of SCM's prosecution department (2005), a duty that later became an exclusive SCM prerogative (2018). The pension amounts increased and the retirement age decreased, forcing the departure from magistracy of numerous judges and prosecutors inherited from the communist regime. The age for advancement to higher courts and prosecutor's offices decreased (2005), helping younger persons – strictly via a contest procedure – fill in vacancies left due to mass retirements. Presiding judges lost some of their power: leading positions within courts and prosecutor's offices now required not a mere interview, but a contest procedure[4], and courts and prosecutor's offices were led by presiding judges and Chief Prosecutors, respectively, in cooperation with the leading college the members of which were elected by the general assembly of the court or prosecutor's office (2005). Case files were randomly distributed to judges, via software (2005). A judicial panel's composition could no longer be changed during trial. Assessments were no longer annual and stopped depending on the number of decisions disallowed by judicial review courts (2004). The wages of judges and prosecutors increased (2006, 2009 and 2019). The Supreme Court judges' mandate extended until retirement (2003) and, to hold that office, a contest procedure was put in place, evolving from a mere interview before SCM to an actual test of judicial knowledge, an assessment of rulings delivered through time and an interview limited to matters of integrity (2012). The principle

[1] In 2008, the National Council for the Study of the Securitate Archives made public that 23 current and former magistrates had collaborator files and two were former Securitate employees. None of the said acting magistrates resigned or was deposed following this disclosure.

[2] In 2016, the Supreme Council of National Defence communicated to the Superior Council of Magistracy that, among judges, prosecutors and the auxiliary personnel of law courts and prosecutor's offices, there were no collaborators, informers or agents of current intelligence services.

[3] This change was carried out in consideration of the fact that the Minister of Justice was in charge with the country's criminal policy and required, in that respect, a team of prosecutors, however, the Prosecutor's Office failure in fighting corruption ultimately caused the minister's resignation. The 2005 change was criticised by all the parties, but hypocrisy was revealed when all of them came to power and none of them actually deprived the minister of such a lever.

[4] The management, human resources and communication knowledge was checked.

of judges' specialisation was provided by the law (2005). The Prosecutor General no longer had the power to request a trial reopening for case files conclusively settled via action for annulment or a stay of execution in the case of decisions delivered by judges (2004). The principle of prosecutors' independence in the solutions delivered was for the first time regulated (2005). The minister's secret service was reorganised, by way of eliminating the powers concerning the magistrates (2005), then fully dissolved (2006); the archive remained sealed and in the custody of the National Administration of Penitentiaries, while no officer thereof was ever sanctioned for the abuses committed by this service. SCM's duties were added those related to training magistrates and clerks and conducting inspections (2004)[1]. A magistrate's profile, underpinning their recruitment, was drawn up and a Deontological Code of magistrates was adopted (2004, 2005). A foreign loan, of 110 million USD, was contracted from the World Bank to build and restore law court premises, as well as to draw up the new codes and conduct the professional training required by their coming into force (2006). Justice became more transparent: pressrooms were set up within each law court and prosecutor's office (2004), judicial practice printed compendiums were issued (2005) and, later on, all decisions were published, under anonymity and for free, on the internet (as of 2015)[2]. Justice entered the IT era and the law courts portal was launched (2004)[3], in certain counties the parties having online password-based access to their digital case file (as of 2013), and official biographical data about judges were published on the portal (2012)[4]. Second appeal as ordinary legal remedy is eliminated as per the small reform law (2010).

Independent justice gave birth to brave magistrates in the enforcement of the law, without the fear of repercussions if they investigated case files on major figures of the day. That is why, at the end of the first ten years into the reform, results were unexpected: people deemed above the law ended up sentenced to years in prison and the first notable sentences for grand corruption offences were delivered[5]; prosecutors conducted investigations with nearly no obstacles, wiping out networks the included businessmen, politicians and even magistrates[6]; judges applied firm sanctions; trials

[1] The National Institute of Magistracy, the National School of Clerks and the Judicial Inspection became subordinated to SCM.

[2] See Romanian Law Information Institute (*www.rolii.ro*).

[3] It comprises data on all the case files settled in Romania (*http://.portal.just.ro*).

[4] SCM Decision no. 515 from June 14, 2012 requires all law courts to publish the business CVs of judges.

[5] The case of Adrian Năstase, former Romanian Prime Minister, is evocative. He is the first "big fish" (term used in the paper Corrupt cities – *R. Klitgaard, R. Maclean-Abaroa*, Humanitas Publishing House, 2006) throughout the fight against corruption in Romania.

[6] "Voicu network" is the best known of all: senator Cătălin Voicu was investigated by NAD prosecutors and sentenced by the supreme court for influence peddling: he was accused of having allegedly claimed and received amounts of money from businessmen in order to favourably settle certain civil and criminal cases on the dockets of judicial bodies. His connections went up to the Supreme Court, to judge Florin Costiniu, presiding judge of the Civil Chamber, also sentenced for corruption. Interestingly, Costiniu was the husband of a female judge who led an older magistrates' association that had set its sight on the fight against... NAD.

took less to settle. The public trust in justice reached 44%, and in NAD 60%. Obviously, all of these could only be possible with the consent and involvement of policy makers, somewhat under the pressure of accession to EU and continuous European monitoring and under the threat of losing supply of European funds. For at least a number of years, a part of the political elite supported the actual independence of justice and magistracy self-governance. The real reasons – undoubtedly political and diplomatic – are of less interest[1].

The powers did collaborate to implement the reform, but they have to keep doing so. As such, the legal standards nowadays stipulate a permanent institutional collaboration among the political and the judicial authorities: SCM holds the magistrate recruitment contest procedure, but the Chief of state appoints the new judges and prosecutors. The Minister of Justice proposes the appointment or removal of prosecutors at the top of the Public Ministry, whereas SCM issues an advisory opinion on them, and the Chief of state carries out the appointments or removals. The Minister of Justice is an *ex officio* member of SCM, whereas the Chief of state presides the SCM assembly when present. The Romanian Senate elects and appoints two members within SCM as civil society representatives and, additionally, validates the elections of SCM members from among magistrates. The Legislator and the Executive are bound to request advisory opinions from SCM for draft laws and legislative initiatives concerning justice. The budget of law courts is administered by the Ministry of Justice as primary budget holder.

Evidently, reform could not have been possible without the actual magistrates' will, either. Having been controlled for a lot of years, the dominant feeling of fear until the mid-2000s was understandable. Few voices from within were heard, before 2003, claiming biases or pressures. Independence was demanded, but debates on this topic always switched lanes to the topic of salaries and were, indeed, very brief. Nobody talked about integrity[2]. The long-lasting lack of criteria for outlining the magistrate's profile allowed the entrance and presence in the system of persons displaying none of the qualities required by this statute: former Securitate officers and former jurists, people who never went to a contest procedure to enter or advance within the system, but reaching magistracy with political support. Some of them advanced, with political backing, directly (or all the way to) the Supreme Court, the General Prosecutor's Office and SCM, respectively. Once the admission contest for magistracy was introduced, the number of contest sessions was increased, and the promotion contest was added, respectively, magistrates' professional competence was enhanced and generations were replaced. Internet access, as of 2002, and associative assemblies favoured the emergence of a professional culture. Magistrates started attending training courses abroad and establishing contact with judicial democracies from advanced countries. Foreign experts began coming to Romania to lecture on magistrates' role in a democratic society. Opinion leaders among magistrates began to emerge.

[1] For further developments of these ideas, see *C. Danileț*, Brief history the magistracy reform, Polis Magazine, vol. II, Issue 2(4), new series, 2014, p. 5-20.

[2] *Society for Justice* Association organised, in 2006, the first seminars with magistrates, throughout all counties, on the topic of push factors and conflicts on interests within the Romanian judiciary.

Visible efforts were made to gradually extend accountability throughout the system: the number of professional training courses within the National Institute of Magistracy increased, ethics courses began being taught, the number of disciplinary cases regarding magistrates multiplied, whereas instances of magistrates sentenced for acts of corruption, as well as more and more officially issued information on the system organisation and activity began to emerge. SCM even adopted a 2011-2016 Strategy to strengthen integrity in the judiciary, doubled by an action plan declaring a "zero tolerance" to judicial corruption and aiming to enhance the management of law courts and the transparency of justice[1]. In 2013, the system welcomed the first magistrates born after 1989, seen as a genuine hope for skill and integrity. SCM began streaming its sessions online (2011), whereas the "The codes are coming!" campaign was used to stream online professional training conferences for magistrates, organised at the National Institute of Magistracy (2011), where representatives of other professions were invited for the first time.

Magistrates realised how critical it is not to develop a corporate, caste spirit, and instead to adopt attitudes in line with their statute. As such, various endeavours to protect the independence of justice from political influences were carried out, such as the 2009 one-month protest[2], public reactions against magistrates tainted by actual or suspected corruption[3], or public reactions of certain SCM members defending of the rule of law, in the summer of 2012[4].

4. Anti-reform

Several political attacks took place against the judiciary. At a legislative level, the strongest were in 2012, 2017 and 2019. Interestingly enough, the attacks in Romania

[1] Approved in the SCM Plenum session of November 22, 2011.

[2] Romanian judges and prosecutors halted their activity for one month, following repeated violations by the other powers of the independence of justice. Beyond the union-like appearance of the movement (requests to increase wages and regulate the activity), the negotiation among powers focused on compliance with justice and granting it the well-deserved importance, as a strategic area of national significance – see the collection of documents: The protest of Romanian justice. The policy documents of the law courts' April-October 2009 assertive movement (*www.juridice.ro*).

[3] Reference is made to the 2020 "*Integrity and Dignity*" petition, signed by 413 magistrates against two Supreme Court judges suspected of corruption. One of them, Florin Costiniu, would receive a conclusive sentence.

[4] A number of SCM members decided to warn the public on certain politicians' rants, in their critical discourse, on magistrates or the judiciary. Their reaction was followed by a series of attacks, also targeting their private and family life, from politicians and the politically controlled media. See SCM Plenum Decision no. 815 from September 18, 2012 on the defence of professional reputation (*www.csm1909.ro*).

took place within a broader, European context: similar anti-reforms took place in Serbia[1], Turkey[2], Hungary[3] and Poland[4].

As such, politicians, after being during the 2004-2005 period rather forced to accept the independence of the judiciary, as of 2010, they realised that magistrates, is acting independently, end up investigating only case files of friends, supporters, colleagues, members of politicians' and businessmen's families. Accordingly, they once again attempted to take control of justice, the aim obviously being criminal justice. We have identified three methods in that respect.

The first method consisted in repeated public statements targeting the judicial system as a whole, but also certain magistrates on an individual basis. They were made by politicians, journalists and even lawyers. Theoretically, for the last category, this kind of conduct is forbidden as per the national laws[5] regulating the lawyer profession. Basically, there is no case where the bar's disciplinary bodies have ever sanctioned a lawyer for such endeavours.

Journalists are protected by regulations on freedom of expression even when they exaggerate, but are not allowed to disclose private life aspects unless they are linked to the public life of the person in question, to slander or present a piece of news without requesting an opinion from that person. In regard to the groundless criticism against magistrates or the disclosure of aspects of their private lives, the self-regulating

[1] Under the guise of judicial reform, in 2009, all the judges were deposed, after which rehirings took place, those who had been part of magistrates' association extremely vocal against political interferences being rejected.

[2] Thousands from among the military, magistrates and teachers were arrested, as of July 2016, as part of a movement to purge those opposing Erdogan's regime. In October 2017, the Council of Europe Parliamentary Assembly granted the human rights award to Murat Arslan, the president of an association of more than 1800 judges, under arrest for more than one year. As per the decision of 16.04.2019, delivered in the case of *Alparslan Altan vs Turkey* (petition no. 12778/17), the European Court of Human Rights ruled that there was a violation of art. 5 parag. (1) (the right to freedom and security) in the European Convention on Human Rights, considering the illegal detention of the plaintiff and the lack of reasonable suspicions that they committed an offence. The plaintiff was a judge at the Turkish Constitutional Court, arrested following the attempted coup of July 15, 2016.

[3] In 2012, the Judicial Council was dissolved and replaced with a new institution, the judges' retirement age was lowered and the Supreme Court presiding judge was discharged from office. The latter won before ECHR the case *Baka vs Hungary,* petition no. 20261/12, the decision from June 23, 2016.

[4] The changes in Poland concerned lowering the retirement age, replacing law court presiding judges, changing the SCM composition. The "March of a Thousand Robes", carried out on January 11, 2020 in Warsaw, gathered magistrates and lawyers from all over Europe to protest against the legislative amendments in Poland. On April 29, 2020, the European Commission launched a new infringement procedure against Poland due to a law that allows sanctioning judges that criticise controversial reforms introduced in the country, but waived ruling in a similar manner in regard to Hungary, where Prime Minister Viktor Orban claimed extended prerogatives against the background of the healthcare crisis.

[5] For the international standards in the field, see ECHR, *Maurice vs France*, petition no. 29369/10, the decision from April 23, 2015.

bodies of the press should have taken action. Unfortunately, journalists' professional associations have been inactive for several years in Romania. There is, however, the National Audiovisual Council but, having fallen under political influence when it comes to appointing its members, this institution is ineffective in enforcing the laws against TV networks that target magistrates in charge with settling major case files or who have made public statements against such conduct[1].

As far as politicians are concerned, the effect they desired was to discredit and destabilise the judiciary in order to justify to the public certain illicit actions sanctioned by magistrates or to make preparations for future legislative changes. In our opinion, such "attacks" are not permitted, from two viewpoints: on the one hand, as pressures are exerted upon the judiciary; on the other hand, as the attack is launched by one power against another power, both belonging to, and even representing, the state – meaning that, in the end, the state undermines itself, ultimately jeopardising the authority that public agents should enjoy.

The "attack" upon justice by the other powers was seen by the European Commission as an attempt to ruin the rule of law and the independence of the judiciary. For that reason, in the summer of 2012, the Commission invited all the political parties and the Government authorities to observe the justice system independence, and Romania to take seriously the commitment to take disciplinary action against all Government or party members who undermine judges' credibility or exert pressures upon the judicial institutions[2]. Romania failed to comply with the guidelines and, in early 2013, the European Commission iterated that the politically motivated attacks against the judiciary had not ceased. One critical item was accepting judicial orders: to that end, all the political class members would have to reach a consensus on refraining criticism towards judicial orders, undermining magistrates' credibility or exerting pressures upon them. It was recommended to introduce a legislative framework that clearly defines the ban on criticizing judicial orders and undermining the activity of magistrates or exerting pressures upon them, and to ensure the effective implementation of these requirements. The Superior Council of Magistracy should be invited to issue an opinion on the relevant provisions[3]. Along the same lines, the Venice Commission warned the Romanian authorities on the need to include in the Romanian Constitution the principle of mutual respect and loyal cooperation among the powers as a fundamental principle of constitutional democracy[4].

[1] "Media terrorism" is a phenomenon in Romania. TV networks backed by politically involved businessmen have created a routine from falsely presenting judicial events, judicial orders or from denigrating magistrates. The only solution in defence of magistrates is for them to take legal action against journalists and/or media trusts. The highest compensation granted in Romania to a magistrate amounted to 300,000 lei.

[2] The European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, July 18, 2012, COM(2012) 410 final, p. 22.

[3] The European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, January 30, 2013, COM(2013) 47 final, p. 4, 7.

[4] The Venice Commission, Opinion no. 73/2013 of March 24, 2014 on the draft revision of the Constitution, item 33 and item 210, document CDL-AD(2014)010-e.

These recommendations were not followed by the political authorities. Moreover, some of the fiercest supporters of justice and NAD independence, president Traian Băsescu, right after completing his second term as the chief of state, began a fanatical attack against the judicial system, which had convicted his brother and the most loyal minister he supported.

A peak of these attacks came on June 9, 2018, when a meeting was organised with nearly 130.000 people brought over from various counties in the nation, by the majority party in the Parliament, in order to witness speeches against magistrates: from the stand, parliamentarians and party leaders designated magistrates as "corrupt", "Stalinist", "Securitate people", "torturers", "rats", accusing them as members of "the parallel state", and stated there were "undercover" magistrates within the system and encouraged participants to "take the fight to the streets till the very end"[1].

The second method to control magistrates' activity was by means of seemingly legal interventions intended to block certain proceedings in case files on the dockets of judicial bodies. Not trusting the judicial system, which it frequently accused of being manipulated by political adversaries or simply pursuing their impunity, the Parliament repeatedly refused the request to commence the criminal prosecution of ministers[2] or to endorse court-ordered reliefs being delivered in relation to certain parliamentarians[3].

We believe that the existence of a filter in relation to the prosecution of officials is in breach of the provisions in Recommendation no. 19 from 2000 of the Council of Europe Committee of Ministers, which states the principles to be considered when public policies are drawn up by the authorities. As such, item 16 in this regulation stipulates that: *"Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law"*. The Committee of Ministers develops further, in the explanatory memorandum: *"Although applicable generally, this recommendation specifically concerns those systems where the public prosecutor is subordinate to the government, a situation that must not prevent it from prosecuting public officials – or, by extension, elected representatives or politicians – who commit offences, particularly where corruption is involved. «Obstruction» means any hindrance placed in the path of prosecution; it also means any practice amounting to reprisal upon public prosecutors"*. Likewise, Resolution 1214/2000 on the role of parliaments in fighting corruption, adopted by the Council of

[1] The "White T-shirts Meeting" organised by PSD in Victoria Square, in Bucharest.

[2] Art. 109 in the Constitution and Law no. 115/1999 on ministerial accountability define this procedural obstacle for ministers: they may not be criminally prosecuted, detained, arrested or searched without the request/consent of the Parliament or the country President. In an utterly questionable move, as per Decision no. 665/2007, the Constitutional Court extended these provisions upon former Government members for deeds committed in office.

[3] Art. 72 in the Constitution defines parliamentary immunity, but it is meant to guarantee to a Parliament member total freedom to vote and express political opinions in the chamber, and not in regard to statements made on television or about common law offences.

Europe Parliamentary Assembly, provides that: *"parliamentarians must set an example of incorruptibility, (...) protect the independence of the judiciary (...)"*[1].

As a matter of fact, Recommendation no. 10 in the CVM Report of 13.11.2018 requests that Romania *"Adopt objective criteria for deciding on and motivating lifting of immunity of Members of Parliament to help ensure that immunity is not used to avoid investigation and prosecution of corruption crimes. The government could also consider modifying the law to limit immunity of ministers to time in office"*. This recommendation has never been followed. That is why, at present, if the President of the country has no objection against filing the request in relation to non-parliamentary ministers, such obstacles are commonly raised by parliamentarians against their own colleagues, who have access to their criminal prosecution file, can publicly hear the person in question and deliver a groundless decision. Instead of being limited strictly to procedural matters, the entire debate takes place on the merits, in reference to prosecutors' professional skills and the consistency of the evidence, with frequent references to the prosecuted colleague's innocence. Parliament has thus become a *de facto* extraordinary law court.

The third method of impairing justice, also the most severe, is that of legislative amendments. Efforts were always made here in two directions: on the one hand, weakening the statute of magistrates so as to be more easily controlled (the changes in 2018 turned out to be, in this respect, the most adverse) and, on the other hand, altering the criminal legislation in order to help keeping certain categories of people exempt from liability, criminal investigation or even the enforcement of the sentence (the 2017 changes are of particular importance here).

4.1. Altering the statute of magistrates

At first, it was attempted to lower the wages[2]. It was then attempted, actually twice, to cancel the retirement pension: first in 2010[3] and again in 2019[4]. The dissolution of

[1] As a matter of fact, parliamentarians also set up GOPAC – the Global Organization of Parliamentarians Against Corruption.

[2] Temporarily, this was also achieved, during the 2009-2010 economic and financial crisis, as magistrates' wages were reduced, similarly to all state employees, by 25%.

[3] This intention failed following the Constitutional Court's intervention. As such, as per Decision no. 873/2010, published in the Off. Gazette no. 433 of June 28, 2010, the Court acknowledged that the right to retirement pension granted to magistrates is a consequence of the provisions of art. 124 parag. (3) and art. 132 parag. (1) in the Constitution. The Court stated that the constitutional statute of magistrates – a statute developed by way of an organic law and comprising a series of incompatibilities and interdictions, as well as the responsibilities and risks entailed by the exercise of these professions – requires granting the retirement pension as an element of justice independence, a guarantee of the rule of law, stipulated by art. 1 parag. (3) in the Fundamental Law. For a comparative study on magistrates' rights, see *"Magistrates' benefits in various countries from Europe and other continents (paper drawn up in 2017)"* (*www.forumuljudecatorilor.ro/index.php/archives/3981*).

[4] This intention equally failed, following the intervention of the same Constitutional Court, this time on procedural considerations. As such, as per decision from May 6, 2020, the Court ascertained that the adoption procedure infringed upon the order of notifying the Chambers of Parliament on the amendments to Law no. 303/2004 on the statute of judges and prosecutors.

certain small and ineffective law courts was denied, with overloaded judges in some courts, whereas others were only leisurely busy, but all earning the same wage. The Minister of Justice acquired the duty of taking disciplinary action against magistrates and the range of disciplinary offences widened[1]. Prosecutors' magistrate statute was regularly challenged, the most intense debates taking place during the 2013-2014 works on the amendments to the Constitution, another failed draft, though[2]. Magistrates were imposed not to criticise the other state powers (in 2018)[3]. The President of the country was now limited to a single refusal regarding the proposal of the Minister of Justice to appoint prosecutors on the top tiers of the Public Ministry (in 2018). The Government decided on its own volition to extend the expired mandate of magistrates running the Judicial Inspection (in 2018)[4]. Confusing rules were used to regulate magistrates' substantive liability for judicial errors (2018)[5].

The most inadequate changes were initiated by Minister of Justice Toader on August 23, 2017, on the grounds that there were too young magistrates in the system, justice "was creaking"[6] and magistrates had to be held accountable for their erroneous decisions: 30 years old was initially stated as the minimum age for the entrance of magistrates in the system, followed by a provision to double the number of years for the courses to be attended by justice auditors at the National Institute of Magistracy; additionally, young magistrates were encouraged to leave the system by means of an extremely tempting early retirement plan; furthermore, an idea was promoted to have the Judicial Inspection operate as a department directly subordinated to the minister. The presentation was drawn up in Power Point, without observing any decision-making

[1] Law no. 24/2012, published in the Official Gazette no. 51 of January 23, 2012.

[2] As per Parliament Decision no. 17/2013, the Joint Commission of the Chamber of Deputies and the Senate was set up in order to elaborate legislative proposals intended to revise the Romanian Constitution. In regard to the criticism surrounding the parliamentary debates, see the papers gathered under the coordination of *S. Bocancea*, The Romanian Constitution. Essential opinions to the fundamental law, Institutul European Publishing House, 2013.

[3] *"In the exercise of their duties, judges and prosecutors are bound to refrain from any kind of denigrating gestures or words towards the other state powers – legislative and executive"* (a provision added to the law on the statute of judges and prosecutors as per Law no. 242/2018).

[4] GEO no. 77/2018, published in the Official Gazette no. 767 from September 5, 2018.

[5] As per Opinion no. 924 of October 20, 2018, the Venice Commission suggested that Romania supplement the provisions on magistrates' substantive liability, explicitly stating that, in the absence of bad faith and/or gross negligence, magistrates are not liable for a solution which could be altered by another court, as well as amend the mechanism for recovery action in such a way as to ensure that the action for recovery only takes place once and the magistrate's liability has been established beforehand through the disciplinary procedure – see document CDL-AD(2018)017. Since the Romanian state failed to regulate this institution in line with the 2018 recommendations, also comprised in the Cooperation and Verification Mechanism, pending before the Court of Justice of the European Union is case file C-397/19, the Romanian State – the Ministry of Public Finance, on this subject.

[6] An argument expressed during Minister Toader's first appearance at one of the television stations known for its extreme enmity towards magistrates, the director of which was also a convicted criminal, a place where the minister routinely appeared to make his main intentions public.

transparency rules[1]. Following the firm opposition of more than 3900 magistrates and the negative opinion of SCM from September 28, 2017, the draft law was no longer advanced by the Minister of Justice. However, by way of an unconstitutional procedure, it was submitted to the parliamentarians, who advanced it as their own initiative. In fact, the Chamber of Deputies and the Senate set up a Special Joint Commission on organising, consolidating and securing legislative stability in the field of justice, that ran from September 27, 2017 to September 24, 2019, where the same minister supported the parliamentarians' draft actually originating from his cabinet.

This modus operandi triggered protests among magistrates[2] and civil society[3], but also from European bodies representing judges and prosecutors, respectively. As

[1] "On 23.08.2017, the new Minister of Justice, Mr Tudorel Toader, organised a press conference during which he spoke that he would submit to SCM for endorsement and then to the Government, which, in its turn, would submit to the Parliament, a draft law on amending and supplementing Law no. 303/2004, Law no. 304/2004 and Law no. 317/2004, and mentioned a number of proposed new legislative interventions, significantly different from the proposals in the draft normative published on the institution's website on October 7, 2016. By accessing the link indicated by the MoJ website, one could see a document related to the legislative proposals, in the form of a power-point material comprising 47 items, with 44 proposed amendments, which did not include the exact fragments in the respective laws and the articles/paragraphs that were going to be amended or added" [Braşov Court of Appeal, Administrative and fiscal litigation chamber, sentence no. 171/2017 from November 8, 2017, case file no. 524/64/2017 (*http://www.forumuljudecatorilor.ro/index.php/archives/2996*)].

[2] In October 2017, approximately 4000 Romanian judges and prosecutors, more than half their entire number, collectively issued the *Memorandum to withdraw the draft on amending the "justice laws"*, addressed to the Romanian Government. In November 2017, more than 90% of the general assemblies of law courts and prosecutor's offices in Romania opposed to the draft laws which were the subject of parliamentary debates and adopted in December 2017. At the same time, the silent protests of hundreds of Romanian magistrates, begun in December 18, 2017, in front of law court and prosecutor's office premises, became popular and were mentioned by the press worldwide. In early 2018, more than 2,000 magistrates separated themselves from the participation of professional associations as part of the Joint Special Parliamentary Commission on amending the "justice laws", being members of non-representative associations supported by the majority party in the Parliament, one of their leaders being rewarded with the proposal by PSD to become Minister of Justice, rejected, though, by the President in August 2019. On April 4, 2019, a delegation comprising 30 magistrates, representing the Romanian Judges' Forum Association, the "Movement for the Defence of Prosecutors' Statute" Association and the "Initiative for Justice" Association, protested in Bruxelles against the legislative changes in Romania affecting the rule of law and held meetings with representatives of the European Union.

[3] As of January 31, 2017, Romanian took to streets each evening to protest against Government, which had passed GEO no. 13/2017. On February 5, 2017, 600,000 citizens took to the streets to protest against GEO no. 13/2017. On October 11, 2017, citizens from several cities thanked the magistrates who opposed the changes to the justice laws initiated by Minister Toader, an action designated as "Thank you, 3500". On May 26, 2019, a referendum, initiated by the Romanian President, took place, the result of which was the Romanian people's overwhelming vote in favour of independent justice and the continued fight against corruption.

such, on April 25, 2019, an Opinion was issued to the CCJE Bureau[1] on the request filed by Romanian Judges' Forum Association on the matter of the independence of the judiciary in Romania. It concluded as follows: in regard to judges' substantive liability, the CCJE Bureau is concerned about any decisive role, at the initial stage, of the Ministry of Public Finance, which is an executive body and cannot therefore be appropriate for assessing the existence or causes of any judicial error. Such claims, if any, should be exclusively decided before an independent court providing all the guarantees of art. 6 in the European Convention on Human Rights. In addition to these procedural aspects, the CCJE Bureau recommends, as a very minimum, that the new definition of judicial error be supplemented by clearly stating that judges are not liable unless bad faith or gross negligence on their part has been established through a due procedure. The CCJE Bureau would like to further recommend considering only bad faith – and not gross negligence – as a possible ground for liability for judicial errors. As regards the establishment of a separate prosecutor office structure for the investigation of offences committed by judges, the CCJE Bureau recommends to abandon this idea entirely. The CCJE Bureau concludes that the new obligation imposed on Romanian judges, limiting their freedom of expression, is not necessary, raises many questions, may be subject to arbitrary and abusive interpretations endangering judicial independence, and recommends therefore to be removed. As regards the reported repeated and unprecedented attacks against judges directed by political actors, the CCJE Bureau condemns any statements, comments or remarks in Romania which overstep the boundaries of legitimate criticism and aim at attacking, intimidating or otherwise pressuring judges or demonstrating disrespect towards them, using simplistic, irresponsible or demagogic arguments or otherwise degrading the judicial system or individual judges. As regards the right of judges to stand against any policies or actions affecting their independence, the CCJE Bureau resolutely confirms the legitimate right of judges in Romania and elsewhere to stand against any policies or actions affecting their independence in a climate of mutual respect, and in a way which is consistent with maintaining judicial independence or impartiality. In the same way, on May 16, 2019, in reply to a request filed by the "Movement for defending Prosecutors' Statute in Romania" Association, the College of the Consultative Council of European Prosecutors issued an Opinion on the status of the Romanian judicial system, in the context of the changes brought to the justice laws and the constant attacks against magistrates in Romania. Its content resembles that of the one issued by CCJE.

Nevertheless, the laws were ultimately amended, despite the Constitutional Court being three consecutive times notified by parliamentarians and the country President, each time serious conception irregularities being found. Right after the publication of the amendments to the laws, the Government amended five more times the justice laws via emergency ordinances. Interestingly and unprecedented enough, one of them (GEO no. 7/2019) even stated that a former judge would be allowed to hold a top tier office within the Public Ministry.

[1] CCJE is the Consultative Council of European Judges, an advisory body within the Council of Europe, gathering judges from all 47 member states. Likewise, CCPE is the Consultative Council of European Prosecutors.

A downright attack against magistrates, the view on the profession and justice independence was setting up the *Judicial Crime Investigation Department* (in 2018)[1]. No rationale stood behind the creation of this department, and comparative law studies were totally absent. Moreover, the existence of this special department was reprobated by the European bodies and challenged, on these grounds, by Romanian judges, before the Court of Justice of the European Union, where six related case files are pending[2]. Their subject is the compliance of the Romanian legislation which, with the Constitutional Court's endorsement[3], stipulated this department, despite its existence being criticised via the European Union's mechanisms[4]. The criticism was so

[1] This special department was set up as per Law no. 201/2018, published in the Official Gazette no. 636 of July 20, 2018, and rendered operational as per GEO no. 20/2018, published in the Official Gazette no. 862 of October 10, 2018.

[2] Reference is made to cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19.

[3] In its case-law, the Constitutional Court of Romania made reference to the European Commission's Cooperation and Verification Mechanism, as per Decision no. 1519/2011, Decision no. 2/2012 and Decision no. 104/2018, ruling that: the member of the European Union imposes to the Romanian state *"the obligation to run this mechanism and implement the recommendations set forth within this framework, as per the provisions of art. 148 parag. (4) in the Constitution"*. The Constitutional Court groundlessly revised its practice and, as per Decision no. 33/2018, dismissed the unconstitutionality claims concerning the effects generated by setting up this new prosecutor's office structure upon the jurisdiction of other already existing structures, the regulation of rules pertaining to the statute of prosecutors, the creation of a discriminating regime, not underpinned by objective and rational criteria, the method of regulating the office of Chief Prosecutor of this department or the jurisdiction of the Prosecutor General within the Prosecutor's Office attached to the High Court of Cassation and Justice to settle jurisdiction conflicts occurred among the Public Ministry's structures. Moreover, as per Decision no. 137/2019, the Court entirely revised its previous practice, stating as follows: *"77. Given the lack of constitutional relevance of Decision 2006/928/EC, a European document legally binding for the Romanian state, much less can there be acknowledged the constitutional relevance of the reports issued under CVM. In this case, the issued document also fails to meet the requirement stipulated by art. 148 parag. (2) in the Constitution, according to which only «the provisions of the treaties establishing the European Union, as well as the other legally binding community regulations, shall prevail over any contrary provisions of domestic laws, while complying with the provisions of the accession document». Thus, though being documents adopted pursuant to a decision, the reports comprise recommendation-like provisions and, following the assessment carried out, after listing the conclusions, mention that, «In order to rectify the situation, the following steps are recommended: [...]». Therefore, by means of a recommendation, institutions make their opinions known and suggest actions paths, without imposing any legal obligation to the recommendation recipients"*.

[4] As per *Opinion no. 924 of October 20, 2018*, CDL-AD(2018)017, the Council of Europe's European Commission for Democracy through Law (the Venice Commission) suggested that the idea to establish a special department for investigating magistrates should be reconsidered; as an alternative, it suggested the use of specialized prosecutors and underlined the critical requirement that such a system designed to fight judicial corruption should have magistrates' consent – item 90. The *Ad hoc Report on Romania*, adopted by the Group of States against Corruption (GRECO) during the 79th Plenary Reunion in Strasbourg, from March 19-23, 2018, Greco-AdHocRep(2018)2, March 23, 2018, argued that the said department appeared as "an anomaly in the current institutional set-up, in particular

strong that it triggered a debate upon the situation in Romania within the European Parliament, which expressed its "deep concern at the redrafted legislation relating to the Romanian judicial and criminal legislation, regarding specifically its potential to structurally undermine the independence of the judicial system and the capacity to fight corruption effectively in Romania, as well as to weaken the rule of law"[1].

Mention should be made that, as per GEO no. 7/2019, the special department would not have been be under the authority of the Prosecutor General of the Prosecutor's Offices attached to HCCJ. Right after the special department became operational as such, several appeals in case files involving magistrates and politicians prosecuted for corruption were withdrawn and, before long, the prosecutor having this idea was "rewarded" by being appointed at the Constitutional Court by the Parliament, at the proposal of PSD, the majority party. One year into its existence, the statistics on the special department display its ineffectiveness: two prosecutions, one of which ended in acquittal, and more than 400 cases closed.

A draft by the Ministry of Justice, from this year, stipulates the dissolution of this department and recommends that it be replaced by another mechanism: the criminal trial of a judge or prosecutor should only be started with the prior consent of the Prosecutor General within the Prosecutor's Office attached to the High Court of Cassation and Justice, and the prosecution of judges and prosecutors should be approved by the Department for Judges or, as the case may be, the Department for Prosecutors within the Superior Council of Magistracy. The proposals are unacceptable: the Prosecutor General acquires total immunity, cannot be investigated, whereas the judges' department of SCM becomes a body that reviews prosecutors' activity, which contradicts the principle of separating judicial careers, added to the legislation in 2018.

The harshest blow to the prosecutors' independence was the alliance between the Minister of Justice and the Constitutional Court intended to dismiss the Chief Prosecutor of the National Anticorruption Directorate. As such, in 2018, the Minister of Justice drew up an assessment report on the NAD chief's activity, although no legal standard entitled them to do so, accusing it of managerial flaws and castigating statements concerning the Government. The minister proposed that the country President dismiss the NAD

because (i) there have been no particular data or assessments demonstrating the existence of structural problems in the judiciary which would warrant such an initiative, (ii) of the way its management is appointed, and (iii) this section would have no investigators and adequate investigative tools at its disposal, unlike other specialist prosecution bodies". The *CVM Report of Nov. 13, 2018* ascertained that "The establishment of the new section for investigation of offences committed by magistrates, in the amended Justice laws, creates a specific concern with regard to the fight against corruption, as a new structure could be more vulnerable in terms of independence than has been the case so far with the NAD, as it could be used as an additional instrument to intimidate and put pressure on magistrates. In addition, as a generalist department dealing with all crimes by magistrates, it will also lack expertise in terms of investigating specific corruption crimes, and the impact would be accentuated if investigations of all individuals linked to a case involving a magistrate were also removed from the jurisdiction of the NAD".

[1] The Resolution of the European Parliament of November 13, 2018 on the rule of law in Romania, 2018/2844 (RSP).

chief, despite SCM's adverse opinion and the reaction of more than 1700 magistrates[1]. The President refused, invoking that the grounds for dismissal are not among those provided in Law no. 303/2004. The Government challenged the President's decision invoking a constitutional conflict among the authorities, which gave the Constitutional Court the opportunity to order the President, as per Decision no. 358/30.05.2018, to dismiss the NAD chief. The Constitutional Court decision is evocative to a model of approaching the relationship between the Minister of Justice and prosecutors that has been abandoned in Europe for quite some time.

This aspect has been recently ascertained by the European Court of Human Rights[2] which, in this case, finds two culpabilities: one belonging to the Minister of Justice, who failed to present evidence on the flawed management displayed by the prosecutor subject to proposed dismissal and failed to observe that prosecutor's right to freedom of speech, and one belonging to the Constitutional Court, which hindered that prosecutor's right to challenge their dismissal in court, given that the Court deemed as constitutional the country president's dismissal act, which exempted the latter from ordinary judicial review.

The decision made history and marked a turning point throughout the relationship between criminal justice and the political establishment. Although, according to the Romanian Constitution, prosecutors are under the authority of the Minister of Justice[3], that is not to say that prosecutors are not allowed to take part in public debates or that their decisions or careers can be dictated by the Minister of Justice. For the very first time, the European Court set forth in the case of prosecutors the same standards applicable to judges in regard to the freedom of speech, also showing that the European trend is to grant increased autonomy levels to prosecutors, expressly highlighting that their independence is vital for the actual independence of justice. Surprising in this case was not the Minister of Justice violating certain elementary rights, given that, as a political figure, he had already set the stage for a seemingly legal assessment, via a warlike discourse in relation to the judiciary as early as his appointment in office, but the way in which the Constitutional Court chose to approach this matter.

As such, we have been witnessing for several years a derailment of the Constitutional Court from its traditional role of negative legislator. On the one hand, in multiple decisions, the Court gave birth to a right, guiding the Parliament on how to adjust normatives or magistrates on how to construe the law.

On the other hand, a new duty within the law it introduced in 2003 allows public authorities to resort to the Court in order to settle political disputes. In this case, the Court deprived the prosecutor of a right and forced the President of the state to adopt a particular conduct. Such aspects highlight issues of the relationship between the political establishment and the Constitutional Court and the need to reform the

[1] A list of the signatories is available at *www.forumuljudecatorilor.ro/index.php/archives/3438*.

[2] The case *Kövesi vs. Romania,* petition no. 3594/19, the decision from May 5, 2020.

[3] Art. 132 parag. (1) in the Romanian Constitution: *"Prosecutors carry out their activity in accordance with the principles of legality, impartiality, and hierarchical control under the authority of the Minister of Justice"*.

constitutional litigation court[1]: the Court's judges should be appointed in office using merit-based criteria, without having been party members beforehand and without holding any political office at the end of their mandate[2]. Additionally, although the Court is the only one entitled to set forth its jurisdiction, it must be prevented from claiming strictly political powers. At last, efforts should be made to find a way to revise Constitutional Court decisions, otherwise ECHR decisions such the one analysed above will have no effect[3]. A model could be the 1995 Constitutional Jurisdiction Code from the Republic of Moldova, which allows the revision of Constitutional Court decisions[4].

4.2. Amendments to criminal and criminal executional laws

A much stronger method of control upon magistrates' activity is preventing them from investigating criminal cases related to certain individuals or offences. As such, in recent years, there have been several attempts to alter the "public servant" definition, to lower sentences for corruption offences, to eliminate abuse of office or amend the structural content of the *conflict of interests* offence within the Penal Code, and to shorten statutes of limitation. Also, there were initiatives to reduce the range of evidentiary means employed in criminal trial proceedings, to prevent remand custody in the case of corruption offences or even to introduce new review cases with retroactive effects.

Additionally, there have been attempts and proposals to reduce the minimum sentence fraction required for a convict to be able to appear before the prison's

[1] The "Initiative for a European Democratic Culture" Association proposes a debate on this topic – see the statement entitled "The CCR reform is critical for CCR to regain its credibility", of din May 7, 2020. Evidently, one must restart discussions on several solutions already mentioned in the "Report of Presidential Commission for Reviewing the Political and Constitutional Regime in Romania – *With a view to strengthening the rule of law*", drawn up in 2009 by several constitutional law experts.

[2] Toader Tudorel was a Constitutional Court member during the October 6, 2006 – July 2016 interval. On February 23, 2018, he was appointed Minister of Justice. On February 27, 2018, he supported the Grindeanu Cabinet's standpoint before his former colleagues at the Constitutional Court, requesting the Court to mention whether there had been a conflict between NAD and the Government during the criminal investigations conducted in relation to how GEO no. 13/2017 was adopted.

[3] Despite de evidence, in a press release from May 6, 2020, the Constitutional Court argued that: "Although the general public's comments promoted the ideas that the Constitutional Court has infringed upon Mrs Kövesi's right to a fair trial and Constitutional Court Decision no. 358/2018 should be invalidated, it was ascertained that ECHR did not review the legal rationale and the solution delivered by the Constitutional Court. As a matter of fact, it also lacked the jurisdiction required to do so".

[4] "Art. 72. Revision of a decision and an opinion: *(1) The revision of a decision and an opinion shall only be performed at the Constitutional Court initiative, by way of a decision adopted with a majority vote of its judges, provided that: a) new circumstances have emerged, unknown on the decision delivery and the opinion issuance date, and such circumstances are able to fundamentally change the said decision and opinion; b) changes are brought to the provisions in the Constitution, the law and other normatives, provisions that underpinned the delivery of said decision and the issuance of said opinion. (2) The revision of a decision and an opinion shall be performed in compliance with the constitutional jurisdiction procedure*".

Release on Probation Commission. Over a period of time, a certain legal provisions was in force, allowing a sentence reduction for those writing scientific works, a phrase that never received a clear definition, as was a particular legal provision allowing a sentence reduction for those detained in unsuitable conditions. Other drafts intended to grant amnesty for certain offences or pardons for certain sentences. At last, a draft issued this year – totally unrelated to the social crisis generated by the spread of Covid-19 medical conditions – proposes the enforcement of one's sentence at home[1].

All these intentions are redundant, at various time intervals. One way or another, legislative proposals or initiatives on criminal laws include regulations intended to hamper efforts to hold somebody criminally accountable or even facilitate exemption from criminal liability or from the enforcement of sentences, for persons at odds with the law, but holding significant public offices. Their advancement is underpinned by hypocritical grounds: the need to adapt the legislation to particular Constitutional Court decisions, the existence of a "parallel state", the investigation of criminal case files with the intelligence services' support, blackmailing magistrates with information from the S.I.P.A. (Independent Protection and Anti-Corruption Service) archive, the need for a "time zero" in the fight against corruption[2].

An evocative moment in Romania's recent history remains the adoption of GEO no. 13/2017 – *"like thieves at night"*: on the night of January 31 to February 1, 2017, two documents were passed by the Government: GEO no. 13/2017 on the decriminalisation of offences, such as *abuse of office* and *dereliction of duty*, was approved and was set to come into force on February 10, and a draft law on acquittal was submitted to Parliament[3]. GEO no. 13 was repealed four days later, as per GEO 14/2017, following the huge street protests organised in Bucharest and throughout the country, and even abroad, the latter normative being the first ever to acknowledge, as the reason for its adoption, civil society's will[4]. The draft law on

[1] The draft law voted by the Senate is similar to older ones that were declared unconstitutional as per Constitutional Court Decisions no. 453/2018, no. 561/2018 and no. 22/2019.

[2] The statement made on television by the former president, Traian Băsescu, on May 4, 2017: *"Romania needs a time zero and this can only be obtained via a large-scale pardon, but not for repeat offenders".*

[3] For a detailed presentation, see *C. Danileț*, One elephant, two elephants *or* The Emergency Ordinance no. 13/2017 saga (*http://revistasinteza.ro*).

[4] *"Whereas, from the publication in the Official Gazette of Romania, Part I, no. 92 of February 1, 2017 of Government Emergency Ordinance no. 13/2017 on amending and supplementing Law no. 286/2009 on the Penal Code and of Law no. 135/2010 on the Criminal Procedure Code, to date, there have been numerous reactions, not only in regard to the substance of the normative, but also in regard to how it was adopted; whereas, these reactions come from both judicial system institutions – the Superior Council of Magistracy, the High Court of Cassation and Justice, the Public Ministry, and other state authorities – the Romanian President, the Ombudsman; in light of the fact that the said normative triggered a real interest among the Romanian citizens, who chose to get actively involved not only by taking part in the public debate conducted prior to its adoption, but also by supporting their ideas as part of public manifestations present throughout the country and in some cities abroad; taking note that the strong reaction of the Romanian people particularly regarded the insufficient debate on the solutions concerning the entire community; requesting, accordingly, a broader debate of said solutions in Parliament; considering that, at*

amnesty and acquittal was rejected by the decision-making chamber no sooner than August 28, 2019.

The swiftness and depth of the legislative changes over the past three years, the lack of actual consultations with the parties concerned and the stupefying effects upon the state's criminal policy invited criticism from European bodies. We shall only mention one example: the Venice Commission argued that *"Some of the proposed amendments are in conflict with the international obligations of the country, especially regarding the fight against corruption, or go far beyond the requirements resulting from the case law of the Constitutional Court or the country's international obligations. The Commission is concerned that, taken separately, but especially in view of their cumulative effect, many amendments will seriously impair the effectiveness of the Romanian criminal justice system in the fight against various forms of crime"*[1]. We do have to mention one detail: one of the Venice Commission members adopting this viewpoint was actually Minister of Justice Toader, who endorsed the justice anti-reform and the changes brought to the criminal laws. He ignored two opinions of the Commission he was a member of, stated that compliance with the GRECO was not needed, being a mere recommendation, totally ignored the CCJE and CCPE opinions and stated, after the ECHR decision in the Kovesi case, that he only proposed the dismissal, whereas the President made the decision.

5. Conclusions

The justice system used to be dominated by fear in the past and, hence, easily controllable. The system nowadays comprises brave, resounding magistrates. Interventions or pressures upon them are, therefore, out of the question[2]. As a result,

present, against the background of tensions caused by the adoption of Government Emergency Ordinance no. 13/2017, there is a genuine society fracture hazard, within the general context of discord, with outcomes throughout society's general balance, and acknowledging and observing, in equal measures, the exercise of democracy in all of its forms; realising that current tensions can be removed via the express and prompt repealing of those laws that triggered the above-mentioned massive reactions; (....)".

[1] *Opinion no. 930/2018 on the changes brought to the Penal and the Criminal Procedure Codes*, adopted by the Venice Commission during its 116th Plenary Session (Venice, October 19-20, 2018), CDL-AD(2018)021.

[2] The number of magistrates sentenced for corruption is constantly decreasing. Nevertheless, we cannot fail to mention the largest bribe ever requested by a Romanian judge: According to NAD, *in February 2012, judge Veronica Cârstoiu from Bucharest Court of Appeal received, by means of lawyer Adriana Dascălu, approximately EUR 630,000 from Dinel Staicu, in order to deliver, together with other two members of the judicial panel, a solution to admit the motion to dismiss filed by Dinel Staicu, in the case file in which he had been sentenced to seven years in prison for defrauding the International Bank of Religions. The money was received through the mediation of Staicu Marian — Dinel Staicu's brother, and defendant Popescu Carmen Ioana. For the said purpose, prior to the delivery of the decision, Dascălu Adriana claimed from Staicu Dinel the amount of EUR 2,500,000, gradually decreased afterwards to EUR 2,000,000 and EUR 1,500,000, respectively. Out of the claimed money, Dascălu Adriana received EUR 1,200,000 from Staicu Marian, who handled, together with defendant Popescu Carmen Ioana, the procurement of the money.* Judge Veronica Cârstoiu was irrevocably sentenced to 7 years in prison. Here is

individuals at odds with the law are left with a single solution: legislative amendments. When the pandemic mankind is currently facing imposes procedural changes designed to prevent the spread of Covid-19 disease, also in contact with the judicial system, Romania will have an additional concern: the monitoring of drafts and initiatives requested or voted within the Government or the Parliament. The words of Rudolf von Ihering, *"The struggle for law is on a daily basis"*, are right on the money.

Happily, there is a hugely attentive civil society: associations of magistrates, civic groups and citizens' associations or foundations, and the press are still free. But beyond all these, foreign pressure remains quite significant: 13 years after accession, Romania continues to be monitored by the European Commission, although this mechanism had been conceived strictly for the early years. Romania's accession may have just taken place a bit sooner than we were prepared for, but it is clear that, without this foreign pressure, much of the progress would have been absent.

Justice must be independent. This is not a negotiable value. And this phrase covers not only judges, but prosecutors, as well. Democracy entails the rule of law, and this means abiding by the law and sanctioning those who infringe upon it. This is magistrates' noble mission, regardless of the law area they specialise in. The general public obviously is extremely interested in criminal justice. And this concerns primarily those holding important offices but disobeying their loyalty oath to their institutions and rules. In their case, the issue no longer is *whether* they are caught, but *when* they are caught.

another case we will mention: in May 2020, a judicial police officer was arrested for allegedly asking for a bribe amounting to EUR 1.1 million, promising to "fix" certain evidence which would invalidate the judicial assessment that revealed a loss of EUR 3 million in the case of a director of a group of companies, investigated in his turn by the prosecutors of the Criminal Prosecution and Forensics Department within the Prosecutor's Office attached to the High Court of Cassation and Justice.

People protesting, for the 13th consecutive day, against Grindeanu's Cabinet and PSD leadership, forming an immense version of the Romanian flag in Victoria Square, February 12, 2017.
Inquam Photos / Liviu Florin Albei

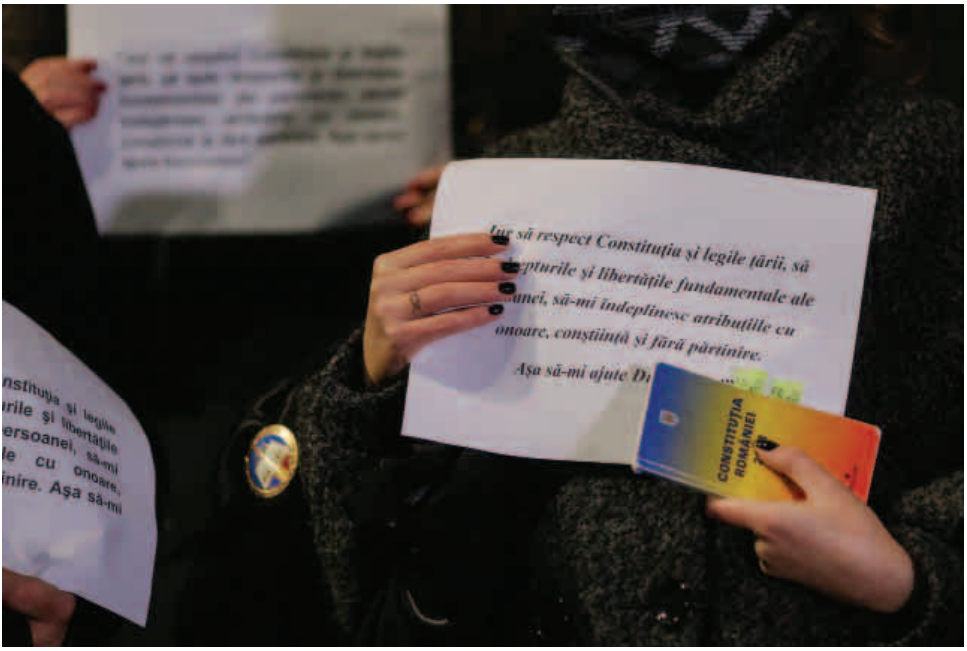
The visit of the President of the European Union's Court of Justice, Koen Lenaerst, at the Romanian Constitutional Court's office, in Bucharest, Monday, November 6, 2017.
Inquam Photos / George Călin

Bucharest Court of Appeal's magistrates protesting against the changes brought to the justice laws and the Penal Code, Monday, December 18, 2017.
Inquam Photos / Octav Ganea

Approximately 50 magistrates protesting at the main entrance of Timișoara Local Court and the Prosecutor's Office attached to Timișoara Local Court, against the changes parliamentarians wanted to bring to the justice laws, Timișoara, Timiș, Monday, December 18, 2017.
Inquam Photos / Cornel Putan

Bucharest Court of Appeal's magistrates protesting against the changes brought to the justice laws and the Penal Code, Monday, December 18, 2017.
Inquam Photos / Octav Ganea

Inquam Photos / Virgil Simonescu



Inquam Photos / Octav Ganea

Inquam Photos / Octav Ganea

Bucharest Court of Appeal's magistrates protesting against the changes brought to the justice laws and the Penal Code – statements by Dragoș Călin, Monday, December 18, 2017.
Inquam Photos / Octav Ganea

Dozens of people participating in a silent protest, in front of Victoria Palace, against the changes brought to the justice laws, the Penal Code and the Criminal Procedure Code, Sunday, January 21, 2018. The protest is part of a wide international movement known as "Stolen Justice".
Inquam Photos / Alberto Groșescu

Courtroom inside the High Court of Cassation and Justice in Bucharest.
Inquam Photos / Octav Ganea

Violent incidents during the protest against the Romanian Constitutional Court's Decision, according to which Laura Codruța Kovesi must be removed from the position of Chief Prosecutor of the NAD, Wednesday, May 30, 2018.
Inquam Photos / Alberto Groșescu

Press conference held by the General Prosecutor Augustin Lazăr at the
General Prosecutor's Office, Monday, August 27, 2018.
Inquam Photos / Adriana Neagoe

Magistrates' representatives from all over the country protesting in front of the Court of Appeal,
against the way Justice is managed, Bucharest, Sunday, September 16, 2018.
Inquam Photos / Liviu Florin Albei

Cristi Danileț protesting in front of the Court of Appeal, against the way Justice is managed, Sunday, September 16, 2018.
Inquam Photos / Liviu Florin Albei

Magistrates' representatives from all over the country protesting in front of the Court of Appeal, against the way Justice is managed, Bucharest, Sunday, September 16, 2018.
Inquam Photos / Liviu Florin Albei

Tudorel Toader and Augustin Lazăr participating in the Superior Council of Magistracy's session, Monday, November 19, 2018.
Inquam Photos / George Călin

Timișoara magistrates' protest against the changes brought to the justice laws by GEO no. 7, in front of Timișoara Dicasterial Palace, Friday, February 22, 2019.
Inquam Photos / Virgil Simonescu

Bucharest magistrates' protest against the changes brought to the justice laws by GEO no. 7, on the steps of Bucharest Court of Appeal, Friday, February 22, 2019.
Inquam Photos / Octav Ganea

Bucharest magistrates' protest against the changes brought to the justice laws by GEO no. 7, on the steps of Bucharest Court of Appeal, Friday, February 22, 2019.
Inquam Photos / Octav Ganea

Sibiu magistrates protesting against the recent changes brought to the justice laws, Friday, March 8, 2019.
Inquam Photos / Ovidiu Dumitru Matiu

Bogdan Pîrlog giving press statements after the meeting with President Klaus Iohannis. Wednesday, March 27, 2019.
Inquam Photos / Octav Ganea

The Evolution of the Superior Council of Magistracy. Between Efficiency and Indifference

Dragoş Călin*

Motto:
"As long as weapons float about,
Though I don't care for violence,
I doubt they're able to wipe out
As much as does... indifference!"
Constantin Monea, Anthology of Romanian epigrammatists

1. Composition. Electoral promises

The current Superior Council of Magistracy was elected in the fall of 2016, with mandates that were set to expire at the end of 2022. Following several postponements, the Senate designated the two members of the Superior Council of Magistracy representing civil society no sooner than early September 2017, before that date the composition remaining incomplete.

The High Court of Cassation and Justice is represented by judges Mariana Ghena and Simona Camelia Marcu, who also held the office of president of the Superior Council of Magistracy.

In her January 2018 draft application for SCM presidency[1] (in which she also carried over some of the points argued in her 2016 application for the SCM member office), **Simona Camelia Marcu** iterated that her mandate would focus on *"increasing the levels of public trust in the judicial system. The Council shall continue the employ the legal means regulated by Law no. 303/2004 and Law no. 317/2004 in order to guarantee the independence of justice,* ***being desirable to have swifter reactions against any attacks against or interferences with the judicial process, the activity of law courts and***

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[1] For more details, see the webpage (*https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKEwj1_IThr8TcAhVJOJoKHQgIB8sQFjAEegQIBBAC&url=https%3A%2F%2Fwww.csm1909.ro%2FDownload.aspx%3Fguid%3Ddaa3cbc5-a04a-4baa-aa60-94053431e88f%257CInfoCSM&usg=AOvVaw1p6by8lS1jeePhmEJ81g5r*), last accessed on April 16, 2020.

prosecutor's offices or that of the Council, but also to deter such actions. Swift reaction is essential, as it demonstrates to magistrates and the general public firmness in defending the independence of justice, whereas letting too much time go by weakens both interest in the causal act and any positive effects of the Council's intervention". In her 2016 draft application for SCM member office, **Mariana Ghena** intended, among others, to "restore judges' professional standing, which must represent a benchmark in professionalism and morals, set up a mechanism of dialogue among the powers in the state, enhance transparency in the activity of the Judicial Inspection".

The Court of Appeal judges are represented within the Superior Council of Magistracy by Lia Savonea (Bucharest Court of Appeal), Nicoleta Țînț (Brașov Court of Appeal) and Andrea Chiș (Cluj Court of Appeal).

In her draft application[1] **Lia Savonea** iterated the wish to change SCM's image, which was "at the end of a recurrent historic failure". She mentioned the fact that "the inability to manage disagreements, boundless egos, individualities, public statements contrary to those owned in plenum or within the department, a climate of suspicion and mistrust, one-man shows, were in stark contrast with sobriety, the mature approach, the responsibility normally expected from SCM members. This state carries a risk of altering hopes for change and, ultimately, of fading SCM legitimacy. Whether intentionally or not, perhaps unconsciously at times, the cardinal value of peer-to-peer respect was lowered to a minimal threshold. There was an internal hypocritical campaign for *respect*, against the backdrop of actions rather revealing disdain. *Meagre rhetoric, snide comments* and *loud remarks* flourished. The truth was perverted into rating figures. Slowly, competence lost motivation as it was found that success does not always require effort and struggle may not necessarily led to victory. Outside, litigants and representatives of other judicial professions speak, all too often not to be considered at least a serious warning, about *disregard*, about the *"ivory tower"* syndrome.

Nicoleta Țînț, SCM's current president, iterated[2], among others, "guaranteeing real independence for each judge, *defending their professional reputation and protecting society's trust in judges (**swift and firm reactions, as well as raising public awareness about them under conditions that can secure visibility levels comparable to those of denigrating actions would be able not only to protect society's trust in the judicial system, but also to create and maintain each judge's belief that they enjoy genuine, concrete protection from SCM**)*", plus the need for the Superior Council of Magistracy to initiate *ex officio* actions intended to defend the independence of judges and, implicitly, of the judicial system.

Andrea Chiș set her sights, by means of the draft application, on *enhanced efficiency in ex officio notifications related to pressures exerted upon judges in certain case files, as well as in settling within optimum deadlines, referrals on the defence of judges' independence or*

[1] (*https://www.universuljuridic.ro/programul-jud-lia-savonea-putem-schimba-mai-bine-sistemul-judiciar/*), last accessed on April 16, 2020.

[2] (*https://www.universuljuridic.ro/alegeri-csm-2016-program-judecator-nicoleta-margareta-tint-pentru-mai-multa-implicare-pentru-echilibru-responsabilitate-buna-credinta-si-onestitate-sistemul-judiciar/*), last accessed on April 16, 2020.

professional reputation ("I believe the future council should: be notified *ex officio*, as the case may be, in relation to interferences in judges' professional activity; settle within optimum deadlines referrals on the defence of the independence of the judiciary or judges' professional reputation")[1].

County court judges are represented within the Superior Council of Magistracy by Gabriela Baltag (Neamț County Court) and Evelina Oprina (Ilfov County Court).

Gabriela Baltag advocated[2], among others, enhancing judges' statute, a mandatory requirement for strengthening judiciary power by way of adding the public dignity element, acknowledged to the other powers, but also to persons holding leading positions within supreme courts and top tier prosecutor's offices, strengthening the statute of prosecutors by way of excluding the authority of the Minister of Justice and hierarchical subordination – otherwise risking being ousted from the body of magistrates due to their lack of genuine independence, which can endanger judges' independence.

In her draft application[3], **Evelina Oprina** aimed to help the Superior Council of Magistracy, as a disciplinary law court, have a balanced, objective and cautionary role, and to secure for the judicial system a guarantee of judges' protection against possible attempts of exerting pressure or abuse, as well as instil into litigants and the general public the idea that judges make up an elite structure which neither tolerates, nor accepts conducts that disregard the rigor, the exactingness and the responsibility of the mission entrusted to it.

Local court judges are represented within the Superior Council of Magistracy by Mihai Bălan (Timișoara Local Court) and Bogdan Mateescu (Râmnicu Vâlcea Local Court).

Mihai Bălan advocated[4], among others, defining and defending the statute of magistrates against any interference with their activity. **Bogdan Mateescu** aimed, in his draft application[5], to streamline the procedure of defending the independence of the judiciary either on the whole or on a case-by-case basis ("each SCM member has the duty ***to publicly and promptly react in relation to any attitude likely to hamper the independence of justice***; a member of the Council cannot remain passive in the face of attacks, *when there is a visible lack of effectiveness in the system independence*

[1] (*https://www.avocatura.com/stire/15552/proiect-de-candidat-pentru-csm-andrea-chis-adoptarea-unui-cod-etic-liber-si-reve.html*), last accessed on April 16, 2020.

[2] (*https://www.universuljuridic.ro/alegeri-csm-2016-judecator-gabriela-baltag-principalele-obiective-urmarite-cazul-alegerii-ca-membru-csm/*), last accessed on April 16, 2020.

[3] (*https://www.universuljuridic.ro/alegeri-csm-2016-program-judecator-evelina-mirela-oprina-independenta-este-inainte-de-toate-o-problema-de-caracter/*), last accessed on April 16, 2020. The draft concludes as follows: "I shall, therefore, be a representative of all judges, fair, unbiased, brave, accountable for my actions and involved".

[4] (*https://www.universuljuridic.ro/alegeri-csm-2016-program-judecator-mihai-andrei-balan-principalele-obiective-ce-urmeaza-fi-urmarite-cazul-alegerii-ca-membru-csm/*), last accessed on April 16, 2020.

[5] (*https://www.universuljuridic.ro/alegeri-csm-2016-program-judecator-judecator-mihai-bogdan-mateescu-principalele-obiective-asumate-in-cazul-alegerii-ca-membru-al-csm/*), last accessed on April 16, 2020.

defence procedure, a procedure additionally entailing a review performed by the Judicial Inspection, although sometimes, particularly in the case of political statements, matters are clear and the applicable procedure only delays a predictable position").

Prosecutors are represented within the Superior Council of Magistracy by Codruț Olaru (PICCJ), Cristian Ban (the Prosecutor's Office attached to Bucharest Court of Appeal) – for prosecutor's offices attached to courts of appeal, Florin Deac (the Prosecutor's Office attached to Maramureș County Court) and Nicolae Solomon (the Prosecutor's Office attached to Bucharest County Court) – for prosecutor's offices attached to county courts, and Tatiana Toader (the Prosecutor's Office attached to Bucharest District 2 Local Court), respectively – for prosecutor's offices attached to local courts.

In his draft application, **Codruț Olaru** aimed to strengthen the prosecutors' magistrate statute ("in the sense that the independence of judge magistrates must also be acknowledged to prosecuting magistrates")[1]. **Cristian Ban** focused himself on holding periodic meetings with the prosecutors' associations and civil society or on consulting with prosecutors, within reasonable deadlines, in relation to draft normatives proposed by SCM. **Florin Deac** argued for a ***prompt, efficient and genuine defence of magistrates' independence and image***. **Nicolae Andrei Solomon** aimed, in his draft application[2], for a ***quick and suitable response*** in cases of interference of the legislative or the executive with the judicial authority's area of work (when the admissible boundaries of political discourse and freedom of expression are exceeded, the principle of the separation of powers in a state and the independence of the judicial system in its entirety are affected), the delivery of a response in cases where media is used to exert pressure upon magistrates that settle cases with real impact, involvement in public debates concerning the field of justice, particularly those related to amendments of legal provisions with vast consequences upon the justice serving activity or the implementation or policies and best practices intended to foster integrity and prevent corruption within the judicial system. **Tatiana Toader** argued for the accountability of SCM's members in the form of each member presenting an annual activity report, whereas SCM would take part, represented by a communication expert, in public debates on the state of justice.

2. The role of the Superior Council of Magistracy in defending the pool of magistrates against actions likely to be detrimental to their independence, impartiality or professional reputation. Analysis of the activity carried out from 2017 to 2019

In its fundamental capacity of guarantor of the independence of the judiciary, as per art. 133 parag. (1) in the Romanian Constitution, the Superior Council of Magistracy

[1] (*https://www.juridice.ro/462364/consolidarea-statutului-procurorului-1.html* and *https://www.juridice.ro/463732/consolidarea-statutului-procurorului-2.html*), last accessed on April 16, 2020.

[2] (*https://www.universuljuridic.ro/alegeri-csm-2016-program-procuror-nicolae-andrei-solomon-principalele-obiective-ce-vor-fi-avute-vedere-exercitarea-mandatului-de-membru-al-csm/*), last accessed on April 16, 2020.

(SCM) must defend the pool of magistrates against actions that are harmful to the independence, impartiality or professional reputation of judges and prosecutors[1].

In the Commission's Report to the European Parliament and the Council, from January 2017, on the progress made by Romania under the Cooperation and Verification Mechanism, SCM was recommended to continue to submit public reports on the measures it took in order to defend the independence of justice, as well as magistrates' reputation, independence and impartiality.

According to the data provided by the Annual Reports of the Superior Council of Magistracy, for 2017[2], the Directorate for the judicial inspection of judges listed 7 notifications submitted by the Superior Council of Magistracy, on the subject of defending the independence and impartiality of the judicial system, whereas the Directorate for the judicial inspection of prosecutors listed 12 notifications on the subject of defending the independence and impartiality of the judicial system. Moreover, the Directorate for the judicial inspection of judges listed 13 notifications on the subject of defending the professional reputation of judges, whereas the Directorate for the judicial inspection of prosecutors listed 11 motions filed by prosecutors on the defence of their professional reputation, independence and impartiality.

From January 1 to December 5, 2018, the Directorate for the judicial inspection of judges listed 22 reports on the subject of the judicial system's independence and impartiality, 16 of them concerning *"petitions filed by magistrates with disciplinary actions on record, currently suspended from office, with a similar subject".* During the same reference period, the Directorate for the judicial inspection of prosecutors listed 4 notifications submitted by the Superior Council of Magistracy, on the subject of the judicial system's independence and impartiality. The Directorate for the judicial inspection of judges listed 36 notifications submitted by the Superior Council of Magistracy, on the subject of defending professional reputation. Out of these petitions, *"18 were filed by magistrates with disciplinary actions on record, currently suspended from office and have a similar subject"*. The Directorate for the judicial inspection of prosecutors listed 19 petitions filed by prosecutors on the defence of their professional reputation, independence and impartiality.

In 2017, SCM admitted 10 motions to defend the professional reputation of magistrates, on an individual basis, or the judicial system's independence (7 motions plus one notification *ex officio*, of the Department for prosecutors, on the subject of reputation, plus 2 motions on the justice system independence, one of them also doubled by the SCM President's *ex officio* notification).

[1] For a detailed look, see The Romanian Judges' Forum – White paper: Analysis of the activity of the Superior Council of Magistracy on protecting the pool of magistrates against actions likely to be detrimental to their independence, impartiality or professional reputation (for the January 2017 – April 2019 period), a study available on the web page (*http://www.forumuljudecatorilor.ro/wp-content/uploads/Analiza-activitatii-CSM-in-privinta-apararii-corpului-magistratilor.pdf*), last accessed on April 16, 2020.

[2] Published on the web page (*http://old.csm1909.ro/csm/index.php?cmd=24*), last accessed on April 16, 2020.

In 2018, SCM admitted 10 motions to defend the professional reputation of magistrates, on an individual basis, or the judicial system's independence (8 motions on reputation and 2 motions on the justice system independence, one of them owned by more than 1500 magistrates).

In 2019, SCM admitted 19 motions to defend the professional reputation of magistrates, on an individual basis, or the judicial system's independence (the notable ones are an *ex officio* notification by the SCM President concerning the reputation of a HCCJ judge designated as the SCM President's "pawn", and a motion concerning the justice system independence, owned by more than 700 de magistrates).

In total, over the course of three years of mandate, SCM adopted less decisions of this nature than the previous SCM establishment adopted in 2016 alone (40).

In regard to the **time required to settle** these petitions, the average duration of under two months from filing, common from 2015 to 2016, was frequently exceeded from 2017 to 2019.

The record is held by SCM Plenum Decisions no. 27, no. 28, no. 30 and no. 31/11.01.2018, according to which the dismissal of the motions to defend professional reputation was ruled ***approximately one year after the filing date*** (petitioner Camelia Bogdan).

Plenum Decision no. 606/24.05.2018 was adopted ***approximately ten months after the filing date*** of the petition to defend professional reputation (petitioner Viorica Costiniu).

Plenum Decisions no. 1032 and no. 1033/01.11.2018, which ruled the dismissal of motions to defend professional reputation, ***were delivered approximately 8 months after the filing date*** (petitioners Giluela Deaconu and Lucian Gabriel Onea).

Plenum Decision no. 1040/13.11.2018 ruled to admit the motion to defend professional independence, ***approximately 6 months after the filing date*** (petitioner Elena Iordache).

Plenum Decision no. 366/27.03.2018 ruled to dismiss the motion to defend the independence of the judicial system on the whole, ***approximately 4 months after the filing date*** (petitioner Laura Codruța Kövesi, Chief Prosecutor, the National Anticorruption Directorate). Plenum Decisions no. 500/25.04.2017 and no. 560/09.05.2017 were issued ***approximately three-four months after*** the libellous deed (petitioner the National Anticorruption Directorate).

In regard to the **deadline for publishing substantiations of decisions** delivered in the field, the 30-day deadline was generally observed, but there were also notable exceptions, with no plausible explanations for the delays (***Plenum Decision no. 433/19.04.2018 took more than 170 days to be published; Plenum Decision no. 27/11.01.2018 and Plenum Decision no. 30/11.01.2018 took more than 160 days to be published; Plenum Decision no. 779/04.07.2018 took more than 100 days to be published; Plenum Decision no. 1031/01.11.2018 required more than 70 days to be published; Decision of the Department for Judges no. 14/10.01.2019 and Plenum Decisions no. 1040/13.11.2018,***

no. 1032/01.11.2018, no. 1033/01.11.2018, no. 955/11.10.2018, no. 434/19.04.2018, no. 32/11.01.2018, no. 31/11.01.2018 and no. 26/11.01.2018 required more than 60 days to be published).

In regard to the **number of votes expressed by the SCM members**, 9 decisions of the SCM Plenum, 3 decisions of the Department for Judges and 6 decisions of the Department for Prosecutors were ruled *unanimously* (most of them upon taking note of the petitioners' waiving the motions to defend professional reputation). Owing to a *majority vote* 59 SCM Plenum decisions and 10 decisions of the Department for Judges were adopted. The ***Department for Prosecutors has always ruled by unanimous vote***. There were also *abstentions from voting* (for instance, 1 abstention each – Plenum Decisions no. 1275/07.12.2017, no. 604 and 605/24.05.2018, no. 780/04.07.2018, no. 322/20.03.2018, as well as 2 abstentions each – Plenum Decisions no. 28, 29 30, 31 and 32/11.01.2018, no. 366/27.03.2018), and *blank votes* (3 – Plenum Decisions no. 1032/01.11.2018 and no. 558/15.05.2018; 1 – Plenum Decisions no. 433/19.04.2018, no. 1032/01.11.2018, no. 779/04.07.2018; Decision of the Department for Judges no. 475/14.03.2019). If, in the case of this last quoted decision, one can assume that the blank vote belonged to the SCM President, who had filed a referral regarding the reputation of a HCCJ judge designated as the SCM President's "pawn", for instance, in the case of Decision no. 779/04.07.2018, according to which the Plenum owned the petition filed by the Romanian Judges' Forum Association and 1504 magistrates, on an individual basis, the existence of this blank vote is incomprehensible and can be deemed a refusal to fulfil the duties pertaining to a Superior Council of Magistracy member.

Throughout this period, the judicial system was the target of unprecedented attacks from public figures, some of them defendants, via media channels controlled by them. The ***Report on the judiciary's state of affairs in 2018***, published in May 2019 by the Superior Council of Magistracy, acknowledged *"the ramping up of attacks launched by political figures and the media against magistrates"*[1] as a vulnerability.

As a matter of fact, ***the Venice Commission*** ascertained that "there are reports of pressure on and intimidation of judges and prosecutors, including by some high-ranking politicians and through media campaigns"[2], whereas the ***Commission's Report on the progress made by Romania under CVM***, of November 13, 2018, expressly stated that "judges and prosecutors have continued to face personal attacks in the media, with mechanisms for redress falling short".

The ***Opinion of the Consultative Council of European Judges Bureau***, from April 25, 2019, issued at the request of the Romanian Judges' Forum Association, in regard to the status of the judicial system's independence in Romania, is a document that reprobated the *repeated and unprecedented attacks of political players against judges* in Romania ("**any**

[1] Available on the web page (*http://old.csm1909.ro/csm/linkuri/06_05_2019__94958_ro.pdf*), last accessed on April 16, 2020.

[2] See the Venice Commission's Opinion on the amendments brought to Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on the judiciary organisation and Law no. 317/2004 on the Superior Council of Magistracy, CDL-AD (2018) 017, parag. 15 and 157.

statements, comments or remarks in Romania which overstep the boundaries of legitimate criticism and aim at attacking, intimidating or otherwise pressuring judges or demonstrating disrespect towards them, using simplistic, irresponsible or demagogic arguments or otherwise degrading the judicial system or individual judges"). CCJE underlined the fact that "the executive and legislative powers (...) are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by attacks or intimidations directed at members of the judiciary. Unbalanced critical commentary by politicians is irresponsible and causes a serious problem because public trust and confidence in the judiciary can thereby be unwittingly or deliberately undermined. In such cases, the judiciary must point out that such behaviour is an attack on the constitution of a democratic state as well as an attack on the legitimacy of another state power. Such behaviour also violates international standards"[1].

In strict regard to SCM's activity on the defence of judges and prosecutors' independence, impartiality or professional reputation, the **Commission Report to the European Parliament and the Council on the progress made by Romania under the Cooperation and Verification Mechanism, from November 13, 2018, and the related Technical Report, iterated the following**:

"The Superior Council of the Magistracy has not been able to act as an effective check and balance to defend the independence of judicial institutions under pressure, an important constitutional role highlighted in the January 2017 report. Divisions within the Superior Council of Magistracy (...) have made it increasingly difficult for the Council to be effective as a voice for the judicial system – notably when consulted on legislation – and as the manager of the judicial system. Even when the Superior Council of Magistracy has come forward with a unanimous opinion, it has been ignored in significant cases. ***Although 2018 has seen judicial institutions as well as individual judges and prosecutors subject to particularly strong public criticism from Government and Parliament representatives, the Council has shown reluctance to take ex-officio decisions to respond to attacks on the independence of the judiciary.*** This risks that magistrates are dissuaded from playing their normal role as a branch of the state in expressing their views on issues relevant to the judicial system. (...) For instance, following the statements made by the prime minister, the president of the Senate and the president of the Chamber of Deputies, during a meeting *against the abuses committed by the judicial system*, on June 9, 2018, the SCM Plenum adopted a decision only following a referral from the Romanian Judges' Forum. As of November 2017, SCM has adopted four decisions on the defence of the judicial system's independence and four decisions on the defence of magistrates' professional reputation, independence and impartiality. From a total number of 34 decisions (6 motions to defend the judicial system's independence were dismissed and 20 motions to defend magistrates' professional reputation, independence and impartiality were dismissed)".

[1] Also see CCJE Opinion no. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, parag. 52.

The European Commission's viewpoint is not at all miscalibrated or unsubstantiated, quite the opposite. During the 2017-2019 interval, the *ex officio* notifications were sublime, while nearly altogether absent, although several members within the current SCM were promising to have an active role in defending the pool of magistrates against actions likely to be detrimental to their independence, impartiality or professional reputation[1]**.**

The **Department for Prosecutors** was notified *ex officio* in the case that became the subject of Plenum Decision no. 1139/31.10.2017, which ruled that the professional reputation of prosecutor Elena Rădescu, a judicial inspector with the Judicial Inspection, be defended against the unrealistic statements made during the "Sinteza zilei" (*Daily overview*) (Antena 3) TV shows from 5.09.2017 and 6.09.2017 in relation to the work carried out by said prosecutor, in regard to Lele Alexandru Florian, a former prosecutor. It was acknowledged that the respective TV show aired misinformation, there being no minimum verification on the topic subject to debate.

The president of the Superior Council of Magistracy (at the time, Mariana Ghena) doubled the National Anticorruption Directorate's motion that led to the adoption of Plenum Decision no. 500/25.04.2017, which ascertained that the judicial system's prestige and independence following the statements made by deputy Sebastian Ghiță during România TV television shows (28.12.2016 – 5.01.2017, 13.01.2017, 16.01.2017): *"NAD is the tool employed by the powerful figures of the day and foreign interests to crush the Romanians' vote. (...) As soon as interests arise against someone in Romania, well-wishing whistleblowers emerge out of nowhere, knowing, lying and skewing reality in a particular way, favourable to prosecutors. (...) Thousands, perhaps hundreds of thousands of Romanians have begun to suffer and be dragged into trials and misleading case files, built on false evidence that do not reflect reality. (...) At the request of Mrs Kövesi, a construction company from Ploiești, which received money from Asesoft, was also the one that paid the flight ticket for the return of Mr Nicolae Popa, former director of FNI (National Investment Fund), from Indonesia. The reality is that a private company, at the request of the Romanian state and Mrs Kövesi, paid EUR 200.000 to fetch the man that threw FNI into bankruptcy. (...) Coldea's power over his colleagues and the other institutions comes from his exclusive relationship with Kövesi. Laura Codruța Kövesi and Florian Coldea are officers of a foreign secret service in one of Romania's partner countries. That is why Florian Coldea forces SRI to assist Kövesi all the time, with the plagiarism, with CNADTCU (National Council for Attestation of University Titles, Degrees and Certifications), with the commissions, with anything, so that Kövesi may firmly hold her office"*.

Independently, the president of the Superior Council of Magistracy (at the time, Lia Savonea) filed an *ex officio* notification strictly in the case that included her own name in the public debate, in relation to a former colleague and main from Bucharest Court of Appeal, currently an HCCJ judge, appointed in the meantime president of the Criminal section. As such, Decision of the Department

[1] For instance, all the existing public data fails to indicate that SCM member Nicoleta Țînț has ever proposed the *ex officio* notification of the Superior Council of Magistracy or at least of the Department for Judges.

for Judges no. 475/14.03.2019 ruled on the defence of professional reputation, being acknowledged that the phrase "Savonea's pawn", associated to one member in the judicial panel, was massively detrimental to impartiality, leading the general public to believe that conducting a fair trial cannot be guaranteed, that judge Daniel Grădinaru misused his position and lacked impartiality. Additionally, in the same context we find the connection the journalist makes in relation to judge Simona Neniță, linking her husband to a person sentenced for corruption[1].

Inexplicably, in a case where the debate could have mentioned, *ex officio*, the defence of a prosecutor's professional reputation (Alexandra Carmen Lăncrănjan), Plenum Decision no. 366/27.03.2018 acknowledged that the respective ***"aspect was not requested"***. The motion filed by the NAD Chief Prosecutor at the time, Laura Codruța Kövesi, focused on how the press mirrored the information made public as per press release no. 1056/V111/3, from 13.11.2017, of the National Anticorruption Directorate, arguing that "this kind of media attack, targeting magistrates and related to an ongoing criminal investigation of the National Anticorruption Directorate, aimed at investigation criminal offences, is a form of interference with prosecutors' activity and can actually affect the justice system's independence".

We have also witnessed bizarre involvements of certain magistrates' associations in the field (for instance, the National Union of Romanian Judges and the Association of Romanian Magistrates requested the defence of the judicial system's independence against the alleged pressures exerted by the NAD Chief Prosecutor upon judicial inspector Mihaela Focică, **despite these associations staying totally silent in blatant cases of publicly slandered magistrates and extreme media lynching**. As per Plenum Decision no. 1471/19.12.2017, the motion was dismissed, being acknowledged and revealed, according to the additional information note submitted in that respect by prosecutor Focică Mihaela, that she did not perceive the discussion held with the National Anticorruption Directorate's Chief Prosecutor at the time, Mrs Kövesi Laura Codruța, as a pressure that might have affect her individual independence, underlying that she never felt threatened, intimidated and no pressures were exerted upon her by the National Anticorruption Directorate's Chief Prosecutor.

The admitted joint motions were filed by **the Romanian Judges' Forum Association, being also owned by approximately 2200 fellow magistrates**.

Accordingly, Plenum Decision no. 779/04.07.2018 admitted the motion to defend the judicial system's independence, a motion focused on the attacks of major figures within the legislative and the executive, materialised in the speeches of certain political leaders held on June 9, 2018 and June 10, 2018, respectively. The petitioner argued that the political discourse harshness, starting from designating magistrates, in cumulative terms, as "**corrupt**", "**Stalinists**", "**Securitate people**", "**torturers**", and culminating with the **totally unacceptable designation of "rats"**, represented an extremely serious deviation from the democratic principles, whereas the entire political meeting

[1] (*https://www.g4media.ro/culisele-deciziei-de-la-inalta-curte-prin-care-s-a-stabilit-ca-dragnea-sa-fie-judecat-de-completul-din-2018-omul-lui-savonea-s-ar-fi-implicat-masiv-in-decizia-finala.html*).

"scenario", the "toolkit" employed and the so-called "people's will" for "the elected ones" to elude the legal means to entail criminal liability, associated with the "**take the struggle to the streets**" and "**to the bitter end**" declarations, outline a significant threat to the independence of the judiciary. The Plenum argued that the statements of certain political leaders exceeded the limits of admissible criticism. Supporting the exertion of pressures, as a generalised practice of building criminal case files, inoculates the idea of a *de plano* repressive system within the criminal prosecution bodies. References to "friendly panels" suggest judges' lack of independence and impartiality and fuel the idea of "ordered" solutions.

Moreover, Plenum Decision no. 50/14.03.2019 admitted the motion to "defend the independence of the judicial authority on the whole", the request submitted to the Romanian Judges' Forum Association concerning the statements made on December 16, 2018 by Liviu Nicolae Dragnea, President of the Chamber of Deputies. The SCM Plenum acknowledged that, considering the respective political figure's capacity as President of the Chamber of Deputies, he ought to have used a conservative language, all the more as some of the cases and investigations were in progress. The limits of the political language employed were visibly exceeded when the idea that justice is selective and requires a restart was suggested. The speech author did not express mere value judgements on the judicial system, making instead factual, concrete statements that depart from reality, in relation to case files conclusively settled or pending settlement, the existence of thousands of persons convicted while being innocent, the revealing of generalised practices, of alleged abuses of prosecutors as part of investigations, or in relation to judicial orders resulting from agreements with the prosecutors.

Unfortunately, both decisions were delivered with massive delays, although the context and weight of the discourse called for a swift *ex officio* intervention by the Superior Council of Magistracy. It took thousands of signatures of Romanian magistrates for the SCM Plenum to ultimately adopt the decisions to admit, one or two months after the dates of the deeds imputed to the respective political figures, and two and three months, respectively, from the adoption date, when the public impact had become ineffective and irrelevant, to publish the substantiations thereof.

Ironically, the SCM President at the time, Simona Camelia Marcu, was utterly inactive in terms of notifying *ex officio* and swiftly settling the motion, despite having stated in her January 2018 draft application for SCM presidency, that is, only a few months earlier, the need for quicker response, *"critical, as it demonstrates to magistrates and the general public firmness in defending the independence of justice, whereas letting too much time go by weakens both interest in the causal act and any positive effects of the Council's intervention"*[1].

[1] For more details, see the webpage (*https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKEwj1_IThr8TcAhVJOJoKHQgIB8sQFjAEegQIBBAC&url=https%3A%2F%2Fwww.csm1909.ro%2FDownload.aspx%3Fguid%3Ddaa3cbc5-a04a-4baa-aa60-94053431e88f%257CInfoCSM&usg=AOvVaw1p6by8lS1jeePhmEJ81g5r*), last accessed on April 16, 2020.

This state of affairs made numerous Romanian magistrates abandon filing motions to the Superior Council of Magistracy, since admitting them, assuming it did happen, had also become a nearly useless formality.

The SCM Plenum argued that a magistrate's professional reputation would not be affected even if, at the time, there were reasonable suspicions of a disciplinary offence committed as part of their activity. The SCM Plenum saw no relevance in the subsequent dismissal of the disciplinary action, including a dismissal ruled by the HCCJ 5-judge panel, or in the possible damages to that magistrate's public image up to that date.

A motion to defend the professional reputation of magistrates labelled as "lobby-fodders" by a producer, on air, at Antena 3 TV station, was dismissed, whereas a motion, filed by the journalists of the same TV station, on ascertaining the violation of judges' independence on the grounds that the National Anticorruption Directorate had exclusively requested, in order to settle a criminal complaint, the issuance of photocopies of documents from a case file in which the NAD Chief Prosecutor at the time was the plaintiff, was admitted. The Plenum ascertained that filing a motion under the said factual assumption might give the impression of the judicial panel being biased, considering that "***a motion not complying with the structure-related legal requirements (the model in the Practical Guide of the National Institute of Magistracy – the National School of Clerks) may cause unease***, possibly felt as hampering independence or impartiality or may cause suspicions related to them".

If such motions not complying with a particular guide can affect judges' independence, the statements of political figures from the series "***Tudorel, do something, this can't go on!*** (...) We are referring here to ministers under investigation, to ***prosecutors interfering with Government decisions – they began deciding who should and should not be prime minister in this country, that is, not the Romanian voters, but them, these people who meet in secrecy for meals, in hospitality villas, at all kinds of private residences and safe houses – we now find out, in consternation, about this behind-the-scenes force trying to make decisions***. (...) We have a colleague under arrest, a prime minister whose criminal trial was reopened eight years later after having his case closed by the same people, each day we find out strange things about our colleagues and the hunt continues abusively, illegally, in disregard of the Constitution, and we can no longer do anything about it. (...) ***What NAD has done these past four years (...) is called political mafia, an organised crime group***, I say it in all accountability, for what they did reflects a severity that, I believe, can only be seen in African countries, and clearly not in an established democracy or the rule of law" **are not deemed harmful enough to affect NAD prosecutors' professional reputation and the justice system independence, as "the criticism made was deemed not to intend to undermine the independence of the judiciary and weaken the public trust in justice, but be a part of a public political discourse with personal viewpoints, thoughts, opinions and fears"** (Plenum Decision no. 559/15.05.2018).

Statements such as "**Without *dedicated* prosecutors and judges, attached to the binomial**[1] **one cannot deliver and accept falsified evidence and deliver sentences set up outside law courts. *Their* judges are placed in exquisitely distributed panels, whereas prosecutors enjoy a playfield under the cover of secret protocols concluded with SRI. You can spot judges adhering to the occult binomial from a mile away. Some prosecutors are former militiamen by trade. Their career paths are swiftly guided not by contest procedures, but by lateral decisions. There are already famous black panels within HCCJ, but also courts of appeal. There are no doubts surrounding the solutions delivered by Ioana Bogdan, Ionuț Matei, Șelaru, Popa. Camelia Bogdan already is a classic case, actually disclosed by Coldea and Kövesi before Băsescu. SCM has promoted, from within the system. judges Mateescu, Chiș, Ghena and the Department for Prosecutors is fully pledged. The «squirrel» within NAD is waiting in line for Kövesi to fall and «setting her stage» with case files that can elevate her rating. We understand why the battle to investigate the exempt within the judiciary somewhat looks like Stalingrad**" are considered **journalistic exaggerations based on the existence of previous press topics**. Given the reference made to "certain prosecutors", not nominated, we cannot conclude that the journalistic endeavour has the capacity to instil the idea that the entire judicial system would be biased and loyal to certain obscure interests (Plenum Decision no. 604/24.05.2018; Plenum Decision no. 605/24.05.2018).

The lynching of magistrates who took part in the protests on the steps of Bucharest Court of Appeal[2] (*"I wrote here about other protests of magistrates, each time marvelling at the high number of those who **accepted to serve «the System» instead of serving the citizens' rights**. Now, however, **also seeing that many young magistrates***

[1] A colloquial term which, for a particular part of the press in Romania, designates the collaboration between the Romanian Intelligence Service (SRI) and the National Anticorruption Directorate (DNA).

[2] (*https://www.hotnews.ro/stiri-esential-22704717-video-protest-magistra-ilor-treptele-cur-apel.htm*), last accessed on April 16, 2020. Very recently, SCM Plenum Decision no. 44 of March 5, 2020 dismissed the motion to defend the judicial system's independence in relation to the following text published by the weekly Q Magazine: "*Some* questionable forums *of magistrates, populated by* sinister characters *such as Cristi Danileț and Camelia Bogdan, who, by breaching all of the magistracy's deontological and statutory standards, do Iohannis and USR's politics under the #rezist movement pennant, spread high and low the lie according to which the most upstanding and bravest fighter for justice independence is, in fact, its assassin from the shadows and ask the President to violate the Constitution by refusing to appoint Gîrbovan as minister with no valid legal justification*". A danger of this nature, drawn up in a context where most Romanian magistrates opposed the appointment of a judge as Minister of Justice, given the obvious incompatibility, fuels the idea that two Romanian judges are "sinister characters", whereas the Romanian Judges' Forum, which comprises the Romanian judges fighting for the independence of the judiciary, would belong to the category of "questionable forums". Most of the members of the Superior Council of Magistracy in Romania deemed the phrases "sinister characters" and "questionable forums" mere journalistic exaggerations. Such descriptions stain both the reputation of judges and the credibility of the most important professional association in Romania, whose viewpoints were borrowed by the Consultative Council of European Judges, the Consultative Council of European Prosecutors, GRECO, the Venice Commission, the European Commission, virtually all the relevant international entities.

***subscribed to Danileț and Bogdan, I do think somewhat fearfully about the future of this country**. If SCM fails to intervene right now to sanction those leading this instigation among young magistrates, we will soon witness the restoration of the entire «System» that operated over the past two decades as a political weapon, before which citizens could only be allowed to act as a defenceless victim. And we do not know whether or not, when the «System» regains all its recently lost territories, a new Tudorel Toader will emerge to knock it down, using the knowledge of those abandoning the power of the law in the interest of subservience that brings fleeting benefits"*) appears to be insignificant, as Plenum Decision no. 1030/01.11.2018 ruled to dismiss the motion to defend professional reputation and the judicial system's independence. **Still, a distinct solution was delivered by the Department for Prosecutors, as per Decision no. 414/07.05.2019, which admitted the motion filed by the Initiative for Justice Association on defending the professional reputation of the prosecutors that took part in the protests triggered by the issuance of GEO no. 7/2019.**

It took a motion signed by 172 magistrates to defend professional reputation, as per Plenum Decision no. 51/14.03.2019, in relation to the statements made six months before by lawyer Aurelian Pavelescu about the Romanian magistrates present at the protest held on 16.09.2018 at Bucharest Court of Appeal, referring to them as "imposter magistrates", "urchins", "imbecils", "they are the mafia state", "Romania's political police", "the most corrupt of all Romanians", "Bolsheviks", "corrupt magistrates", "loafers", "axe tails", "hooligans", "politically used animals", "bandits". The SCM Plenum acknowledged that the freedom of speech limits were exceeded, the general public being led to believe that magistrates lack a sound moral and professional reputation, are completely unprofessional and fail to adequately fulfil their duties. The image of justice in Romania was being greatly impaired.

The separation of careers, which has underpinned the division of competences of the Plenum among the SCM Departments, already gave way to other contradictory decisions.

For instance, **Decision of the Department for Prosecutors no. 699/13.11.2018 ruled to dismiss the motion to defend professional reputation, filed by Gheorghe Stan (prosecutor, at the time chief inspector of the Judicial Inspection, appointed in the meantime Constitutional Court judge, as nominated by PSD) in relation to an article that presented a statement issued by the Association of Romanian Prosecutors – Brașov Branch** (*"the mandate extension for the management of the Judicial Inspection, via the issuance of an emergency ordinance, was deemed by most magistrates as an extremely dangerous measure proving the fact that political players can now directly appoint the Judicial Inspection management, something that does not comply with the rule of law principles"*). The Department for Prosecutors considered that the respective press article tackled viewpoints regarding GEO no. 77/2018, without touching on any actual aspects from the petitioner's activity.

Decision of the Department for Judges no. 1358/27.11.2018 admitted the motion to defend professional reputation filed by Lucian Netejoru (judge and chief inspector of the Judicial Inspection) in relation to the same article. The Department for Judges acknowledged that position statement of the Association of

Romanian Prosecutors – Brașov Branch did not comprise an objective representation on how the mandate of the Judicial Inspection chief inspector position was assigned pursuant to GEO no. 77/2018. The suggested appointment allegedly disregarded the legal provisions and infringed upon the rule of law, despite having been criticised by the European Commission and being the subject of a preliminary referral pending before the Court of Justice of the European Union (case C-83/19, *The Romanian Judges' Forum Association*), for which a priority settlement procedure was set forth.

The least explicable solution to the general public is perhaps the one provided by Decision of the Department for Judges no. 507/21.03.2019, which dismissed the motion to defend professional reputation against a journalist's post on Facebook: ***"Nee-naw, nee-naw, nee-naw! Camelia Bogdan: "87% of magistrates are members of the Grand Masonic Lodge". Therefore, 87%, not 86%, not 88%! I cannot help but remember time and time again: Camelia Bogdan, Livia Stanciu and Laura Codruța Kövesi were idolised by the chimpanzees I had found in the newsroom cheering arrests broadcast live on television, three years ago, when I joined EvZ. I wouldn't be surprised to learn that, to execute Băsescu's opponents, General Coldea took out Bogdan straight from "Obregia". Having the same brain and the same understanding of the surrounding reality, she gave sentences worth thousands of prison years in 12 years in office. Băse, shove her up your behind! The other two, as well!"*** The Department for Judges acknowledged that these comments made by journalists, though occasionally biased, come to support the press' legitimate concern with actively contributing to the debate on the operation of justice. It is true that, here and there, the wording used by the journalist (*took out Bogdan straight from "Obregia". Having the same brain and the same understanding of the surrounding reality, she gave sentences worth thousands of prison years in 12 years in office; she will go back to wiping out people*) or their opinions (*Bogdan is the litigious type*) can be perceived as a disproportionate reaction of the press towards that magistrate's person, however, to support a democratic and pluralist democracy, the press is allowed to enjoy an exaggeration and even a provocation leeway. **The Department for Judges failed to rule on the final phrases:** ***"Băse, shove her up your behind! The other two, as well!"...***

We will also mention the existence of an admitted preliminary criminal complaint (Plenum Decision no. 412/19.04.2018), filed by Tudorel Toader, the Minister of Justice, which ruled the rescindment of Superior Council of Magistracy Plenum Decision no. 1472/19.12.2017, which had ruled to defend the judicial system's reputation in the Belina case (approximately three months after the denigrating deed). The Plenum considered the fact that, in the recitals of Decision no. 757/2017, published in the Official Gazette of Romania no. 33/15.01.2018, that is, after the adoption of the challenged decision, the Constitutional Court argued that: "in regard to the opportunity of issuing the individual administrative document, the prosecutor's office unit lacks the jurisdiction to commence criminal prosecution, while having the jurisdiction to investigate deeds of a criminal nature committed in relation to its issuance (...) there is no mechanism that controls the opportunity of issuing the administrative document. Therefore, if the law allows conducting a certain administrative operation, as in leaving it within the appraisal margin of the administrative body, censoring the latter's opportunity to appraise cannot be challenged".

The jurisdiction of investigating the legality of administrative documents belongs to the administrative litigation court and only incidentally may they be investigated by the criminal law court, insofar as, in the case, a criminal allegation is made in relation to deeds/actions committed in the context of issuing the respective document. **The Superior Council of Magistracy Plenum also acknowledged that, in his replies to the reporters, Minister of Justice Tudorel Toader strictly referred to the means to challenge the legality of Government decisions, but not to the crimes and the persons mentioned in the press release of the National Anticorruption Directorate from September 22, 2017. He also presented the basic method and jurisdiction required to review the legality of a document issued by the Government, as well as the categories of normatives that may be subject to such review.**

Additionally, we ascertain and take into account that, **the repeated request, by the Judicial Crime Investigation Department, for a case file that NAD was in charge of at the time undermined the independence and impartiality of prosecutors within the Public Ministry, an element of judicial authority, but also the independence of the case file prosecutor, who was under pressure**. Still, Decision no. 216/04.04.2019 produced no effects of a disciplinary nature, as the Judicial Inspection ordered no disciplinary investigation in the case.

Although the Superior Council of Magistracy concluded a Collaboration protocol with the National Audiovisual Council on November 17, 2011, it is non-operational, as SCM has never notified the public institution monitoring audiovisual activities from 2017 to 2019, something constantly done during the former SCM's mandate (according to art. 4, "CNA may notify SCM in regard to the presentation, during audiovisual programmes, of opinions expressed by magistrates about ongoing trials or cases that were notified to the prosecutor's office. (2) CAN shall swiftly verify the SCM notifications for possible cases of non-compliance, by the radio or television stations, with the provisions of Law no. 504/2002, as subsequently amended and supplemented, the provisions of art. 38, 42, 43 and 44 or any other related provisions in Decision no. 220/2011 on the Code for the regulation of audiovisual content. (3) CNA shall verify the SCM notifications for the provision of unreal data, mentioned in art. 5, by the radio or television stations and, in cases where it deems them justified, it fulfils its legal duties to make sure that the public receives accurate and complete information by exercising its right to rectify, whenever obvious and significant errors occur, or its right of reply".).

The ***Opinion of the Consultative Council of European Judges Bureau*** from April 25, 2019, issued at the request of the Romanian Judges' Forum Association, concerning the matter of the judicial system's independence in Romania, **acknowledged the legitimate right of judges in Romania and anywhere else to stand against any policies or actions affecting their independence in a climate of mutual respect, and in a way which is consistent with maintaining judicial independence or impartiality**.

The independence of the judiciary is critical for the rule of law and the judicial system to operate. Independence guarantees must be ensured, whereas the attacks targeting judicial institutions and certain judges and prosecutors pot may have adverse effects,

unless there is refrainment from challenging judicial orders, undermining magistrates' credibility or exerting pressures upon them.

Unfortunately, the Superior Council of Magistracy failed to demonstrate either stability or an active role and swiftness when it came to defending the pool of magistrates against actions likely to be detrimental to their independence, impartiality or professional reputation[1]**, during the 2017–2019 interval, with the exception of certain specific situations, some of which dealt with attacks against the very image of the Superior Council of Magistracy members, particularly that of its president, in 2019.**

Even though magistrates are lynched on a daily basis during the programmes of various television stations, on websites and in print media, the response of the Superior Council of Magistracy is nearly non-existent, despite being also tasked with communicating to the public factual reality if false information is disseminated. Moreover, SCM publicly discloses, in almost any case, via at least four or five distinct channels (the SCM Plenum, the departments, the SCM President and the members representing civil society etc.), the latter issuing personal and extraordinary statements, as if the institution were an individual, instead of a collective body[2].

Although all the elected members of the current SCM have undertaken in their draft application an active and expeditious role in regard to defending the pool of magistrates against actions likely to be detrimental to their independence, impartiality or professional reputation, this commitment seems to have been reduced to mere words on a piece of paper.

SCM has not taken any additional steps in order to provide suitable support to magistrates faced with criticism undermining the independence of justice (for instance, financial or legal support for magistrates claiming moral compensations via motions filed with law courts). The statements issued, in very rare cases, from 2017 to 2019 are not covered by the media in the same way as those containing the initial criticism and, as inferred from the decisions published by SCM on these matters, the National Audiovisual Council has not been notified, not even once, to have the information rectified by the radio/TV station that had misinformed the public or conducted the media lynching.

[1] SCM did not request the support of either the Consultative Council of European Judges or the Consultative Council of European Prosecutors, for instance. It could have also had an active role within the European Network of Councils for the Judiciary, in regard to the matter of the judicial system's independence in România. CCJE reprobated the "*repeated and unprecedented attacks of political players against judges* in Romania" only after being notified by the Romanian Judges' Forum Association, given SCM's lack of involvement.

[2] See the statement entitles *"Truth lies in lessons from history"* (*https://www.csm1909.ro/323/Comunicate-societatea-civil%C4%83-CSM*), last accessed on April 16, 2020. Some of the included opinions, belonging to a SCM member, give the impression of imbalances within the magistracy, serious enough to minimise the actual constitutional role of the Superior Council of Magistracy. Surprisingly, they are allowed by the other members, without any proper public explanations.

3. Promotion of judges to top tier positions within the judicial system during the 2017-2019 interval. Promotion to executive positions

The changes brought in 2018 to the "justice laws", which have also impaired the manner of conducting contest procedure in recent years, weaken judges' intent to access elite offices[1]. By means of the legislative intervention on art. 52[1] parag. (2) let. c) in Law no. 303/2004, and by eliminating the "written test, of a practical nature" and only keeping the interview test – art. 52[1] parag. (2) let. b) – for promotion to the office of judge within the High Court of Cassation and Justice, the legislator eliminated a guarantee of holding a contest procedure as objectively as possible, intended to make sure that judges with high professional training levels advance to the supreme court. By exclusively keeping the interview test, professional standards become relative, with an impact on the quality of the Supreme Court judges' activity and an increased degree of subjectivity. These provisions also disregard the international documents that uphold the fundamental principles concerning judges' independence – the importance of their selection, professional training and conduct, as well as of the objective standards that must be observed both when employing new magistrates and when implementing means to promote. Regarding the assessment of decisions, regulated as an elimination threshold on the path to promote to the High Court of Cassation and Justice, in order to reach the interview phase, as is constantly reiterated by the Venice Commission, the proposed criteria underpinning the reviews of said decisions cannot be arguments in favour of judges' merit-based promotion to executive positions.

Appointment to top tier positions of the High Court of Cassation and Justice, or even to the office of Supreme Court judge, falls under the exclusive jurisdiction of SCM's Department for Judges, which also handles, by way of a majority vote, appointments within the Judicial Crime Investigation Department (for instance, Mrs Lia Savonea, Mrs Mariana Ghena and Mrs Nicoleta Țînț, SCM members, were also members in the commission of the contest procedure to appoint the Chief Prosecutor of the Judicial Crime Investigation Department within the Prosecutor's Office attached to the High Court of Cassation and Justice, from May 15, 2019 to June 18, 2019, but also in the commission of the contest to appoint prosecutors to executive positions within the Judicial Crime Investigation Department, held between April 11, 2019 and June 15, 2019).

Additionally, the appointment by SCM (lately, after the legislative changes, exclusively by the Department for Judges, instead of the Plenum) of examination commissions has led to a practice of constant appointments of a number of judges within nearly all relevant commissions. Upon review, the SCM decisions in question did not reveal that the commission members are designated by lot, as there is no real pool of sufficient potential members and no random selection procedure regulated by secondary legislation.

[1] See, for more details, The Romanian Judges' Forum – White Paper: "Promotion of judges to top tier positions within the judicial system. In search for meritocracy", study available on the web page (*http://www.forumuljudecatorilor.ro/index.php/archives/3893*), last accessed on April 16, 2020.

For instance, Mr Daniel Grădinaru (HCCJ judge, appointed in 2018 president of the Criminal Chamber, former vice-president of Bucharest Court of Appeal), appears as substitute within the commissions that held the contest procedure or exam for the appointment of judges and prosecutors to management positions from March 24 to June 28, 2017, as member in the commissions that held the contest procedure or exam for the appointment of judges and prosecutors to management positions from March 23 to June 28, 2018, and the contest procedures or exams for the appointment of judges to management positions from April 12 to June 20, 2019 (three out of five contest procedures organised during the 2017-2019 reference interval). The same judge was a substitute in commissions that held the contest for promotion to the office of judge with the High Court of Cassation and Justice from January 3 to May 31, 2017, the contest procedure for promotion to the office of judge with the High Court of Cassation and Justice from August 2017 to March 2018, as well as a member in commissions that held the contest procedure to promote to the office of judge with the High Court of Cassation and Justice from August 30, 2017 to March 14, 2018, and the contest procedure to promote to the office of judge with the High Court of Cassation and Justice from December 21, 2018 to May 22, 2019 (four out of four contest procedures organised during the 2017-2019 reference interval). The same Mr Grădinaru is a member in the commission that held the contest procedure for the appointment of prosecutors to executive offices within the Judicial Crime Investigation Department (2019), but also a member in the commission that elaborated subjects for the entrance exam held by the National Institute of Magistracy from July 10 to October 30, 2018.

Mrs Alexandra Iuliana Rus (promoted to HCCJ judge in 2018, former president of Alba Iulia Court of Appeal) appears as a member in the commission of the contest procedure or exam for the appointment of judges and prosecutors to management offices within courts of appeal, county courts and local courts, as well as prosecutor's offices attached to them, held from October to December 2018, as substitute in a commission of the contest procedure to appoint prosecutors to executive offices within the Judicial Crime Investigation Department (accompanied by her husband, Andrei Claudiu Rus, a full member; in the absence, for whatever reason, of the other full member, Daniel Grădinaru, the commission would have basically been a family one), but also a member in the examination commission that held contest procedure interviews, for entrance into the National Institute of Magistracy, from July 10 to October 30, 2018. Her husband, Mr Andrei Claudiu Rus[1] (promoted to HCCJ judge in 2018, former president of Oradea Court of Appeal and vice-president of Alba Iulia Court of Appeal) was a designated substitute for the contest procedure or exam to appoint judges to management offices, held from April 12 – June 20, 2019, as member in the commission that held the contest procedure to appoint prosecutors to executive offices within the Judicial Crime Investigation Department (accompanied by his wife, Mrs Alexandra Iuliana Rus), but also a member in the commission that held the contest

[1] In relation to him, the Department for judge-related disciplinary issues, as per Decision no. 5J of March 22, 2017, had just dismissed, by a majority vote, a disciplinary action, the case causing strong public ripples (*https://m.ebihoreanul.ro/stiri/ultima-or-31-6/joaca-cu-libertatea-trei-judecatori-de-la-curtea-de-apel-oradea-au-bagat-din-eroare-un-om-in-puscarie-dar-nu-sunt-pusi-sa-plateasca-137826.html*), last accessed on April 16, 2020.

procedure for promotion to judge with the High Court of Cassation and Justice, held from December 21, 2018 to May 22, 2019.

Many of the members of these commissions were promoted to judge within the High Court of Cassation and Justice by the very current Superior Council of Magistracy (see the related interviews), the same council that also appointed them *ante* and *post-factum* in various contest commissions: for instance, Mr Adrian Remus Ghiculescu; Mrs Alexandra Iuliana Rus; Mr Andrei Claudiu Rus; Mr Valentin Mitea[1] (a substitute in the commission that held the contest procedure or exam to appoint judges and prosecutors to management offices from March 24 to June 28, 2017, a member in the commission that held the contest procedure for entrance into the National Institute of Magistracy from July 10 to October 30, 2018); Mrs Elisabeta Roșu (substitute in the exam commission that held the contest procedure or exam to appoint judges and prosecutors to management offices held from March 23 to June 28, 2018, and a member in the exam commission that held the contest procedure or exam to appoint judges and prosecutors to management offices within courts of appeal, county courts and local courts, as well as prosecutor's offices attached to them, from October to December 2018); Mr Alin Sorin Nicolescu[2] (a substitute in the exam commission that held the contest procedure or exam to appoint judges and prosecutors to management offices from March 23 to June 28, 2018); Mrs Virginia Filipescu[3] (a substitute in the exam commission that held the contest procedure or exam to appoint judges and prosecutors to management offices within courts of appeal, county courts and local courts, as well as prosecutor's offices attached to them, from October to December 2018); Mrs Cristina Truțescu[4] (substitute in the commission that held the contest procedure for entrance into the National Institute of Magistracy from July 10 to October 30, 2018); Mrs Maria Speranța Cornea (member in the commission that held the contest procedure for entrance into the National Institute of Magistracy from July 10 to October 30, 2018)[5], Mrs Elena Barbu (member in the commission that held the contest procedure or exam to appoint judges to management offices, held from April 12 – June 20, 2019).

Of the judges promoted during the 2017-2019 interval to the High Court of Cassation and Justice, members of commissions for the various contest procedures run by SCM,

[1] Member of the Association of Romanian Magistrates, as per the declaration of interests submitted in 2018 (*http://declaratii.integritate.eu/*), last accessed on April 16, 2020.

[2] Member of the Association of Romanian Magistrates, as per the declaration of interests submitted in 2018 (*http://declaratii.integritate.eu/*), last accessed on April 16, 2020.

[3] Member of the Association of Romanian Magistrates, as per the declaration of interests submitted in 2018 (*http://declaratii.integritate.eu/*), last accessed on April 16, 2020.

[4] Member of the Association of Romanian Magistrates, as per the declaration of interests submitted in 2018 (*http://declaratii.integritate.eu/*), last accessed on April 16, 2020.

[5] The Romanian Judges' Forum requested the law court to invalidate Decision of the Department for Judges within the Superior Council of Magistracy no. 1489/19.12.2018, which approved the organisation of the contest procedure for promotion to judge within the High Court of Cassation and Justice from 21.12.2018 to 2.05.2019 and implicitly amended SCM Plenum Decision no. 74/2012 on approving the Regulation for organising and holding the contest procedure for promotion to judge within the High Court of Cassation and Justice. The case is *pending*.

some had held management offices within courts of appeal: Mrs Alexandra Iuliana Rus – president of Alba Iulia Court of Appeal; Mr Andrei Claudiu Rus – president of Oradea Court of Appeal and vice-president of Alba Iulia Court of Appeal; Mrs Virginia Filipescu – Galați Court of Appeal vice-president; Mr Adrian Remus Ghiculescu – president of Ploiești Court of Appeal, chamber president within Ploiești Court of Appeal; Mr Valentin Mitea – president and vice-president of Cluj Court of Appeal; Mrs Cristina Trutescu – president of Iași Court of Appeal; Mrs Elisabeta Roșu – president and vice-president of Bucharest Court of Appeal; Mrs Maria Speranța Cornea – president and chamber president of Bucharest Court of Appeal; Mr Dan Andrei Enescu – vice-president of Ploiești Court of Appeal (out of 30 judges, 9 were promoted to HCCJ from 2017 to 2019), namely one third.

The composition of commissions assessing judges for appointment to management offices also includes, as a member, a judge and president of a professional association (the National Union of Romanian Judges) – Mrs Dana Gîrbovan, Cluj Court of Appeal, proposed on August 23, 2019 by the PSD-ALDE cabinet Prime Minister, Mrs Viorica Dăncilă, for the Minister of Justice office, a proposal dismissed by the Romanian President, Mr Klaus Iohannis.

Consequently, there is a visible participation of certain judges, primarily from the High Court of Cassation and Justice, as members in several contest commissions, though only approximately 1/3 of the judge magistrates of this court were designated members of examination commissions from 2017 to 2019. Also, there is a prominent trend to designate for these commissions judges holding management positions within courts of appeal.

On the other hand, there are notorious cases of collaboration or support from various presidents or vice-presidents of courts of appeal or county courts in regard to certain initiatives of the majority in the Department for Judges within the Superior Council of Magistracy[1].

Out of these presidents or vice-presidents that signed memoranda or public letters, some have been frequently assigned to commissions for the promotion of judges to top positions in the judiciary, some even being promoted to the supreme court during 2017 to 2019 (Mrs Maria Violeta Chiriac – Bacău Court of Appeal vice-president; Mrs Elena Barbu – former president of Brașov Court of Appeal, promoted to HCCJ in December 2019; Mrs Elisabeta Roșu – former president of Bucharest Court of Appeal, promoted to HCCJ in June 2019; Mrs Luminița Crișțiu-Ninu – president of Bucharest Court of Appeal; Mrs Adina Ponea – president of Craiova Court of Appeal; Mr. Cosmin-Răzvan Mihăilă – president of Galați Court of Appeal; Mrs Cristina Trutescu – former president of Iași Court of Appeal, promoted to HCCJ in June 2019; Mrs Maria Andrieș – former president of Suceava Court of Appeal; appointed judicial inspector with the Judicial Inspection in July 2019; Mrs Erica Nistor – president of Timișoara Court of Appeal).

[1] See, for more details, the web pages (*https://www.mediafax.ro/social/30-de-sefi-de-curti-de-apel-trimit-o-scrisoare-la-consiliul-superior-al-magistraturii-nu-sustinem-initiative-din-sfera-politica-17907488 and https://www.g4media.ro/presedintii-celor-16-curti-de-apel-din-tara-cer-csm-sa-stabileasca-daca-protocoalele-secrete-dintre-sri-si-parchet-au-afectat-independenta-justitiei-miza-ar-fi-justificarea-unei-ordonante-pentru-revi.html*), last accessed on April 16, 2020.

Superior Council of Magistracy's Department for Judges Decision no. 1348/17.09.2019 approved the Regulation for organising and holding the contest procedure for the promotion of judges to executive positions.

The Romanian Judges' Forum Association challenged in court the above-mentioned decision, warning about the triggered effects. The case is *pending*.

As such, the actual promotion of judges, as proposed, with two consecutive steps (in rank and in office, respectively), pays tribute to a hierarchical subordination inadmissible for judges and will somewhat lead to the infiltration of local barons into the judicial system. The new standards of the exam for the promotion of judges to executive offices turn the promotion exam into a prior and necessary phase for actual promotion, the latter step becoming a subjective procedure, entirely in the hands of judges with the court promotion is requested to. The introduction of an actual promotion procedure exclusively based on assessing the candidates' activity and conduct over the past 3 years, also upon consulting with judges from higher law courts, plus a review of documents drawn up by the candidates and an interview, before assessment commissions proposed by the presidents of higher courts actual promotion is requested to, will lead to trends of hierarchical subordination to higher court judges and the colleagues who will hold management positions.

As constantly iterated by the Venice Commission, the proposed criteria underpinning the reviews of decisions cannot argue for judges' merit-based promotions to executive offices. All the criteria proposed by the regulation can only be relevant for the periodic assessment of judges (while being applicable in relation to the characteristics of each individual law court – the number of judges, the workload in terms of how many case files and their complexity).

Moreover, the regulation of procedures for promoting judges via a normative inferior to the law, which obviously supplements the latter's provisions, is in breach of the constitutional rules regarding the statute of the trade. The procedure of the contest or exam for the promotion of judges and prosecutors must be provided by the law, taking into account how the Superior Council of Magistracy is organised, *lato sensu*, as the statute of magistrates cannot be inferior to the statute of public servants, even in the absence of a distinct regulation in that respect.

4. The response of the Superior Council of Magistracy to the changes brought to the "justice laws". Criticism towards the relevant international bodies

Initially, under public pressure, but also at the repeated requests of the Romanian Judges' Forum Association, in 2017, SCM dismissed, truth be told, with a thin majority, the entire set of amendments brought to the "justice laws", after consulting with law courts and prosecutor's offices, more than 90% of these subscribing to the same opinion.

Nevertheless, certain members (Lia Savonea, Evelina Oprina, Simona Camelia Marcu, Nicoleta Țînț and Gabriela Baltag) publicly favoured some of the proposals,

despite the opposition of the overwhelming majority of judges who voted them for SCM, ignoring their colleagues' viewpoint and also highlighting the allegedly aggressive language of SCM colleagues who shared the opinions expressed by the vast majority of the magistracy.

An SCM Plenum meeting witnessed a memorable exchange of replies, where an SCM member alleging nothing less than particular "subversive moves" within the magistracy, by those who opposed the amendment of the "justice laws"[1]:

Min. 1:32:00 – **Nicoleta Țînț**: *"I also am discontent at the fact that, for so long, the justice laws could not have been changed whatsoever, as we have all publicly stated and admitted that changing the justice laws was a necessity. Sadly, too much emotion and trepidation have built up around this topic, and we forgot our constitutional duty, what we swore when stepping into this trade. I believe we need to reacquire our balance, think and rethink whether we want or not to have the justice laws amended".*

Min. 2:22:22 – **Lia Savonea**: *"I would avoid and even refrain from making any more comments in this respect, on matters that converged, on our obligation of reserve,* ***on the backstage games****, I'd rather not further speak about it. I am not criticising my colleagues... I said..."*; **Andrea Chiș**: "*Who are you talking about, madam judge, when saying there are judges influenced through subversive channels?*" **Lia Savonea**: *"No. I don't think what I said was properly understood. I won't be subject to an interrogation that you are conducting*".

Min. 3:01:00 – **Nicoleta Țînț**: *"Law courts are overworked with consultations in regard to sets of laws. Let's remember how many times we have gone through them ourselves for nothing to happen. How many years now have we been meeting and consulting with one another at no avail?"*; **Andrea Chiș**: *"Madam judge, are you saying that a judge, if they are yet to settle a very old case file, out of annoyance, will rule based on emotions?"*; **Nicoleta Țînț**: *"No. I meant there must an explanation for this feeling of uselessness that we have, looming over what we do"*.

During a broadcast hosted by Antena 3 TV station on November 14, 2017, judge **Evelina Oprina**, an SCM member, openly stated that she supported certain provisions in the draft legislation proposed by the political establishment (as in, the Minister of Justice) and reprobated the aggressive language of her fellow prosecutors and judges, SCM members, in regard to which the Judicial Inspection did not deem it necessary to run *ex officio* investigations[2]:

"**Evelina Oprina:** *I want to mention that this statement somewhat comes to support what I stated last week, namely that on the Plenum meeting day, September 28, when we were about to issue our opinion on the draft submitted by Minister Tudorel Toader, we had worked until late at night, as I stated at the Council. And this work of ours consisted in outlining proposals and remarks concerning that draft. Not for a second have we discussed,*

[1] (*https://www.facebook.com/CLUJUST/videos/1503749649694225/*), last accessed on April 16, 2020.

[2] See, for more details, the web page (*https://www.antena3.ro/actualitate/sinteza-zilei-un-inalt-magistrat-rupe-tacerea-culisele-unei-razgandiri-colective-in-csm-cinci-442250.html*), last accessed on April 17, 2020.

has any of our colleagues expanded upon, or has anyone mentioned issuing an adverse opinion. I believe that, being a collective body, that is how we should have proceeded. Whichever of us has an idea must lay it down for the other to debate upon. This didn't happen. And that, at least to my mind, meant that the next day's vote would be favourable, with remarks unanimously agreed upon among all present there and, to reiterate: with a single exception, the matter of separating careers. A matter I shall return to in a moment. Why did I refer to that statement? Because, if you browse through its content, I mentioned the minutes for the meeting of that internal commission, from the 26th and the 27th, which state that the commission analysed the draft law, the acknowledged proposals and remarks, presented inside tables constituting the annexes to those minutes. Therefore, those very minutes drawn up during that meeting mention the fact that the Council members ended up making certain proposals and remarks. On the other hand, still in relation to this matter, I would like to add two more (...).

Producer: *What don't you agree with in this set? For example, do you agree with the existence of an independent department within the General Prosecutor's Office, designed to investigate magistrates?*

Evelina Oprina: *I personally **see it as an asset to the independence guarantee we are all pursuing**. However, not in the form proposed in this draft. That is, not to the level of an entire structure, of a path developed to such extent, as it would mean that crime among magistrates has become so large a phenomenon that it requires this kind of structure. The draft was drawn up, in my opinion, somewhat in a rush, following the current model of NAD and DIOCT specialised structures. Why do I believe in this structure that myself and other colleagues of mine see within a department of the General Prosecutor's Office attached to The High Court of Cassation and Justice? In that respect, I shall mention a basic example: the fact that, at present, and I'm rather presenting a judge's view on the matter, since I am a judge and have a better understanding of a judge's condition. The criminal case judge, to add another side note: this issue concerns... no, I'd better get back to it, I don't want to digress too much. The judge enters and court room together with the prosecutor, who belongs to a prosecutor's office unit that can, as per its jurisdiction, subsequently investigate and prosecute the judge that delivers the respective solution. Basically, the case file prosecutor could garner two capacities: the first, that of prosecutor who has built the case file before the judge and, the second, of possible and potential investigator into the judge that rule on the respective case. (...)*

Producer: *Judge Baltag, an SCM member, claims there are pressures and a behaviour, difficult to render into words, exerted and displayed by certain members in relation to herself. Have you felt pressures or any sort of behaviour intended to intimidate you or anything similar while you were part of SCM?*

Evelina Oprina: *I will tell you there are certain methods, to be further labelled by you, not by me, certain techniques and drills meant to impose superiority within the council and among its members. They are designed to assert superiority, one's own point of view, aggressive language, ironies meant to sound intelligent, lack of tolerance, intimidating conducts. I, too, have witnessed such episodes. I believe such aspects were pointed out by my colleague, as well.*

Producer: *Those who do these things are also members of the council?*

Evelina Oprina: *Yes, they are colleagues of ours from the council.*

Producer: *Prosecutors?*

Evelina Oprina: *Elected members.* ***Fellow prosecutors and fellow judges.***

Producer: *Therefore, intimidation, aggressive behaviour…*

Evelina Oprina: *I'd say aggressive language in most cases. Intimidating conduct, unsubstantiated allegations. All these can generate a state of inadequacy, as a colleague of mine said it all too well. Each person is built in his or her own specific way, has a particular emotional makeup, a stronger or weaker personality, some can withstand more, others give up more easily. That about sums up the pretty tense climate within the council. (…)*

Producer*: Suppose that these intimidations, these aggressive elements, this attempt at imposing one's point of view, all seemingly borrowed from an environment different from SCM, do continue, what are you going to do? What approach do you intend to adopt in order to respond, or maybe not, to these issues?*

Evelina Oprina*: Have you noticed that, during the first half of the year, not so many aspects from within the Council were revealed, in regard to our work. However, starting from that August 30 meeting, where myself and a few other female colleagues reluctantly decided to leave the Council Plenum assembly in order not to allow the legal framework for thrashing the law. And I shall get back to this matter, as well. (…) I am one of them, my colleagues, as well, but we had to stick together and leave together the Plenum chamber during the August 30 meeting, the possibility of leaving SCM altogether being something we had been contemplating for some time now.*

Producer*: Leave it, but how? By way of resignation? By way of suspension?*

Evelina Oprina*: By way of resignation, thus effectively leaving behind this capacity that our colleagues had entrusted us with in all confidence. I'm aware of our colleagues' expectations from me and from us. I've been in their midst. I know all too well their issues, fears, concerns, reasons for unease and I see that I cannot help them, at least I haven't really been able to help them until now. And we are, indeed, thinking about this option. But before that, as I told you, since I felt a lack of communication, a communication deficit on our part, I see it as our duty to explain to the colleagues that sent us here, to the general public, the rather current state of affairs and then we can form an opinion.*

Producer*: How many judges do you think might leave via resignation?*

Evelina Oprina*: 5, possibly. (…) It is not an easy decision to make. We give it a serious thought, I'm not saying it's a decision we've just made. We ponder on it and all the outcomes it might have. We don't give in that easily and always remember behind us there are hundreds of judges who had placed their trust in us there and whom we're not allowed to disappoint. And I believe neither I, nor my female colleagues have nothing to regret about our actions so far, in the sense that we strove and struggled to solve these issues, but to no avail".*

The resignations heralded with all the theatrics never happened…

Instead, Commission no. 1 within SCM proposed drawing up a text according to which, "upon expiration of their mandate, ***the judges and prosecutors elected as members of the Superior Council of Magistracy, who completed a 6-year mandate, should be able to acquire the professional rank immediately above the one they held and opt to carry out their activity at a law court or prosecutor's office in line with their rank*** (including the High Court of Cassation and Justice – AN), as well as opt, whenever they desire, to ***switch to a lawyer's or notary public's path***, without prior examination". This *intuitu personae* proposal was virulently disapproved by magistrates from law courts and prosecutor's offices and never became a reality[1].

On April 26, 2018, **the Romanian Judges' Forum Association requested that the President of the Superior Council of Magistracy at the time, Simona Camelia Marcu, support the notification submitted to the Venice Commission by the Council of Europe Parliamentary Assembly**, concerning the "justice laws", apparently with no effect[2].

In the summer and fall of 2018, the Romanian Judges' Forum requested that the Superior Council of Magistracy take action in the sense that the Ombudsman should promptly notify the Constitutional Court in regard to the laws amending the "justice legislation", but received no answer. However, the majority within the Department for Judges always found time to wage war against the ambassador of the United States of America, who had criticised the operation of the judiciary in Romania and its departures from the rule of law.

On October 4, 2018, the Romanian Judges' Forum Association called for transparency and accountability on the part of the Superior Council of Magistracy members, stating the following:

"**It is inadmissible for the SCM Plenum not to have any reaction regarding the changes brought to the justice laws, harshly criticised by the Venice Commission or GRECO, already in force or, as the case may be, submitted to the Romanian President for promulgation, many of them very harmful to the magistracy, making it necessary to postpone or suspend the enforcement of the provisions in question until they have been totally revised or, as the case may be, the provisions in force have been repealed**. (...)

It is inadmissible for the Department for Judges to reply, with no substantiation, to the discourse of an ambassador who raised genuine questions on the activity of the Judicial Inspection, given that, strictly statistically, based on the daily agenda

[1] See the Minutes of the meetings of Commission no. 1 from September 26, 2017 and September 27, 2017 (*https://www.csm1909.ro/ViewFile.ashx?guid=41725f17-d58d-45d8-9d6d-1a2fb5f04ada|InfoCSM*), last accessed on April 17, 2020.

[2] Deputy Ionuț-Marian Stroe made reference to the viewpoint expressed by Simona Camelia Marcu: "Madam President of SCM has publicly stated her opinions in Romania, therefore, it is known how she stands" (*http://www.ziare.com/stiri/justitie/sesizarea-comisiei-de-la-venetia-pe-legile-justitiei-s-a-decis-in-unanimitate-la-consiliul-europei-ce-urmeaza-si-cand-am-putea-avea-o-opinie-de-la-expertii-internationali-1511325*), last accessed on April 14, 2020. Despite these opinions, it was unanimously decided to notify the Venice Commission.

of settled disciplinary matters and the High Court of Cassation and Justice webpage (as the disciplinary decisions of the chambers within the current SCM stopped being made public in 2017, despite committing to transparency), we see that, in 2017 and 2018, 29 disciplinary actions against judges were admitted and 24 disciplinary actions against them were dismissed, whereas 11 was the number for both admitted and dismissed disciplinary actions against prosecutors, nearly half (50%) of the magistrates sent before disciplinary chambers being cleared (AN – some disciplinary actions initially admitted were dismissed by HCCJ). All these realities inevitably invite public remarks, as freedom of speech is inviolable, according to the Constitution. It is inadmissible for the SCM Plenum to have no reaction whatsoever towards the permanent unsubstantiated statements of various public figures, including Prime Minister Viorica Vasilica Dăncilă, concerning the fact that "half the magistrates in Romania have worked for years case files in which they were probably influenced to deliver solutions set forth outside the court room", given that we are talking nearly entirely about fictitious complaints, some anonymous ones, abusively filed by parties discontent with decisions delivered in case files, whereas an actual influence upon a judge has never been proved. It is inadmissible to find from the media matters pending before the Superior Council of Magistracy, which was in fashion in the 2000s, despite the European Commission having constantly recommended SCM to set up for its mandate a collective programme that would include measures for promoting transparency and accountability.

Consequently, the Superior Council of Magistracy should continue to strengthen its efforts of defending the magistracy's reputation, in a coherent and effective manner, as requested by the European Commission, under CVM, being bound to demonstrate its commitment to transparency and accountability in fulfilling SCM's constitutional role, instead of passively witnessing the magistracy's fading credibility, also fuelled by the dissemination of the message, launched by various public figures, that justice is served un pressure from or the influence of external factors, able to hamper judges' independence and impartiality".

The CVM Report made public on November 13, 2018 by the European Commission stated that, at the time, "The Superior Council of Magistracy was divided on how to react to the recommendations of the Venice Commission and GRECO on the Justice laws, even in more managerial areas such as analysing the impact of amendments such as the early retirement scheme and delayed entry into the profession. (...) The members of the Superior Council of Magistracy attended the debates in Parliament, putting forward amendments and making comments. **However, after the adoption of the laws by Parliament, the Superior Council of Magistracy did not give an opinion on the changes, nor did it analyse the impacts of the amendments on the judicial system**[1]**.** The January 2017 report underlined in particular the value of public reporting by the Superior Council of Magistracy on actions it has taken in defending the independence of justice and protection of reputation, independence and impartiality of magistrates. However, the Superior Council of Magistracy **was not able to provide a**

[1] SCM did find time to deliver on the compatibility of the judge or prosecutor office with that of martial arts referee, and in no way on the essence of the judicial system's operation; see the Minutes of Commission no. 1 from July 1, 2019.

strong stance in this area, despite the overall situation in terms of public criticism of the magistracy and judicial institutions".

Reactions from certain SCM members did not take too long to emerge.

The newly elected President of the Superior Council of Magistracy, **Lia Savonea**, stated on December 21, 2018 that, *"starting from the errors in the latest report, we must clearly understand that **these recommendations cannot be blindingly followed, like holy relics**, without commenting and discussing upon them. Especially that they contain verifiable aspects that conflict with provisions in the laws and in the Criminal Procedure Code, in particular. They were obvious"*[1].

Moreover, the Romanian Minister of Justice at the time, **Tudorel Toader**, an *ex officio* member of SCM, stated as follows[2]: *"The Romanian legislator has this freedom to legislate. I will not let anyone tell me that a recommendation supersedes a CCR decision. The semantics of the term indicate that a recommendation is not binding in nature. European standards are binding. The irreversible lawmaking process is binding. I would rather not answer to ill-suited questions. That is actually why I refused to make a public statement last evening, as many capitalise on these tense moments to express their less documented opinions. One person with legal education, but unsubstantiated discourse, said that the Venice Commission's recommendations have to be observed and given full priority, quoting art. 148 in the Constitution, which stipulates that the legal standards in the treaties and community must take precedence. It doesn't take a great jurist to see the full picture. You don't even have to be a jurist to understand that some commission from Bruxelles, with 3-5 experts, draws up a report and a few added recommendations. Don't think that these 3-5 experts come to Romania and their recommendation becomes more influential than CCR's decisions, they're not legislators. (...) We analyse each and every recommendation. We associate to it the legal worth it deserves. Don't think that a recommendation can overthrow national law. Yes, we do take them into account, we assess and screen them as such, since I highly doubt, in my personal opinion and from a minister's perspective, that we can be asked, though CVM, to suspend the enforcement of laws. That is a bit too much and outside the scope of CVM".*

In regard to a visit by Romanian magistrates set to be hosted in Bruxelles, the Department for Judges decided to speak to the Romanian representatives within the European Commission, and kindly asked to be informed on the matter so that, pursuant to the constitutional and legal role assigned to the Superior Council of Magistracy, in its capacity of justice independence guarantor and authority representing the pool of judges in relation to other public institutions or authorities, both national and international, it should be able to express its opinions and viewpoints owned in its capacity of independent collegiate body, representative to Romanian judges[3].

[1] (*http://www.ziare.com/stiri/magistrati/o-parte-din-membrii-csm-critica-recomandarile-mcv-lia-savonea-nu-putem-sa-le-ducem-asa-orbeste-ca-pe-sfintele-moaste-1543219*), last accessed on April 17, 2020.

[2] (*https://www.digi24.ro/stiri/actualitate/justitie/tudorel-toader-acuzatii-pe-tema-raportului-mcv-are-iz-politic-1032416*), last accessed on April 17, 2020.

[3] See SCM, The Section for Judges, Agenda of settled items from 14.03.2019 – Analysis of aspects recorded during general assemblies of judges and in the content of open letters

Superior Council of Magistracy's Department for Judges Decision no. **49/17.01.2019** approved the Methodology for the appointment of judges, under the provisions of 33[1] in Law no. 303/2004 on the statute of judges and prosecutors, republished, as subsequently amended and supplemented, the appointment of court attorneys under the provisions of. 67 parag. (5), as well as for reclassifying judges or court attorneys under the provisions of. 83 parag. (3) in the same law.

SCM has never expressed in any way its concern in regard to such a procedure, despite the **CVM Report of February 4, 2008** having ascertained that "Roughly half of all recruitments to the judiciary followed an *ad hoc* procedure in order to fill existing vacancies quickly. In these cases, openings were filled on the basis of interviews and previous work experience without verification of the qualification or training of the new magistrate". Romania abandoned this form of admission into magistracy in 2008, as an outcome of Government Emergency Ordinance no. 46/2008, issued precisely to implement CVM, as revealed in its Substantiation note. This aspect was argued by the Superior Council of Magistracy, in its 2008 composition. The method of admission into magistracy was, however, once again regulated in 2018 (see item 48, art. I in Law no. 242/2018, published in the Official Gazette no. 868 from October 15, 2018).

Therefore, appointments to judge offices were made for a former deputy from the Romanian Social Democracy Party[1], but also for a lawyer, acquitted of corruption offences, who was also granted retirement merely a few months after his appointment. There were extremely numerous public reactions[2]. The Judges' Forum challenged in court Superior Council of Magistracy's Department for Judges Decision no. 49/2019, a case still *pending*.

On October 3, 2019, the Romanian Judges' Forum and the Initiative for Justice disapproved **the request, made by the Superior Council of Magistracy, to amend the legislative framework on integrity in the exercise of public functions and offices, as well as on the organisation and operation of the National Agency for Integrity**.

What stood out was the "secretive" nature of these proposals submitted by the President of the Superior Council of Magistracy, not published on the institution's website. Disapprovals were also voiced towards the legislative changes that would allow challenging magistrates' integrity, perceived as one of the main elements underpinning the citizens' trust in the judicial system, changes such as the publication of declarations of assets and interests for a limited, 3-year period, limiting the capacity of the National Agency for Integrity to check a public servant in terms of their acquired wealth, strictly

submitted by presidents and vice-presidents of law courts to the Superior Council of Magistracy on March 11, 2019.

[1] (*http://www.ziare.com/stiri/magistrati/un-fost-deputat-pdsr-si-o-avocata-judecata-si-achitata-pentru-coruptie-sunt-propusi-de-csm-pentru-a-fi-numiti-judecatori-1561721*), last accessed on April 17, 2020.

[2] (*https://www.g4media.ro/csm-a-aprobat-pensionarea-claudiei-silinescu-gherbovan-fosta-avocata-care-a-revenit-in-magistratura-si-a-stat-doar-un-an-pentru-a-primi-pensie-speciala-cine-este-controversatul-magistrat.html*), last accessed on April 17, 2020.

for the three years prior to the notification, and within a 45-day deadline, or anonymizing the income obtained by the spouse of the person submitting their declaration of assets, provided that said income is generated by a law practice. Additionally, it was difficult to understand, in a state upholding the rule of law, a provision that would narrow down ANI's assessment of the wealth belonging to the spouse of the person submitting the declaration of assets in cases where the spouses did not opt for the matrimonial system of split tenancy of assets and, as the case may be, of the dependant children's wealth[1].

On October 15, 2019, seven SCM members (Mihai Andrei Bălan, Cristian Mihai Ban, Andrea Annamaria Chiș, Florin Deac, Mihai Bogdan Mateescu, Nicolae Andrei Solomon and Tatiana Toader) proposed that the Superior Council of Magistracy Plenum discharge judge Lia Savonea from the office of President of Superior Council of Magistracy, for the inefficient way in which she exercised the duties provided by the law for the high-ranking office of President of the Superior Council of Magistracy, for depriving the Council from its constitutional role, making collaboration within the collegiate body impossible, with extremely serious consequences for its operation and, both domestically, in relation to the Romanian magistrates and the entire society, and externally, upon relations with the international bodies[2].

Lia Savonea's presidency was perfectly portrayed by the endeavour of those seven members, an endeavour with no result, considering that making a case on the docket out of it was, according to the law, to be decided by the very person in question. Several law courts attempted to dismiss Lia Savonea from SCM, but their attempts came to a premature end (Brașov Court of Appeal, Pitești Court of Appeal). Additionally, as early as April 2019, the Initiative for Justice Association requested the dismissal of Lia Savonea from the office of SCM President[3] **and, together with the Romanian Judges' Forum, requested several times that the respective judge resign from office.**

It was argued that "**the President of the Council has generated and fuelled a state of conflict with the Minister of Justice**, Ana Birchall, related to the former's absence from certain meetings of the Council Plenum, also considering that she refused, in an arrogant and non-productive manner (see the statement from October 5, 2019), to set forth a predictable work procedure for the Council's activities that would allow the largest possible number of elected or *ex officio* members to take part in meetings, a criticism that she also received from her fellow judges and prosecutors, elected

[1] The media speculated the *intuitu personae* nature of certain changes (*http://www.ziare.com/lia-savonea/csm/tabara-savonea-din-csm-a-incercat-sa-amputeze-legea-ani-fara-consultarea-magistratilor-ministerul-justitiei-critica-pe-linie-toate-propunerile-1579809*), last accessed on April 17, 2020.

[2] (*https://www.g4media.ro/document-sapte-membri-ai-csm-cer-revocarea-liei-savonea-de-la-sefia-institutiei-pentru-modul-defectuos-in-care-a-condus-consiliul.html*), last accessed on April 17, 2020.

[3] (*https://www.g4media.ro/asociatia-initiativa-pentru-justitie-solicita-membrilor-csm-revocarea-judecatoarei-lia-savonea-din-functia-de-presedinte.html*), last accessed on April 17, 2020.

members within the Council. (...) Another topic of disagreement was **the absence of reply, within a reasonable deadline, from the Superior Council of Magistracy to the request made by the Minister of Justice in July 2019, regarding the Council's opinion on the recommendations aimed at the state of justice in Romania the GRECO and CVM reports**. The reports were included in the Council Plenum's agenda no sooner than October 8, 2019, three months after publication, given the notoriously critical attitude of the Council President towards the content of the reports in general, or towards the European institutions drawing them up, aspects also highlighted in the press releases issued on behalf of the Council, but not owned by it as an institution"[1].

Additionally, Lia Savonea "**initiated on January 29, 2019 the amendments to Laws no. 303/2004, no. 304/2004, no. 317/2004, in the absence of a decision from the Superior Council of Magistracy Plenum**, according to art. 38 parag. (5) in Law no. 317/2004, and particularly without notifying on the matter the members of the Department for Prosecutors, although the included proposals also focused on rules concerning the Public Ministry's activity; **she got the Superior Council of Magistracy entangled in an institutional spat with the Romanian President** on the topic of the latter's refusal to appoint as Minister of Justice an acting judge, although the Council has no duty in the matter and should not get under any circumstance involved in an exclusively political procedure; **she met in private with leaders of the judiciary** – for example, with the deputy director of SIIJ, prosecutor Adina Florea, on April 1, 2019, with current leaders of the Judicial Inspection, presiding judges of law courts, **without notifying the Council members on the existence of those meetings, the topics of debate and conclusions reached**, taking the representation function into an obscure area, prone to speculations; **she did not foster any balance in the management of relations between the Superior Council of Magistracy and the professional associations of magistrates**, considering that she had a positive attitude towards certain professional associations (AMR, UNJR, APR) and criticised other professional associations (the Romanian Judges' Forum, AMASP and the Initiative for Justice)[2],

[1] The Constitutional Court, as per Decision no. 26 from January 22, 2020, ascertained there was no legal conflict, of a constitutional nature, between the Minister of Justice and the Superior Council of Magistracy, generated by the conduct of the former, Ana Birchall, in relation to the Public Ministry's activity, or generated by an alleged negotiation, by the Minister of Justice, of a rule-of-law "roadmap" with the representative of a foreign state, or the manner in which the Minister of Justice chose to address in public certain issues pertaining to her participation in the Council Plenum's meetings, in her capacity of *ex officio* member, or the method of settling the notifications of the Superior Council of Magistracy addressed to the Ministry of Justice in regard to the need to issue or amend certain normatives and the position adopted by the Ministry of Justice towards the legal status of the Council's office. The Constitutional Court acknowledged that *"the statements made by the Minister of Justice were political in nature, within the limits of this own freedom of speech. They did not cause judicial effects that triggered an institutional blockage or prevented any public authority from exercising its constitutional powers, effects that could only be remedied with the delivery by the Constitutional Court of a solution likely to be enforced"*.

[2] This typology is nothing new. Let us remember how Călin Popescu Tăriceanu, President of the Chamber of Deputies at the time, stated, with no prior documentation, that *"The Judges' Forum, comprising prosecutors, so that it is perfectly clear for us and everyone else, is not*

generating disagreements among the pool of magistrates and antagonising them, spreading the false idea that only some of them are supportive of justice reforms and trustworthy partners for inter-institutional dialogue, whereas the rest are retrogressive elements acting against the interests of justice and misinforming the international institutions that draw up various reports on the judiciary in Romania".

At the same time, Lia Savonea "**disseminated among the general public an inaccurate image of various activities or opinions of the Council through various press releases owned not by all of its members**; **damaged the image of the Council and of its members by means of comments and allegations that were insinuating and totally inadequate within a collegiate body**, such as the press statement from October 8, 2019 when, intending to inform the general public on the reason for postponing the meeting of the Superior Council of Magistracy Plenum on that date, she stated, without an actual evidence base, that: «the attitude of the missing colleagues has triggered consequences throughout the magistracy, prevented the performance of certain activities and was a genuine institutional boycott», insinuating an obscure agreement between the elected members with the Prosecutor General and the Minister of Justice; **she tackled the issue of public communication in a manner lacking any balance and impartiality, depending on the political ranking of the initiator of said action that triggered the Council's reactions**; **she has developed a personal form of public communication**, when she did not receive the other members' support for her opinions or no longer found necessary to consult with them, despite it being a collegiate body only operating by Departments and in Plenum, undermining the institution's credibility in the eyes of the magistrates and the society; **she used the institution's website to express views on personal matters**, as was the press release of October 1, 2019 on the criticism she received in regard to a proposed amendment to the laws regulating the activity of the National Agency for Integrity, comprising certain provisions that seem, in the eyes of the public, to become favourable to certain Council members, herself included (for instance: ANI's possibility to check the wealth acquired by a public servant strictly over the past three years prior to the notification; anonymizing the income obtained by the spouse of the person submitting the declaration of assets; denying ANI to right to assess the spouse's wealth if the couple's property is split). We find it inadmissible to attack an institution publicly known to inspect wealth status, as part of targeted, personal and subjective circumstances, through statements owned on the Superior Council of Magistracy's web page".

In terms of foreign relations, as indicated by the seven SCM members, on May 28, 2019, Lia Savonea, in her capacity of President of the Superior Council of Magistracy, "**communicated on behalf of the Council a viewpoint (*written observations*), to the Court of Justice of the European Union, on case *C-127/19*, the topic of which**

an association, is a blog, a platform, I'm not quite clear on that, but it is not a structure with a legal status, which is why we place this matter into the "miscellaneous" category, which also contains other opinions expressed in society, and it's good that the Romanian society allows diversity of opinions, for this is the fundamentally democratic element" (*https://www.news.ro/politic-intern/tariceanu-forumul-judecatorilor-e-compus-din-procurori-e-de-fapt-un-blog-asa-ca-opinia-lui-o-trecem-la-si-altele-1922400811002018061418160851*), last accessed on April 17, 2020.

being the compatibility of setting up the Judicial Crime Investigation Department with the rules in the Treaty on the European Union, without bringing the matter to the attention of the Superior Council of Magistracy members (*in the Plenum or a commission*). This action is puzzling, given that the creation of the Judicial Crime Investigation Department was met by the opposition of both approximately 4000 judges and prosecutors and international bodies. Moreover, the interests of the Superior Council of Magistracy were seriously undermined by this submission of a document related to a critical area for the European Union, namely the observance of the rule of law, a document that fails to reflect the Council members' position and, thus, disregards the principle of loyal cooperation with the European institutions"[1].

In addition, "**via statements owned directly and without any consultation with/notification of the members, the President of the Council, madam judge Lia Savonea, has minimised the importance of recommendations and findings from international reports, discrediting the bodies that issued them and wrongly accusing them of factual errors**. As such, in regard to the Follow-up Report to the *ad hoc* Report regarding Romania (Rule 34), adopted by GRECO during the 83rd Plenary Reunion (Strasbourg, June 17-21, 2019), the President of the Council issued a press release on July 10, 2019, without consulting with the Council members, in which she stated alleged obvious factual errors, given that its analysis could not even have been possible on the same day it was published".

The CVM Report made public by the European Commission on October 22, 2019 reiterated the fact that the Superior Council of Magistracy had failed to fulfil its role of securing an effective control and harmonisation system capable of defending the independence of judicial institutions subject to pressures: "Despite the fact that the Superior Council of Magistracy reports indicate that it continues to fulfil its priority duties targeted for its mandate, the time period that passed since the November 2018 report was marked by discord and controversy within SCM. Moreover, SCM has often been moved aside when the Government or the Parliament made critical decisions on the organisation and operation of the judicial system. **The views expressed within SCM on fundamental aspects for the operation of the judiciary in Romania, such as setting up the Special department for the investigation of magistrates or appointments to key offices and defending the independence of justice, raise concerns regarding the independence and authority of this institution**. **The situation was aggravated even more by the changes brought to the justice laws, which made it possible for a limited number of SCM members to make decisions on vital matters.** This is additionally demonstrated by a series of statements presented as originating from SCM, when they had actually been approved by only a part of the

[1] To defend this individual standpoint, the former SCM president signed a legal representation agreement, for SCM's benefit, with layer Radu Chiriță, strongly denied by the public opinion, given that SCM had hundreds of available jurists within its own apparatus. For more details, see the web pages (*http://www.ziare.com/stiri/justitie/csm-la-mana-avocatului-pma-sii-cacat-1593483* and *http://www.ziare.com/stiri/magistrati/avocatul-radu-chirita-aparatoral-unor-vip-uri-acuzate-de-coruptie-reprezinta-csm-in-procesul-de-la-cjue-privind-infiintareasectiei-speciale-1593341*), last accessed on April 17, 2020.

SCM members. It is a recurrent situation, also reflected by the absent support from the professional associations or harmonisation with magistrates from law courts and prosecutor's offices. **SCM failed to show a consistent position for a response to the recommendations made by the European Commission, the Venice Commission and GRECO, or, at a more general scale, in relation to the best moment to take measures intended to defend the independence of justice, SCM's current president and some of the institution's members continuing to defend the justice laws in their current version**. SCM reacted to a series of complaints it received on how it has defended magistrates' independence, reputation and impartiality, but its reactions seems modest in relation to the magnitude of the issue. In cases where it advocated that the judicial system's independence should be defended, **SCM has at times raised concern that it might be subject to political influences**[1]".

On October 23, 2019, the Romanian Judges' Forum warned the general public on the fact that the Judicial Inspection and the leaders of the Superior Council of Magistracy were attempting to blatantly hide disciplinary proceedings initiated against a judge who, in the exercise of their jurisdictional duties, had filed with the Court of Justice of the European Union a request for a preliminary decision, the subject of case C-379/19, *NAD Prosecutor – Oradea Territorial Service*.

5. Overt support for a judge for them to be appointed Minister of Justice

On August 23, 2019, an acting judge, Dana Gîrbovan, was officially proposed by the Romanian Government for the Minister of Justice office.

Immediately after the proposal, on August 24, 2019, the professional associations reacted, stating that the proposal was incompatible with the statute of judges and *"this political nomination, accepted by the judge in question, President of the National Union of Romanian Judges, may be construed by the general public as the receipt of a reward for that association's energetic activity (accompanied by the Association of Romanian Magistrates) of supporting certain harmful amendments brought over the past three years, by the political establishment, to the justice laws, contrary to the rule of law, fiercely challenged by all the relevant international organisations (the Venice Commission, the Consultative Council of European Judges, the Consultative Council of European Prosecutors,*

[1] "For example, statements that, in their turn, reprobated the statements made by the President of the European Parliament, in which they criticised the preventive measures taken by the Special department for the investigation of magistrates, that did not allow the candidate for the European Prosecutor's Office leadership (Laura Codruța Kövesi, AN) to attend the hearing in the European Parliament and the Romanian President's statements in which he rejected the candidate proposed in August 2019 by the Prime Minister for the Minister of Justice office" (*https://ec.europa.eu/info/sites/info/files/progress-report-romania-2019-com-2019-499_ro.pdf*), last accessed on April 17, 2020. On that occasion, the Romanian Judges' Forum, the Initiative for Justice and the Movement for the Defence of Prosecutors' Statute initiated a dialogue with the European Parliament, presenting an independent report on the issue of the legislative amendments and the state of the magistracy in Romania, contrary to SCM's account.

the European Commission, the European Parliament, GRECO etc.), the Superior Council of Magistracy in Romania, nearly all the law courts and prosecutor's offices in Romania, but also individually, by thousands of Romanian judges and prosecutors (in particular, setting up the Judicial Crime Investigation Department, proposed and firmly supported by the judge and candidate to the minister office within the «Iordache Commission»[1]). In 2018, more than 2000 fellow magistrates separated themselves from these associations, considering that the views expressed during the legislative process were inadequate for the progress of the magistracy. Moreover, certain branches of these associations dissolved themselves and a lot of members resigned, on the same grounds". Not in the least, the appointment of a judge, by a political government, as president of a professional association could be later seen as irretrievable damage to the credibility of its activity, publicly perceived as primarily linked to the political establishment and its representatives at one particular point in time, with dire outcomes for the image of the entire judiciary in Romania and the pool of magistrates.

Following these public position statements, on August 26, 2019, the Romanian Superior Council of Magistracy's Department for Judges decided to "submit to the Romanian President the proposal to dismiss, via resignation, Mrs Dana Cristina Gîrbovan, judge with Cluj Court of Appeal, pursuant to art. 65 parag. (1) let. a) in Law no. 303/2004, republished, as subsequently amended and supplemented"[2].

However, the proposal to dismiss was not effectively submitted to the Romanian President.

On August 28, 2019, the Romanian President rejected the Romanian Government's proposal to appoint a judge Minister of Justice be it a resigning one: *"I hereby reject the proposal for the Minister of Justice office. I shall not tolerate the neglect towards the vote expressed on May 26 ignored, when Romanians halted as such PSD and ALDE's program to disorganise the judiciary, stop the fight against corruption and totally place Romania under the influence of local barons. PSD and ALDE are to blame for the current disaster, for politicising institutions, and I shall not tolerate proposals that go completely against the democratic values that most Romanians, myself included, believe in"*[3].

On August 29, 2019, the Romanian Superior Council of Magistracy's Department for Judges issued a press release, arguing that *"the program proposed by the candidate whose application for the Ministry of Justice was rejected would have helped improve conditions within the judiciary and we ought to disapprove the fact that political quarrels were deemed more important than developing a better justice system for the benefit of the citizens".*

In reply, the Romanian President (the Presidential Administration) issued, on August 29, 2019, a statement: *"(...) Since it outlines the idea that a judge can hold*

[1] (*https://www.cotidianul.ro/argumentele-judecatoarei-dana-girbovan/*), last accessed on April 17, 2020.

[2] (*https://www.csm1909.ro/ViewFile.ashx?guid=35f6bde2-43c2-45d2-bd4b-d95f74ddbda8|InfoCSM*), last accessed on April 17, 2020.

[3] (*https://www.presidency.ro/ro/presedinte/agenda-presedintelui/declaratia-de-presa-sustinuta-de-presedintele-romaniei-domnul-klaus-iohannis1567005316*), last accessed on April 17, 2020.

a minister office, the Opinion of SCM's Department for Judges is disconcerting and likely to weaken, by itself, the independence and prestige of justice and the statute of judges. SCM's Department for Judges has to explain how the Romanian President would have consented to appointing a judge minister, as clearly stated in the statement made public. These inexplicable opinions of experts in the judicial process are precisely interferences truly harmful for the independence of justice; they seem to criticise the very fact that the Romanian President observed the country's laws and Constitution. It would have been beneficial for the signatories, prior to issuing the press release, to have gone through the Venice Commission's recommendations, according to which a judge has to resign prior to competing for a political office as, even if they are not appointed, they will be associated to a certain political trend, to the detriment of independence. The Venice Commission also considers that judges should not place themselves in a position that would jeopardise their independence or impartiality. Via opinions it expresses, SCM's Department for Judges should not do politics, but genuinely promote the independence of justice and of each individual judge, while staying unbiased and within its constitutional jurisdiction".

On August 30, 2019, the Department for Judges within the Superior Council of Magistracy in Romania made public another statement:

"The Venice Commission's recommendations, mentioned by President Klaus Iohannis, concern the legislation of Kârgâzstan, which regulated the candidacy of a magistrate for an elective political office, entailing that a judge would have to run an election campaign. (...)

In regard to the Romanian legislation, as per Decision no. 45/2018, the Constitutional Court argued that the office of judge or prosecutor is incompatible with any other public office, and this incompatibility also applies if the said magistrate is suspended from office. However, no reason within the Constitutional Court decision can lead to the conclusion that a judge's acceptance to be proposed for appointment as Minister of Justice entails, de plano, a political activity. Such a conclusion can only be drawn if the interpretation of the Constitutional Court decision is skewed and contrary to the judicial rationale comprised within its reasons. In regard to the actual incompatibility, it only occurs when two offices are held simultaneously, which is not the case at the time of accepting a proposal for appointment in office.

The analysis and clarification of laws, in accordance with and in the spirit of these provisions, in addition to solid legal knowledge, require rigor and interpreting them in line with the purpose for which they were issued. When a judge's statute is effectively called into question, this analysis must be carried out entirely independently, without any interfering interests, political or otherwise. For that matter, all the aspects concerning the statute of judges, including the issue of incompatibilities, exclusively fall under the jurisdiction of the Superior Council of Magistracy's Department for Judges, and not the Romanian President's. The categorical communication, by the Romanian President, Klaus Iohannis, to the Department for Judges, of guidelines on how the rules on the statute of judges should be interpreted and applied is unacceptable. The Department for Judges shall not take orders from any other power of the state, much less from a president in full election campaign, who wishes to drag justice into political battle. (...)".

The fact that the Department for Judges within the Superior Council of Magistracy publicly expressed its support for the election program of a potential

minister proposed by a political party was able to challenge the credibility of the entire judicial system, the image of the judiciary and of the pool of magistrates in Romania, raising questions in relation to this body's role of justice independence guarantor and its neutral status granted by the Constitution, particularly in the current pre-election context.

As far as the chronology of events is concerned, one cannot ignore, either, the manner in which the Department of Judges within the Superior Council of Magistracy decided to take action, choosing to submit the proposal to discharge from office the judge proposed for the minister office within an optimal deadline, which would eventually eliminate the emerged case of incompatibility and facilitate the legal possibility of appointing them, so long as they were no longer a magistrate, to an office within the executive, according to that person's own option.

As a matter of fact, on September 3, 2019, at the end of a game with an unexpected result, the Superior Council of Magistracy's Department for Judges "was notified on the decision expressed by Mrs Gîrbovan Dana Cristina, a judge with Cluj Court of Appeal, to waive the request to be discharged from the office of judge, via resignation and, accordingly, ruled the reversal of Decision of the Superior Council of Magistracy's Department for Judges no. 1269/26.08.2019"[1].

6. Appointment of the Judicial Inspection chief inspector, with the modification of the assessment procedure by the actual contest commission

Decision no. 82/15.05.2019 of the Superior Council of Magistracy Plenum validated the contest procedure for the appointment of the Judicial Inspection chief inspector, Lucian Netejoru, for a second mandate.

A true first in the history of SCM, the contest commission set forth a minimum granted score and adopted rules to cancel scoring sheets, by means of which it obviously exceeded its own powers. By setting forth scoring sub-criteria, a minimum score, to be mandatorily granted based on the sub-criteria, as well as the sanction of invalidating the scoring sheets, that indicated a score below the minimum one, a score that was also disregarded in deciding the final score, the commission substituted themselves to the SCM Plenum. Since the contest commission also put into practice these rules adopted in its capacity of self-appointed "third-party legislator", pursuant to a so-called *"decision-making autonomy"*, the contest result was influenced by this legality flaw. A commission's freedom of choice is limited, among others, by the competences it has been granted by the authority that set it up, whereas the decisions of commissions set up by the authorities have no autonomy in relation to the law and the administrative document pursuant to which they operate.

The subsequent measures of "invalidating" scoring sheets compliant with the regulatory provisions on calculating the final score, and the disregard of said sheets,

[1] (*https://www.csm1909.ro/ViewFile.ashx?guid=08335e73-8490-407c-884a-d303b150b063|InfoCSM*), last accessed on April 17, 2020.

are clearly in breach of the provision stipulated at art. 11 parag. (3) in the Regulation. To be compliant, in order to obtain the final score, one must take into account all the five scoring sheets, according to which candidate Netejoru Lucian had cumulated a 60-point score, insufficient to be appointed chief inspector of the Judicial Inspection.

Decision no. 82/15.05.2019 of the Superior Council of Magistracy Plenum was legally challenged by the Romanian Judges' Forum, the Initiative for Justice Association and the Movement for the Defence of Prosecutors' Statute Association, the cases being *pending*.

7. Appointment of the president of the High Court of Cassation and Justice by infringing upon the legal deadlines

As indicated in the request to dismiss judge Lia Savonea from the office of president of the Superior Council of Magistracy, initiated in 2019 by seven SCM members, on 30.05.2019, **Lia Savonea**, in her capacity of president of the Superior Council of Magistracy and the Department for Judges, **unilaterally commenced the procedure of appointment to the office of president of the High Court of Cassation and Justice**, a procedure stipulating, as deadline for the submission of candidacies, the May 30 – July 1, 2019 interval, an interval that violated the provisions of art. 53 parag. (4) Law no. 303/2004, on the statute of judges and prosecutors, republished and as subsequently supplemented, given that the HCCJ president office was going to become vacant no sooner than September 15, 2019.

However, as per the provisions of art. 53 parag. (4) in Law no. 303/2004, in their form amended by Law no. 242/2018, the High Court of Cassation and Justice judges who meet the requirements stipulated by the law for holding a leading position within the supreme court can submit their candidacies for the office of president or vice-president of the High Court of Cassation and Justice, or chamber president within the Superior Council of Magistracy's Department for Judges, within 30 days from the date when the office of president, vice-president or chamber president has become vacant.

A simple reading of these legal provisions indicates that **the period during which one may submit candidacies for the office president of the High Court of Cassation and Justice is 30 days, a period that runs as of the date when the acting president's mandate has expired**, this being the date when the respective office has actually been vacated.

Rushing by nearly three months the application submission deadline made it impossible to declare candidacy by applicants who would have met the legal prerequisites after July 1, 2019, namely within the 30-day interval calculated from September 14, 2019, when that leadership position was set to become vacant, upon the expiration of the acting president's mandate. One cannot justify the apparent violation of an express legal provision by arguing that the intention is to secure continuity of office, as, even upon the mandate expiration of the current president of the High Court of Cassation and Justice, leaving a managerial void would not have been allowed, whereas one of the vice-presidents would have held the office of supreme court president, with the possibility to delegate another judge to the temporary vacant leading position.

Decision no. 1256/18.07.2019 of the Superior Council of Magistracy's Department for Judges, based on which judge Corina Alina Corbu was appointed president of the High Court of Cassation and Justice for a 3-year mandate, starting from 15.09.2019, was challenged in court by the Romanian Judges' Forum, the case being *pending*.

8. Certain disciplinary solutions delivered by the Superior Council of Magistracy

Undoubtedly, what draws attention is the fact that disciplinary actions were taken against judges that stood out by way of public statements opposing the changes brought to the "justice laws", while safeguarding magistrates who supported those legislative changes.

One of the best known judges in Romania, specialised in the fight against money laundering, Camelia Bogdan, who sentenced political leaders within the PSD-ALDE government coalition or Romanian or Romanian businessmen for committing corruption offences, was initially ousted from the magistracy in February 2017, as per **Decision no. 1J from February 8, 2017**, for having taught, outside the higher education institutions, but as part of a project funded by the World Bank, courses in the fight against corruption, to public servants in charge with the use of European funds[1].

As per Decision no. 336 from December 13, 2017, the High Court of Cassation and Justice – the 5-judge Panel admitted, with a majority of votes, the second appeals filed by defendant Camelia Bogdan and intervener The Romanian Judges' Forum Association against Decision no. 1/J of February 8, 2017, rendered by the Superior Council of Magistracy – the Department for judge-related disciplinary issues in case file no. 14/J/2016. The challenged decision was partly invalidated, in regard to the sanction of exclusion for magistracy, replaced with the sanction of disciplinary transfer, over a 6-month period, to Târgu Mureș Court of Appeal, starting from January 15, 2018. Judge Camelia Bogdan referred the matter to the European Court of Human Rights[2].

Decision no. 15J of May 4, 2017, delivered by the Department for judge-related disciplinary issues, dismissed the disciplinary action taken by the Judicial Inspection against judge Florica Roman for committing the disciplinary offence provided by art. 99 let. a) in Law no. 303/2004 on the statute of judges and prosecutors, republished, as

[1] (*http://thelondonpost.net/romanian-judge-who-jailed-corrupt-billionaire-media-mogul-is-suspended-seeking-justice-for-herself/*), last accessed on April 16, 2020.

[2] In the case *Bogdan vs Romania*, no. 36889/18, on the docket of the European Court of Human Rights, the Romanian state must answer, among others, the Court's question whether "the SCM Plenum's refusal, of January 11, 2018, regarding the motion filed by the plaintiff, pursuant to art. 30 din Law no. 317/2004, to protect their professional reputation marred by a certain press campaign, as well as leaking to the press confidential information from the disciplinary investigation file, during said investigation, violated or interfered with their right to private life as provided by art. 8 parag. (1) in the Convention. If they did interfere, did the interference meet the requirements of art. 8 parag. (2) in the Convention (*Axel Springer AG vs Germany* [MC], no. 39954/08, parag. 83-84, the decision from February 7, 2012; *Von Hannover vs Germany (no. 2)* [MC], no. 40660/08 and 60641/08, parag. 106)?".

subsequently amended and supplemented, and started after the judge published on her personal blog the article *"Complaint filed with NAD against the American ambassador, Hans Klemm, and Valeriu Zgonea for influence peddling. Their remand custody is demanded"*[1]. It was separately acknowledged that, by also informing the public on the content of this complaint, her conduct is contrary to magistrates' obligation of reserve in exercising freedom of speech. The Judicial Inspection did not challenge the decision of SCM's Department for judge-related disciplinary issues.

Decision no. 20J of June 14, 2017, delivered by the Department for judge-related disciplinary issues, admitted the disciplinary action filed by the Judicial Inspection against judge Ioan Fundătureanu with Pitești Court of Appeal. Pursuant to art. 100 let. b) in Law no. 303/2004 on the statute of judges and prosecutors, republished, as subsequently amended and supplemented, the judge was subject to a disciplinary penalty in the form of a basic monthly allowance diminished by 20% over a 5-monthy period, for committing the disciplinary offence stipulated by art. 99 let. a) in the same normative.

It was acknowledged that, in the context of appointing Mr Florin Iordache Minister of Justice, the judge expressed himself quite explicitly, with no room for interpretations, on Facebook, in the sense that *"The appointment of this serf at the top of this sensitive ministry is a slap on the face of honest magistrates and professional jurists. No better proposal could there be in the new Dragnea era, for the Ministry of Justice, than this Caracal-born tool and die maker, called Florin Iordache. Rarely do we see a greater paragon of ineptitude and charlatan than this individual. His mandate will be clean-cut: suppress the fight against corruption, impunity for the beloved high-ranking PSD rulers, create a mechanism for magistrates' direct liability to deter departures, that is, investigating and sentencing the country's great plunderers".*

As per Decision no. 54 of March 26, 2018, The High Court of Cassation and Justice – the 5-judge Panel admitted the second appeal rendered by the judge and, after invalidating the decision and a retrial, dismissed the disciplinary action. The court believed that the defendant did not intend, directly or indirectly, to have their opinion reach the public by being quoted by a local newspaper. Also, the European Court of Human Rights case-law in case *Baka vs. Hungary* is relevant, the statements dealing with a general interest matter for the Romanian justice.

Additionally, **Decision no. 5J of March 14, 2018**, delivered by the Department for judge-related disciplinary issues, by a majority of votes, admitted the disciplinary action filed by the Judicial Inspection against judge Ciprian Coadă. Pursuant to art. 100 let. b) in Law no. 303/2004 on the statute of judges and prosecutors, republished, as subsequently amended and supplemented, a disciplinary penalty was applied, consisting in "a basic monthly allowance diminished by 5% over a two-month period", for committing the disciplinary offence provided by art. 99 let. a) in the same normative.

As per Decision no. 128 of May 27, 2019, the High Court of Cassation and Justice – the 5-judge Panel admitted the second appeal rendered by the judge and partly invalidated

[1] (*https://floricaroman.wordpress.com/2016/05/18/plangere-la-dna-impotriva-ambasadorului-american-hans-klemm-si-valeriu-zgonea-pentru-trafic-de-influenta-se-cere-arestarea-lor-preventiva/*), last accessed on April 16, 2020.

the challenged decision, in the sense that it applied to defendant Coadă Ciprian the penalty provided by art. 100 let. a) in Law no. 303/2004, republished, as subsequently amended and supplemented, consisting in a warning, for committing the disciplinary offence provided by art. 99 let. a) in the same normative. It was acknowledged that, as the author of an article published on *www.juridice.ro*, via allegations and denigrations, he tainted the honour and moral integrity of the Constitutional Court judges, conveying the idea that they are tools of certain group interests. Judge Ciprian Coadă notified the European Court of Human Rights on the matter.

Decision no. 9J of April 2, 2018, delivered by the Department for judge-related disciplinary issues, admitted the disciplinary action filed by the Judicial Inspection against judge Camelia Bogdan. Pursuant to art. 100 let. e) in Law no. 303/2004 on the statute of judges and prosecutors, republished, as subsequently amended and supplemented, a disciplinary penalty was applied, consisting in "exclusion from magistracy", for committing the disciplinary offence provided by art. 99 let. o) in the same normative. It was acknowledged that, by settling a case file in their capacity of permanent panel member and redocketting the case, after the ruling was postponed, the judge breached the random distribution rules, fully aware of their duties according to the law, while trying to render the seeming legality of the ordered measures. The second appeal rendered by the sanctioned judge is pending before the High Court of Cassation and Justice – the 5-judge Panel.

Decision no. 5J din May 7, 2019, delivered by the Department for judge-related disciplinary issues, admitted the disciplinary action filed by the Judicial Inspection against judge Cristi Danileț with Cluj County Court. Pursuant to art. 100 let. b) in the Law on the statute of judges and prosecutors, republished, as subsequently amended and supplemented, a disciplinary penalty was applied, consisting in "a basic monthly allowance diminished by 5% over a 2-month period", for committing the disciplinary offence provided at art. 99 let. a) in the same normative. The disciplinary action concerned the following Facebook post: *"Perhaps somebody will notice, though, the string of attacks, dismantling and undermining efforts against the following institutions: DGIPI (General Directorate of Intelligence and Internal Protection), SRI, SPP (Protection and Guard Service), the Police, NAD, the Gendarmerie, PICCJ, HCCJ, the Army. They don't seem incidental after the very vocal revealing of «security institutions' abuses». We all know what impairing the efficiency of these institutions or, even worse, taking them under political control, would mean: the services, the police, the judiciary, the army? And speaking about the Army: has anybody read the provisions of art. 118 parag. (1) in the Constitution, according to which the army is subject solely to the will of the people for the purpose of guaranteeing (...) constitutional democracy? What if, one day, we were to see the army in the streets safeguarding... democracy, since we just saw the coefficient decreasing?! Wouldn't you be surprised to realise that it would be... constitutional!? I believe we can't see the wood for the trees..."*[1] The second appeal rendered by the sanctioned judge is pending before the High Court of Cassation and Justice – the 5-judge Panel.

[1] (*https://www.hotnews.ro/stiri-esential-23126672-cristi-danilet-sanctionat-disciplinar-judecatorii-csm-5-din-indemnizatia-doua-luni-dupa-spunea-armata-putea-iesi-strada-pentru-pazi-democratia.htm*), last accessed on April 16, 2020.

We shall also acknowledge that, as indicated by the request to dismiss judge Lia Savonea from the office of president of the Superior Council of Magistracy, filed in 2019 by seven SCM members, the judge Savonea "**unreasonably delayed substantiating the disciplinary decisions of the Department for Judges, thus violating the provisions of art. 51 parag. (1) in Law no. 317/2004, which stipulate a 20-day drawing up deadline**. As such, the draft decision that invalidated the disciplinary action taken against the former president of the High Court of Cassation and Justice is withheld by the president's cabinet, despite a 4-month interval having passed since delivery. In this context, we must mention that judge Savonea refused to discuss with the Department for Judges the challenge on delaying the proceedings filed by judge Iulia Cristina Tarcea (HCCJ president at the time) in relation to that delay".

As of 2017, **the decisions delivered by the disciplinary departments have no longer been published on the SCM website**. SCM's Commission no. 1 decided, during the September 25, 2017 meeting, that these decisions were not to be communicated to third parties, either.

Last but not least, **the Superior Council of Magistracy had no reaction whatsoever concerning documents issued by the Judicial Inspection, including texts from disciplinary penalties, that became public**. The Romanian Judges' Forum Association requested that the latter entity communicate whether it had investigated or not any possible violations of the confidentiality requirement by the institution's personnel or by any other person, regarding the activity that the said institution has the power to supervise, in several circumstances detailed in the petition. The Judicial Inspection replied it had identified any cases that would require checking whether the personnel had disregarded the confidentiality requirement. In the Judicial Inspection's records "one cannot identify reports on verifications of issues in fact that fall under the disciplinary offence provided by art. 99 let. j) in Law no. 303/2004 on the statute of judges and prosecutors, since, during the preliminary verifications, one cannot refer to the existence of a disciplinary offence, but only to the existence or absence of clues"[1].

9. Other aspects from the activity of the Superior Council of Magistracy

• Over the course of 2018, the Romanian Judges' Forum and the Movement for the Defence of Prosecutors' Statute **requested that SCM finalise the procedure of approving the 2016 Independent External Audit Report**[2]**, drawn up for the yearly assessment of the Judicial Inspection's management and, consequently, to discuss about the dismissal of the chief inspector from the leading position**.

[1] (*http://www.forumuljudecatorilor.ro/index.php/archives/3624*), last accessed on April 16, 2020.

[2] The audit reports comprise recommendations on the manner of fulfilling managerial duties, efficient organisation, conduct and communication, the Judicial Inspection being accountable for their actions, making it mandatory to capitalise on their conclusive findings in the procedure of reviewing the dismissal request.

As per note no. 22443/28.11.2018, the president of the Superior Council of Magistracy informed that, upon interpreting the provisions of art. 67 parag. (5) and art. 68 parag. (1), (4) and (5) in Law no. 317/2004, he concluded that "the dismissal of the Judicial Inspection chief inspector can only be ordered upon the review of the independent external audit report by the Superior Council of Magistracy Plenum". In this context, the settlement of the request by the Plenum was explicitly refused, on the grounds that: *"The audit report on assessing the quality of the Judicial Inspection management in 2017 was already reviewed and approved by the Superior Council of Magistracy Plenum, as per Decision no. 441/2018, whereas the audit report for 2018 shall be drawn up, under the provisions of art. 68 in Law no. 317/2004, republished, as subsequently amended and supplemented, within the first 3 months of 2019"*. Note no. 22443/28.11.2018 was issued by the president of the Superior Council of Magistracy without being underpinned by a decision of the Plenum, a qualified collegiate entity according to the law, while at the same time making no reference to the main subject of the request: the 2016 independent external audit report, drawn up pursuant to art. 68 in Law no. 317/2004. As per the Minutes of the joint Commission no. 1, the date of March 1, 2020 was set forth to discuss the 2016 audit report, but not complied with[1].

• On July 22, 2019, the Romanian Judges' Forum and the Initiative for Justice Association expressed their concerns towards the **intention of the Superior Council of Magistracy to purchase premises in order to turn it into the institution's office, making it an extremely expensive investment (EUR 18.000.000)**, considering that the Government was a running a project to build a suitable office. The amount should have been redistributed to investments genuinely urgent for the judicial system. Lia Savonea **designated a Council member to represent civil society – Victor Teodor Alistar – in the commission in charge with purchasing premises for the Council**, the SCM member office being incompatible with management/executive offices within the apparatus or internal commissions of that nature. By the date of the present paper, SCM's endeavour has not been completed.

• The conclusion, upon reviewing the request to dismiss judge Lia Savonea from the office of President of the Superior Council of Magistracy, filed in 2019 by seven SCM members, is that the judge **assigned to Council members tasks from areas that were not compatible with the offices they held.** For instance, Evelina Mirela Oprina, an elected member, was consecutively appointed spokeswoman, which is a management position within the entity's own apparatus, substituting the actual office holder: "In this capacity, judge Savonea initiated an «investigation» in relation to meetings of Council members, relying on a piece of false news provided to a news website, stiripesurse.ro (where totally false statements were made, according to which several SCM members demanded explanations from the SIIJ deputy director concerning a case file). Evelina Oprina conducted a genuine investigation, outside any legal framework, hearing members, staff within their cabinets and SIIJ prosecutors, in her capacity assigned directly by the president, under the pretext of replying to a request made by the respective website as per the provisions of Law no. 544/2001.

[1] (*https://www.csm1909.ro/ViewFile.ashx?guid=48fdcf66-4447-46b8-9591-2a07deb60e7e|InfoCSM*), last accessed on April 16, 2020.

However, the reply sent to the news website was brief and evasive, easily foreseeable as early as the request filing date".

• The same request to dismiss judge Lia Savonea from the office of president of the Superior Council of Magistracy reveals that the judge **made the discretionary choice to refuse the publication, on the Superior Council of Magistracy website, a press release of the Department for Prosecutors, on October 8, 2019**: "This action is in stark contrast with her extremely permissive attitude towards a civil society member, Victor Teodor Alistar, who publishes his own viewpoints on the institution's website, under the press release designation (see the press release from October 14, 2019)".

10. Conclusions

The evolution of the Superior Council of Magistracy in recent years displays ***ineffectiveness*** (for instance, the failure to fulfil its role of securing an effective control and balancing system, able to defend the independence of the judicial institutions that pressures are exerted upon; the inconsistent exercise of the duty to defend the pool of magistrates against actions likely to be detrimental to their independence, impartiality or professional reputation, in the absence of *ex officio* referrals), ***indifference*** (the reaction of the Superior Council of Magistracy towards the changes brought to the justice laws; its criticism towards the relevant international bodies; the lack of a consistent opinion concerning the response to the recommendations made by the European Commission, the Venice Commission and GRECO; the lack of any concern towards magistrates working conditions; the proposal to appoint judges only for them to retire merely a few months into their mandate etc.) or even ***suspicions of political bias*** (according to the European Commission, SCM sometimes raised concern that it might be subject to political influences; as revealed by the seven SCM members, signatories of the request to dismiss the Council president, SCM has discredited the bodies that issued international reports, making unsubstantiated claims that they had committed factual errors).

All the attacks that targeted, from 2017 to 2019, the judiciary also took place against a backdrop with a feeble SCM, unable to reply, but having prompt responses strictly in wage-related matters, partly accountable for the rule of law regression in Romania.

A legislative model, perhaps "perfect on paper"[1], has already turned into a semi-failed practical experiment, unable to strengthen its status of guarantor of independent justice.

[1] See, for more details, *B. Selejan-Guțan*, Romania: Perils of a "Perfect Euro-Model" of Judicial Council, in German Law Journal Vol. 19 No. 7, p. 1707-1740, article available on the web page (*https://www.cambridge.org/core/journals/german-law-journal/article/romania-perils-of-a-perfect-euromodel-of-judicial-council/D910A4D3BF0BAF0E5A26C75965C0B31D*), last accessed on April 16, 2020.

A Guide on the Harassment of Inconvenient Magistrates

Bogdan Pîrlog[*]
Sorin Marian Lia[**]

Motto:
"Fiat iustitia et pereat mundus".
Ferdinand I, Holy Roman Emperor (1558-1564)

As of 2017, the rule of law, in general, and justice, in particular, have been under continuous attack. Groups, more or less organised, heterogeneous, transpolitical, rooted within the economic and financial sectors or even in the underworld and linked to the *"intelligence"* community, as well as in the judiciary, influencing or even directly or indirectly controlling the decision-making process within the executive or the legislative power, becoming strongly influential upon the Constitutional Court, as well, coordinate the efforts to subordinate de judicial system.

In early 2017, after the elections held by the Superior Council of Magistracy, a majority in the Department for Judges drew closer to decision makers within the executive and the legislative, contributing, next to a few other judges and prosecutors, to the emergence of *"reflection hubs"*. Out of the collaboration, set up against the order of things and the provisions in the Constitution, among decision-making elements within the executive and legislative powers and the Constitutional Court, on the one hand, and magistrates, on the other hand, some of the latter holding key offices within the judiciary or the Ministry of Justice, came out an ever more coherent and more integrated strategy to destroy and subordinate justice to various more or less perceptible power hubs.

The first attempts were actually made in early 2017. The endeavour was concurrently commenced in two directions, a broad amnesty or pardon and a *de facto* decriminalisation of occupational offences, related to the corruption ones. The amnesty/pardon draft was coordinated by three prosecutors, relocated as state secretaries within the Ministry of Justice, prosecutors Constantin Sima, Oana Andrea Schmidt-Hăinează and Gabriela Scutea, the last one also being the decision-maker, as per Minister of Justice Order no. 169/C/2017. The decriminalisation draft, the notorious

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[**] First prosecutor of the Prosecutor's Office attached to Corabia Local Court, co-president of the *Initiative for Justice* Association.

Government Emergency Ordinance no. 13/2017, was coordinated by the prosecutor relocated as state secretary within the Ministry of Justice, Gabriela Scutea. Thus, as of 25.01.2017, Gabriela Scutea, whose final relocation day was 31.01.2017, was placed in charge with coordinating the Directorate for the elaboration of normatives and supervising the elaboration by the Directorate personnel, who made numerous objections, of the draft normative adopted on 31.01.2017 as GEO no. 13/2017. Ignoring the adverse opinions issued by the magistrate-equivalent experts within the Ministry of Justice, particularly within the Directorate for the elaboration of normatives, state secretary Gabriela Scutea issued a favourable opinion on the draft, during her last day relocated within the ministry. The emergency ordinance was accompanied by a 10-day deadline to come into effect, a deadline set forth at the proposal of one of the magistrate-equivalent experts within the Ministry of Justice, Alina Barbu.

The adoption of GEO no. 13/2017 triggered the greatest wave of demonstrations over the past decade, more than one million protesters taking to the streets on a daily basis, for one week, until it was repealed, prior to its coming into force date.

Later on, the anti-justice forces withdrew, for almost 6 months, in which time the Minister of Justice, Tudorel Toader, aided by the state secretary, prosecutor Oana Andrea Schmidt-Hăineală, launched a draft with ample amendments brought to the "justice laws" and the Penal and Criminal Procedure Codes. Afterwards, this draft was submitted via informal channels to the Joint Special Commission of the two Chambers of Parliament, where, for nearly one year under the coordination of the former Minister of Justice, Florin Iordache, the most ample and harmful changes to the justice laws, criminal and procedural criminal laws were carried out.

The context is all the more serious as the "legislative experiment", called *amendments to the justice laws*, took place against a background where the Romanian police, in general, and the judicial police, in particular, following the "reforms" of the past 2 years (17.000 officers and non-commissioned officers retires, whereas there were 10.000 vacancies nationwide), display a staffing rate of 48-50% of their organisational chart. As a result of these changes, public order and citizens' safety are in grave danger.

The drastic reduction of the judicial police staff and the deprofessionalization of the pool of policemen are already seriously impairing the expediency and quality of the criminal process. If doubled by the similar predictable effects of altering the justice laws, justice, as a rule of law element, will vanish and take with it the rule of law itself. Basically, the Romanian state will place itself outside the European values, with damaging outcomes for our society.

The main changes brought to the justice laws are likely to have the following dangerous consequences for the rule of law:

1. The judicial system collapses and justice stops working as a public service

➢ Through these changes, the pool of magistrates will become deprofessionalized, and the National Institute of Magistracy will become the main deprofessionalization tool.

➢ Promotion, by eliminating the professional competence objective criteria, will become a tool for review courts to indirectly control the decisions delivered.

➢ The body of magistrates will be decreased by at least 50% by 2022.

➢ The workload will be artificially increased and these measures, coupled with the massive decrease of the pool of magistrates, will triple the workload, for judges in particular.

2. The judicial process becomes biased and corrupted

➢ Mechanisms designed to control and exert pressure on magistrates will be set up, directly or indirectly, via susceptible bodies coordinated by entities outside the Judicial Authority. As such, it will be able to exert pressures upon magistrates, either through the department for the investigation of magistrates or by means of the Judicial Inspection, bodies controlled via the members of SCM's Department for Judges.

➢ Depriving prosecutors of their independence will be regulated.

➢ The political establishment will be able to also exert direct control over prosecutors via the Minister of Justice (who will be able to set guidelines on the prevention and effective fight against crime), the Romanian Prosecutor General, the Chief Prosecutor of the National Anticorruption Directorate or the Chief Prosecutor of the Directorate for Investigating Organized Crime and Terrorism, the appointment of whom is controlled by the Minister of Justice.

➢ These measures will place the judicial system on a subordinating tier in relation to the political establishment, the effect being the loss of the rule of law status, and will favour high-level corruption or corruption within the judiciary.

➢ There is a risk of having judicial bodies, prosecutor's offices in particular, turn into political battle weapons, available to political power wielders, taking them back to the status of repressive, corrupt and non-functional body from an era prior to the adoption of the "justice" laws.

3. Violation of art. 47 in the European Union Charter of Fundamental Rights (EUCFR), art. 6 in the European Convention on Human Rights, art. 21 in the Romanian Constitution

The changes, taken *ut singuli*, are not all unconstitutional. However, if we analyse them collectively, we find that, through their effect of dismantling the judicial authority, infringe upon art. 47 in EUCFR, art. 6 in the Convention and art. 21 in the Romanian Constitution.

EUCFR, the European Convention on Human Rights and the Romanian Constitution do not guarantee theoretical and illusive rights, but practical and genuine rights. The right to a fair trial must be regarded in relation to the placement of justice in the frontlines of a state upholding the rule of law, corresponding to a democratic society.

The obligation to secure the right to access justice is a positive duty of the state, critical to the proper fulfilment by the state of the commitments it made upon signing the European Convention on Human Rights or derived from the status of European Union member. The signatory states of the Convention and the Council of Europe member states are bound to organise their own judicial system in a manner that allows their jurisdictions to guarantee litigants the rights to a fair trial within a reasonable timeframe (e.g. *Airey vs. Irland* and *Golder vs. The United Kingdom*).

The right to a fair trial entails two main components. The first component consists in regulating fundamental rights such as free access to justice, the right to an independent and impartial law court, the right to the settlement of one's case within a reasonable timeframe, the equality of arms, the presumption of innocence, the right to an effective legal remedy etc. The second component is ensuring a functional judicial system able to offer the needed guarantees and genuinely and effectively ensure the fair settlement of cases within reasonable timeframes.

Both components are positive obligations of the Romanian state, both according to the Constitution and accompanying the status of signatory of the European Convention on Human Rights and EU member.

More than 4000 of the approximately 6500 judges and prosecutors signed a statement of protest against these changes and, later on, these changes were also discussed upon in the general assemblies of prosecutors and judges, organised within all law courts and prosecutor's offices, the result being more than 95% against these changes.

In their turn, the amendments brought to the Penal and Criminal Procedure Codes are likely to make it nearly impossible to fight crime, in general, and corruption, in particular. To date, the amendments to the codes have not come into effect.

Concurrently with the above-mentioned legislative changes, the Minister of Justice Tudorel Toader took ample steps to purge the management of the Public Ministry. He dismissed Laura Codruța Kövesi from the National Anticorruption Directorate (NAD) leadership with the help of the Constitutional Court. For this measure, Romania was reprobated by ECHR.

Capitalising on the nearly finalised mandates of some of the highest-ranking prosecutors within the Public Ministry, minister Tudorel Toader forcefully dismissed the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, Augustin Lazăr (the most qualified and valued Prosecutor General in post-revolutionary history) and the Chief Prosecutor of the Directorate for Investigating Organized Crime and Terrorism (DIOCT), Daniel-Constantin Horodniceanu (another professional with remarkable results). To steer DIOCT, he appointed to the office of Chief Prosecutor a person lacking any experience and any notable professional achievement, but with serious professional training gaps (Felix Bănilă), and, to the office of Deputy Chief Prosecutor, Giorgiana Hosu, an extremely controversial figure with notorious integrity issues and debateable professional achievements. To be noted that the latter, both when she worked as deputy for the DIOCT Chief Prosecutor, Felix Bănilă, as well as after his resignation, when she actually led the directorate, failed to prove she had the qualities required to hold an office of that nature. The reasons

behind the request for the resignation of DIOCT's former Chief Prosecutor would at least equally apply to madam prosecutor Elena Georgiana Hosu, as well. The ineffective manner in which she handled the case on the Caracal murders (e.g., allowing hundreds of persons access to the perimeter of the crimes, risking damaged or altered evidence), calls for the cessation of her activity within the directorate.

In that respect, we should also acknowledge the ineffective way in which she handled the "August 10" case file, where she also designated herself case prosecutor, the public impression being that, since it was taken over from PICCJ's Department for Military Prosecutor's Offices, investigations made no progress and the crimes entailing the directorate's jurisdiction were not detailed upon.

Moreover, integrity issues, at least in regard to her image, given that her husband was prosecuted for corruption offences in Bucharest County Court case file 3603/3/2017, call for her removal from the Directorate for Investigating Organized Crime and Terrorism, in order not to taint the institution's image.

In addition, to secure his own favourable steering of the Judicial Inspection, Minister of Justice Tudorel Toader extended, via an emergency ordinance, the mandate of the Judicial Inspection's chief inspector, Lucian Netejoru, and that of his deputy, Gheorghe Stan.

The judges and prosecutors who challenged or criticised the changes brought to criminal law and/or the "justice laws" by the Romanian Parliament, Government or Constitutional Court, as well as by those who delivered court orders unfavourable to defendants prosecuted by the National Anticorruption Directorate, became targets of the Judicial Inspection or even of the newly created Judicial Crime Investigation Department.

In regard to the Judicial Crime Investigation Department, it seems to have been set up for two main reasons: on the one hand, to secure impunity for corrupt magistrates approved by the rulers, risking a remake of the corruption networks of the '90s and the former half of the 2000s and, on the other hand, to act as a repressive body used against inconvenient magistrates – aspects that magistrates had warned about since the very moment the creation of that special department became an idea, only to be called alarmists. Unfortunately, after the activity of the special department was ceased, the magistrates' fears were confirmed, as indicated by the department's public statements. These official statements indicate that there is no correspondence between the issue in fact and the legal classification associated to the investigated deeds, any person with elementary criminal law knowledge being able to notice the massive discrepancy.

The special department for magistrates was claimed to be an elite unit, but the persons appointed to run it do not belong to the prosecutors' elite. The first Chief Prosecutor, Gheorghe Stan, had an insignificant investigative activity with a prosecutor's office attached to a minor local court, then worked as "court" prosecutor, subsequent to which he held a management position, followed by that of judicial inspector.

The Judicial Crime Investigation Department only investigated magistrates, unlike the former homonymous service, NAD, which investigated justice-linked corruption and related offences falling under NAD's jurisdiction, regardless of the culprit (lawyer, policeman, clerk, magistrate).

From the very beginning, the Judicial Crime Investigation Department was not conceived as an operating unit. Its structure comprises 15 prosecutors at most, considering that, on a yearly basis, there are thousands of (false) referrals against magistrates, for which a minimum investigation has to be carried out as per the ECHR case-law. Prior to the changes, these referrals were investigated by more than 150 prosecutors within 19 prosecutor's office units (16 prosecutor's offices attached to courts of appeal, the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate and the Directorate for Investigating Organized Crime and Terrorism). At present, there are 7 active prosecutors out of the total 15, visibly overwhelmed by the workload. This adds to the suspicion that setting up the new department aimed not at streamlining criminal investigation in cases with criminal allegations against magistrates, but only at creating a unit to be specifically used against an "inconvenient" judge or prosecutor. There is the added suspicion that it was also attempted to guarantee impunity for corrupt magistrates, willing to serve the interests of certain influence groups who controlled the lawmaking process when the justice laws were being amended.

The appointment procedure for this department is a legal mishmash that violates both the separation-of-careers principle for judges and prosecutors, newly adopted by the law, and the general-nature-of-the-law principle. As such, the appointment of the Chief Prosecutor and the 14 prosecutors is entirely controlled by the Department for Judges within the Superior Council of Magistracy (SCM), and not, as normalcy would dictate, by the Department for Prosecutors. The Superior Council of Magistracy's Department for Judges appoints most members in the contest commission. The Chief Prosecutor is appointed by the SCM Plenum following a "contest procedure" held before a commission comprising 3 judges assigned by the Department for Judges and one prosecutor assigned by the Department for Prosecutors, whereas the other 14 prosecutors are selected following a "contest procedure" held before a commission comprising the directorate Chief Prosecutor and 3 judges assigned by the Department for Judges, from among the department members who worked at a court ranking at least as a court of appeal, and one prosecutor assigned by the Department for Prosecutors. The requirement for the judge to have worked at a court ranking at least as a court of appeal clearly has an *"intuitu personae"* nature, this regulation being the tool employed to remove two judge members not approved by the informal group controlling SCM's Department for Judges. Although one of the judge members, removed from the selection procedure by virtue of the law, notified the Constitutional Court as early as one year ago on the discriminating and subjective nature of that regulation, the Court has ruled on it yet. In the meantime, the first head of the special department was appointed judge with the Constitutional Court by the party that controlled the changes to the justice laws.

The Judicial Crime Investigation Department was brought to public attention in Romania by the impromptu withdrawal, with no public explanations, of appeals filed against decisions delivered by the High Court of Cassation and Justice in relation to current or former major members of the Social Democratic Party or former magistrates prosecuted for committing corruption offences (for instance, Sebastian Aurelian Ghiță, Liviu Mihail

Tudose, Ioan Adam, Anca Roxana Bularca, Lorand Andras Ordog, Gheorghe Sturdza Paltin, Viorel Hrebenciuc, Tudor Alexandru Chiuariu) or other offences (Damian Dolache), as well as by not lodging an appeal in a case file related to a judge prosecuted for having committed the offence of false testimony on an ongoing basis (Ovidiu Daniel Galea).

Additionally, the Judicial Crime Investigation Department drew public attention in Romania by means of its repeated attempts to physically acquire, from NAD, the case file in which the prosecuted figures also included Liviu Nicolae Dragnea, at the time president of the Romanian Parliament's Chamber of Deputies, currently in custody for committing corruption-related offences. SCM's Department for Prosecutors ascertained that these repeated attempts to acquire the respective case file undermined the case prosecutor's independence.

There is no pertinent logical and legal argument for assigning this power to an informal group within the Department for Judges. All of the above lead to the reasonable suspicion that the propelling rationale of the new legal provision is that, at present, most of the members of the Department for Judges are in favour of the detrimental amendments brought to the justice laws (see even the active involvement of members in the media, openly stating their support for the proposed amendments).

The creation of this structure with no counterpart in any of the European Union states or the other democratic states was widely criticised by the international organisations Romania is a part of, GRECO, the Venice Commission, the European Commission, but also by representatives of all strategic partners.

Pending before the Court of Justice of the European Union are, collectively, several requests to deliver a preliminary decision pursuant to art. 267 parag. (1) and (2) in the Treaty on the Functioning of the European Union, to determine whether the European Union law excludes a domestic law provision which sets up a prosecutor's office department with the exclusive jurisdiction of investigating any offence committed by a judge or prosecutor. A decision is expected to be delivered by the end of June this year.

The following are among the most *"relevant"* case files worked:

1. This structure's criminal case file no. 295/P/2019, generically called "Timmermans"

In the *"case"*, criminal prosecution began for offences of abuse in office, provided at art. 297 in the Penal Code, document forgery, provided at art. 321 in the Penal Code, communication of false information, provided at art. 404 in the Penal Code, and establishment of an organised crime group, provided at art. 367 in the Penal Code. The said criminal case file comprised investigations into deeds allegedly committed by: Frans Timmermans (senior vice president of the European Commission), Vera Jourova (European Commissioner for Justice), Angela Cristea (head of the European Commission' office in Romania) and Augustin Lazăr (Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice).

The complaint content indicates that the alleged offences were committed by adopting the "Commission Report to the European Parliament and the Council on the

progress made by Romania under the Cooperation and Verification Mechanism" (the CVM Report) of 13.11.2018, in breach of one's job functions.

Via the statement of 28.03.2019, the Information and Public Relations Bureau within PICCJ informed the general public on the fact that the SIIJ prosecutor ordered, on 27.03.2019, to have this case closed, "having been revealed no element/clue that might lead to the reasonable assumption that the deeds complained about actually took place".

Given the case-closing grounds mentioned in the statement, prosecutor Adina Florea apparently ran a full criminal prosecution against deeds allegedly committed by three European Union officials.

Pursuant to art. 11 let. a) in Protocol no. 7 to the European Union Treaties, on the privileges and immunities of the European Union, European Union officials enjoy immunity from jurisdiction, for the deeds carried out in their official capacity, including their written or verbal statements.

Becoming aware of the matter, through the media, the European Commission, by means of its spokeswoman, Margaritis Schinas, reminded the Romanian authorities that, by signing that Protocol, Romania was bound to observe the Commission's officials immunity from jurisdiction, also stating they only fall under the jurisdiction of the Court of Justice of the European Union.

These aspects were ignored during the entire criminal prosecution, also in the case file-closing order, prosecutor Adina Florea substantiating the criminal proceedings in the case pursuant to the SIIJ jurisdiction to prosecute alleged deeds of the Prosecutor General at the time, joined in their actions by high-ranking European officials, according to the complaint.

2. The case file on madam judge Muntean Crina-Elena

"Prosecutor" Adina Florea with the Judicial Crime Investigation Department ruled on continuing criminal prosecution for committing "the offences of aiding and abetting the culprit, as provided in art. 269 parag. (1) in the Penal Code, abetment to false testimony, as provided in art. 47 in the Penal Code, in relation to art. 273 parag. (1) in the Penal Code, in regard to art. 279 parag. (2) in the Penal Code, abetment to abuse of office, as provided in art. 47 in the Penal Code, in relation to art. 297 parag. (1) in the Penal Code, in regard to art. 279 parag. (2) in the Penal Code", in case 1/P/2019, by "prosecutor" Adina Florea with the Judicial Crime Investigation Department.

In regard to the case, we acknowledge the following: until it was ordered to continue the criminal prosecution against madam judge Muntean Crina-Elena, no investigations were carried out in relation to her conduct. They were out of the question, anyway, the object of the case being the allegedly illegal criminal prosecution against two judges with Oradea Court of Appeal, in the context of a debate among prosecutors with NAD – Oradea Territorial Service, made public as an audio recording of an apparent discussion between said prosecutors, with no related technical verification. Madam

judge Muntean Crina-Elena neither attended, nor was she referred to in that discussion. As such, continuing criminal prosecution against madam judge Muntean Crina-Elena 11 months after starting criminal prosecution on an issue in fact she has no knowledge of renders the entire effort trivial and abusive, serving purposes outside the judicial process.

Case prosecutor Adina Florea recused herself and recusal was admitted after having displayed, in the presence of several witnesses, including the parties' lawyers, her joy hearing the news that madam judge Crina-Elena Muntean was ill, stating that the latter was unlikely to survive. Her recusal was admitted, but the documents drawn up by the case prosecutor were maintained, although she had been declared incompatible.

3. The case files of former prosecutors with NAD – Oradea Territorial Service and Ploiești Territorial Service

4. The case files of SCM members who publicly opposed the harmful changes brought to the justice laws

Cristian Ban, Nicolae Andrei Solomon, Bogdan Mateescu and Florin Deac are being investigated by the Judicial Crime Investigation Department. The existence of case files on SCM members, prosecutors Cristian Ban, Nicolae Andrei Solomon and Florin Deac, came to public attention after Gabriela Scutea, Georgiana Hosu and Bogdan Dimitrie Licu received adverse opinions on holding the offices of PICCJ Prosecutor General, Chief Prosecutor with DIOCT and PICCJ first deputy Prosecutor General, respectively, when the three SCM members and prosecutors were noticed to appear in court, before the Special Department, there being strong suspicions that this notice, doubled by a media campaign more aggressive than ever, against the said SCM members and their families, intended to intimidate and *"persuade"* them to issue favourable opinions on the three candidates. Fortunately, the SCM members in question did not give in and issued negative opinions on the three candidates, given the latter's extremely poor performance and integrity issues that disqualified them from holding such offices.

5. Vast international reverberations were produced by the unexpected investigation conducted against Mrs Laura Codruța Kövesi

The former NAD prosecutor was notified that she was a suspect, right after receiving confirmation of her candidacy, as the first name on the final three-candidate list, for the office of Chief Prosecutor with the European Public Prosecutor's Office (EPPO), with jurisdiction to conduct criminal investigations and prosecutions of offences affecting the European Union budget, such as fraud, corruption, money laundering or cross-border VAT fraud. Prior to that, Mrs Laura Codruța Kövesi's candidacy for the European Public Prosecutor's Office (EPPO) Chief Prosecutor had been criticised by the Romanian Senate President at the time, Mr Călin Popescu Tăriceanu or by the Romanian Minister of Justice at the time, Mr Tudorel Toader.

The investigation triggered an immediate response from the European Commission ("all the candidates to the position of European Chief Prosecutor must be treated fairly; the independence of justice in Romania is of the outmost importance").

As per the decision from April 3, 2019, the High Court of Cassation and Justice ruled to revoke the judicial review ordered upon Mrs Laura Codruța Kövesi, determining that the allegations made (bribe taking, abuse of office and false testimony) were inaccurate, unclear (incoherent) and unsubstantiated, whereas the judicial review was entirely illegal. The Justice of peace acknowledged the failure to meet the requirements for commencing the criminal prosecution *in personam* and the criminal proceedings (the allegations lacked clarity, which equals to the absence of the official notification, an existent case of extinction of or preclusion to exercise criminal action, the lack of evidence), the lack of reasoning for the order to carry out the judicial review, the imposition of obligations different from those expressly provided within the limits of law. All these vices subscribe to particular legality conditions which, if proven, render the analysis of any legal grounds superfluous.

Nevertheless, the main tool used to exert pressure and intimidate, from 2017 to date, the Judicial Inspection. In certain cases, the disciplinary procedure concerns the actual actions detailed above, whereas in others, the procedure runs under some pretext, for deeds which, in different circumstances, would not be deemed judicial defaults.

By means of the changes brought to the justice laws, the Judicial Inspection turned, *de facto*, into the technical support team of the chief inspector, who acquires absolute powers within the inspection. As such, he or she: appoints to leading positions from among judicial inspectors; controls the entire selection of judicial inspectors; leads and controls the inspection and disciplinary investigation activities, imposing solutions in a discretionary manner; is primary budget holder and sets forth the flowchart; approves, as per the regulation, the rules for carrying out the inspection activities; is the sole initiator of the disciplinary action.

The appointment of the chief inspector is totally controlled by the Department for Judges, which designates, from among its members, most of the contest commission members. These changes, too, similar to those related to the appointment of the special Judicial Crime Investigation Department's Chief Prosecutor, lack any logical and legal support, leading to the reasonable suspicion that the reasoning behind altering the legal provision is that most members in the Department for Judges support the harmful changes proposed and, at the same time, support the current chief inspector. Moreover, by adding the requirement to have actually worked at a County court, a Court of Appeal or HCCJ, for the judge members of the commission, the "conjectural-personal" nature of this regulation is all the more prominent as, within the Department for Judges, the 2 representatives of judges, with county court judge rank, were always opposed the amendments to the "justice laws" (that is how one enjoys, within the Department for Judges, a comfortable majority in favour of amending the "justice laws").

Following the changes, the chief inspector office becomes, next to that of Chief Prosecutor with the special Judicial Crime Investigation Department, one of the most

powerful pressure and repressive tools throughout the judicial system (in that respect, also see "no-show" endeavour carried out by 5 of the members in the Department for Judges, during the SCM Plenum meeting of 30.08.2017, the topic of which was discussing the Judicial Inspection's 2016 management external audit final report, a no-show whose overt objective was not to make up the quorum required to dismiss the Judicial Inspection's management).

Below are several examples of the use of disciplinary measures as a tool employed to intimidate, exert pressure or repression:

1. Judge Georgeta Ciungan from Bihor County Court

Ruling on criminal case no. 3507/111/2016, judge Georgeta Ciungan from Bihor County Court found herself forced to exclude all the evidence collected by NAD prosecutors against four defendants in order to comply with three controversial decisions of the Constitutional Court. On May 7, 2019, she decided to notify the Court of Justice of the European Union, with a request to deliver a preliminary decision pursuant to art. 267 in the Treaty on the Functioning of the European Union. The questions raised concerned the following aspects: whether the Cooperation and Verification Mechanism was mandatory for Romania, whether the Constitutional Court of Romania had to refrain from delivering decisions falling under the exclusive jurisdiction of law courts and the Parliament, whether the Union law stipulates that the effects of such decisions should not be taken into account and excludes a domestic law provision which sets forth disciplinary accountability for the magistrate who dismisses a constitutional court decision, in the context of the question raised (case C-379/19).

One of the lawyers of two of the defendants accused of corruption offences in the said case filed a complaint with the Judicial Inspection against the above-mentioned judge, in relation to the request for a preliminary decision. Upon conducting preliminary investigations, as per Resolution no. 2112/A of July 1, 2019 (case file no. 19-1794), the Judicial Inspection commenced disciplinary investigation against judge Georgeta Ciungan for having committed the disciplinary offence stipulated in the first sentence of let. ș) in art. 99 of Law no. 303/2004 – *"non-compliance with Constitutional Court decisions"*.

The Judicial Inspection acknowledged that the disciplinary offence consisted in: making observations – in the content of the questions submitted to the Court of Justice of the European Union – on the jurisdiction and binding nature of Constitutional Court decisions, tackling these aspects in order to avoid a disciplinary action if the judge were to exclude the enforcement of the three controversial decisions of the Constitutional in the case submitted for trial.

2. Military judge George Dorel Matei from de la Bucharest Military Court of Appeal

On February 15, 2019, in criminal case file no. 36/2/2019, judge George Dorel Matei from Bucharest Court of Appeal notified the Court of Justice of the European Union

with a request to deliver a preliminary decision pursuant to art. 267 in the Treaty on the Functioning of the European Union. The questions raised concerned the following aspects: whether the Cooperation and Verification Mechanism was mandatory for Romania, whether the European Union law excludes a domestic law provision which sets forth a prosecutor's office department with the exclusive jurisdiction of investigating any crime committed by a judge or prosecutor and whether the principle or supremacy in the European law excludes a domestic law provision that allows a political-jurisdictional institution, such as the Constitutional Court of Romania, to violate the said principle via decisions that are not likely to entail a second appeal (case C-195/19).

Right away, the President of the Superior Council of Magistracy, Mrs Lia Savonea notified the Judicial Inspection, using as pretext a media article regarding the judge in the case, an article on a different subject, published on *www.luju.ro*, a website specialised in the vilification of magistrates.

Upon conducting preliminary investigations, as per Resolution no. 2705/A of August 12, 2019 (case no. 19-3262), the Judicial Inspection commenced disciplinary investigation against judge George Dorel Matei for having committed the disciplinary offence stipulated by the first sentence of let. i) in art. 99 of Law no. 303/2004, *"non-compliance with the duty to refrain when the judge or prosecutor is aware there is one of the cases in which they must refrain, according to the law"*.

The Judicial Inspection acknowledged the following:

Judge George Dorel Matei was a member in the appeal judicial panel of case file no. 43351/3/2015. Decision 1707/A from December 19, 2018 of Bucharest Court of Appeal admitted the appeal filed by NAD and two defendants accused of corruption offences were sentenced, after being initially acquitted by the first instance court. The Judicial Inspection, notified by the president of the Superior Council of Magistracy, stated that judge George Dorel Matei should have refrained from trying that appeal, given that on July 4, 2019 (approximately 8 months from the delivery of the decision concluding the appeal) a motion to dismiss was, basically, admitted, on the grounds that there was an instance of incompatibility in relation to it [art. 64 parag. (1) let. f) in the Criminal Procedure Code, *"there are reasonable suspicions that the judge's impartiality might be impaired"*], with the consequence of having the appeal tried.

The website *www.luju.ro* accused judge George Dorel Matei of being biased, as one of the defendants, in their capacity of public servant, had allegedly settled a request submitted by the judge's father, in 2014, through the judge's e-mail address, a request by which the judge's father wished to verify compliance with the legal provisions in relation to an already commenced construction. No element was presented that might indicate that any conflict might have emerged between the above-mentioned judge or even his father and the said servant in relation to the how the request had been settled (as a matter of fact, a request with no relevance).

At present, the disciplinary case is pending before the Superior Council of Magistracy's Department for Judges, a department unofficially controlled precisely by Mrs Lia Savonea, the author of the disciplinary referral.

3. Judge Ruxandra Grecu from Bucharest Court of Appeal

On October 19, 2018, in case no. 5811/3/2015, a panel within Bucharest Court of Appeal, led by judge Ruxandra Grecu, raised an unconstitutionality exception of certain provisions in Emergency Ordinance no. 92/2018, which amended Law no. 304/2004, by setting forth restrictive and unjustifiable rules, applicable as of 16.10.2018 to NAD prosecutors who continued their activity within the directorate.

On March 19, 2019, *www.ziare.ro* website published an article in which judge Ruxandra Grecu was quoted explaining why, in some cases, to ensure the proper protection of witnesses' identity, the same person must be heard both under their real identity and their alias, stating that no legal provision forbids that practice and the court can dismiss either of that witness' two statements.

Two journalists requested Bucharest Court of Appeal to present a viewpoint on the alleged lack of impartiality of judge Ruxandra Grecu (favoured by NAD), in regard to criminal case file no. 48239/3/2017/a1, in which a protected witness was heard by NAD under both their real and their protected identity. As per Decision 100 of April 18, 2019, the managing college of Bucharest Court of Appeal requested the Judicial Inspection to start investigations into alleged judicial defaults. The case was filed with the Judicial Inspection under number 19-2362.

Shortly afterwards, the defendant in criminal case file no. 48239/3/2017/a1 filed a motion to disqualify judge Ruxandra Grecu, pursuant to Decision 100 of the managing body. The motion to disqualify was rejected.

After preliminary investigations, as per Resolution no. 1960 from June 20, 2019, a judicial inspector closed case no. 19-2362, on the grounds that the judge had only expressed her professional opinion on a matter of principle, without making reference to a particular case, therefore, there were no indications of having been committed the offences provided at letter b and in the first sentence of let. i) in art. 99 of Law no. 303/2004, *"violation of legal provisions related to incompatibilities and interdictions pertaining to judges and prosecutors*" and "*non-compliance with the duty to refrain when the judge or prosecutor is aware there is one of the cases in which they must refrain, according to the law"*. The resolution was acknowledged by the chief inspector and no complaint was filed against it.

Surprisingly, since there are no legal grounds for such a procedure, as per protocol no. 2815/A of August 26, 2019, in the same case no. 19-2362, another judicial inspector (the same that commenced an investigation into judge George Dorel Matei) started a disciplinary investigation against judge Ruxandra Grecu for committing the disciplinary offence provided by art. 99 let. a) and b) in Law no. 303/2004, *"manifestations that affect the honour or professional integrity or prestige of the judiciary, carried out in or outside the exercise of one's occupational duties"*, *"violation of legal provisions related to incompatibilities and interdictions pertaining to judges and prosecutors"*.

There was an additional disciplinary action taken against the same judge for alleged repeated absence. In fact, during the days when he was allegedly absent, the judge was either attending a training course organised via the National Institute of Magistracy or

was actually present at the workplace, being clocked in by the actual person who filed the referral (the head of department at the time).

4. Judge Crina Elena Munteanu from Bihor County Court

Between January 1, 2018 and November 21, 2018, as per the decision of December 27, 2017 of Bihor County Court managing college (comprising seven judges and including judge Crina Elena Munteanu), judge Crina Elena Munteanu was temporarily designated as the sole justice of peace within Bihor County Court. Although the rule states that all the civil and criminal cases must be randomly distributed, on "objective grounds", the Internal regulations of law courts also allow designating a single justice of peace. The decision was made taking into account the insufficient number of judges and the need to maintain confidentiality. In other cases, the Judicial Inspection deemed a practice of this nature adequate.

In her capacity of justice of peace, Crina Elena Munteanu decided, during the criminal prosecution, in relation to requests, proposals or any other requests related to preventive measures, to approve searches and the use of special surveillance or investigation methods, many of these in cases where the criminal investigation had already been conducted by NAD prosecutors.

On January 11, 2019, a referral in the form of a complaint was filed with the Judicial Inspection, by a lawyer, on non-compliance with the random of causes to the justice of peace within Bihor County Court. The respective referral (submitted in December 2018) had been left unfiled for almost 4 weeks so that one could arrange distribution to the *"approved"* judicial inspector (the workload distribution within the Judicial Inspection follows a cyclical system, based on the case filing order).

Upon conducting prior verifications, as per Resolution no. 233 from February 21, 2019 (case no. 19-134), the Judicial Inspection closed the case, ascertaining there were no clues indicating that the disciplinary offence stipulated by art. 99 let. o) in Law no. 303/2004, *"non-compliance with the provisions on the random distribution of cases"* had been committed. This resolution was invalidated by the chief inspector, who ordered additional investigations.

As per Resolution no. 1016 of April 11, 2019, the Judicial Inspection started disciplinary investigations into all the seven judges and members of the managing body, for committing the disciplinary offence provided by art. 99 let. o) in Law no. 303/2004.

As per Resolution no. 1839 of June 10, 2019, the Judicial Inspection decided to dismiss the lawyer's complaint against six of the judges and members of the managing college, and to take disciplinary action against judge Crina Elena Munteanu before the Department for Judges within the Superior Council of Magistracy.

In the Judicial Inspection's opinion, judge Crina Elena Munteanu would have been the only one to understand that the random distribution principle had been infringed upon by the managing college, which is she manipulated the other members of the managing college. The Judicial Inspection believed that, since four of the judges worked

in county court departments different from the criminal one and one judge worked in the criminal department, but had a shorter work experience (one judge was omitted), those judges failed to understand the implications of their vote.

The Judicial Inspection also concluded that the respective managing college did not have the power to ascertain the existence of "objective grounds", whereas the fact that a certain practice, be it a nationwide general practice, can be deemed suitable in other cases does not eliminate disciplinary accountability in particular cases.

At present, the disciplinary case is pending before the Superior Council of Magistracy's Department for Judges, a department unofficially controlled precisely by Mrs Lia Savonea. All the defences and exceptions raised by the judge were dismissed or rejected, for reasons acknowledged by most members of the Superior Council of Magistracy's Department for Judges, thus the High Court of Cassation and Justice case-law being infringed upon.

Later on, the Inspection commenced yet another disciplinary procedure against the same judge, on the subject of the aspects she mentioned during an interview granted to *Newsweek România* magazine. She spoke about the corruption networks within the Bihor county judiciary, coming as a whistleblower on integrity issues.

5. Judge Ciprian Coadă from Constanța Court of Appeal

On March 14, 2017, judge Ciprian Coadă from Constanța Court of Appeal criticised Constitutional Court Decision no. 68 from February 27, 2017 in an article published on *www.juridice.ro* (a specialised media outlet). Analysing the decision, judge Ciprian Coadă noticed that the Constitutional Court exceeded its jurisdiction, by introducing a new form of parliamentary and ministerial immunity, as well as new reason for to remove the criminal nature of the deeds committed in the exercise of legislative activity, thus legitimizing misuse of power.

Following a complaint filed by the Constitutional Court, judge Ciprian Coadă became the subject of a disciplinary action, with the High Court of Cassation and Justice delivering a conclusive decision in that respect. As per civil decision no. 128 of May 27, 2019, in civil case no. 584/1/2019, the High Court of Cassation and Justice sanctioned the above-mentioned judge with a warning for the disciplinary offence provided by art. 99 let. a) in Law no. 303/2004, *"manifestations that affect the honour or professional integrity or prestige of the judiciary, carried out in or outside the exercise of one's occupational duties"*, after the Department for Judges within the Superior Council of Magistracy had initially sanctioned him with a 5% monthly allowance decrease over a 2-month period.

6. Judge Anca Codreanu from Brașov County Court

On October 2, 2018, the Romanian Judges' Forum Association published on its own website a study entitled *"White Paper: Protocols of cooperation between the Romanian*

Intelligence Service and various judicial authorities with jurisdiction over criminal matters"[1]. At the same time, the association made public a statement containing the conclusions of this study and mentioning at the end *"Contact: judge Anca Codreanu, co-president of the Romanian Judges' Forum Association"*.

Discontent with this study, a defendant under criminal prosecution by NAD filed with the Judicial Inspection a disciplinary complaint against all the members of the said professional association. The defendant disapproved the fact that the study employed the term "felon" and some of the ideas expressed in the study are contrary to those expressed, on the same topic, by 14 of the court of appeal presidents, arguing that the study is an attempt to influence other judges. Consequently, judge Anca Codreanu from Brașov County Court (working within the 2nd Civilian Division for administrative and fiscal litigations) became the subject of prior verifications (case no. 7113/IJ/3186/DIJ/2018). Judge Anca Codreanu was the only member of that professional association subject to prior verifications.

As per the resolution of April 19, 2019, the designated judicial inspector closed the case, as there were no clues that the disciplinary offence provided by art. 99 let. a) and art. l in Law no. 303/2004, *"manifestations that affect the honour or professional integrity or prestige of the judiciary, carried out in or outside the exercise of one's occupational duties"* and *"interference with another judge's or prosecutor's activity"* had been committed. This resolution was invalidated by the chief inspector, who ordered additional verifications. As per the Resolution of May 27, 2019, the same inspector closed the case once again, this time conclusively, as the law did not allow for another invalidation.

7. Judge Mihai Bogdan Mateescu, elected member of the Superior Council of Magistracy

Judge Mihai Bogdan Mateescu, an elected member of the Superior Council of Magistracy, known for his view on the legislative changes that impair the rule of law, was the subject of disciplinary proceedings after expressing, in Facebook post on May 31, 2018, a rhetorical question regarding the generally binding nature of Constitutional Court decisions, after mentioning, as an example, the status of a Constitutional Court member who held that office for approximately 10 years, although the Constitutional Court had deemed unconstitutional the mechanism by means of which the mandate of a Constitutional Court member is extended beyond the constitutional 9-year period.

Following a complaint of the respective Constitutional Court member, and upon conducting prior verifications, as per the Resolution of September 21, 2018 (case file no. 5104/IJ/2354/DIJ/2018), the Judicial Inspection commenced disciplinary investigations against judge Mihai Bogdan Mateescu for having committed the disciplinary offence provided by art. 99 let. a) in Law no. 303/2004, *"manifestations that affect the honour or professional integrity or prestige of the judiciary, carried out in or outside the exercise of one's occupational duties"*. As per the Resolution of December 12, 2018, the complaint

[1] (*http://www.forumuljudecatorilor.ro/wp-content/uploads/FJR-White-Paper-Protocoalele-de-cooperare-dintre-SRI-si-diverse-autoritati-din-sistemul-judiciar-avand-competenta-in-materie-penala.pdf*).

was dismissed, despite certain clues indicating non-compliance with the Deontological Code of Judges and Prosecutors. This is a procedure exclusively regulated at an infralegal (non-statutory) level.

On December 13, 2019, the Judicial Inspection notified the Department for Judges within the Superior Council of Magistracy, arguing there were indications of non-compliance with art. 7 and art. 9 parag. (2) in the Deontological Code of Judges and Prosecutors, *"Judges and prosecutors have a duty to foster the rule of law and defend the citizens' fundamental rights and freedoms"* and *"Judges and prosecutors must refrain from any behaviour, action or manifestation that might impair their impartiality"*.

As per Decision no. 579 of April 10, with a majority of votes, the Superior Council of Magistracy's Department for Judges decided there were no clues indicating that judge Mihai Bogdan Mateescu had not complied with the above-mentioned rules of conduct and accordingly dismissed the Judicial Inspection's request (6 votes in favour and 2 against).

8. Prosecutor Bogdan Ciprian Pîrlog, first deputy military prosecutor of the Military Prosecutor's Office attached to Bucharest Military Court

Prosecutor Bogdan Ciprian Pîrlog is the subject of three disciplinary procedures, whereas a fourth disciplinary action has just been commenced against him, currently in the prior verifications phase.

The first disciplinary procedure (case no. 601/IJ/136/DIP/2018) centres around him committing the disciplinary offence stipulated by art. 99 let. a) in Law no. 303/2004, *"manifestations that affect the honour or professional integrity or prestige of the judiciary, carried out in or outside the exercise of one's occupational duties"*, and concerns the opinions that he had allegedly expressed in the article *"Main aspects likely to severely harm the judicial system"*, published on January 25, 2018, on *www.juridice.ro* website. The Judicial Inspection was notified *ex officio.*

As per the Resolution of August 27, 2018, the Judicial Inspection decided to take disciplinary action against military prosecutor Bogdan Ciprian Pîrlog, arguing that he acted *"in overt and total disregard of the rules and standards of conduct magistrates must abide by, willingly denigrated (...) the members of the Superior Council of Magistracy's Department for Judges, stating that it is loyal to and supportive of the current political establishment"*. In regard to the inspectors within the Judicial Inspection, it was actually acknowledged by the latter that the said prosecutor *"had allegedly described them as entities controlled by the political rulers so as to be used (...) as means to exert pressures upon magistrates"*.

Considering that prosecutor Bogdan Ciprian Pîrlog challenged before Bucharest Court of Appeal the legality of a provision in the Regulation concerning the rules on conducting inspections by the Judicial Inspection, adopted by the Superior Council of Magistracy, which supplements the law and impaired his rights throughout the disciplinary procedure, as per civil case sentence no. 4823/2018 of November 23, 2018, delivered in case no. 2873/2/2018, this provision was cancelled and its enforcement remains suspended until the conclusive settlement of the case.

The Superior Council of Magistracy and the Judicial Inspection (which argued, despite the law and the evidence, that the chief inspector had adopted the Regulation in question, although they should have been a party in the case) filed an appeal with the High Court of Cassation and Justice, the first trial date being set forth for February 18, 2021, with the disciplinary procedure staying suspended until the High Court of Cassation and Justice has ruled on the matter.

We should mention that, in the grounds for appeal, the Judicial Inspection criticised the conduct of the judge in case no. 2873/2/2018 for having rushed to justify the above-mentioned sentence, shortly after which the Judicial Inspection took disciplinary action against that judge under the pretext of delayed justifications in other cases. It is obvious that, through this evident "show of strength", the Judicial Inspection tried to intimidate the judges in the appeal panel.

The second disciplinary procedure (case no. 5922/IJ/1454/DIP/2018) is on the subject of committing the disciplinary offence stipulated by art. 99 let. m) in Law no. 303/2004, *"unreasonable non-compliance with administrative provisions or decisions set forth, in accordance with the law, by the presiding judge of the law court or the prosecutor's office, or with other administrative duties stipulated by the law or regulations"* and concerns the activities carried out by military prosecutor Bogdan Ciprian Pîrlog in regard to the acts of violence carried out by gendarmes against the peaceful demonstrators protesting against corruption in Victoria Square, on August 10, 2018. The Judicial Inspection responded *ex officio*.

As per the Resolution of January 8, 2019, the Judicial Inspection decided to take disciplinary action against military prosecutor Bogdan Ciprian Pîrlog, arguing that, by going to Victoria Square to see what was going on and taking steps *ex officio* (in accordance with art. 292 in the Criminal Procedure Code), he had allegedly infringed upon art. 89 in the Internal Regulations of Prosecutor's Offices (which do not forbid prosecutors' free passage or curiosity and stipulate that prosecutors shall fulfil any duties provided by the law). The Judicial Inspection also considered that prosecutor Bogdan Ciprian Pîrlog was allegedly in breach of art. 2 and 5 in Order no. 192/2010 of the Prosecutor General, in the sense that he had failed to inform his superior on his activities, although he actually had (this aspect is obviously false, as there are both written notifications and the statements of the notified persons).

On March 6, 2019, in case no. 3/P/2019, the Department for Prosecutors within the Superior Council of Magistracy suspended the disciplinary procedure until the delivery of a conclusive decision by the High Court of Cassation and Justice in case file no. 2874/2/2018.

Both in the first, as well in the second disciplinary action, the distribution of the disciplinary proceedings was manipulated in such a manner that the same judicial inspector, loyal to the Judicial Inspection management, and the spouse of whom held a major office in a ministry, would be assigned to the case.

The third disciplinary procedure (case no. 19-1863) centres around committing the disciplinary offence provided by art. 99 let. a) in Law no. 303/2004, *"manifestations that affect the honour or professional integrity or prestige of the judiciary, carried out in or*

outside the exercise of one's occupational duties", and concerns the opinions expressed by prosecutor Bogdan Ciprian Pîrlog, in his capacity of representative of the "Initiative for Justice" Association (a professional association of prosecutors), during a reunion organised by the Romanian President, Mr Klaus Werner Iohannis, on March 27, 2019 – opinions presented to the public as part of a press release on March 31, 2019, signed by all the three co-presidents of the professional association, prosecutors Sorin Marian Lia, Ionuț Marcu and Bogdan Ciprian Pîrlog.

The procedure was commenced after a joint complaint was filed with the Judicial Inspection, by all the prosecutors within the Judicial Crime Investigation Department (an official, targeted body recently set up within the Prosecutor's Office attached to the High Court of Cassation and Justice, unofficially running under the control of Mrs Lia Savonea), against prosecutors Bogdan Ciprian Pîrlog and Sorin Marian Lia.

Initially, the procedure was centred around the actual discussions held during the meeting with the Romanian President by the two representatives of the "Initiative for Justice" Association, however, after the military prosecutor requested that all the participants in the meeting, the Romanian President included, be heard, the object of the disciplinary procedure was narrowed down to the statements in the press release.

As per Resolution no. 2860/B/30.08.2019 of August 30, 2019, the Judicial Inspection decided to take disciplinary action against military prosecutor Bogdan Ciprian Pîrlog on the grounds that his critical views concerning the Judicial Crime Investigation Department (described as having a dual role: on the one hand, to act as a repressive body, strictly controlling and exerting pressure on inconvenient judges and prosecutors and, on the other hand, to secure impunity for corrupt, but approved judges and prosecutors) and the prosecutors operating under this department (deemed not part of the prosecutors' elite) failed to reflect reality.

The Department for Prosecutors within the Superior Council of Magistracy ascertained the absolute nullity of Resolution no. 2860/B/30.08.2019 and of the disciplinary procedure.

The fourth disciplinary procedure (case no. 20-1472) concerns the *ex officio* notification related to technical surveillance and stakeout activities illegally conducted on the deputy (at the time) Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice. Prosecutor General Gabriela Scutea notified the Judicial Inspection on the matter, despite not having this duty according to the law.

Context:

As such, the 2017, 2018 and 2019 CVM Reports reiterated the European Commission's recommendation to set up a robust and independent system of appointing high-ranking prosecutors, based on clear and transparent criteria, with assistance from the Venice Commission, able to offer solid guarantees against political interferences. As to how the matter evolved in time, these CVM Reports highlighted a consistently weakened control and balancing system within the high-ranking prosecutor appointment procedures, plus a departure from the Venice Commission's recommendations, with increased freedom to the Minister of Justice in selecting candidates and a particularly limited role assigned to the Superior Council of Magistracy.

The 2018 and 2019 GRECO Reports on Romania reiterated the recommendations that procedures of appointing and dismissing the highest-ranking officials within the prosecutor's office should be transparent and rely on objective criteria, whereas the Superior Council of Magistracy should be granted a more significant role in this procedure.

The Venice Commission argued that, if the choice is for an appointment mechanism involving the executive power, one shall require additional guarantees in order to lower the risk of politicising the prosecution, which is why the genuine involvement of a judicial council for prosecutors, if such a structure were to exist, would be essential, being a guarantee of neutrality and non-political professional skill.

The Consultative Council of European Prosecutors (CCPE) ruled, as per the Opinion issued on May 16, 2019, that "an independent professional authority, such a Prosecutors' council, should be qualified to appoint, promote and impose disciplinary penalties against prosecutors, excluding or at least restricting, in that respect, interventions from other state bodies".

In November 2019, right after his appointment as Minister of Justice, Cătălin Predoiu announced the start of procedures to appoint to the major offices within the Public Ministry, without amending the legal framework in line with the recommendations of international bodies and the European Commission, also ignoring the views expressed by the Department for Prosecutors within the Superior Council of Magistracy, the European Commission experts, as well as by the main professional associations of magistrates (a single professional association stood by the minister's endeavour, namely the association run by Gabriela Scutea, who was subsequently appointed Prosecutor General at the proposal of the Minister of Justice, which adds even more to the assumption of prior hidden agreements to appoint to the highest offices in prosecutor's offices persons with backing from politics or entities outside the judicial system).

Răzvan Horațiu Radu and Gabriela Scutea applied, among others, for the position of Prosecutor General with the Prosecutor's Office attached to the High Court of Cassation and Justice.

Minister Cătălin Predoiu, at the end of the interviews before the commission he presided, proposed Gabriela Scutea to be appointed in office, by disregarding the opinions of the experts in the commission and by not even drawing up an assessment sheet or any other written document.

After a disastrous performance at the interview held before the Department for Prosecutors within the Superior Council of Magistracy, she received an adverse opinion from SCM. Right away, two of the members of SCM's Department for Prosecutors became subject to a generalised media lynching, doubled by an aggressive (and, most times, misleading) media campaign in favour of candidate Gabriela Scutea.

On 20.02.2020, ignoring the adverse opinions of the SCM's Department for Prosecutors, the Romanian President signed the appointment decrees for Gabriela Scutea and Georgiana Hosu, stating he *"was pleased"* to appoint them and found the SCM opinion to be *"in part, quite superficial"* (on 11.03.2020, he would also ignore the adverse opinion issued for Bogdan Licu and appoint him first deputy Prosecutor General).

The day when the appointment decrees for Mmes/prosecutors Gabriela Scutea and Hosu Georgiana were signed was also marked by the incidents that became the subject of a military prosecutor's office investigation (case file 166/P/2020).

On 23.02.2020, the Military Prosecutor's Office attached to Bucharest Military Court was notified *ex officio*.

The issue in fact:

Prosecutor Răzvan Horațiu Radu, pursuant to his capacity of deputy Prosecutor General with the Prosecutor's Office attached to the High Court of Cassation and Justice, on 20.02.2020, was in Târgu Mureș, attending the Review of the Prosecutor's Office attached to the Court of Appeal. The activities completed, he went back to Cluj Napoca, where he was going to attend, the next day, the Review of the Prosecutor's Office attached to Cluj Court of Appeal.

During his journey, he was contacted by the former Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, Bogdan Dimitrie Licu, who informed him that the new Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, Gabriela Scutea, had asked the former to return to Bucharest to meet her the next day. No one else knew that he was going to return to Bucharest.

Răzvan Horațiu Radu drove to Bucharest with the service vehicle. On his way to Bucharest, at 15:30, he invited journalists C.A. and S.C., via Whatsapp messages, to meet in order to celebrate Răzvan Horațiu Radu's birthday. At 15:40, he communicated to C.A. the meeting place and approximate time. Around 19:30, he confirmed to S.C., as well, the place and time of arrival. In regard to witness P.R., a judge, he/she was invited by Răzvan Horațiu Radu when the latter was already at the diner with the other witnesses. The guests did not reveal to anybody any details concerning the event. No reservations had been made. The three individuals were expected at the location.

Considering the fact that the respective communications used to make the invitations took place via the Whatsapp application which, in order to have it intercepted, one has to take control remotely over the mobile device used by one of the targets, and the technical solutions required to execute such operations are only possessed by intelligence services, the person who submitted them to the professionals conducting the stakeout could only have been an officer or non-commissioned officer within one such service.

As early as 17:00, a team comprising 4 individuals arrived at the diner. One of them performed a reconnaissance of the diner. Later on, three of them sat at a table (desk) close to the entrance. The three were still inside the diner when C.A. (at 20:15), S.C. (at 20:25) and Radu Răzvan Horațiu (at 20:40) arrived. Around 19:30, on the sofa in the proximity of the restroom, two additional individuals were identified, a male and a female, who sat down for a few hours and had a minimal, non-alcoholic order. The two individuals, given their position, were the only ones that might have made the video recording inside the men's restroom.

The early investigations revealed that the stakeout team comprised at least 20 persons, who used 5 vehicles (the number of persons and vehicles involved may increase upon completing the viewing of all video recordings). The final 4 vehicles joined the team at 19:30.

In the media, a "stakeout report" was published, drawn up in a similar fashion to some employed by the intelligence services. Pictures, video and audio recordings taken and

made during the event, depicting the 4 customers, were presented, as well. The manner of conducting the above-mentioned operations is specific to employees within structures with intelligence-collecting duties. An extremely negative campaign commenced, nearly throughout all national media, against Radu Răzvan Horațiu, the case prosecutor (first deputy military prosecutor with the Military Prosecutor's Office attached to Bucharest Military Court) and certain members of SCM's Department for Prosecutors, which included their families, as well.

Interferences of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice with the case file.

On 24.02.2020 the formalities required to file case 166/P/2020 with the Military Prosecutor's Office attached to Bucharest Military Court were carried out. This information was "leaked" to the media in the evening of the same day. Although (at least) a witness in the case file, Prosecutor General Gabriela Scutea ordered, in the morning of 25.02.2020, a review regarding the *ex officio* referral, the filing of the case and the jurisdiction of the military prosecutor's office. The review was performed on behalf of Prosecutor General Gabriela Scutea, who did not refrain from ruling in the case.

As of 27.02.2020, there have been 4 attempts, outside the legal framework, by Prosecutor General Gabriela Scutea, to physically acquire the case file.

On 2.04.2020, in overt breach of the law, Prosecutor General Gabriela Scutea ordered the invalidation of all orders of the court delivered in the case and the suppression of all the submitted evidence. Since the case prosecutor stated that the action was clearly illegal, not enjoying the presumption of legality of the documents issued by the public authorities, the case prosecutor continued the investigation in the case.

Although Prosecutor General Gabriela Scutea and her first deputy, Bogdan Licu, were notified to appear in court as witnesses, they failed to do without justification.

On 8.04.2020, DIOCT, led by Chief Prosecutor Georgiana Hosu (appointed under the same controversial conditions as Prosecutor General Gabriela Scutea) extended the criminal prosecution in a case pending before the directorate. The extension concerned precisely the issue in fact that was the subject of the case file pending before the military prosecutor's office, which allowed the directorate to claim jurisdiction. On 14.04.2020, Prosecutor General Gabriela Scutea refrained from ruling in the case. The deputy prosecutor general assigned jurisdiction to DIOCT and ordered the submission of the case file to the directorate.

On 15.04.2020, although the case file should have been submitted to DIOCT, and although she was incompatible in the case, Prosecutor General Gabriela Scutea ordered the first prosecutor with the military prosecutor's office to have the case file personally handed over to her so that she could submit it to the directorate. Naturally, this illegal order, indicating desperation to learn the case file content, can only ass to the suspicion of her involvement in the history of the facts the make up the subject of the case file.

Following the interventions of Prosecutor General Gabriela Scutea, the case prosecutor filed two requests with the Department for Prosecutors within the Superior

Council of Magistracy for the latter to ascertain that their professional independence had been impaired. The fact that the PICCJ Prosecutor General made repeated requests to be handed over the case file, followed by the visibly illegal invalidation of the criminal prosecution in the case and the persistent attempts to persuade the case prosecutor to refer the case to a different prosecutor's office represent an unfair interference, lacking any legal grounds, with the criminal prosecution conducted in the case, as a means to try to intimidate the case prosecutor, the outcome being the prosecutor's violated independence, as defined by art. 3 in Law no. 303/2004. Moreover, the illegal invalidation of the order to start the criminal prosecution and those on submitting the video recordings is likely to irretrievably thwart a settlement in the case and identifying the culprits. This procedure is currently still pending.

9. Prosecutor Sorin Marian Lia, first prosecutor with the Prosecutor's Office attached to Corabia Local Court

Prosecutor Sorin Marian Lia was the subject of a disciplinary procedure, together with military prosecutor Bogdan Ciprian Pîrlog, following the views he has expressed, as a representative of the "Initiative for Justice" Association, during the above-mentioned meeting with the Romanian President, Mr Klaus Werner Iohannis, on March 27, 2019 – views made public in the association's press release of March 31, 2019.

Upon conducting prior verifications and the disciplinary investigations in case no. 19-1863 for committing the disciplinary offence provided by art. 99 let. a) in Law no. 303/2004, *"manifestations that affect the honour or professional integrity or prestige of the judiciary, carried out in or outside the exercise of one's occupational duties"*, the case was closed in relation to prosecutor Sorin Marian Lia. Based on the documents drawn up by the Judicial Inspection, he did not seem to have contradicted prosecutor Bogdan Ciprian Pîrlog during the talks at Cotroceni Palace.

In Resolution no. 2861/B/30.08.2019 of August 30, 2019, the Judicial Inspection ruled that prosecutor Sorin Marian Lia could not be found culpable of anything indicating a disciplinary offence and accordingly dismissed the complaint against prosecutor Sorin Marian Lia.

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The double standard is obvious. Unlike the above-mentioned cases, the Judicial Inspection deemed well within the limits of freedom of speech the messages of judge Adina Daria Lupea, who expressed her support towards the gendarmes' violent acts from August 10, 2018 (the Resolution of November 28, 2018 in case 7848/IJ/3505/DIJ/2018) and her contempt towards homosexuals (the Resolution of December 7, 2018 in case 6293/IJ/2821/DIJ/2018).

Additionally, the Judicial Inspection deemed well within the limits of freedom of speech the statement made by 14 court of appeal presidents and vice-presidents who, in their capacity of heads of top-tier law courts, minimised the scale of the protests made by judges and prosecutors and criticised the intention of a group of judges and prosecutors to fly to Bruxelles in order to discuss with the senior vice president of the

European Commission, Mr Frans Timmermans, about justice in Romania (Resolution no. 2655/A of 8 august 2018 in case no. 19-3254).

In these and other similar circumstances, the Judicial Inspection closed the respective cases upon conducting prior verifications.

Moreover, the Judicial Inspection deemed well within the limits of freedom of speech a series of very unflattering and libellous messages regarding the judicial system, authored by public figures.

For instance:

Aurelian Pavelescu, lawyer and head of a political party, characterised the judges and prosecutors who protested for the independence of justice and the defence of the rule of law as *"imposter magistrates"*, *"bandits"*, *"fools"*, *"Romanian political police"*, *"the most corrupt of all Romanians"*, *"Bolsheviks"*, *"wrongdoers"*, *"mobsters"*, *"fought political* animals" (the Report of November 5, 2018 in case 7064/IJ/3143/DIJ/1753/DIP/2018, concerning a motion to defend the judicial system, collectively filed by 172 judges and prosecutors).

Liviu Nicolae Dragnea, former leader of the Government party and former president of the Chamber of Deputies in the Romanian Parliament, currently detained for committing corruption-related offences, had several extremely fierce speeches against the judiciary. One of the most hateful public statements was made on June 9, 2018, when, speaking in front of a crowd nearly 180.000-large, called the judges and prosecutors *"rats"*.

Additionally, the Judicial Inspection acknowledged in its report, in relation to Liviu Nicolae Dragnea's speech at the National Council of the Social Democratic Party of December 16, 2018, that his statement regarding *"thousands of people still under trial, others under criminal prosecution, equally illegally"*, *"**is the expression of a value judgement from a political discourse that does not exceed the freedom of speech limits stipulated by the European Court of Human Rights case-law***" and all of his statements, including *"Read the CVM Report! I haven't found any line, any word mentioning the independence of judges"* and *"Justice in this country must be reset"*, *"**do not warp reality, do not render the idea of an abnormal and defective operation of the judicial authority and fall within the limits of admissible criticism***" (the Report of January 31, 2019 in case no. 9031/IJ/4074/DIJ/2018 and the Report of February 21, 2018 in case no. 19-297, concerning a motion to defend the judicial system, filed by the Romanian Judges' Forum Association).

A troubling aspect is that, even if the Superior Council of Magistracy, as per Decisions no. 50 and 51, both from March 14, 2019, admitted the motions to defend the judicial system's independence, in the two above-mentioned cases, despite the Judicial Inspection's conclusions, the decisions were only made with a majority of 11 to 5.

The Constitutional Court of Romania and the Rule of Law Standards

Dragoş Călin*

Motto:
"Cațavencu (barking even louder): Europe should just stick to its own affairs!
Do we meddle in its affairs? No.
It follows that it doesn't have the right to meddle in ours..."
Ion Luca Caragiale, A lost letter

1. Introduction

The Constitutional Court of Romania, a political-jurisdictional body[1], has experienced in recent years a strong crisis due to the diminishing trust placed in it by the Romanian public opinion, caused by solutions broadly debated upon throughout society or the scientific community, which also stirred, as acknowledged in the doctrine, an unforeseen change of the political regime type, from a semi-presidential to a hybrid-parliamentary one[2], in the absence of any referendum to that end, making it a downright exceptional event within functional constitutional democracies[3].

One outcome was taking legal action against the Constitutional Court, successfully at that, whereas law courts reacted by submitting a cascade of preliminary questions to

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[1] See *C. Doldur*, Effects of Constitutional decisions and the rule of law, a study available on the web page (*https://ro.scribd.com/doc/297973728/Efectele-Deciziilor-Cur%C5%A3ii-Constitu%C5%A3ionale-%C5%9Ei-Statul-de-Drept*), last accessed on April 11, 2020.

[2] See *B. Selejan-Guțan*, The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court, a study available on the web page (*https://verfassungsblog.de/the-taming-of-the-court-when-politics-overcome-law-in-the-romanian-constitutional-court/*), last accessed on April 11, 2020.

[3] Professor Vlad Perju (Boston College) shows that the Venice Commission documents were incorrectly construed and erroneous references were made in context to the French and Germen comparative law. For more details, *V. Perju*, Constitutional analysis of CCR Decision no. 358/2018, a study available on the web page (*http://www.contributors.ro/reactie-rapida/analiza-constitutionala-a-deciziei-ccr-3582018/*), last accessed on April 11, 2020.

the Court of Justice of the European Union, in reply to decisions delivered by the Constitutional Court. On the docket of the European Court of Human Rights, in case *Kövesi vs. Romania*, the effects of a Constitutional Court decision were assessed in terms of compliance, in that case, with the European Convention on Human Rights.

Additionally, the President of the Constitutional Court, Mr Valer Dorneanu, former esteemed representative of the Social Democratic Party and former president and vice-president of the Chamber of Deputies (from 2000 to 2008)[1], via his statements made during the interview aired by B1 TV television station, on October 7, 2017, in regard to aspects of judicial orders delivered by law courts, were detrimental to the judicial system's independence, as ascertained by the Superior Council of Magistracy Plenum on October 17, 2017[2].

The controversy concerning the cessation of a Constitutional Court judge, already for over 9 years in office (insufficiently and tardily justified by the Constitutional Court, in the context of Decision no. 136 of March 20, 2018, which the Court actually delivered), invited other hectic debates in Romania.

Last but not least, the President of the Constitutional Court of Romania, Mr Valer Dorneanu, informed the European Commission delegation that assesses the progress made by Romania and Bulgaria in the field of justice that "the majority of CCR Plenum stated their wish to no longer be involved in the program of the European Commission delegations under CVM"[3], in the context of reconsidering the interpretation of CVM recommendations[4].

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[1] Mr Valer Dorneanu was appointed interim Ombudsman during the anti-constitutional events of 2012, critically analysed by the Venice Commission (*https://www.ccr.ro/uploads/aviz_ro.pdf*), last accessed on June 17, 2018. "81. The events examined above show that the absence of such guarantees can lead to serious problems, not only as concerns the protection of human rights, which are the essential task of the Ombudsman, but also as concerns the control of government emergency ordinances and, consequently, for the rule of law. The initiation of the constitutional control of government emergency ordinances need not necessarily be attributed to the Ombudsman, as long as it is assured that such control can be effectively exercised, for example, through initiation by a Parliamentary minority. (...) 84. In July 2012, the Romanian Government and Parliament adopted a series of measures in quick succession, which led to the removal from office of the Advocate of the People, the Presidents of both Chambers of Parliament, a limitation of the competences of the Constitutional Court, changes on the conditions for a referendum on the suspension of the President of the Republic and the suspension of the President itself. The Venice Commission is of the opinion that these measures, both individually and taken as a whole are problematic from the viewpoint of constitutionality and the rule of law.

[2] (*https://www.csm1909.ro/ViewFile.ashx?guid=fef34dac-3f46-4eb6-9d14-13bcebfac7a0%7CInfoCSM*), last accessed on April 11, 2020. Mr Valer Dorneanu stated as follows: "*I hope my colleagues in the judiciary won't get upset, but I'd hate to start counting the cases of political influence upon joint judicial orders and the number of such cases at our court*". He also referred to the case file in which Liviu Nicolae Dragnea is tried for abettal to abuse of office and abettal to document forgery, next to his former wife, Bombonica Prodana and the former employees of Teleorman General Directorate for Social Care and Child Welfare: "(...) *the case file in which he is accused of having employed some people at... Wait, is that corruption? That's abuse of office*".

[3] (*https://newsweek.ro/politica/ccr-scoasa-din-ue-intr-o-pauza-de-tigara*), last accessed on April 11, 2020.

[4] Without speculating at all in this respect, as our current endeavour is strictly judicial, we shall also mention that Mr Dorneanu was designated the 2019 Romanian personality of the

2. Discretionary publication of dissenting opinions

From an historical standpoint, in terms of internal organisation, the general public were at the time amazed at the decision to make public, in a discretionary manner, dissenting and concurring opinions issued by minority judges, something unique within the European Union.

As per **Decision no. 1/2017** issued by the Constitutional Court, enclosing to the case file and the publication of dissenting and concurring opinions were conditional upon the will of the Constitutional Court President, considering that no law allowed an interference of that nature with the legal duty to publish the respective opinions.

On June 27, 2017, the Romanian Judges' Forum Association requested that the Constitutional Court reconsider its position on the rules for drawing up dissenting and concurring opinions, adopted as per Decision no. 1/2017, arguing that the Constitutional Court judges' right to formulate dissenting and concurring opinions cannot be curtailed, considering certain legality reasons and the fact that, as stated by the Venice Commission (in Opinion no. 537/2009[1]), these opinions *"do not weaken a Constitutional Court but have numerous advantages. Dissenting opinions enable public, especially scientific, discussion of the judgments, strengthen the independence of judges and ensure their effective participation in the constitutional review"*. The Venice Commission (in Opinion no. 622/2011)[2] also argued that *"dissenting and concurring opinions also assert the moral independence of judges and their freedom of speech and enhance the quality of decisions and their conclusive nature, strengthening institutional transparency. At the same time, their publication together with the decision must be mandatory"*.

It was argued that this decision of the Constitutional Court, which departs from rules set forth for similar law courts in the European Union countries, rules that allow dissenting and concurring opinions[3], without the prior consultation of the Venice Commission, basically enforces a censorship of the minority opinion, to the detriment of the respective judges' independence. This censorship not provided by the law has adverse outcomes, impairing the litigants' right to know the arguments of the minority and preventing the progress of the Constitutional Court case-law.

year by the Russian news website *Sputnik.md* (*https://ro.sputnik.md/politics/20191227/28700699/Presedintele-CCR-Valer-Dorneanu-desemnat-Personalitatea-anului-2019-in-Romania.html*), last accessed on April 11, 2020.

[1] See *Opinion on the Draft constitutional law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan*, adopted by the Venice Commission on June 17-18, 2011 (*http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)018-e*), last accessed on April 11, 2020.

[2] See *Opinion on Draft amendments to the Law on the Constitutional Court of Latvia*, adopted by the Venice Commission on October 9-10, 2009 (*http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)042-e*), last accessed on April 11, 2020.

[3] For instance, the Czech Republic, Lithuania, Slovenia or Poland. See, for more details, the study *Opinions divergentes au sein des cours suprêmes des États membres*, issued by the European Parliament, author: *R. Rafaelli* (*http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET(2012)462470_FR.pdf*), last accessed on April 11, 2020.

The same opinion was shared, in the case of Decision no. 1/2017 of the Constitutional Court of Romania, in the "**Report on separate opinions of constitutional courts**", adopted by the Venice Commission during the 117th plenary session, on December 14-15, 2018, in the content of which the following were acknowledged: *"46. It is important that a separate opinion that breaches the code of conduct or ethics (or other) be published regardless of whether or not a procedure has been launched against the dissenting judge.* ***A solution, as had been adopted in Romania by a decision of the Constitutional Court in June 2017****, allowing the President of the Constitutional Court to prevent the publication of separate opinions considered to bring criticism to the Court, or considered to be judgmental or ostentatious or political in nature,* ***is problematic and should be avoided****".*

In the meantime, as per civil case sentence no. 2924 of June 20, 2018, Bucharest Court of Appeal – the 8th Administrative and Fiscal Litigation Division, conclusive after the dismissal of the second appeal, had partly admitted the sue petition filed by plaintiff Elenina Nicuț, a brave lawyer with Bucharest Bar, against the defendant – the Constitutional Court, and accordingly invalidated Constitutional Court of Romania Plenum Decision no. 1/22.06.2017 on the rules of drawing up dissenting or concurring opinions, published in the Official Gazette of Romania no. 477/23.06.2017, in regard to the provisions of art. 1 parag. (2), (3), (4), (5) of art. 2 and of art. 3, and ordered the defendant to re-enclose the dissenting and/or concurring opinions issued in relation to Decisions no. 304/2017 and no. 392/2017, delivered in case files 32D/2017 and 1328D/2017, respectively, as well as to post on its website and submit for publication in the Official Gazette of Romania the said decisions, together with the dissenting and/or concurring opinions. The court acknowledged that "art. 59 parag. (3) in Law no. 47/1992 does not entitle the Constitutional Court to either adopt rules on drawing up dissenting/concurring opinions or enforce sanctions if they are not complied with, as the legal provision in question cannot operate as legal grounds for Decision no. 1/2017, when, quite the opposite, it visibly contradicts its content".

As an effect of the newly created circumstance, as per Decision no. 1/2018, it was decided to amend Constitutional Court Plenum Decision no. 1/2017 on the rules of drawing up dissenting or concurring opinions, as the case may be, to have the concurring one published, uncensored, in the Official Gazette of Romania, Part I, together with the decision.

3. Delivery of case-law solutions widely debated upon within the magistracy, society or the scientific community

At a case-law level, several Constitutional Court decisions have triggered chain reactions from the press, doctrinaires, but also from law courts.

As per Decision no. 392/2017, whose dissenting opinion had only been published after legal action was taken against the Constitutional Court, the unconstitutionality was admitted and it was found that the provisions of art. 248 in the 1969 Penal Code are constitutional insofar as the phrase "poorly fulfils" in their content is understood as "fulfils in violation of the law". In the reasoning it was argued that *"the legislator is bound to regulate the monetary (financial) threshold of the loss and the severity of the*

damage incurred upon the legitimate right or interest by the deed committed, in the content of the criminal-law rules on the abuse of office offence, whereas its passivity may lead to the occurrence of new cases of incoherence and instability, contrary to the legal security principle, namely its provisions concerning the clarity and predictability of the law".

The Constitutional Court of Romania invoked the Report on the relationship between Government members' political liability and their criminal liability, adopted at the 94th plenary session of the Venice Commission of March 11, 2013, but there are indications of an erroneous interpretation of the recommendations, as **the Venice Commission's spokesman, Mr Panos Kakaviatos**, replied to a request to clarify certain critical aspects, at a Romanian journalist's initiative[1], stating as follows: *"The Report on the relationship between political and criminal ministerial responsibility addresses, in conformity with its title, the situation of ministers only; (...) The Venice Commission considers that national criminal provisions on «abuse of office», «excess of authority» and similar expressions should be interpreted narrowly and applied with a high threshold, so that they may only be invoked in cases where the offence is of a grave nature, such as for example serious offences against the national democratic processes, infringement of fundamental rights, violation of the impartiality of the public administration and so on (parag. 102). So, it is the nature of the offence which is decisive, and the threshold referred to is in no case a financial one. Moreover, this threshold applies, of course, only to the «blanket» rules of criminal law relating to abuse of office or excess of authority, and not to other offences such as corruption, money laundering or breach of trust".* Therefore, "the high threshold" seems to concern the actual social peril, a high level thereof due to the damaging of social values (related or unrelated to property), and not a minimum financial amount below which the abstract social peril of the offence would be reflected, as decided by the Constitutional Court of Romania.

As per Decision no. 104 din March 6, 2018 on the unconstitutionality objection to the provisions of the Law which amends Law no. 161/2003 on measures intended to ensure transparency in the exercise of public offices, public functions and in the business environment, and on the prevention and sanctioning of corruption, the Constitutional Court of Romania a conducted a broad and comprehensive review of Decision 2006/928/EC of the European Commission, from December 13, 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 and its consequences.

The interpretation of the Romanian Constitutional Court ignores the effects of Decision 2006/928/EC of the European Commission from December 13, 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, arguing that it *"is a document adopted prior to Romania's accession to the European Union, not clarified by the Court of Justice of the European Union in regard to*

[1] *L. Avram*, The Venice Commission: "A financial threshold is out of the question for abuse of office", in "Adevărul" newspaper, September 24, 2017 (*http://adevarul.ro/news/politica/comisia-venetia-In-niciun-caz-nu-e-vorba-pragfinanciar-abuzul-serviciu-1_59c7b6035ab6550cb87c4d6d/index.html*), last accessed on April 11, 2020.

content, nature and timeframe and whether these factors align to the provisions of the Accession treaty and, implicitly, to Law no. 157/2005, which is part of the domestic regulatory framework, which is why Decision 2006/928/EC cannot operate as a reference standard as part of the constitutionality review, via art. 148 in the Constitution".

An interpretation of this nature denies the role of CJEU (the Constitutional Court of Romania should have filed a preliminary motion to refer), under the CVM interpretation, the European Commission's role and the need for periodic assessment reports.

In case *Kreil*, C-285/98, the decision from January 11, 2000, the Court of Justice admitted the prevalence of the Union law, also over domestic constitutional rules, whereas the *Simmenthal* doctrine was clarified in case *IN.CO.GE. '90* – cases C-10/97 up to C-22/97, the decision from October 22, 1998, item 21. The Court of Justice firmly believes that it is the only body qualified to check the validity of the European Union law and declare a document *ultra vires.* There are no constitutional limits that can limit the European Union's option to rule prevalence (priority) over the member states.

The recommendations and requirements mentioned in the reports drawn up by the European Commission, pursuant to art. 2 in Decision 2006/928 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, focus on meeting the benchmarks. The attainment of these benchmarks is a result-producing obligation undertaken by Romania, whereas the CVM reports are built around these benchmarks that Romania has to meet, being integral parts of the decision and entailing concrete and clearly defined duties and commitments. Therefore, the recommendations made by the Commission on addressing the benchmarks, pursuant to the loyal cooperation principle, stipulated by art. 4 parag. (3) in the Treaty on the European Union, have to be taken into account by the Romanian authorities, precisely in order to meet the benchmarks set forth in the Annex to Decision 2006/928/EC and refrain from any measure that might infringe them or endanger their implementation.

However, the content, nature and timeframe of the Cooperation and Verification Mechanism would later on be clarified by the Court of Justice of the European Union, in related cases C-83/19, C-127/19, C-195/19, *The Romanian Judges' Forum Association et al.*, where the session of statements took place on January 20 and 21, 2020.

Such decisions of the Romanian Constitutional Court Romania have encouraged attitudes aimed at diminishing the role of bodies elected by magistrates in order to enforce justice, and particularly that of the opinion issued by the Venice Commission or the CVM reports.

For instance, as per **Decision no. 358/2018**, it was expressly ascertained that the "opinion submitted by the Venice Commission cannot be capitalised upon as part of the constitutionality review. The recommendations made by the international forum could have been useful to the legislator, in the parliamentary procedure of drawing up or amending the legislative framework, the Constitutional Court being qualified to conduct a review of the compliance of the normative adopted by Parliament with the Fundamental Law, but in no way to assess the opportunity of a various legislative

solutions, aspects that fall under the legislator's appraisal margin, as part of its policy on the justice laws" (parag. 30).

In a state plagued with endemic corruption, as per **Decision no. 91/2018**, it was expressly ruled that **committing corruption offences cannot be qualified as threats to national security** (*"81. For instance, committing certain offences, such as those against persons, would not be qualified as threats to national security, even if the deeds seriously impair the fundamental right to life or a person's fundamental right to physical and psychic integrity. At the same time, committing a determined offence, such as those of corruption or against property, would not be qualified as a threat to national security, even if the deeds seriously impair particular fundamental rights and freedoms of Romanian citizens. This owes to the fact that, although certain offences have the capacity to be seriously detrimental to particular fundamental rights and freedoms, making it a matter of general interest to sanction such deeds, their magnitude is not bread enough to categorise them as threats against national security. On the other hand, committing deeds against a group, for instance, committing offences such as genocide or crimes against humanity may be construed as threats to national security"*).

The decision is part of a long string of similar solutions, among them **Decision no. 26/2019**, which ascertained the existence of a judicial conflict of a constitutional nature between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice and the other law courts, on the other hand, generated by the conclusion, between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service, of Protocol no. 09472 of December 8, 2016, strictly concerning the provisions of art. 6 parag. (1), art. 7 parag. (1) and art. 9, as well as by the inadequate exercise of parliamentary oversight of the activity of the Romanian Intelligence Service. The Decision was deemed to be creating a new constitutional concept, the "legal paradigm", defined as "a unified set of rules and concepts set forth and accepted throughout legal thinking"[1].

This type of decisions led to the exclusion of numerous items of evidence from criminal case files pending before law courts and even the acquittal of certain defendants, particularly from those involved in corruption offences. There is also a law court that did not accept that manner of interpretation, Bihor County Court, which referred a preliminary question to the Court of Justice of the European Union in pending case *C-379/19, NAD Prosecutor – Oradea Territorial Service*. Among others, the court asked whether "The principle of judges' independence, defined by art. 19 parag. (1), the second paragraph in TEU and de art. 47 in the European Union's Charter of Fundamental Rights, in its interpretation from the case-law of the Court of Justice of the European Union (the Grand Chamber, the decision from February 27, 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117), opposes the substitution of their jurisdiction with the Constitutional Court decisions (Decision

[1] For critical comments, see *E.-S. Tănăsescu*, Romania – Another Brick in the Wall Fencing the Fight against Corruption, VerfBlog, 2019/3/19 (*https://verfassungsblog.de/romania-another-brick-in-the-wall-fencing-the-fight-against-corruption/*).

no. 51 from February 16, 2016, Decision no. 302 from May 4, 2017 and Decision no. 26 from January 16, 2019), the outcomes being a lack of predictability of the criminal trial (retroactive enforcement) and the impossibility to interpret and enforce the law in the actual case. Does the European Union law oppose the existence of a Domestic standard that regulates disciplinary liability for the magistrate who cancels the enforcement of a Constitutional Court decision, in the context of the referred question"?

The court found it necessary to notify CJEU for the priority settlement of the request to exclude the evidentiary means, filed as such by the defendants, in regard to the protocols on the assessment of technical surveillance activity results, evidence submitted during the criminal prosecution phase, *ex officio*. The law court's dilemma started from "its role in enforcing justice, in relation to CCR's role which, according to art. 146 in the Constitution, is to check the compliance of the laws with the Fundamental Law, and not to interpret and enforce the law and much less to set forth legal standards with retroactive enforcement, with the possible effects of destabilising the criminal trial and rendering it un predictable. However, as per Decision no. 51/2016, CCR had designated the participation of the Romanian Intelligence Service («SRI») in the activity of executing the surveillance warrants a criminal prosecution act and had deemed the latter's involvement illegal, non-compliant with the constitutional standards of a criminal trial, with the outcome of having the regulatory standard repealed. The surveillance warrant, as provided by the law, renders the guarantees entailed by the EU law, namely it is subject to censorship and issued by a judge and only its enforcement can be achieved with SRI's technical support, being the only national institution possessing an infrastructure likely to ensure the adequate enforcement of technical surveillance warrants requested by all the Public Ministry units and authorised by a judge, at least by the date when the law was amended in line with the requirements in CCR's decision"[1].

By resorting to the procedure of judicial conflict of a constitutional nature, Decision no. 358/2018 forced the Romanian President do depose the Chief Prosecutor of the National Anticorruption Directorate at the time, Mrs Laura Codruța Kövesi. The media speculated that the deliberations took place in a Constitutional Court restroom, an aspect not denied by any of the Constitutional Court judges[2].

It was acknowledged that *"the text of art. 132 parag. (1) in the Constitution is for special purposes, setting forth the jurisdiction of the Minister of Justice in regard to the prosecutors' activity, which is why, insofar as the organic legislator opted for the appointment document to the issued by the President, pursuant to the provisions of art. 94 let. c) in the Constitution,* ***the latter cannot be acknowledged to have a discretionary power, but a power to check the compliance of the procedure****. Therefore, even if, during the Constitutional*

[1] See, for more details, *D. Călin*, Ten requests for a preliminary decision filed by law courts in Romania in order to maintain the rule of law, a common value of all the European Union member states, in Revista Română de Drept European (Romanian Review of European Law) no. 4/2019, p. 97 and the following.

[2] See *L. Avram*, Country with its WC at the bottom of the Constitutional Court, in "Adevărul" newspaper, June 4, 2018, (*https://adevarul.ro/news/politica/Tara-wc-ul-fundul-curtii-constitutionale-1_5b15560fdf52022f75c41f22/index.html*), last accessed on April 11, 2020.

Court public session of May 10, 2018, it was argued that public authorities with a broader political legitimacy also enjoy a broader discretionary power, whereas public authorities with a lower level of political legitimacy, the technical ones or those resulted from an appointment in office enjoy a more limited discretionary power, the Court ascertains that a support of this nature cannot be accepted due to the fact that, primarily, the Constitution and the law, which expands upon it, are the ones that set forth public authorities' duties/ powers, as the a public authority's different political legitimacy in relation to another's cannot justify an infringement upon the other public authority's duties/powers by having another public authority, elected through vote, claim and take them over. To exemplify, the Court acknowledges that the Romanian President enjoys a discretionary power in terms of their awarding/granting duties provided by art. 94 let. a), b) and d) in the Constitution, a power that must be exercised as provided by the law, as well, whereas in regard to letter c), which sets forth that appointments to public offices are to be conducted «as provided by the law», the Romanian President can only check the compliance of the procedure, thus having, pursuant to this constitutional text, no discretionary power. For that reason, the Romanian President's duty, in the case of a dismissal/discharge from office ordered pursuant to art. 94 let. c) in the Constitution, can only subscribe to certain compliance requirements strictly provided by the law, and not to their own discretionary power of assessment" (parag. 100).

Commenting upon this decision, prof. Vlad Perju stated that *"the Court judges are determined to unsettle the already fragile balance of our institutional system and decisively intervene in the most significant political matters in Romania, which are the fight against corruption and the status of NAD's Chief Prosecutor (...) The Court's radical decision adds new imbalances throughout the Romanian institutional system, with major effects upon the rule of law. Prosecutors are agents of the Government (p. 50), whereas the Minister of Justice has unlimited jurisdiction (in other words, not only administrative jurisdiction) in terms of authority over prosecutors. Prosecutors are independent as magistrates (though this concept is now devoid of essence), however, prosecutors in management offices can be dismissed at the proposal of the Minister of Justice, whose powers, although strictly defined by the law, can be exercised without any other authority having any power of control. Most believe that, so long as the Minister of Justice accurately formulates the request to dismiss a prosecutor from a management office and provides the appropriate law in that respect, regardless of the grounds for that request and regardless of the abuses that an SCM review would identify throughout the request, the President is constitutionally bound to comply and order the dismissal. The only accountability of the Minister of Justice is political and is secondary to the Government's accountability before Parliament"*[1]. Additionally, two French deputies took the classification of the decision as "tainted by several irregularities", which *"indicates both the seizure of the Constitutional Court by the majority in Parliament and a form of regime change"*[2].

[1] See *V. Perju*, Constitutional analysis of CCR Decision no. 358/2018, a study available on the web page (*http://www.contributors.ro/reactie-rapida/analiza-constitutionala-a-deciziei-ccr-3582018/*), last accessed on April 11, 2020.

[2] See Assemblée Nationale, *Rapport d'information sur le respect de l'État de droit au sein de l'Union européenne* (n° 1299), déposé par la Commission des affaires européennes et présenté par *C. Dubost* et *V. Bru*, p. 34, a study available on the web page (*http://www.assemblee-nationale.fr/dyn/15/rapports/due/l15b1299_rapport-information*), last accessed on April 11, 2020.

As per Opinion no. 924/October 20, 2018, CDL-AD(2018)017-e, the Venice Commission draws attention to the fact that the Constitutional Court decision *"gives the Minister of Justice the crucial power in removing high-ranking prosecutors, while confining the President in a rather ceremonial role, limited to certifying the legality of the relevant procedure. The weight of SCM [...] is also considerably weakened, taken into account the increased power of the Minister of Justice and the limited scope of the influence that it may have on the President's position (only on legality issues)".* The Venice Commission concluded with the need to introduce changes, even if that entailed amending the Constitution: *"The judgment leads to a clear strengthening of the powers of the Minister of Justice with respect to the prosecution service, while, on the contrary, it would be important, in particular in the current context, to strengthen the independence of prosecutors and maintain and increase the role of the institutions, such as the President or the SCM, able to balance the influence of the Minister. [...] One key measure would therefore be to revise, in the context of a future revision of the Romanian Constitution, the provisions of art. 132 parag. (1) of the Romanian Constitution. At the legislative level, it could be considered, as far as dismissal is concerned, to amend Law no. 303 in such a way as to give to the opinion of the SCM a binding force"*[1].

As per the decision delivered on May 5, 2020, in the case ***Kövesi vs. Romania*** (petition no. 3594/19), the European Court of Human Rights ascertained the breach of art. 6 parag. (1) (the right to a fair trial), as well as the breach of art. 10 (freedom of expression) in the Convention.

The Court concluded that the defending state impaired the essence of the plaintiff's right to a law court due to the specific limitations of a judicial review of the case (challenging the reasons for which she was dismissed from the office Chief Prosecutor of the National Anticorruption Directorate), imposed as per Constitutional Court Decision no. 358 of May 30, 2018 on the request to settle the judicial conflict, of a constitutional nature, between the Minister of Justice, on the one hand, and the Romanian President, on the other hand. Moreover, the Court believes that the plaintiff's right to freedom of expression was infringed upon, as the dismissal was an interference with the exercise of said right, the procedure being carried out after madam prosecutor criticised the legislative proposals to amend "the justice laws" in terms of their consequences upon the judicial system and its independence, as well as, an in particular, of the fight against corruption. The Court ascertained that the plaintiff's dismissal and the grounds presented as justification were hardly compatible with the major significance that has to accompany maintaining the judicial system's independence. Given its seriousness, the measure had a "deterring effect" upon the participation of prosecutors and judges in public debates concerning legislative reforms with an impact upon the judicial system and, in general, concerning all the aspects related to the independence of the judiciary[2].

[1] (*https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e*), last accessed on April 11, 2020.

[2] See, for comments, *G. Caian*, Comments on the decision of the European Court of Human Rights delivered in the case *Kövesi vs. Romania* (*https://www.juridice.ro/682521/comentarii-pe-marginea-hotararii-curtii-europene-a-drepturilor-omului-pronuntata-in-cauza-kovesi-c-romaniei.html*), last accessed on May 8, 2020.

The delivery of this historical decision can undoubtedly strengthen the justice system independence, prosecutors' independence, but also encourage the participation of magistrates in debates regarding the independence and modernisation of justice in Romania.

It is inadmissible for the effects of a decision delivered, with a majority of votes, by o constitutional court of a supposedly democratic state to affect to such extent a prosecutor's legitimate rights and interests, but also the independence of justice, aspects acknowledged by ECHR, especially in a context where all the relevant European and international bodies have witnessed how rule of law backfires in Romania[1]**.**

The reaction of some of the Constitutional Court judges, on la May 6, 2020, shows that nothing has been learnt from this experience (*"Although the general public's comments promoted the ideas that the Constitutional Court has infringed upon Mrs Kövesi's right to a fair trial and Constitutional Court Decision no. 358/2018 should be invalidated, it was ascertained that ECHR did not review the legal rationale and the solution delivered by the Constitutional Court. As a matter of fact, it also lacked the jurisdiction required to do so"*)[2], being obvious that the missing access to a law court results from the Constitutional Court decision, which set forth that the Romanian President's decree can be subject to an administrative litigation court review exclusively in relation to the formal aspects, and not the substantive ones, as ECHR, along the same lines, did not require the plaintiff to have taken legal action, beforehand, with an ordinary law court, given that the constitutional court decisions were generally binding for the ordinary ones. By nature, the procedure of judicial conflicts of a constitutional nature is not designed to bring forward civil rights, which is why ECHR's decision shall be critical in settling preliminary referrals pending before the Court of Justice of the European Union, the direct damage of fundamental rights of third parties being undeniable.

As per **Decision no. 685/2019** and **Decision no. 417/2019**, the Constitutional Court, in a similar procedure of settling a judicial conflict of a constitutional nature, ruled that the High Court of Cassation and Justice promptly designate, by lot, all the members of the 5-judge panels, but also ruled that there had been a judicial conflict of a constitutional nature between Parliament, on the one hand, and the High Court of Cassation and Justice, on the other hand, generated by failure of the High Court of Cassation and Justice to designate the composition of the judicial panels specialised in trying, in lower court, offences stipulated by Law no. 78/2000 on the prevention, discovery and sanctioning of corruption acts.

By interfering with the exclusive jurisdiction of law courts, by arbitrarily enforcing certain legal provisions strictly intended for law courts, based on "confidential in-house criteria", the Constitutional Court calls into question legal security and the independence of justice, as stated by two judges in a dissenting opinion to Constitutional Court

[1] (*http://www.forumuljudecatorilor.ro/index.php/archives/4111*), web page last accessed on May 8, 2020.

[2] (*https://www.ccr.ro/download/comunicate_de_presa/Precizari.pdf*), last accessed on May 8, 2020.

Decision no. 417/2019. The legislation in force stipulates methods by means of which stakeholders can challenge in court both administrative documents issued by the Managing College of the High Court to effectively organise how justice is served, and the illegal composition of law courts. The possible unlawfulness of a document adopted by the Managing College of the Supreme Court on administrative topics, that is, the unlawfulness of an administrative document, cannot be ascertained by way of settling a judicial conflict of a constitutional nature, but in compliance with the legislation in effect, exclusively by way of administrative litigation. Any exceeded jurisdiction equals to an intrusion outside the scope of judiciary power, with severe repercussions upon the regulatory progress of the Romanian state.

There were neither pre-existing conditions for such a drastic option, nor exceptional circumstances in which the High Court of Cassation and Justice had blatantly disregarded the constitutional interpretation previously set forth by the Constitutional Court of Romania, given that the 5-judge Panels have consented to the composition set forth by the Managing College, by interpreting the law, a composition not challenged by any party in any pending legal case for approximately four years, leading to a well-established case-law. Additionally, the Constitutional Court stated that "there may emerge latent pressures upon the panel members, pressures in terms of judges obeying their judicial superiors or at least consisting in judges hesitating/not willing to contradict the latter", by improperly using the Decision of the European Court of Human Rights from December 22, 2009, delivered in case *Parlov-Tkalčić vs. Croatia*, though there were totally different circumstances, as no personal interests of the HCCJ president, vice-presidents or division presidents were found to exist in the settling of cases by the 5-judge panels, as they did exist in the *Parlov-Tkalčić* case, an aspect that excluded any latent pressures *ab initio*.

In its Study no. 538/2009 on individual access to constitutional justice, the Venice Commission recommended, so as to avoid tensions and any jurisdiction-related conflicts between supreme courts and constitutional courts, that the constitutional court not operate as an "ultimate supreme court" interposing with the day-to-day enforcement of the law by regular law courts, and only examine constitutional matters, limiting its operating scope *ratione materiae* while also overloading (naturally, we are ruling out systems that introduced constitutional claims – Germany, Spain, Austria, the Czech Republic, Slovakia, Hungary, Poland, where different coordinates apply and the jurisdiction of constitutional courts, embedded in the judicial system, are undeniably extended). That seemed to be Hans Kelsen's initial idea, as well. As a matter of fact, the first version of the Austrian constitution, in 1920, limited the constitutional court's powers to an abstract review of the law and no longer provided any direct link between the effective enforcement of the law and the constitutional court's jurisdiction.

The CVM Report of October 22, 2019 acknowledges that, "[although] the Constitutional Court rulings do not apply to closed court cases, the follow-up ruling, subequent to the Constitutional Court decision on the 5-judge panels ***has given rise to major uncertainty***. In early 2019, consideration was given to adopting an emergency ordinance, which, if adopted, could have made it possible to reopen all high level corruption cases closed by a final HCCJ judgement handed down since 2014 by a 5-judge

panel. Whilst domestic and international criticism of the proposal helped to prevent the adoption of such emergency ordinance, it would be important for the Romanian authorities to renounce the pursuit of the objectives of such a measure and to make clear that legislation affecting past cases is not needed, following the Constitutional Court rulings, reiterating their commitment to effectively combat corruption. ***The Constitutional Court rulings directly impact ongoing high-level corruption cases, entailing delays and restarts of trials, and have even allowed the re-opening of several final cases, under certain conditions***. The full consequences are yet to unfold. This clear knock-on on the process of justice also raised broader doubts about the sustainability of the progress made so far by Romania in the fight against corruption – all the more so when coming at the same time as amendments brought to the Penal Code and the Criminal Procedure Code, which did not take into account the November 2018 recommendation on the need for compatibility with EU law and international anti-corruption instruments (see Benchmark 1 – judicial independence and judicial reform)".

In two of the cases where the composition of the three-judge judicial panel had to be, yet again, replaced, by lot, the High Court of Cassation and Justice notified the Court of Justice of the European Union (case C-357/19, *Euro Box Promotion et al.*, and case C-547/19, *The Romanian Judges' Forum Association*, respectively), inquiring whether the provisions of art. 19 parag. (1) in the Treaty on the European Union *"have to be interpreted in the sense that they oppose to the adoption of a decision by a body outside the judiciary, the Constitutional Court of Romania, left to determine whether the composition of judicial panels is legal or not, leading to the existence of prerequisites towards extraordinary legal remedies against conclusive judicial orders delivered within a certain timeframe".*

Moreover, in four of the cases regarding the specialisation of judges who settle corruption case files, the High Court of Cassation and Justice notified the Court of Justice of the European Union (case *The Public Ministry*, C-811/19; case *The Public Ministry*, C-840/19; case *The Prosecutor's Office attached to the High Court of Cassation and Justice – The National Anticorruption Directorate*, C-859/19; case *The Prosecutor's Office attached to the High Court of Cassation and Justice – The National Anticorruption Directorate et al.*, C-926/19), inquiring whether the previously mentioned European Union law rules *"have to be interpreted in the sense that they oppose to the adoption of a decision by a body outside the judiciary, the Constitutional Court of Romania, left to settle a litigation defence that would concern a possibly illegal composition of judicial panels, in relation to the principle of the specialisation of judges within the High Court of Cassation and Justice (not stipulated in the Romanian Constitution), and to compel a law court to remand the cases, currently in the appeal (devolutive) phase, during the first trial stage, to the same law court".*

All these cases are pending and shall be settled throughout 2020.

Opinion no. 954/2019, issued by the Venice Commission on the constitutional status in the Republic of Moldova, highlighted the fact that an essential role of the Constitutional Court is to maintain equal distance from all three branches of power and to act as an impartial arbiter in case of collision between them. A constitutional court, like any other state authority, must abide by its own procedures (parag. 52). For the sake of constitutional stability and legal certainty, a Constitutional Court should

be consistent with its own case-law; it should only reverse its judgments when legally justifiable in exceptional cases, when new facts arise or when its reasoned appreciation of the law has evolved. The Venice Commission reiterated that, in a state governed by the rule of law, it is essential that constitutional bodies decide within the parameters of their legal authority and responsibility, lest the robustness of State Institutions in the country, in line with the Constitution, be seriously undermined and the democratic functioning of state institutions be irreparably compromised. As a matter of fact, only in such a situation would the Venice Commission exceptionally accept to assess the judgments of a Constitutional Court.

Although the Romanian Judges' Forum Association requested that the Parliamentary Assembly of the Council of Europe notify the Venice Commission on the issuance of an opinion regarding certain Constitutional Court decisions, this action is yet to be taken. The Association also requested that the Constitutional Court, pursuant to the latter's duty of constitutional loyalty, wait and capitalise on the Venice Commission's opinions, thus, also in relation to the changes brought to the justice laws, the Penal Code and the Criminal Procedure Code, another thing that never materialised.

Considering Romania's status of party to the European Convention on Human Rights and member state of the Council of Europe, the Venice Commission's recommendations cannot be simply left with no practical outcomes, since the goal is to enhance the regulatory framework without interpreting said goal as infringing upon the principle of the supremacy of the Romanian Constitution (see, for instance, Constitutional Court Decision no. 334 from June 26, 2013).

The fulfilment, by a particular state, of international obligations resulting from a treaty in effect is the mission of all its state authorities, the Constitutional Court included. If the constitutional provisions are in conflict with the treaty, which already is embedded in the domestic legal system, all the state authorities are bound to identify adequate solutions to reconcile those treaty provisions with the Constitution (for instance, by way of interpretation or by actually revising the Constitution), otherwise the international liability of that state shall be entailed, with all the consequences deriving from it, including penalties [*see The Venice Commission, Interim Opinion on the amendments to the Federal constitutional law on the Constitutional Court of the Russian Federation, parag. 47, CDL-AD (2016) 005*].

Still, and following the involvement of the Romanian Judges' Forum Association, which submitted memoranda *amicus curiae* in 15 fundamental cases on the Constitutional Court's docket[1], a great number of newly-entered provisions concerning the

[1] Decision no. 530 from July 17, 2018 on the unconstitutionality objection to the Law on amending and supplementing Law no. 317/2004 on the Superior Council of Magistracy; Decision no. 65 from February 21, 2018 on the unconstitutionality objection to the Law on amending and supplementing Law no. 317/2004 on the organisation and operation of the Superior Council of Magistracy; Decision no. 66 from February 21, 2018 on the unconstitutionality objection to the provisions of the Law on amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors; Decision no. 562 from September 18, 2018 on the unconstitutionality objection to the Law on amending and supplementing Law no. 317/2004 on the Superior Council of Magistracy; Decision no. 64 from February 9,

changes brought to the justice laws, the Penal Code and the Criminal Procedure Code were declared unconstitutional.

4. Extreme delays in the settlement of unconstitutionality exceptions

An acutely disconcerting aspect pertains to the **settlement, with extreme delays, of unconstitutionality exceptions concerning the emergency ordinances issued in relation to "the justice laws"**. This is in opposition with the state of law and a visible limitation of a possible fast *a posteriori* review, as the Constitutional Court failed to set forth deadlines for settling the exceptions filed with law courts even 1 year after their filing date.

As such, and especially given the regulatory insufficiencies, the gaps, the contradictory provisions, unsuitable to the needs of the judicial system, from 2018 to 2019, the Romanian Government issued five emergency ordinances (GEO no. 77/2018; GEO no. 90/2018; GEO no. 92/2018; GEO no. 7/2019; GEO no. 12/2019)[1].

2017 on the unconstitutionality exception to the provisions of Government Emergency Ordinance no. 13/2017 on amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code; Decision no. 67 from February 21, 2018 on the unconstitutionality objection to the provisions of the Law on amending and supplementing Law no. on the judiciary organisation; Decision no. 685 from November 7, 2018 on the request to settle a judicial conflict of a constitutional nature between the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice, on the other hand; Decision no. 33 from January 23, 2018 on the unconstitutionality objection to the provisions of the Law on amending and supplementing Law no. on the judiciary organisation; Decision no. 26 from January 22, 2020 on the request to settle a judicial conflict of a constitutional nature between the ministry of justice and the Ministry of Justice, on the one hand, și the Superior Council of Magistracy, on the other hand; Decision no. 356 from May 30, 2018 on the unconstitutionality objection to the provisions of the Law on the alternative measures for the enforcement of custodial sentences; Decision no. 417 from July 3, 2019 on the request to settle a judicial conflict of a constitutional nature between the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice, on the other hand; Decision no. 466 from July 29, 2019 on the unconstitutionality objection to the Law on amending and supplementing Law no. 286/2009 on the Criminal Code, as well as Law no. 78/2000 on the prevention, discovery and sanctioning of corruption acts; Decision no. 26 from January 16, 2019 on the request to settle a judicial conflict of a constitutional nature between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, the Romanian Parliament, the High Court of Cassation and Justice and the other law courts; Decision no. 650 from October 25, 2018 on the unconstitutionality objection of the provisions in the Law on amending and supplementing Law no. 286/2009 on the Criminal Code, as well as Law no. 78/2000 on the prevention, discovery and sanctioning of corruption acts, but also the law in its entirety; Decision no. 633 from October 12, 2018 on the unconstitutionality objection to the provisions of the Law on amending and supplementing Law no. 135/2010 on the Criminal Procedure Code, as well as on amending and supplementing Law no. on the judiciary organisation.

[1] For more details, see *D. Călin, I. Alexe*, *Festina lente* or how the delegated and exceptional legislator can take over the core duties of a Parliament, in Studii și Cercetări Juridice (Judicial Studies and Research) Issue 2/2020, the magazine of "Acad. Andrei Rădulescu" Legal Research Institute of the Romanian Academy.

Government Emergency Ordinance no. 77/2018 was adopted with *intuitu personae* effects in order to secure continuity for the office of chief inspector or, as the case may be, deputy chief inspector of the Judicial Inspection, as revealed in the recitals. From the date of publication (September 5, 2018) to the date of the present paper, the Constitutional Court of Romania has not yet ruled on the three unconstitutionality exceptions on the docket of law courts (the oldest one being rendered by means of ruling delivered on December 19, 2018 by Olt County Court, in case file no. 2122/104/2018[1]).

Government Emergency Ordinance no. 90/2018 was issued in order to render the Judicial Crime Investigation Department (newly created for the exclusive investigation of offences committed by judges and prosecutors) operational. From the date of publication (October 10, 2018) to the date of the present paper, the Constitutional Court of Romania has not yet ruled on the four unconstitutionality exceptions on the docket of law courts (the oldest one being rendered by means of ruling delivered on February 7, 2019 by Pitești Court of Appeal, in case file no. 1156/46/2018[2]).

Government Emergency Ordinance no. 92/2018 was adopted as a means to postpone, until January 1, 2020, the enforcement of the provisions on the early retirement of magistrates, after not more than 20 years of service, as well as the provisions regarding the judgement of appeals by 3-judge panels. It was approved by Parliament, as per Law no. 239/2019, published on December 19, 2019 in the Official Gazette of Romania, Part I. Nevertheless, to the date of the present paper, the Constitutional Court of Romania has not yet ruled on the 24 unconstitutionality exceptions on the docket of law courts (the oldest one being rendered by means of ruling delivered on October 4, 2018 by Bucharest Court of Appeal, in case file no. 5811/3/2015[3]).

5. Guarantees and other rights legislated in recent years for the Constitutional Court judges

According to Law no. 168/2018 on amending and supplementing Law no. 47/1992 on the organisation and operation of the Constitutional Court, the judges of the Constitutional Court may not be detained, arrested, searched or criminally prosecuted with the consent of the Constitutional Court plenum, at the request of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice. The consent *is granted with the vote of **two thirds** of the number of Constitutional Court judges*, upon hearing the judge in question. The judge under criminal prosecution may be suspended from office as per a decision of the Constitutional Court plenum, adopted with the vote of two thirds of the Constitutional Court members.

Additionally, at the end of the mandate following the expiration of the appointment term, **a Constitutional Court judge is free to choose to become a lawyer or a notary public, without taking an exam. It will be possible to cumulate the retirement pension with any earned incomes**.

[1] See *Law courts' portal* (*http://portal.just.ro*).
[2] See *Law courts' portal* (*http://portal.just.ro*).
[3] See *Law courts' portal* (*http://portal.just.ro*).

Still, as per Decision no. 136 from March 20, 2018, the Constitutional Court admitted the unconstitutionality objection and ascertained that the provisions of the Law on amending and supplementing Law no. 47/1992 on the organisation and operation of the Constitutional Court, comprised in the sole article, item 2, concerning the amendment to art. 68 parag. (3) in Law no. 47/1992, are unconstitutional.

The Constitutional Court acknowledged that "the legislator's solution to widen the scope of constitutional judges' immunity in regard to the court-ordered relief of *commencing criminal prosecution* appears as an endeavour with no rational, objective and reasonable justification, which can also give birth to a privilege. The constitutional status of this public office and the independence of Constitutional Court judges cannot be invoked as objective and reasonable criteria that would justify the creation of a privileged legal status within this magistracy, in terms of immunity, since, on the contrary, its constitutional rank and duty mandatorily entail the proper and fair implementation of the means to protect the constitutional mandate".

At the same time, the proposed amendments stipulated that the initiator of the application for consenting to criminal-law court-ordered reliefs was *the Minister of Justice*, following the notification of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice. The Constitutional Court ascertained, however, that "the introduction of a third authority in the immunity-waiving procedure, as a component of the executive power, with no jurisdiction over the prosecuted and referred procedural criminal matters, not only is contrary to the constitutional powers of the Public Ministry and, by default, to the principle of the separation of powers in a state, but also, given the consequences that the veto right the Minister of Justice can exercise according to the law, sabotages the very concept of immunity. As such, the purpose of creating a special protection of public offices is to prevent any possible pressures or abuses that might be exerted upon or committed against the persons holding the public office, instead of preventing criminal prosecution carried out in compliance with the legal provisions".

Theoretical and Practical Matters on the Predictability of the National Constitution Case-law, with Direct Implications on Certain Public Authority and Procedural Criminal Legal Relationships in Romania

Ciprian Coadă*

Motto:
"Justice and the facade of a temple are seen best from the outside".
Austin O'Malley

1. Brief considerations on constitutional jurisdiction in Romania

In Romania, the revolution of December 1989 marked the replacement of the totalitarian regime with a democratic society, underpinned by the legitimate values of the rule of law, whereas in the context of the subsequent historical events, the adoption of the 1991 Constitution set forth the new coordinates of a democratic and social state upholding the rule of law, by implementing a fundamental legal framework of the new guidelines.

By capitalising on the constitutional tradition in Romania, but also on the constitutional requirements of western European states, the 1991 Constitution outlined a series of structures designed to allow transposing the most significant paths, principles and desiderata, regulating new public authorities, one of which is the Constitutional Court.

Organised pursuant to the provisions of art. 142-147 in the Romanian Constitution and Organic law no. 47/1992, the Constitutional Court acts as the guarantor of the supremacy of the Constitution, being the only authority with constitutional jurisdiction in Romania.

Although the formal establishment of the Constitutional Court of Romania stands as the natural outcome of perceiving the European model of reviewing the constitutionality of laws, the constitutional justice in Romania stood out "through judicial channels" as early as 1912, as per a judicial order of Ilfov County Court in Bucharest, based on the American model of the constitutional review exercised by the judicial authorities.

This order, with a remarkable impact even on the French doctrine upon which it was grounded, was underpinned by the Constitution supremacy principle, whereas

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the reference system it used as a model was set forth in the 1923 Constitution, the jurisdiction of the High Court of Cassation, throughout its united divisions, gaining the task of exercising an *a posteriori* constitutional review, limited to the case submitted for trial/arbitration and non-systematic in nature.

Following the arrival of post-1938 dictatorships and totalitarian regimes, the judicial review of the constitutionality of laws was repealed, whereas the 1965 Romanian Constitution only added a preventive constitutionality review of laws, as part of a parliamentary-like procedure without the intended effectiveness, due to its expressly political nature.

Having received the third wave of the European system of constitutionality review of laws, the 1991 Romanian Constitution assigned this jurisdiction to a specialised, centralised body, enjoying multiple functionality, the duties, organisation and operation of which make it similar to, but also different from the other contemporary European models it can be compared with.

The duties of the Constitutional Court, in the original form stipulated in the 1991 Constitution and Law no. 47/1992, were redefined following the changes brought to the fundamental document and the organic law via the 2003 Law on revising the Romanian Constitution[1], a normative which, in addition to setting forth constitutional grounds necessary for Romania's integration in the Euro-Atlantic community, intended to also capitalise on the results of the Constitutional Court's activity spanning over a decade, ensuring the enhanced efficiency of an institution belonging to the Conference of European Constitutional Courts.

Along these lines we also find the idea that a national institution, such as the Constitutional Court, should be rendered compatible with similar institutions established in the European Union states, by means of extending the range of referring parties and including the Ombudsman as the owner of the right to notify the Court as part of the preliminary review, but also by adding new duties to and altering older duties of the Court.

According to art. 146 in the Romanian Constitution, the Constitutional Court of Romania has the following duties: a) it rules on the constitutionality of laws, before they are enacted, upon being notified by the Romanian President, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Ombudsman, at least 50 deputies or at least 25 senators, as well as, *ex officio*, on the initiatives to revise the Constitution; b) it rules on the constitutionality of international treaties or other agreements, upon being notified by one of the presidents of the two Chambers, at least 50 deputies or at least 25 senators; c) it rules on the constitutionality of the Parliament's regulations, upon being notified by one of the presidents of the two Chambers, a parliamentary group or at least 50 deputies or at least 25 senators; d) it decides upon the unconstitutionality exceptions concerning laws and ordinances, filed with law courts or trade arbitration courts; unconstitutionality exceptions may also be

[1] The law on the revision of the Constitution was published in the Official Gazette of Romania no. 669 from September 22, 2003.

directly filed by the Ombudsman; e) it settles judicial conflicts of a constitutional nature emerged among public authorities, at the request made by the Romanian President, one of the presidents of the two Chambers, the prime minister or the president of the Superior Council of Magistracy; f) it monitors compliance with the procedure of electing the Romanian President and acknowledges the poll results; g) it ascertains the existence of circumstances that justify the interim exercise of the Romanian President office and communicates its findings to the Parliament and the Government; h) it issues an advisory opinion regarding the proposal to suspend the Romanian President from office; i) it monitors compliance with the procedure of organising and conducting referendums and acknowledges their results; j) it makes sure that the requirements are met for the citizens' exercise of the legislative initiative; k) it rules in relation to challenges focused on the constitutionality of a political party; l) it also fulfils other duties stipulated by the Court's organic law.

All these duties and the limits within which some of them can be fulfilled are also stipulated by means of Law no. 47/1992, on the organisation and operation of the Constitutional Court, republished, being also developed through the Court's rich case-law, whose role was to complete or explain certain insufficiently outlined provisions that have given birth, over the years, to practical and doctrinal disputes.

Although, over time, some of these duties have been exercised and fulfilled by strictly complying with the constitutional framework, it is certain that particular duties, together with the decisions issued in relation to their fulfilment, have been influenced by the Constitutional Court composition, the loyal constitutional conduct of the other public authorities, the accuracy and predictability of the applicable procedural standards, but also the consistency of this institution when interpreting the same rules of law.

This endeavour, far from being an exhaustive one, intends to bring into focus, for those concerned and from an analytical perspective, some of the functional capacities of the Constitutional Court, by presenting topical debate subjects which, in relation to certain relatively recent practical examples, would actually become sources of future analyses and regulations within the European common area.

As we shall see, our endeavour is not at all accidental as constitutional justice, by means of its role and position, leaves an ever deeper mark on the proper operation of the rule of law, which is why the latter, in its turn, cannot operate outside certain coordinates that would help strengthen the core principles of democracy, increase citizens' trust in public authorities and the triumph of the supremacy of the Constitution and the law as a rule of law fundamental pillar.

2. The requirements of the right to a fair trial, as provided by art. 6 in the European Convention on Human Rights, in the case of conflicts of a constitutional nature

The emergence of conflicts among public authorities is unavoidable due to the fact that, although these authorities, in fulfilling the mandates assigned to them, must express a loyal constitutional conduct, the principles of the separation of powers and

the balance among powers also entail, as part of collaboration, autonomous and independent areas at risk of being interfered with by the authorities.

Judicial conflicts of a constitutional nature are nowadays settled by various constitutional courts in Europe or on other continents, while leading, unfortunately, to open conflicts between constitutional courts and the respective authorities, as well.

It was rightfully argued in the doctrine that this task entails an intervention in areas often deemed sensitive, difficult to mediate, with hard-to-satisfy egos.

In the exercise of this duty, constitutional judges must display mindfulness and refrainment, so as not to be lured into traps, independence and impartiality, caution and tact, as well as a vast imagination within the scope of constitutions[1].

As per the provisions of art. 146 let. e) in the Romanian Constitution, revised, the Constitutional Court settles judicial conflicts of a constitutional nature among public authorities, at the request made by the Romanian President, one of the presidents of the two Chambers, the prime minister or the president of the Superior Council of Magistracy.

Similar provisions are also found in the content of Law no. 47/1992, republished, on the organisation and operation of the Constitutional Court of Romania (art. 11 and art. 34-36), these rules regulating the types of delivered decisions and procedures to settle judicial conflicts of a constitutional nature.

The procedure to settle a judicial conflict of a constitutional nature, completed in the form of a decision, is relatively simple, in the sense that the request to settle the conflict shall mention the conflicting public authorities, the legal texts the conflict derived from, a presentation of the parties' standpoint and the request initiator's opinion.

Upon receiving the request, the president of the Constitutional Court shall communicate it to the conflicting parties, requesting that they express, in writing and within the provided deadline, a point of view on the subject of the conflict, as well as on possible ways to settle it, and shall designate the judge-rapporteur.

On the date when the last viewpoint is received, but not later than 20 days from receiving the request, the president of the Constitutional Court sets forth the trial date and *summons the parties involved in the conflict*.

The debate shall take place on the date set forth by the president of the Constitutional Court, even if any of the public authorities involved fails to meet the viewpoint submission deadline.

The debate takes place based on the report presented by the judge-rapporteur, the request to notify, the viewpoints presented, the evidence submitted and the submissions of parties.

The decision issued in order to settle judicial conflict of a constitutional nature is conclusive and shall be communicated to the applicant, as well as to the conflicting parties, before being published in the Official Gazette of Romania.

[1] *I. Muraru, E.S. Tănăsescu* (*coord*.), The Romanian Constitution, Comment by article, C.H. Beck Publishing House, Bucharest, 2008, p. 1404.

However, what both the Constitution and the Organic law fail to regulate is the actual content of the judicial conflict of a constitutional nature, which is neither defined as such by the legislator, nor subject to certain requirements expressly provided by the law, that would also welcome all the guarantees specific to the right to a fair trial, as defined by art. 6 in ECHR.

It is true that, by issuing a series of decisions, for example, no. 53/2005 or no. 435/2006, the Constitutional Court set forth the meaning of the judicial conflict of a constitutional nature sparked among public authorities, underlining that it entails "*concrete acts or actions* by means of which one or several authorities claim powers, duties or capacities that, according to the Constitution, belong to other public authorities, or *omission* on the part of public authorities, as in declining jurisdiction or the refusal to carry out certain actions falling under their duties".

From a procedural perspective, however, neither the Constitution, nor the organic law comprises provisions with a comprehensive enough scope in relation to a series of atypical situations, as they do not mention the need to notify foreign individuals and entities on a possible conflict or for the latter to present a justified viewpoint should the effects of the decision have an impact upon them.

The wording of the domestic law provisions indicates that the procedure carried out before the Constitutional Court runs while implementing certain fundamental guarantees of the fair trial: the publicity and adversarial nature of the procedure, the right to defence, immediacy and the principle of judges' independence.

Indeed, most of the procedures of this kind have been carried out in strict compliance with these principles and with the direct participation of the parties involved in the conflict, however, the recent case-law demonstrates that, in some instances, the immediate effects of certain procedures may ripple upon individuals or entities not considered parties in such and whose right to defence, right to an effective legal remedy and right to access a law court may be infringed upon.

The most illuminating example in this respect concerns the case of dismissing from office the head of a public authority or a specialised structure, where the parties involved in the appointment and dismissal procedures, finding themselves in conflict with each another, fail to agree on the future decision, as one of these parties has been granted with decision-making duties, whereas the other chooses to submit to the former a proposal to dismiss that person from office.

A relatively recent example is provided by Decision no. 358/2018 of the Constitutional Court of Romania, where the Court, in settling a judicial conflict of a constitutional nature, generated by the Romanian President's refusal to subscribe to the proposal of the Minister of Justice to dismiss from office the Chief Prosecutor of the National Anticorruption Directorate, forced the Romanian President to issue the decree for the dismissal of the said Directorate's Chief Prosecutor.

To substantiate its decision, the Constitutional Court acknowledges that the Romanian President is not entitled to conduct a decisional review of how the proposal is substantiated, while being able to initiate dialogue with the Minister of Justice in

regard to these aspects. The Constitutional Court states neither the President, nor the Constitutional Court has the duty to conduct this review as, if it were to take place, it would warp the role of the Minister of Justice they would turn into authorities that control the way in which the Minister of Justice chooses to exercise its minimal discretionary constitutional power reflected throughout the assessment carried out. The Constitutional Court thus ascertains that the chief of state as conducted a "review of the review" done by the Minister of Justice, in other words, of the soundness of the grounds comprised in the proposal to dismiss, placing themselves above the authority of the Minister of Justice, in breach of the Constitution.

Specific to the operative provisions in the Constitutional Court decision are also the fact that they bind the Romanian President to issue the decree for the dismissal of the National Anticorruption Directorate Chief Prosecutor, plus that fact that, in light of its considerations and case-law, the Court does not provide the plaintiff with a legal remedy regarding the substantive grounds that underpinned their dismissal, whereas a legal remedy could only be exercised on formal unlawfulness grounds identified in the presidential decree.

The Constitutional Court decision requiring that the Romanian President issue the decree for the dismissal of the National Anticorruption Directorate Chief Prosecutor was not, however, made unanimously, as three of the Court judges had issued dissenting opinions, in which they argued that the President of the state had not triggered a constitutional conflict by refusing the proposal to dismiss filed by the Minister of Justice.

Regardless of the substantive and formal aspects entailed by the judicial conflict of a constitutional nature in question, this procedure brings along, from the very beginning, a series of major issues concerning the applicability of the provisions of art. 6 in the European Convention on Human Rights, being interesting to know whether the requirements specific to the right to a fair trial also apply in the case of a procedure which takes place before a constitutional litigation court and the immediate effects of which are similar to the removal from office of a persons via any official act.

This is also the reason why, in December 2018, the former Chief Prosecutor of the National Anticorruption Directorate filed a complaint with the European Court of Human Rights, in which the plaintiff claimed that her rights, stipulated in the European Convention on Human Rights, had been violated, the grounds being that the Constitutional Court of Romania, by means of its decision, ruled to have her dismissed, despite not being a party in the conflict settled by the constitutional court, not being summoned by the Constitutional Court and not having at least the status of "intervener" so that she might express an opinion in their defence.

In the plaintiff's opinion, the violation of rights stipulated in the Convention originates from the fact that the Constitutional Court Decision could not be challenged, the absence of a legal remedy being set forth in the actual reasoning of the Constitutional Court decision. It was also argued, in that respect, that the domestic law does not include any legal ground that would allow resorting to a legal remedy against a decision delivered by the Constitutional Court, as is Decision no. 358/30.05.2018. In other words, the plaintiff claimed that the procedure completed with the Constitutional

Court delivering Decision no. 358 of May 30, 2018 failed to observe the guarantees of a fair trial, as far as access to a law court is concerned, given that the domestic la does not include an "effective remedy", a legal ground and an internal procedure relying on objective criteria that might have secured for the plaintiff the right to challenge concerning the civilian rights and obligations related to the disciplinary measures ordered by the Minister of Justice and ruled by the Constitutional Court via a conclusive decision, with no legal remedy.

As per a historic decision, unanimously delivered on May 5, 2020, the European Court of Human Rights ruled in favour of the plaintiff in her legal action taken against the Romanian state, upon her dismissal from office on July 9, 2018, via a decree by the Romanian President, pursuant to a Constitutional Court decision that basically forced the chief of state to depose them.

The European Court of Human Rights ruled that there had been a violation of the plaintiff's right to access a law court in order to formulate her defence, a right guaranteed by art. 6 parag. (1) in the European Convention on Human Rights, as well as of her right to free speech, guaranteed by art. 10 in the Convention, starting from the allegation of the former Minister of Justice, who wrote in the report that underpinned the dismissal from office that the plaintiff had been in breach of her duties, making statements to the national international media.

The European Court of Human Rights determined that the plaintiff had expressed her opinions regarding amnesty and acquittal, the changes brought to the Criminal Codes and the justice laws, within the freedom of expression limits, and had made public her viewpoint on the reforms, in her capacity of head of the National Anticorruption Directorate.

The Court also stated that this aspect had in no way violated the legal provisions and, quite the opposite, fully complied with her right to free speech.

The Court concluded that the plaintiff's removal from the National Anticorruption Directorate leadership defeated the purpose of maintaining the judiciary independent and had an impact upon the other prosecutors and judges who had taken part in public debates on the legislative reforms.

The press release issued by the European Court of Human Rights on 5.05.2020 stated the following:

"The case concerned the applicant's removal as the Chief Prosecutor of the National Anticorruption Directorate before the end of her second term following her criticism of legislative reforms in the area of corruption. She alleged that she had also been unable to challenge that decision in court.

The Court found in particular that there had been no way for the applicant to bring a claim in court against her dismissal as such proceedings would only have been able to examine the formal aspects of the presidential decree for her removal and not her substantive argument that she had been incorrectly removed for criticising the legislative changes in corruption law.

Her right to freedom of expression had been violated because she had been dismissed for those criticisms, which she had made in the exercise of her duties on a matter of great public interest. One of her duties as anticorruption Chief Prosecutor had been to express her opinion on legislative reforms which could have an impact on the judiciary and its independence, and on the fight against corruption".

In the Court's opinion, "It appeared that her premature removal had defeated the very purpose of maintaining judicial independence and must have had a chilling effect on her and other prosecutors and judges in taking part in public debate on legislative reforms affecting the judiciary and judicial independence".

In the reasoning to the decision, the European Court of Human Rights acknowledged that the Romanian legal system provides the general possibility of challenging before law courts an administrative decision, as stated in the Romanian Government's viewpoint.

Nevertheless, European judges claim that the examples presented by the Government do not concern cases similar to the plaintiff's, especially since the case concerned the adoption by the president of decree to remove a prosecutor from a managing position, pursuant to a specific order issued by the Constitutional Court.

The European Court of Human Rights stipulates in parag. 114 and 115 of the decision that, although access to a position such as the one held by the plaintiff represents a privilege that can be granted by the qualified authority, the same cannot be said about the termination of one's term, as a unilateral and arbitrary decision of this kind is out of the question due to the existence of a legal framework that should have protected the plaintiff against an unlawful decision of this nature. Upon reviewing the legal framework as at the dismissal date, the Court ascertained that the plaintiff's access to a law court, even if theoretically not erased, could only concern formal aspects of the decree and would have never led to the settlement of the substantive issue.

"On this point, the Court notes that in its decision of 30 May 2018 the Constitutional Court specifically mentioned that, in the particular circumstances of the applicant's case, the administrative courts had limited powers to review the presidential decree for the applicant's removal.

Basically, had the plaintiff taken legal action, in order to challenge the presidential decree, it would have been a mere formal review.

Such an avenue, had it been taken by the plaintiff, would not have been an effective remedy for the core of the applicant's complaint, in which respect the Court added: "Her removal had been an illegal disciplinary sanction triggered by her opinions expressed publicly in the context of legislative reforms".

As such, the Court stated that the plaintiff would not have been able to effectively defend in court her rights concerning the disciplinary removal from the office of NAD Chief Prosecutor, as a result of the statements she had made.

"In view of the above, in the absence of domestic case-law examples of similar cases and in view of the binding and specific nature of the decision adopted by CCR in the

current case, the Court is not convinced that the applicant had an available domestic remedy for effectively attacking in court what she really intended to challenge, namely the reasons of her removal from the position of Chief Prosecutor of the NAD by the presidential decree of 9 July 2018".

The plaintiff's possibility of judicial review was limited to the formal review of the removal decree, while any examination of the appropriateness of the reasons for her removal, in the light of the relevant findings presented by the Minister of Justice at the time, was excluded.

The Court dismisses the Government's objection as to the non-exhaustion of domestic remedies and concludes that the respondent State (Romania) impaired the very essence of the applicant's right of access to a court owing to the specific boundaries for a review of her case set down in the ruling of the Constitutional Court", as argued by the Court.

According to the decision, the Court ascertained that most of the grounds advanced by the former Minister of Justice in the report on the plaintiff's dismissal are opinions that the latter had expressed from a professional capacity.

More specifically, the reasons presented by the Constitutional Court only referred to investigations opened by NAD in connection with possible corruption allegedly committed by members of the Government and to the disclosure of the details of these investigations to the media by way of press releases. Furthermore, Laura Codruța Kövesi's public statements in connection with the legislative reforms proposed by the Government and the NAD investigations connected to these reforms have been extensively quoted and commented on twelve pages of the report submitted by the Minister of Justice.

Additionally, all the arguments presented by the former Minister of Justice were examined by the professional body of the judiciary, the Superior Council of Magistracy, and were found to lack any factual or legal basis.

"Therefore, in view of the above and having regard to the sequence of events in their entirety, rather than as separate and distinct incidents, there is evidence of a causal link between the applicant's exercise of her freedom of expression and the termination of her mandate".

"In view of the above, the Court concludes that the main reasons for the applicant's removal from her position as NAD Chief Prosecutor were connected to her right to freedom of expression, which includes the freedom to communicate opinions and information".

In conclusion, the Court acknowledge that the plaintiff's removal from the office of NAD Chief Prosecutor and the reasons justifying it can hardly be reconciled with the principle that Justice operates as an independent branch of State power and to the principle of the independence of prosecutors, which – according to Council of Europe and other international instruments – is a key element for the maintaining judicial independence.

In conclusion, European judges show that the plaintiff's premature removal from her office of NAD Chief Prosecutor violated the actual purpose of maintaining the judicial system's independence, set forth by these regulations: "Furthermore, the premature termination of the applicant's mandate was a particularly severe sanction, which undoubtedly had a «chilling effect» in that it must have discouraged not only Kövesi, but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary".

This fact further emphasizes the historical significance of the European court's decision, in light of the conclusion according to which the dismissal and the reasons underpinning cannot be reconciled with the importance that has to be granted to the judicial function as an independent branch of the State and to the prosecutors' independence principle, stipulated by multiple regulations of the Council of Europe and the international ones, as a key element of maintaining the independence of the judicial system on the whole.

Based on the arguments above and keeping in mind the fundamental importance of freedom of expression in matters of general interest, the Strasbourg Court believes that the plaintiff's removal from the office of NAD Chief Prosecutor was not a measure "necessary in a democratic society".

This decision must not come as a surprise, being as predictable as can be.

Indeed, the European Court of Human Rights case-law has accommodated certain nuanced interpretations of the scope of art. 6 parag.1 in the Convention, although the reference standard only concerns complaints related to "civil rights and obligations" and "allegations of a criminal nature".

Although this wording apparently rules out public law litigations from the protection granted by art. 6 in the Convention, the scope of the fair trial general guarantees has been extended in terms of case-law by the Strasbourg Court, which added that the guarantees in question can apply to public office litigation, provided that certain criteria are met, as well as to constitutional litigation[1].

In consideration of this case-law, all the guarantees of a fair trial also apply before a constitutional litigation court which, in its capacity of objective guardian of the Constitution, performs a series of activities with a possible decisive influence upon the protection of an individual's fundamental rights.

Since the reviews on the merits of the case exceed those on procedural matters that are of particular interest to us, we shall definitely confine ourselves by stating that the

[1] In the case *Pellegrin vs. France* (1999), the Court replaced, also for litigations related to public offices, the asset-based criterion employed until that time to outline the practical scope of art. 6 in ECHR with a functional distinction criterion. In the said case, the Court concluded that exclusions from the enforcement of art. 6 in the Convention are strictly litigations concerning public servants fulfilling specific tasks within the general government and acting as representatives of the state's public power or of local communities, only to subsequently extend the practical scope of art. 6 in the Convention to other categories of officials, as well.

aspects stated in the complaint filed with the European Court of Human Rights bring forward matters of compatibility between the domestic law and the requirements of one's right to a fair trial, stipulated by art. 6 in the European Convention on Human Rights, similar to those notified by the Court in the case *Baka vs. Hungary*, stemming from being denied access to a law court upon the removal from office of a high-ranking magistrate, as was also the case with the President of Hungary's Supreme Court of Justice.

Likewise, in this case (petition no. 20261/12), plaintiff Andras Baka complained about the violation of the right to access a law court – pursuant to art. 6 in the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), in that the measure of terminating his term as the President of the Supreme Court could not be challenged and become subject to an effective judicial review. Moreover, the plaintiff complained about his freedom of expression being infringed upon – pursuant to art. 10 in the Convention, having been replaced midway through this term (in 2012) due to his critical attitude towards certain matters regarding the independence of the Hungarian judiciary, reflected in the new Hungarian Constitution and/or in the subsequent legislation[1].

[1] As to the facts, the plaintiff, president of the Hungarian Supreme Court of Justice, elected by the Hungarian Parliament as per the law in effect in 2009, for a 6-year term, made critical comments about a series of legislative endeavours and initiatives, as follows: the plaintiff publicly criticised the law that made it possible to reopen proceedings ended with conclusive decisions for deeds committed during the dispersal of demonstrators in 2006. At the same time, via the Supreme Court's spokesperson, a viewpoint was stated in the sense that such standards would be unconstitutional. Secondly, in relation to the constitutional provision pursuant to which judges' retirement age would be lowered from 70 to 62 years old, the plaintiff submitted letters to various players in charge with adopting the Constitution (the President of the republic, the Prime Minister, the president of the legislative forum), where he underlined the risk entailed by such a measure (the sudden retirement of a significant number of persons in 2012, approximately one tenth of the total number of judges, with implications on their independence and immovability etc.). On the day the respective amendment had been set for debate, the plaintiff sent another letter to the prime minister, arguing that the said proposal was humiliating, groundless and even discriminating towards to the judges in question, impairing their independence and immovability. Upon the adoption of the amendment, the plaintiff, in their capacity of President of the Hungarian National Judicial Council, made public statement for the attention of both the Hungarian public and the European Union bodies, reiterating his critical position towards the changes occurred. Thirdly, at the plaintiff's request, the criminal division of the Supreme Court drew up a review of certain amendments related to the procedural criminal legislation in Hungary. Given that the judges' remarks and proposals had not been considered by the legislative forum, the constitutional review procedure was resorted, and the Hungarian Constitutional Court declared the respective amending standards unconstitutional.

In the end, the plaintiff expressed critical opinions in relation to other laws undergoing adoption, the ones on the organisation and operation of law courts and the judges' statute and wages, respectively. In late 2011, the plaintiff carried out an intervention in the Parliament plenum in relation to these aspects. The fundamental law, adopted on April 25, 2011, stipulated that the Hungarian Supreme Court would be the Curia, a traditional designation for the Supreme Court institution. The transitional rules in the Constitution stated that the mandates of the Supreme Court President, the National Judicial Council President and of the members of said council, respectively, would end once the new Constitution has come

In this case, too, domestic law flaws, coupled with the infringements sanctioned pursuant to art. 10 in the Convention, led to the plaintiff's referral being reviewed in relation to the scope of art. 6 in the Convention, as well, considering that the plaintiff had been denied the right to access a law court and their complaint had not enjoyed from an effective domestic legal remedy.

As far as the right to access a county court is concerned – stipulated by **art. 6 in the Convention**, the Court reiterated the fact that this article secures for any individual the right to have any personal complaint in civil rights and obligations reviewed by an independent court.

From this perspective, art. 6 in the Convention entails, in the Court's opinion, "the right to a county court", whereas the right to access a county court or law court of this nature is, likewise, an aspect falling under the protection scope of art. 6 (see in that respect the case *Golder vs. Great Britain*, the decision from February 21, 1975).

In the present case, the Court ascertained that the Supreme Court judges in Hungary, the president included, are not expressly denied the right to access a county court.

Quite the opposite, the domestic Hungarian legislation sets forth that persons with management positions within the judicial system are entitled to challenge any replacement from office before a specialised body.

However, in the particular circumstances of the case, the Court ascertained that the plaintiff's exercising their right to access a county court, where they could challenge their replacement from the office of Supreme Court President, was prevented not necessarily by an express provision, but rather by the fact that the termination of their term had been literally stipulated in the transitional rules of the fundamental law. As such, if the Supreme Court vice-president was entitled to challenge the termination of

into force. The new fundamental law entry-into-force date was set to January 1, 2012, when the plaintiff's president mandate was terminated, nearly three and a half years prior to the normal expiry date of the 6-year term granted to him by Parliament in 2009. At the same time, with the law on the organisation and operation of law courts amended, the plaintiff was no longer eligible to hold such offices, given the introduction of a new criterion that set forth candidates' 5-year minimum length of service as judges. Consequently, the Parliament elected two other persons for the offices of President of the Curia and President of the newly-created National Office for Justice, respectively. The legislative and constitutional changes in Hungary were noticed by the European Union's bodies. Following the start of a fast-tracked *infringement* procedure against Hungary focused, *inter alia*, on the independence of the judiciary. The European Commission notified the Unions Court of Justice which, as per a decision from November 6, 2012, acknowledged the violation by the Hungarian state of Directive 2000/78/EC from November 27, 2000 on equal treatment in employment and occupation. In fact, as per a decision from July 16, 2012, Hungary's Constitutional Court had declared unconstitutional the national provisions regarding the mandatory retirement of judges at the age of 62. Concerning the termination (under similar conditions to the plaintiff's) of the 6-year term of the Supreme Court Vice-President, the Constitutional Court delivered a decision, on March 19, 2013, acknowledging, with a vote of 8 to 7, that there had been no violation of Hungary's fundamental law. In any case, the fragile majority that benefitted the decision and the arguments expressed in the dissenting opinion were, by themselves, starting points for the review carried out by the European Court.

their term before the Constitutional Court (which he actually did), the plaintiff did not even have this possibility.

Moreover, given that the Hungarian authorities failed to prove the existence of the first criterion among those presented in detail in the case *Vilho Eskelinen et al. vs. Finland* [MC], no. 63235/00, and could not substantiate the fact that the limitation of the right to access a county court was enforced "in an area that entails exercising discretionary powers pertaining to state sovereignty, which prevail over the interests of individuals", the Court concluded that there had been a violation of art. 6 in the Convention.

Before the delivery of this decision, too, the European Court of Human Rights had the opportunity to analyse a series of issued concerning the fairness of proceedings conducted before constitutional courts, ruling for the first time in this respect in the case *Ruis Mateos vs. Spain*.

In this case, the Spanish Constitutional Court disregarded the principle of the equality of arms, specific to a fair trial, guaranteed by art. 6 parag. (1) in the Convention, since the state attorney was allowed to present written observations before the Constitutional Court in regard to the validity of the challenged law, whereas the plaintiffs were denied any attempt to intervene in this special procedure, as aspect likely to violate the general principle of contradiction.

A violation of the Convention, along the same lines, was subsequently ascertained by the European Court of Human Rights in other cases, as well, such as *Krcmar vs. The Czech Republic* (2000), *Niederost-Huber vs. Switzerland* (2000), *Mantovanelli vs. France* (2000) and others, not to be understood that this extension of the European protection of human rights would entail subordinating constitutional courts to the Strasbourg Court, but only that the proceedings carried out before these courts fall under the same requirements of the right to a fair trial, provided by art. 6 in the Convention.

3. The importance the principle of predictability has for interpretative decisions

The supremacy of the Constitution within the context of a constitutionality review of laws entails not only the invalidation of a legislative text in conflict with the Constitution, which thus becomes inapplicable, but also strengthening the constitutional meaning of a legislative text, as required by more complex circumstances, by resorting to interpretative decisions.

Interpretative decisions are widely encountered in the practice of European constitutional courts, being stipulated both as part of the *"a priori"* review, exercised in France by the Constitutional Council, and as part of the *"a posteriori"* review, exercised in other states such as Germany, Italy or Spain, which served as inspiration templates for other countries, Romania included.

Interpretative decisions, together with simple decisions, by means of which the unconstitutionality of a law is acknowledged or disproved, are specific to the European law constitutionality centralised review model, also adopted in Romania by

means of the 1991 Constitution, whereas the rationale behind this type of decisions is relatively simple.

As mentioned in the doctrine, by analysing the constitutionality of a law, constitutional jurisdiction may ascertain that it is contrary, in full or in part, to the provisions in the Constitution, in which case no interpretation can save it, whereas the Court is bound to declare that law unconstitutional, in part of in full, as the case may be.

It is, however, possible for the law subject to review to only entail certain outcomes contrary to the Constitution, whereas other outcomes do not oppose the Constitution.

To consider an entire law unconstitutional, for the mere fact that some of its outcomes are unconstitutional means invalidating and ruling out a presumption of constitutionality where there would not be the case, by wiping out an entire foundation underpinning the law, beyond the limits of its rationality. At the same time, though, leaving the effects contrary to the Constitution and the related interpretation to exist, simply due to the fact that they belong to a law deemed constitutional or the effects of which are not entirely contrary to the Constitution, invites another denial of the role of constitutional justice.

In this latter situation, the constitutional judge becomes a positive legislator, by stipulating a particular interpretation, which ensures the constitutional nature of the legislative text. Therefore, the "unconstitutional venom" of a legislative text, hidden within a certain collocation in the content or in parts of an article or paragraph, expressed as a word, a sentence or a phrase, is eliminated, making it sure that the legislative text is understood in full compliance with the imperative constitutional provisions.

Normally, interpretative decisions should eliminate controversies that might emerge from interpreting a legislative text in a manner not aligned to the provisions or spirit of the Constitution and should be as explicit and illuminating as possible.

However, when things do not go quite as planned, an interpretative decision, instead of clarifying the litigious circumstance it applies to, risks rendering it even more controversial, leading to an inconsistent judicial practice.

A recent example included in the case-law of the Romanian Constitutional Court is Decision no. 2972018, by which the Court ascertains that the legislative solution that stipulates the interruption of criminal liability statute of limitation by fulfilling *"any step in the proceedings in question"* and is part of the provisions of art. 155 parag. (1) in the Penal Code is unconstitutional.

In order to understand the circumstance that underpinned the unconstitutionality decision, we need to recall that committing any criminal offence gives birth to a legal relationship of constraint which includes the state, on the one hand, and the person committing the offence, on the other hand.

The content of the legal relationship of constraint comprises **the state's right** to hold accountable the person who committed the offence, by enforcing an adequate penalty, provided by the criminal law, as well as the **obligation of the person** in question to serve delivered sentence.

The culprit's obligation to bear the consequences of the deed they committed is not perpetual, however, meaning that, pursuant to the ***principle of criminal liability subject to the statute of limitation***, the state's right to hold criminally liable persons who commit offences *is extinguished* if it is not exercised within a certain timeframe.

Criminal liability statutes of limitation are regulated by art. 154 in the Romanian Penal Code, depending on the nature and severity of the penalties provided by the law for the offences they apply to and, in order to lead to the removal of criminal liability, such statutes must run without the intervention of a procedure that can bring back the wrongdoing to public awareness.

In other words, any activity which, via the intervention of judicial bodies, can bring back to public awareness the fact that an offence has been committed, leads to the interruption of the statute of limitation and postpones its effects.

In that respect, the provisions of art. 155 parag. (1) in the Romanian Penal Code regulate the interruption of the criminal liability statute of limitation by way of carrying out any step in the respective proceedings and, as per parag. (2) in the same article, after each interruption a new statute of limitation shall begin to run.

To substantiate Decision no. 297/26.04.2018, the Constitutional Court basically acknowledges that the interruption of the criminal liability statute of limitation can become efficient and produce its effects to the fullest only if there are certain legal levers for notifying the persons concerned on the commencement of a new statute of limitation, and that a procedure of this nature may consist precisely in communicating the steps carried out in the respective proceedings the effects of which is the start of a new criminal liability statute of limitation.

In direct reference to the text under analysis, the Court ascertained that that the provisions of art. 155 parag. (1) in the Penal Code introduce a legislative solution able to render the status of a person deemed a suspect or defendant uncertain regarding the requirements to be met in order to hold them accountable for the deeds committed. Basically, these provisions lack predictability and, at the same time, oppose the criminalisation legality principle, given that the phrase *"of any step in the proceedings"* in their content also covers steps that are not communicated to the suspect or defendant and do not allow them to know about the statute of limitation interruption and the commencement of a new statute of limitation for their criminal liability.

Consequently, the Court ascertains that the legislative solution stipulating the interruption of the criminal liability statute of limitation by the fulfilment *"of any step in the respective proceedings"*, in the text of art. 155 parag. (1) in the Penal Code, is unconstitutional and, to conclude the substantiation of the decision, also states that the legislative solution stipulated by art. 123 parag. (1) in the 1969 Penal Code, currently repealed – which provided that the statute of limitation can be interrupted only by the fulfilment of a step which, in accordance with the law, had to be communicated in cases where the person concerned was deemed the accused or the defendant in the criminal trial – meets the law clarity and predictability standards.

As with other cases, and as demonstrated by the experience of the past years, during the 45 days from the publication of the decision, the legislator, though having

the constitutional obligation to act, remained passive by reconciling the criticised legal text with the Constitution.

Following this decision, a first approach shared among law theoreticians and practitioners finds Constitutional Court Decision no. 297 from April 26, 2018 to be a simple decision that merely states the unconstitutionality of art. 155 parag. (1) in the Penal Code.

This non-interpretative nature of the decision renders the provisions of art. 147 in the Constitution applicable, provisions according to which, upon its publication in the Official Gazette of Romania, Part I, the text found to be unconstitutional is suspended over a 45-day period, at the end of which the respective text ceases to have any effects.

Therefore, in this approach, art. 155 parag. (1) in the Penal Code is currently absent from the active legislative substance, the case consisting in the legislator's passiveness and, both legally and constitutionally, there is no possibility for the Constitutional Court decision to be deemed interpretative and to argue that it provides that "by way of fulfilling a step in the proceedings, communicated to the suspect or the defendant, the statute of limitation is interrupted".

A second approach put into practice and added to the doctrine favours the assumption according to which the cause for interrupting the criminal liability statute of limitation, that is, the fulfilment of steps in the respective proceedings, only produces effects in the case of steps in the proceedings which, according to the law, must be communicated to the suspect or the defendant throughout the criminal trial.

In this approach, the Constitutional Court Decision stands as an interpretation-based decision whose effects happen directly, even if the legislator has no intervention and, to identify the constitutional legislative solution, the recitals of the decision must be analysed.

Since the constitutional litigation court considered, in the recitals, that the legislative solution meeting the requirements of the Constitution is the one regulated by art. 123 parag. (1) in the previous Penal Code, it follows that the Court's option was to basically revert, in the current regulation, to the requirements for interrupting the statute of limitation provided by the previous Penal Code, that also being the interpretation that should be given to art. 155 parag. (1) in the Penal Code.

Obviously, these two approaches have given birth to a divergent case-law, some law courts delivering solutions that ceased the criminal trial, as an effect of the criminal liability statute of limitation, whereas others considered that the steps in the proceedings communicated to the suspect or the defendant throughout the criminal trial are equally subject to the same effect of interrupting the statute of limitation.

To make inconsistent judicial practices consistent, the Romanian legislator has regulated the second appeal on a point of law, conceived as a court-ordered relief with the goal of having the High Court of Cassation and Justice impose a unified interpretation of the law in relation to law issues that were settled differently, by way of issuing a decision that is binding for all law courts in Romania and effective only for the future.

In this respect, the provisions of art. 471 parag. (1) in the Criminal Procedure Code state that, in order to ensure the consistent interpretation and enforcement of the law by all the law courts, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, *ex officio* or at the request of the Minister of Justice, the Managing College of the High Court of Cassation and Justice or the managing colleges of the courts of appeal, as well as the Ombudsman have a duty to request that the High Court of Cassation and Justice rule on legal matters that have been settled in different ways by law courts.

Following the divergences occurred in terms of case-law in 2019, the Prosecutor General of Romania notified the High Court of Cassation and Justice on the second appeal on a point of law concerning **the consistent interpretation and enforcement of the provisions of art. 155 parag. (1) in the Penal Code, on the interruption of the criminal liability statute of limitation by way of fulfilling any step in the respective proceedings, after the publication in the Official Gazette of Romania of Constitutional Court Decision no. 297 from April 26, 2018**.

To substantiate the second appeal on a point of law, it is argued that the review of national case-law highlights an initial minority opinion stating that after the publication of Constitutional Court Decision no. 297 of April 26, 2018, the criminal liability statute of limitation can no longer be interrupted in light of art. 155 parag. (1) in the Penal Code, at present only the general criminal liability statutes of limitation in the current regulation being applicable.

As a result, these law courts ruled that criminal trials cease pursuant to art. 16 parag. (1) let. f) in the Criminal Procedure Code, with the application of Constitutional Court Decision no. 297/2018, in all cases where they ascertained that the criminal liability statutes of limitation had been reached.

Conversely, the majority opposite opinion stated that, at present, in the interpretation of the provisions of art. 155 parag. (1) in the Penal Code, the cause of interrupting the criminal liability statute of limitation, that is, the fulfilment of steps in the respective proceedings, only produces effects in the case of steps in the proceedings which, according to the law, must be communicated to the suspect or the defendant, and that Constitutional Court Decision no. 297 from April 26, 2018 is interpretative.

As such, it is argued that, although the operative part of this decision is not specific to an interpretation-based decision, is must be correlated with the recitals, the resulting conclusion being that the decision is interpretative, a decision by means of which the Constitutional Court ascertains that a particular legislative solution is unconstitutional.

With a broad motivation, which captures the aspect that in this case the condition of admissibility imposed by art. 471 parag. (1) of the Criminal Procedure Code is not fulfilled, namely that the appeal request concerns the interpretation of the law, respectively of the provisions of art. 155 parag. (1) of the Penal Code – through this request in fact aiming to establish the effects of the Decision of the Constitutional Court no. 297/2018 on art. 155 parag. (1) of the Penal Code – High Court of Cassation and Justice, by Decision no. 25/11.11.2019, pronounced in the interest of the law, rejected the appeal in the interest

of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, on "interpretation and application of art. 155 parag. (1) of the Penal Code on interruption of the prescription of criminal liability by fulfilling any procedural act in question, subsequent to the publication in the Official Gazette of the Decision of the Constitutional Court no. 297 of April 26, 2018", as inadmissible.

Moreover, the High Court of Cassation and Justice, and through the panels for the resolution of legal issues in criminal matters, has consistently found inadmissible the complaints which questioned the interpretation, the application or establishment of the effects of a decision rendered by the court of constitutional contentious, the following can be brought as an example: Decision no. 24 of October 8, 2015, Decision no. 22 of October 25, 2016, Decision no. 4 of February 28, 2017, Decision no. 1 of February 8, 2018 and Decision no. 5 of March 21, 2019, by which, within a mechanism of unification of judicial practice, provided by art. 475 and the following of the Criminal Procedure Code, the High Court of Cassation and Justice was notified by the Cluj and Constanța Courts of Appeal, with the same legal issue that led to an appeal filed in the interest of the law.

Therefore, the difficulty of the legal issue in question persists and starts precisely from the fact that the court of constitutional contentious did not establish the nature of this decision, the effects of this decision on the active substance of the legislation and the extent of these effects on acts of interruption of the prescription of criminal liability already fulfilled, following the model enshrined in other similar decisions.

A much more uncompromising solution to this issue is to have prevented the emergence of an inconsistent judicial practice that would have not invited any conclusions or concerns, partly justified ones, in the sense that the rule "maintained" in the legislation would no longer meet the clarity and predictability requirements imposed by art. 1 parag. (5) in the Constitution[1].

The concerns expressed in the doctrine and in practice are far from theoretical, being particularly relevant in calculating the criminal liability statute of limitation, especially that inconsistent case-law leads to strong differences of treatment, whereas the principle of equality of all citizens before the law opposes such differences, given that, according to art. 124 parag. (2) in the Romanian Constitution, justice is **unique**, impartial and **the same** for all citizens.

Within a relatively constant case-law, the Constitutional Court of Romania set forth that both the operative provisions and the recitals of its decisions are generally binding and all matters of law are subject to them to the same extent.

Therefore, nothing prevents the constitutional litigation court from stating in the content of the recitals that the said decision did not declare unconstitutional the entire art. 155 in the Penal Code, but only the legislative solution that stipulated the interruption of the criminal liability statute of limitation by the fulfilment of any step in the respective proceedings, so that the provisions of parag. (4) in the same article, on the special statute of limitation, would continue to apply irrespective of any reserves.

[1] In this respect, see *A. Sarchizian*, Interruption of criminal liability statute of limitation. Non liquet, a study published on *juridice.ro* online judicial platform on 31.05.2019.

A settlement by law of this kind would have also prevented the legislator from exercising due diligence, given that it remained passive and failed to intervene upon the criticised legal standard, and would have eliminated any case-law divergence, whereas law courts would not have been able to extend the effects of Decision no. 297/26.04.2018 to the entire concept of criminal liability interruption, being compelled to limit themselves strictly to the unconstitutionality aspects pointed out by the Constitutional Court to substantiate its solution.

4. Regulatory limitations within the constitutionality review of laws where the unconstitutionality exception is concerned

Organic law no. 47/1992 on the organisation and operation of the Constitutional Court, republished, provides a detailed regulation of the unconstitutionality exception.

This legal framework has undergone significant changes over the years and comprises both special procedural rules on the settlement of the unconstitutionality exception, concerning how this exception can be claimed before law court and how the Constitutional Court can settle that exception, as well as general rules applicable to any type of procedure carried out before the Court.

According to art. 146 let. d) in the Romanian Constitution, the Constitutional Court decides on objections as to the unconstitutionality of laws and ordinances, brought before courts of law or commercial arbitration tribunals.

One of the general rules also applicable to the unconstitutionality exception settlement procedure is comprised in art. 3 parag. (1) in Law no. 47/1992, republished, which states that "The Constitutional Court's duties are the ones set forth in the Constitution and the present law".

To formalise the function of negative legislator, the provisions of art. 2 parag. (3) in the law define, as a general principle, the rule according to which *"The Constitutional Court rules exclusively on the constitutionality of documents it has been notified about, without being able to amend or supplement the provisions subject to review".*

On the literal observance of this principle we further intend to conduct a brief analysis, starting from a recent example with far-reaching effects upon the rule of law in Romania, based on brief theoretical and practical considerations the doctrine has highlighted over the years in relation to interpretative decisions.

The rule according to which, in exercising the constitutionality review, the Constitutional Court only rules on the constitutionality of the documents it has been notified about, without being able to amend or supplement the provisions subject to review, is the application of Kelsen's "negative legislator" theory, which states that the function of a constitutional court is "genuinely jurisdictional" and does not entail creating or amending legal standards.

The importance of this rule has been underlined primarily in the case of interpretative decisions whose characteristics and requirements had been indicated, as well, so that the decisions should align to the Constitutional Court's role of negative legislator.

As such, it was argued that, in the case of interpretative or interim decisions, the interpretation of a legislative text must be irrefutably necessary, must not ignore or alter the legislator' intention and must not lead to redrafting the reviewed text.

To that end, as per Decision no. 1/1992, the Constitutional Court itself ruled that "The law does not grant the Constitutional Court the power to reword the legal texts it might deem inadequately drawn up, this power belonging to other state bodies".

This limitation brought to the Court powers does not equate to an absolute limitation of the Constitutional Court to the status of "negative legislator", in the narrowest sense of the concept, as this limitation would otherwise disregard the nature and limits of the constitutionality review, which does not always make it possible to promptly determine the compliance or non-compliance of a law with the Constitution.

This is also the reason behind interpretative decision becoming dominant at a European level and the model being adopted by the Constitutional Court of Romania, as well, a court that argued, as far back as 1993, in Decision no. 19/1993, that: "As part of its duties stipulated by the Constitution and within the limits imposed by the case in relation to the constitutionality review by way of exception, in order to avoid the lack of regulation and the effects it might produce, the Court believes it is entitled, until a new regulation has been adopted in the field, to interpret the texts challenged before it in a manner that is aligned to the Constitution".

Despite the above-mentioned legal limitations and the doctrinal requirements, the newer practice of the Constitutional Court also provides examples that derogate from these rules, two relatively recent circumstances being the focus of Decisions no. 405/2016[1] and no. 392/2017[2], in which the constitutional litigation court ruled that the provisions of art. 246 and art. 248 in the 1969 Penal Code and those of art. 297 parag. (1) in the current Penal Code, on the criminalisation of the *abuse of office* offence, are constitutional insofar as the phrase "poorly fulfils" in their content is understood as fulfilling occupational duties in violation of the law.

To substantiate the two decisions, it is essentially argued that the phrase "poorly fulfils" present in the criticised legislative texts is flawed and that only by limiting penal criminalisation to a manner of exercising occupational duties in violation of the law can there be avoided, in regard to the clarity and predictability of the law, cases of incoherence and instability, which are contrary to the legal security principle.

The recitals of these decisions also state that, for the same reasons of rendering the law clear and predictable, these occupational duties shall be strictly limited to those provided by primary legislation – circumscribed to the laws issued by Parliament and the ordinances the Government can adopt as delegated legislator – and shall exclude occupational duties provided in secondary normatives, submitted for inclusion in primary legislation by any other authorities.

In the content of its decisions, the Constitutional Court also highlights the mandatory nature of a decision's recitals – starting from the old debate on whether the considerations

[1] Published in the Official Gazette of Romania no. 517 from July 8, 2016.

[2] Published in the Official Gazette of Romania no. 504 from June 30, 2017.

underpinning the operative provisions cover the entire substantiation or only a part thereof – arguing that: "since all the considerations accommodated by a support its operative provisions... the *res iudicata* authority and the binding nature of the solution reflect upon all the considerations of a decision".

According to this guideline, the recitals of the Constitutional Court decisions are, in their entirety, mandatory, as are their operative provisions, whereas one cannot agree with the assumption stating that the text of a Court decisions might contain considerations independent of the judicial reasoning converging towards the delivered solution and, by default, which would not fall under the binding nature of the operative provisions of the jurisdictional act.

This substantiation of the Constitutional Court relies on the provisions of art. 147 parag. (4) the second sentence in the Constitution, which stipulates that "As from their publication, [Constitutional Court – AN] decisions shall be generally binding and effective only for the future", as the constitutional text makes no distinction depending on either the types of decisions the Constitutional Court delivers or their content, and sees them generally binding in their entirety.

In the content of Decision no. 392/2017, the Constitutional Court adds an element of novelty, distinct from the elements comprised in previous Decision no. 405/2016, acknowledging that, although it lacks the power to adjust for a regulatory flaw, as it would exceed its legal duties by acting within the exclusive jurisdiction of the primary or delegated legislator, taking into account, nevertheless, the constitutional provisions of art. 142 parag. (1), which state that "The Constitutional Court is the guarantor of the supremacy of the Constitution", and those of art. 1 parag. (5), stating that "In Romania, the observance (...) of the laws shall be mandatory", "**the legislator, nevertheless, is bound to regulate the monetary threshold of the loss and the severity of the damage incurred upon the legitimate right or interest by the deed committed, in the content of the criminal-law rules on the abuse of office offence, whereas its passivity may lead to the occurrence of new cases of incoherence and instability, contrary to the legal security principle, namely its provisions concerning the clarity and predictability of the law**".

In the concurring opinion associated to Decision no. 392/2017, which criticises the addition to the recitals of certain aspects that exceed the scope of the solution, it is argued, among others, that: "One can easily notice the said additions to the recitals of Decision no. 405/2016, in the sense of reinterpreting opinions included in its recitals and converting them, by infringing upon the Constitutional Court's powers, into an obligation for the legislator".

This obligation, however, has no constitutional grounds, as it is not supported by any operative provisions that admit the unconstitutionality exception – and equally lacks the support of Decision no. 405/2016, which regards totally different topics, and that of the present decision, so long as the solution provides inadmissibility.

The content of the concurring opinion also states that: "The additional considerations we have emphasized determine an intolerable interference (not even by the Court via the delivered solution) with the jurisdiction of other public authorities, as they set forth

a conduct of the authorities that would have been backed by a different operative part than the one delivered".

As it can be easily ascertained, the two Constitutional Court decisions, also coupled with Decision no. 518/06.07.2017 on the admission of the unconstitutionality exception of art. 249 parag. (1) in the 1969 Penal Code and art. 298 in the Penal Code, depart from the requirements imposed by art. 2 parag. (3) in Law no. 47/1992, according to which "the Constitutional Court shall only rule on the constitutionality of the documents it has been notified about, without being able to amend or supplement the provisions subject to review".

Indeed, the rules that regulate the offences of *abuse of office against personal interests* and *abuse of office against public interests*, consecutively stipulated at art. 246 and art. 248 in the 1969 Penal Code and at art. 297 in the current Penal Code, respectively, criminalise the act of a public servant or another official who, in the exercise of service prerogatives, knowingly fails to perform an act or performs it erroneously and by this infringes upon the legal interests of a person or a significant disturbance of the proper operation of a state body or institution or of another entity among those referred to at art. 145 in the 1969 Penal Code, or causes damage to its property, or, as provided in the current Penal Code, damage to or an infringement upon the legitimate rights or interests of a natural person or a legal entity.

Although the decisions issues while exercising the constitutionality review add to the clarity of the above-mentioned criminalisation rules, they restrict the scope of the *abuse of office* offence by limiting the occupational duties exercised in violation of the law strictly to those stipulated in primary legislation, in the absence of an intervention from the legislator and even by restricting and misinterpreting the latter's will.

This conclusion resides in the fact that the *abuse of office* offence has not been regulated as a violation of occupational duties by the public servant or a different official, but as a non-performance or an inadequate performance of an action during the exercise of one's occupation duties.

Therefore, the circumstance related to the exercise of occupation duties is nothing but a requirement allowed by the existence of the offence, preceding the criminalised act of conduct, which is why turning this requirement into a genuine conduct falling under the violation of occupational duties in primary legislation basically leads to redefining the offence.

The expression of the criminal provision reveals as clearly as possible that the primary legislator failed to mention distinctions concerning the regulatory level of the occupational duties specific to the *abuse of office* offence active subject, as far as the hierarchy of normatives in concerned, meaning that the occupation duties could have reached a statute of limitation in accordance with either primary normatives or secondary legislation, since primary legislation can be detailed by way of adopting secondary regulatory documents, according to art. 4 parag. (3) in Law no. 24/2000, which sets forth a single requirement, that is, normatives adopted to enforce laws and Government ordinance must be strictly issued within the limits of and pursuant to the rules that call for them.

In relation to the legitimate question whether the constitutional court was actually qualified to introduce distinctions that the legislator itself failed to add when drawing up a standard, thus limiting the scope of that standard, against the legislator's will, we believe it can only have a negative answer, given that the Court, in doing so, omitted a substantive requirement pertaining to interpretative decisions, highlighted both in the doctrine and in its own case-law, according to which its interpretation shall neither ignore, nor alter the legislator's intention.

The need to meet this requirement is actually underlined by a recently delivered solution, included in Constitutional Court Decision no. 466 from July 29, 2019, where it is argued, as an example, that "the legislative solution derived from the amendment to art. 39 parag. (1) let. c) in the Penal Code, is a matter of legislative option that cannot be censored by the Constitutional Court. Moreover, in its own case-law, the Court ruled that reviewing the constitutionality of a law takes into account its compatibility with the allegedly breached constitutional provisions, and not a comparison among the provisions of several laws and an analysis on the possible conclusion revealed by the comparison in relation to provisions or principles of the Constitution. In this manner, it would inevitably be concluded that, although each of the legal provisions is constitutional, only their coexistence would challenge the constitutionality of one of them. Ultimately, in this case, one does not identify a constitutionality issue, but an alleged opposition among legal standards in the same field; yet, coordinating the legislation in force is the legislator's duty (Decision no. 81 of May 25, 1999, published in the Official Gazette of Romania, no. 325 of July 8, 1999, or Decision no. 304 of May 4, 2017, published in the Official Gazette of Romania no. 520 from July 5, 2017, parag. 28).

Consequently, taking into account art. 2 parag. (2) and (3) in Law no. 47/1992, the unconstitutionality claim filed as such is inadmissible".

Since many of the occupational duties of public servants and other officials are not provided in primary legislation, but in secondary legislation issued to facilitate the enforcement of the former, but also in job descriptions and various documents, regulations and internal instructions of various entities, the *abuse of office* offence, together with *dereliction of duty*, have basically enjoyed a *"de facto"* decriminalisation.

Paradoxically, though, is precisely the fact that, in the absence of "secondary legislation", no public servant would be able to actually fulfil their occupational duties, obligations and tasks pertaining to the offices they hold, that cancels any practical end for the criminalisation of the *abuse of office* offence, although, in terms of legislative technique, many of secondary legislation rules are mere extensions of primary legislation they consistently integrate with. Along the same lines are also the provisions of Law no. 24/2000, on the legislative technique, which allow detailing upon the rules comprised in primary legislation by means of secondary legislation, to the extent to which primary legislation calls for it and strictly within the limits set forth by primary legislation.

Concurrently with the fact that the Romanian state no longer ensures, via this criminalisation, a genuine protection of fundamental values fostered by the Constitution and the law, it is faced with a real difficulty, given that, internally, the legislator seems to be equally unable to fulfil the obligations undertaken in various

international conventions it is a party to and which pursue containing *abuse of power* and acts of corruption, by means of the broadest possible criminalisation of criminal wrongdoings with a high risk of social hazard, likely to jeopardise the foundations of the rule of law and democracy itself.

A limitation of this kind brought upon the *abuse of office* offence, within the current national and international context, is all the more debateable as not only in Romania, but worldwide, the phenomenon comprising abuse of office, grand corruption and corruption within the general government is quantified and monitored by means of various opinion barometers and various international instruments.

This newer type of approach deviates even from the angle expressed by the Constitutional Court which acknowledged in its recent case-law[1] that it "lacks the power to create new legal standards by amending an already existing legal text, but can only to review the compliance of the current standards with the constitutional requirements and ascertain their constitutionality or unconstitutionality" and which, as per Decision no. 2/2014, in regard to the legal scope of the *abuse of office* and *corruption* offences, basically acknowledges as follows:

"Corruption is considered one of the greatest threats to the rule of law institutions, democracy, human rights, social fairness and justice, with negative outcomes on the activity of public authorities and institutions and the operation of market economy. Corruption is a barrier against a country's economic development and undermines the stability of democratic institutions and the moral foundation of society.

In conclusion, in recent years, the State's declared criminal policy was to intensify efforts towards adopting normatives in the area of fighting corruption, stipulating, among other things, the coordinated criminalisation of all acts of corruption throughout all tiers of public authorities and institutions".

The link between an offence such as *abuse of office* with the corruption phenomenon is as obvious as it gets, since many of the service offences actually mask acts of corruption, particularly in the case of deeds that cause significant losses to the public budget.

Tackling this phenomenon could not leave out the content of the 2015–2019 National Defence Strategy which, at item 59, stipulates that "one of the risks faced by national defence and security is the failure to achieve Romania's development goals, which may be attributed to the proliferation of corruption, this being a vulnerability affecting trust in the judicial process and the state institutions and also tainting Romania's image abroad".

Furthermore, this phenomenon cannot be tackled while disregarding the 2016–2020 National Anti-Corruption Strategy, approved as per Decision no. 583/2016 of the Romanian Government, a document which calls corruption a direct vulnerability, or the United Nations Convention against Corruption, adopted in New York on 30.10.2003 and ratified by Romania, which makes it a requirement to criminalise *abuse of power*,

[1] Decisions no. 162/24.03.2016 and no. 102/25.02.2016, published in the Official Gazette of Romania no. 400 from 26.05.2016 and no. 397 from 25.05.2016.

the abusive exercise of one's office being deemed a violation of the law and of ethics, likely to question the integrity demanded in the exercise of a public office.

Last but not least, Romania must not neglect the Reports drawn up under the Cooperation and Verification Mechanisms, namely the recommendations in these reports regarding the need to stop the corruption phenomenon within the central and local government, or the GRECO Assessment Reports, which periodically record the status of the progress made, also by Romania, in fighting the corruption phenomenon, underlining the need to escalate the fight against corruption, particularly in the field of public administration.

In the concurring opinion of this decision, but also in the doctrine[1], it is argued that, as per Decision no. 392 from 2017, the Constitutional Court has departed, once again, from the requirements imposed to interpretative decisions, given that no Constitutional Court can claim the right to compel the Parliament to legislate in a particular manner, especially by setting forth a monetary threshold for abuse of office, and Constitutional Courts cannot even anticipate the content of the new law, but only to highlight the unconstitutionality of the older one. As a matter of fact, the obligation imposed to Parliament also contradicts the recitals of Decision no. 405/2016, where the Constitutional Court states that the task of reviewing the *ultimo ratio* principle belongs, in equal measure, to the parliament and the judicial bodies.

Assigning an obligation to legislate the "threshold" to Parliament, in the absence of supporting provisions that would have expressly resulted from the operative part of the Constitutional Court decision actually equates to the absence of constitutional grounds to legitimise this decision, as stated in the concurring opinion on one of the Court's decision, which is why the recitals of the decision cannot be mandatory for Parliament, having no counterpart whatsoever within the operative part of the decision[2].

Moreover, as per the same opinions, by compelling Parliament to set forth a monetary threshold, up to which *abuse of office* is not considered an offence, the Court appears to have suggested a new partial decriminalisation of this offence, added to the one already done.

Finally, the provision on the value of recitals of these decisions departs, as well, from its own case-law in the field, given that the Constitutional Court's entire case-law until the delivery of Decision no. 392/2017 indicated that the res iudicata power of a decision is only attached to the operative part and the considerations underpinning the decision**.**

As also concluded in the doctrine[3], the Constitutional Court decisions generated an inconsistent judicial practice, both within the High Court of Cassation and Justice, as well as within the other law courts, which demonstrates once again that such decisions deviate from the patterns usually followed by the Constitutional Court, whereas an

[1] *L. Barac*, A critical view of the Constitutional Court decisions delivered on the abuse of office offence, Part II, published on 27.02.2018 in *juridice.ro* online publication.

[2] *L. Barac*, op. cit.

[3] *L. Barac*, op. cit.

interpretative decision of the constitutional court generating an inconsistent case-law is not to be desired.

For good reason, it was argued that interpretative decisions, by nature, are designed to eliminate the consequences and interpretations that underpinned them, non-compliant with the Constitution, emerged during the application of a constitutional rule and generating several interpretations in the process of implementing as part of law courts' activity.

This state of affairs is substantiated by the actual circumstance that some law courts have continued to apply criminal laws in line with its reasoning and spirit, in order to safeguard the rule of law and protect the public interests defended via the criminalisation rules, whereas other law courts have delivered acquittal solutions for *abuse of office* offences, pursuant to art. 16 let. b) in the Criminal Procedure Code, ruling that such deed was not stipulated by the criminal laws, in which context they acknowledged that the deed was missing one of the constituent elements of the objective side or such deed had been decriminalised.

Naturally, however, even the law courts that had accurately identified the legal basis of pardoning the defendants admitted that, by means of the Constitutional Court decisions, there had been a decriminalisation *in concreto* of the criminal wrongdoing, despite none of the constitutional courts having the functional responsibility of decriminalising criminal wrongdoings by way of interpretation-based decisions.

The virtue of criminalising and decriminalising any criminal deeds falls exclusively under the legislator's power, the provisions of art. 147 parag. (1) in the Romanian Constitution granting Constitutional Court decisions effects similar to decriminalisation in a single case alone, that is, when the Court deems the criminalisation rule unconstitutional and the legislator does not abide by the constitutional requirements within the deadline set in the Constitution.

In conclusion, the delivery of the two decisions, primarily Constitutional Court Decision no. 405/2016, corroborated with the legislator staying passive, led to a partial, but substantial decriminalisation of the *abuse of office* offence, as also highlighted by the viewpoint of the Ombudsman who, in their public intervention from 3.02.2017, explaining the grounds behind them challenging before the Constitutional Court GEO no. 13/2017, on amending and supplementing Law no. 286/2009 on the Penal Code and Law no. 135/2010[1], on the Criminal Procedure Code, stated that one of the unconstitutionality grounds of GEO no. 13/2017 is precisely limiting *abuse of office* exclusively to violations of laws and ordinances issued by the Government, a context where they argued that limiting abuse of office strictly to violations of Government laws, ordinances and emergency ordinances, with no mention about the other normatives (Government decisions, minister orders, decisions of county and local councils etc.) means removing from the scope of criminal laws the activity of nearly all government tiers in Romania, which is utterly unconstitutional, given the meaning of the word "law"

[1] Published in the Official Gazette of Romania no. 92 from February 1, 2017, repealed as per GEO no. 14/2017, published in the Official Gazette of Romania no. 101 from February 5, 2017.

assigned by the Constitutional Court in its permanent case-law, according to which the law also covers secondary legislation and the term "law" shall be understood in its broader meaning (*lato sensu*).

5. Case-law controversies regarding the duration the effects of Constitutional Court decisions have

Estimating the effects in time of Constitutional Court decisions delivered as part of the constitutionality review, but also in other matters, is particularly important within any law system for the best possible settlement of legal circumstances resulted from a law that has been cancelled or rendered with no legal effect.

This issue exists not only in the case of *a posteriori* constitutionality review, but also in the case of other decisions, such as those delivered in the area of judicial conflicts of a constitutional nature, given that the method of solving this issue prevents an inconsistent judicial practice, but also a long series of trials before ordinary law courts, and is meant to remove any effects of documents declared unconstitutional.

The European system for the constitutionality review of laws comprises two main paths for the regulation of such effects.

Thus, in certain countries, such as Germany, Italy or Portugal, decisions declaring the unconstitutionality of laws cause retroactive effects, *ex tunc*, from the entry-into-force date of the cancelled document, whereas in other states, such as Austria, Switzerland, Turkey, Poland and Spain, unconstitutionality decisions cause effects in the future, *ex nunc*, as of their publication date.

In certain states, such as Germany, the constitutional court can, however, rule that the retroactive effect of such decisions shall not affect documents that have become challengeable following a constitutionality review of the law they are underpinned by, but strictly their forced execution, whereas in other states, such as Austria, following express legal provisions, the constitutional court has the power to render retroactive or future effects to the decision to repeal a law, and can equally rule to delay the effects of a decision to repeal a law or reinstate older standards replaced by newer ones declared invalid.

The constitutional and legal regulations in Romania expressly emphasize the *ex nunc* nature of all Constitutional Court decisions in the content of art. 47 parag. (4) in the Constitution and art. 11 parag. (3) in Law no. 47/1992, republished. Applying the non-retroactivity principle relies on the fact that any possible retroactive judicial effects that might result from these decisions would upset legal circumstances occurred under a law that enjoyed the presumption of unconstitutionality, and thus violate the legal security principle. There is, however, an entirely different matter with criminal rules, declared unconstitutional, subject to the principle of the retroactivity of the more favourable criminal law, since declaring unconstitutional a legal provision that criminalises or affects the defendant's criminal liability shall have an impact on pending cases and can actually be grounds for revision, but only if an exception has been claimed.

As of 2016, the Constitutional Court of Romania has delivered three decisions with direct effects upon the jurisdiction of the criminal prosecution bodies in conducting

technical surveillance activities, two of them concerning technical surveillance activities conducted with the technical assistance of specialised state bodies with express duties in the area of national security, decisions whose effects in time have occurred not only for the future, but also on steps in the proceedings and evidentiary means acquired until the publication of said decisions.

As such, as per Decision no. 302/2017, the Constitutional Court, upon admitting an unconstitutionality exception, ascertained that the legislative solution comprised in the provisions of art. 281 parag. (1) let. b) in the Criminal Procedure Code, which does not regulate within the category of absolute nullities the violation of the provisions on the criminal prosecution body's jurisdiction in terms of subject-matter and the official's capacity, is unconstitutional.

The criticised legal provisions rendered absolute nullity only for procedural rules concerning the substantive and personal competence of law in cases where the judgement had been rendered by a law court on a tier below the court of competent jurisdiction, and this type of nullity could be ascertained *ex officio* or upon request and during any phase of the proceedings.

Leaving aside the merits that underpinned the admission of the exception, one must notice that, in the content of its decision, the Constitutional Court failed to state a timeframe for the effects produced, however, since this decision was referred to in the practice of law courts that cancelled evidentiary means acquired following technical surveillance activities, but also in the Court's subsequent case-law, we found it necessary to grant it its due importance.

We chose to do so due to the fact that this decision was preceded by another, namely Constitutional Court Decision no. 51/2016, on the admission of the unconstitutionality exception of the provisions of art. 142 parag. (1) in the Criminal Procedure Code, which stated as follows: "The prosecutor enforces technical surveillance or can order that it be carried out by the criminal prosecution body or specialised officers within the police or other specialised state bodies".

Thus, the Constitutional Court acknowledged that, unlike the old regulation, in the current regulation the legislator included, in the content of art. 142 parag. (1) in the Criminal Procedure Code, in addition to the prosecutor, the criminal prosecution body and the specialised officers within the police and other specialised state bodies.

These specialised bodies of the State were defined neither expressly, nor indirectly in the content of the Criminal Procedure Code. Additionally, the criticised rule fails to provide their specific area of activity, considering that in Romania there are, pursuant to special regulations, numerous active bodies specialised in various fields, one of them with criminal prosecution duties, but strictly in the area of national security, plus others that have duties in the area of national security alone while others have no criminal prosecution duties whatsoever.

Furthermore, in its review of unconstitutionality claims, the Court ascertains that none of the regulations in the national legislation in force, except for the provisions of art. 142 parag. (1) in the Criminal Procedure Code, contains any rule that expressly

defines the jurisdiction of another state body, outside the criminal prosecution bodies, to carry out wiretaps or to enforce a technical surveillance warrant.

However, starting from the concrete data revealed by the matter subject to review, the Court argues that regulation in this area can only be achieved by way of a normative acting as a law, and not by way of an infralegal legislation or normatives of an administrative nature, adopted by bodies different from the legislating authority, featuring a significant level of instability inaccessibility.

Given the intrusive nature of technical surveillance measures, the Court finds it mandatory for said surveillance to take place within a clearly-defined, accurate and predictable regulatory framework, both for the person subject to this measure, as well as for criminal prosecution bodies and law courts.

Otherwise, it would become possible to randomly/abusively infringe upon some of the essential fundamental rights within a state upholding the rule of law: personal, family and private life and correspondence privacy. Therefore, the constitutional standard of protection for personal, family and private life and correspondence privacy stipulates that they be limited within a regulatory framework that expressly stipulates, in a clear, accurate and predictable manner, the bodies qualified to conduct operations deemed intrusions into the protected scope of rights.

Accordingly, the Court acknowledges that there are proper grounds for the legislator's older option for the technical surveillance warrant to be enforced by the prosecutor and the criminal prosecution bodies, which are judicial bodies as per art. 30 in the Criminal Procedure Code, but also by specialised staff within the police, provided that they can be issued the judicial police officer certificate, under the provisions of 55 parag. (5) in the Criminal Procedure Code.

On all these grounds, the Court ascertains that the criticised provisions **infringe upon the constitutional provisions comprised in art. 1 parag. (3) in the Constitution, concerning the rule of law, with its component on guaranteeing citizens' rights, and in art. 1 parag. (5) in the Constitution, which defines the principle of legality**.

Regarding the effects of the delivered decision, the Court reiterates the *erga omnes* and *ex nunc* nature of its decisions, meaning that a normative, during its entre applicability period, enjoys the presumption of constitutionality, which is why such a decision shall not apply to cases conclusively settled until the date of its publication, but shall apply accordingly in cases files on the docket of law courts.

In regard to conclusive decisions, the Court points out that this decision may serve as grounds for revision, pursuant to art. 453 parag. (1) let. f) in the Criminal Procedure Code, in the case in question, but also in cases where similar unconstitutionality exceptions have been raised, prior to the date when the decision is set to be published in the Official Gazette.

Quite relevant from a judicial standpoint is the dissenting opinion to this decision, which argues that the exception raised should have been rejected as inadmissible, being unrelated to the case, given that the authors of said exception claimed the unconstitutionality of a legal text that had not facilitated wiretaps, obtained pursuant

the legal text applicable as per the previous Penal Code and which had been repealed in the meantime, and the subject of an unconstitutionality exception can only be a legal provision in effect.

It is also argued that an exception of that nature cannot be analysed in light of circumstances resulting from the concrete data of the case, which emphasize that those evidentiary means had been obtained with assistance from specialised bodies, considering that an unconstitutionality exception cannot deal with the interpretation and enforcement of the law, aspects that fall under the exclusive jurisdiction of law courts – the only structures qualified to check the legality of evidence submissions – and not of the Constitutional Court.

At last, one final decision that we deem relevant, in terms of effects generated in time, is Constitutional Court Decision no. 26/2019, by means of which, in the settlement of the judicial conflict of a constitutional nature between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, the Romanian Parliament, the High Court of Cassation and Justice and the other law courts, it emerged, and a related referral was admitted, that a judicial conflict of a constitutional nature existed between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice and the other law courts, on the other hand, generated by the conclusion between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service of Protocol no. 00750 of February 4, 2009 and Protocol no. 09472 of December 8, 2016, strictly concerning the provisions of art. 6 parag. (1), art. 7 parag. (1) and art. 9, plus the inadequate performance of parliamentary oversight of the Romanian Intelligence Service's activity.

Basically, the Court, with a majority opinion, acknowledged that the Public Ministry concluded two successive "collaboration protocols" with the Romanian Intelligence Service, an aspect deemed by the applicant contrary to art. 61 parag. (1) in the Constitution, stating that Parliament is the supreme representative body of the Romanian people and sole legislating authority of the country, as the protocols, by means of their content, supplemented the law.

The Court ascertained that, since, as part of the judicial procedure, the measures/documents a prosecutor can take/issue are expressly stipulated by the law, and those "collaboration protocols" drawn up deal with criminal trial, the procedural criminal legislation does not stipulate the prosecutors' duty, regardless of their level or position, to conclude "collaboration protocols" in relation to individual cases they rule on. As such, the Court acknowledged that the protocols did not concern a particular case, but a broad "institutional cooperation" framework, as such "collaboration protocols" were not orders of the court prosecutors might enforce in the proceedings.

In terms of the long-lasting effects of this decision, in the final recitals, the Constitutional Court provides a solution for the issues of law raised in the criminal cases still pending before law courts, in relation to which it acknowledges that: "Therefore, considering art. 197 parag. (2) in the Criminal Procedure Code 1968 and art. 281 in

the Procedure Code, the latter text, corroborated with Constitutional Court Decision no. 302 of May 4, 2017, which ascertained that the legislative solution presented by the provisions of art. 281 parag. (1) let. b) in the Criminal Procedure Code, which fails to regulate the category of absolute nullities, the violation of the provisions on the criminal prosecution body's jurisdiction in terms of subject-matter and the official's capacity is unconstitutional, it is the duty of the High Court of Cassation and Justice and the other law courts, but also of the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and their subordinated units – to check the pending cases, the extent of violations of the provisions on the criminal prosecution body's jurisdiction in terms of subject-matter and the official's capacity, and order any suitable legal measures.

The Court ascertains that the present decision brings nothing new to the primary regulatory framework existing on the date of its delivery, given that, pursuant to Constitutional Court decisions no. 51 from February 16, 2016 and no. 302 from May 4, 2017, decisions which, as they were published, became part of the national regulatory system (Decision no. 847 of July 8, 2008, published in the Official Gazette of Romania no. 605 of August 14, 2008, and Decision no. 650 of October 25, 2018 parag. 451, not published, as at the delivery date of the present decision, in the Official Gazette of Romania, Part I), the provisions of art. 102 in the Criminal Procedure Code – Exclusion of evidence obtained by illegal means, and of art. 281 – Absolute nullities, were applicable.

The present decision sanctions an institutional conduct that infringes upon the constitutional order and compels the public authorities involved in a judicial conflict of a constitutional nature to observe and exercise their powers within the limits provided by the law and the Constitution".

In that respect, the Court reiterates the fact that the res iudicata authority that accompanies jurisdictional acts, hence, Constitutional Court decisions, too, accompany not only the operative part, but also the recitals *it relies upon*, recalling Constitutional Court Plenum Decision no. 1 of January 17, 1995, published in the Official Gazette of Romania no. 16 of January 26, 1995, Decision no. 414 of April 14, 2010, published in the Official Gazette of Romania no. 291 of May 4, 2010 or Decision no. 392 of June 6, 2017, published in the Official Gazette of Romania no. 504 of June 30, 2017, parag. 52].

Additionally, the Court underlines that, according to art. 147 parag. (4) in the Constitution, its decisions are published in the Official Gazette of Romania and, as of their date of publication, are generally binding and *only produce effects ex nunc*, having the same effects for all the public authorities and all the individual matters of law.

Following these decisions, two opinion trends have emerged in the judicial practice.

The court laws falling under the minority trend have maintained the evidence obtained based on technical surveillance activities carried out prior to the publication dates of these decisions[1], dismissing requests to exclude such evidentiary means from

[1] In that respect, see, for example, Bihor County Court, criminal ruling no. 8/CP/27.01.2017 delivered by the pre-trial chamber judge, which remained conclusive as per Oradea Court of Appeal criminal ruling no. 55/CCP/10.05.2017 and criminal case judgment no. 2/11.05.2018 of the High Court of Cassation and Justice.

case files on grounds that Constitutional Court Decision no. 51/2016 was inapplicable in the given cases and only produced effects in the future.

These courts have acknowledged that the irregularity determined by the capacity of the body that employed the technical surveillance methods could only be placed within the category of virtual and relative nullities, regulated by art. 282 in the Criminal Procedure Code, being absent from any of the assumptions stated in the provisions of art. 281 parag. (1).

Keeping in mind that any technical surveillance activities carried out by bodies different from the criminal prosecution ones are sanctioned with relative nullity, regarding the time sequence of Constitutional Court decisions no. 51/2016 and no. 302/2017 and the presumption of constitutionality of any legal provision, the legal standard requirements have to be met, namely a violation of the rights of the parties or of other main litigants and the invalidation of the document seen as the only way to repair said violation.

To be more precise, it was ascertained that these requirements were not met and the respective evidentiary means could neither be eliminated under the effects of Constitutional Court Decision no. 302/04.05.2017, which had admitted the unconstitutionality exception of the provisions of art. 281 parag. (1) let. b) in the Criminal Procedure Code, following the fact that the law does not include in the category of absolute nullities the violation of the provisions on the criminal prosecution body's jurisdiction in terms of subject-matter and the official's capacity.

The effects of this decision used in order to broaden the scope of absolute nullities by including the assumption of a violation of the provisions on the criminal prosecution body's jurisdiction in terms of subject-matter and the official's capacity, apply to cases undergoing trial as at the publication date of the decision, in the sense that, being an absolute nullity, it can be claimed at any point during the criminal trial, without the possibility to extend its effects in time beyond the service life of an amending or repealing legal standard.

As such, a possible sanction cannot lead to the nullity of procedural documents legally drawn up as provided by the law until the publication of the constitutional litigation court's decision, as this would violate the principle provided by art. 147 parag. (4) in the Constitution and the coherence of the applicable legal standards, seen in relation to the principle of the legality of submitting evidence as early as the pre-trial chamber phase.

The law courts that made out the majority trend, by subscribing to the conduct pattern actually suggested to public authorities by the Constitutional Court as per Decision no. 26/2019, have chosen to invalidate the procedural acts/documents and exclude the evidentiary means obtained pursuant to the criticised legislative texts, considering them acquired by illegal means.

One aspect overlooked by both the Constitutional Court and the law courts that subscribed to these decisions is the very fact that declaring a legislative text unconstitutional or settling a judicial conflict of a constitutional nature, in the absence of an express legal basis, does not represent grounds for the nullity of the steps in the

proceedings taken while the legislative text was in effect, a circumstance of this nature entailing no more than the possible ineffectiveness of the legal effects that text generates.

Neither the Romanian Constitution, nor Law no. 47/1992 provides that declaring a legal provision unconstitutional represents a reason to nullify steps in the proceedings taken prior to the publication of a Constitutional Court Decision in the Official Gazette of Romania, but, quite the opposite, art. 147 parag. (1) in the Constitution stipulates that the provisions of the laws and ordinances in force, as well as those of the regulations which are found to be unconstitutional, shall cease to be legally effective 45 days after the publication of the decision of the Constitutional Court in The Official Gazette if Parliament or the Government, as the case may be, fail to bring the unconstitutional provisions into conformity with the Constitution before the end of this period – during this period, the application of the provisions found to be unconstitutional shall be suspended by law.

Insofar as declaring a legal provision unconstitutional had become a reason to nullify steps in the proceedings taken pursuant to that provision, the legislator would have stipulated that the effects of the Constitutional Court decision only apply in the past tense, however, since the provisions of art. 147 parag. (4) in the Constitution stipulate that decisions can only produce effects in the future, it follows that judicial documents drawn up prior to the publication of decisions cannot be sanctioned by rendering them null and void.

Secondly, even if nullity as a sanction operates retroactively, this entails infringing upon the legal standards in force on the date the step in the proceedings is taken, by disregarding one of the requirements provided by the law for it to be valid.

As a matter of fact, not even the Constitutional Court will rule on the possible applicable sanction – since examining the legality of evidentiary falls among the duties of the pre-trial chamber or the law court judge – doing, instead nothing more than indicating the applicable court-ordered reliefs in case a nullity should actually operate.

As such, judicial bodies are bound to check the extent to which the requirements for nullity to exist are met, using the legal provisions that regulate this type of procedural sanction, as they have been laid down in the doctrine and the case-law, given that steps in the proceedings can only be invalidated under the conditions provided by the law and in no case in disregard of said conditions.

The literature has defined nullity as that court-ordered penalty ascertained and applied by a judicial body, which entails the invalidity of orders of the court issued and procedural acts/documents carried out/drawn up in violation of the provisions regulating the course of a criminal trial, provided there was a mischief substantiated or presumed by the law, a mischief that can only be removed by invalidating that act/document and reissuing it, when necessary and if possible.

With an absent definition of nullity in the Criminal Procedure Code, one shall apply the general principle of art. 2 in the Romanian Civil Procedure Code, which states that the provisions in the present Code is the common law procedure for civil matters, but its provisions apply to other matters, as well, insofar as the regulating laws do not provide otherwise.

As such, the general definition of nullity is the one defined by the provisions of art. 174 parag. (1) in the Civil Procedure Code, stating that nullity is the penalty that renders fully or partly ineffective the procedural act performed in violation of substantive or formal legal requirements.

In regard to the legal status of these substantive or formal requirements, they can only be those provided by the trial-related law in force when the act is performed, as the nullity penalty shall not apply either when subsequent validity requirements provided by the new law are not met, in breach of art. 15 parag. (2) in the Romanian Constitution, or when other avenues are used to invalidate legal provisions that procedural acts would have relied on when they were performed.

Although the constitutional court does not add retroactive effects to its decisions, in relation to cases conclusively settled by the publication dates of these decisions, in reality, the legal effects produced in still pending cases, pursuant to the binding nature of these decisions, equate to their retroactive enforcement, given that the consequences produced pursuant to the acts performed by those dates are eliminated.

In the case of decisions delivered in settling unconstitutionality exceptions, any opposite interpretation would defeat the actual reasons why the effects of these decisions only produce effects in the future, the presumption of constitutionality of the challenged rule being removed only by the delivery of the Constitutional Court decision, whereas the enforcement of the law during the period between its entry into force and the ascertainment of unconstitutionality can only be denied by sacrificing the legal security principle.

The non-retroactivity rule explains itself through the fact that repealing a legal standard cannot entail the nullity of the acts/documents performed/drawn up while said standard was in force, as that law ceasing to have effects can produce retroactive effects; likewise, declaring a legislative text unconstitutional cannot have retroactive effects, as the Constitution and Law no. 47/1992, republished, expressly stipulate that the effects of a decision shall only produce in the future, pursuant to the same principle.

Moreover, the novelty in this circumstance also stems from the fact that Constitutional Court decisions invite an atypical analysis, from the angle of a solution not found in any sort of legislation and which should represent the legislator's exclusive will, but which, for reasons beyond the judicial bodies' will, is not yet legislated.

As a result of this, judicial bodies are unable to legislate, as the legislative text that would have allowed the nullity penalty to operate has not been supplemented, by including in the content of art. 281 parag. (1) let. b) in the Criminal Procedure Code a particular case of absolute nullity, grounded on the violation of rules regarding the criminal prosecution body's jurisdiction in terms of subject-matter and the official's capacity, whereas the legislator's positive obligation cannot be substituted by the judicial bodies by way of supplementing the law.

Pursuant to the texts of art. 1 parag. (4) in the Constitution, which defines the principle of the separation of powers in a state, and art. 61 parag. (1) in the fundamental document, pursuant to which Parliament is the sole legislative authority in the country, only Parliament and, by way of legislative delegation, under the provisions of. 115 in

the Constitution, the Government have the power to issue, amend and repeal generally applicable legal standards. Court laws do not enjoy this power, their constitutional mission being to deliver justice – art. 126 parag. (1) in the Fundamental Law – that is, to settle, by enforcing the law, litigations among subjects of law in relation to the existence, extent and exercise of their subjective rights.

So long as law courts are unable to "create" law not even pursuant to a regulatory document that would grant them that possibility, by following the case-law, they will all the more be unable to fill in for the lack of the legislator's intervention within a certain field, such as that of criminal procedures and judicial bodies' jurisdiction, which cannot be, by way of analogy, subject to rules of strict interpretation and enforcement.

These being the facts, and since the legislator has not filled in the legislative gap ascertained by the Constitutional Court, the latter's decision could not have been able to supplement the provisions of art. 281 parag. (1) let. b) in the Criminal Procedure Code, concerning the jurisdiction of criminal prosecution bodies, compelling judicial bodies to analyse the matter strictly from the perspective of the legal provisions still in effect.

6. Conclusions and proposals de lege ferenda. What is next for constitutional justice?

The constitutional provisions introduced by the 2003 Law on the revision of the Constitution strengthened the Constitutional Court's functions and duties.

Current events, which evolve as we speak, require that these functions and duties, in the near future, facilitate an even greater strengthening of the rule of law primary principles, such as those stipulated at art. 1 parag. (5) in the Constitution, stating that "In Romania, the supremacy of the Constitution and the observance of the Constitution and the laws shall be mandatory" and art. 16 parag. (2) in the fundamental document, stating that "No one is above the law".

6.1. In that respect, it is *first and foremost* necessary to harmonize to a greater extent certain constitutional procedures with the *requirements set forth at art. 6 in the European Convention on Human Rights*, especially that, as of the 2003 revision of the Constitution, the right to a fair trial has been stipulated at art. 21 parag. (3) in the fundamental document, in the form of the law principle according to which the parties are entitled to a fair trial and the settlement of their case within a reasonable deadline.

Although, at first, the Strasbourg Court case-law indicated that art. 6 in the Convention only applies to constitutional jurisdictions triggered at the initiative of private parties, in order to exercise the constitutionality review, for the purpose of defending fundamental values and rights, by way of direct second appeal or by way of exception, subsequent events led to a shift of this approach, going so far as the Court ultimately admitted that the entire arsenal of guarantees specific to the right to a fair trial have to apply both to litigations surrounding public offices and to constitutional litigations, insofar as they are decisive in determining the plaintiffs' civil rights, regardless of the nature of domestic procedures.

As far back as 1993, in the report drawn up in the case *Ruiz-Mateos vs. Spain*, the European Commission itself ruled that "when national law stipulates the existence of a constitutional jurisdiction, that litigants have direct or indirect access to, the procedures taking place before it must abide by the principles of art. 6 parag. (1) in the Convention, when its decision may influence the litigation result delivered by the ordinary court", a position that has been acknowledged not only by the decision of the European Court at the time, but also by means of a rich subsequent case-law.

The recent case-law of the European Court of Human Rights goes, however, even further, by ruling that these guarantees apply independently of the existence of a litigation on the docket of ordinary law courts and even in the absence of a constitutional jurisdictional procedure characterised by adversarial nature, immediacy and vocality.

This also explains why, in the case *Baka vs. Hungary*, the Strasbourg Court ascertained that the plaintiff had been violated their rights to a law court and to effective legal remedy, following their removal from office, even in the absence of a jurisdictional procedure commenced before the Hungarian Constitutional Court, or why it got down to extending the civilian scope of art. 6 parag. (1) in the Convention to certain procedures specific to political and/or parliamentary justice, as in the case *Demicoli vs. Malta* (August 27, 1991), where the subject of the domestic procedure was the action taken against a journalist before the Chamber of Representatives in the Maltese Parliament.

This type of casuistry might lead to the conclusion that these guarantees stipulated in the Convention must also be observed in the case of internal judicial conflicts of a constitutional nature, which take place following the same rules applicable to the constitutionality review of laws, but the effects of which are felt by persons unrelated to such conflicts and notified to appear in court during the proceedings.

Indeed, the European Court ruled that the lack of connection to the procedures carried out before law courts justifies the inapplicability of art. 6 in the Convention only in cases of second appeals or referrals filed by public authorities with constitutional courts, actions that attempt to render an abstract interpretation of the Constitution, an *in abstracto* censorship of an unconstitutional law or to settle concurrences of jurisdiction among public powers, given the wholly constitutional nature of the procedures[1].

6.2. *Secondly*, decisions that finalise any constitutional procedure must be subject to the same *predictability and clarity standards specific to the law*, especially that certain procedures for the constitutionality review of laws, commenced by private parties by way of exception, appear only as an extension of judicial procedures that take place before ordinary law courts, ending in a generally binding judicial order with effects similar to those of the law.

For that particular reason, it might be best to have the Constitutional Court decisions free of diverging interpretations and not leading to inconsistent judicial practices that might result in the aggravation of matters of law caused by not accurate enough regulations.

[1] *F. Sudre, J.P. Marguenaud, J. Andriantsimbazovina, A. Gouttenoire, M. Levinet*, Great decisions of the European Court of Human Rights, Rosetti International Publishing House, Bucharest, 2011, p. 203.

By means of their binding nature, Constitutional Court decisions integrate with the national rule of law precisely as a law, resembling sources of law[1], meaning that, similarly to laws, they must also entail some level of accessibility and predictability, so that any individual may be able to know – starting from the text of the pertinent clause and, if necessary, helped by its interpretation by law courts – the actions and omissions entailed by their criminal liability and under which conditions.

Additionally, in the European Court's opinion, in regard to the constitutionality review by way of exception, the constitutional litigation phase appears as ancillary in relation to the judicial phase – be it civil or criminal – during which the unconstitutionality exception was claimed, a case in which the *sui-generis* nature of constitutional courts and the particularities of those constitutional jurisdictions are secondary issues, due to the close connection between the prejudicial matter of unconstitutionality and the result of the main trial[2].

With an assumption of this kind, the predictability requirement would also apply to the interpretation of case-law itself since, as highlighted by the Court, however clear the text of a legal provision might be, there always is an "element of judicial interpretation", within criminal law, as well, requiring that the judge, acting as an interpreter, ensure the predictability of "the law"[3].

As per Decision from May 15, 1996, delivered in the case *Cantoni vs. France*, the European Court of Human Rights underlined that the decision-making function law courts are entrusted with serves to eliminate any doubts that might exist, concerning the interpretation of rules, while keeping in mind the daily practice trends.

As understood by the Court, this means admitting that, both in a continental law and a *common law* legal system, case-law, as a source of law, can contribute to the "progressive evolution" of criminal liability rules, provided that the judicial interpretation result "is coherent with the substance of the offence and reasonably predictable".

As such, in the case *Achour vs. France* (March 29, 2006), the Court considered that the "clear and consistent case-law" of the French Court of Cassation – acknowledging the second repeat offence instance (the second offence committed) in order to settle the matter of enforcing in time the laws on repeat offence – allows the legal provision pursuant to which the person was sentenced, for having acted towards repeating

[1] As part of a consistent case-law, starting with decisions *Sunday Times vs. The United Kinngdom*, of April 26, 1979, and *Dudgeon and Chappell*, the European Court of Human Rights has understood the term "law" in its "substantive", instead of its "formal" sense, in that is included in its content both texts of the "infralegislative" variety and "non-written" law, also associated with the case-law *common law* systems. In other words, for the purposes of the Convention, "substantive law" designates the entire law in effect, be it legislative, regulatory or case-law. It is certain, however, that in an area regulated by written law, the European Court has a very flexible opinion, considering that "the law" is represented by the text in effect, as interpreted by law courts of competent jurisdiction, while keeping in mind any new technical information.

[2] *B. Selejan-Guțan*, Unconstitutionality exception, All Beck Publishing House, Bucharest, 2005, p. 177.

[3] *F. Sudre, J.P. Marguenaud, J. Andriantsimbazovina, A. Gouttenoire, M. Levinet*, op. cit., p. 329.

the offence, to meet the accessibility and predictability requirements of art. 7 in the Convention on the date when the deeds were perpetrated.

The fact that an interpretative decision of the Constitutional Court of Romania, such as decision no. 297 from 26.04.2018, delivered on a criminal matter and in regard to a question of law the criminal liability of the accused directly depends upon – which ascertains that the domestic legislative solution, stating the interruption of the criminal liability statute of limitation by way of fulfilling "any step in the respective proceedings", included in the provisions of art. 155 parag. (1) in the Penal Code, is unconstitutional – has led to an inconsistent judicial practice, and also generated a second appeal on a point of law, due to the legislator staying passive, must be seen as a serious warning by all public authorities involved in the law drafting, enforcing and interpreting processes, being an example to be taken as a reference model for the future.

6.3. Thirdly, to remain within the realm of the provisions of art. 6 in the Convention, the national legislator should concern itself with providing a *selection system* in regard to constitutional judges, superior to the current one, able to help enhancing the impartiality and professionalism guarantees in the exercise of one's office, both by including within the selection pool constitutionality law experts and current or former judges with extensive work experience, untainted reputation and vast recognition among law theoreticians and practitioners, as well as by eliminating any links of a political nature, that might compromise their complete independence over the course of their mandate.

An equally important aspect, which must be detailed upon in a future constitutional reform, is also the high professional skills requirement to be met by candidates running for Constitutional Court judge offices, given that a body of professionals tasked with interpreting the Constitution cannot comprise basic law experts, but theoreticians and practitioners whose occupational conduct must be demonstrated and assessed based on predictable and measurable criteria, meant to guarantee their high training levels.

At present, the provisions of art. 143 in the Romanian Constitution state that Constitutional Court judges must possess superior judicial training, high levels of professional skill and at least 18 years of legal work or spent in law higher education, without detailing on the criteria the high professional skills are to be assessed upon or the content of said length of service of at least 18 years in the legal area or in law higher education.

In regard to the provisions comprised in Organic law no. 47/1992, republished, they equally lack sufficient details and stipulate, in the form of quite meagre procedural rules, that: "(4) Each Chamber of Parliament appoints as judge, at the proposal of the Standing Bureau and based on the Judicial Committee's recommendations, the person that cumulated the majority vote of the present members. (5) Applications shall be submitted to the Judicial Committee by parliamentary groups, deputies and senators. Each candidate shall submit a "curriculum vitae" and documents proving he or she meets the requirements stated in the Constitution. Candidates shall be heard by the committee and the Chamber plenum. The Judicial Committee's report shall make justified references to all the candidates".

6.4. A future constitutional reform must not ignore the possibility that certain Constitutional Court decisions, which can indicate exceeded limits of assigned duties or critical procedural flaws, *might be challenged* before the High Court of Cassation and Justice, by means of a special legal remedy, since in a democratic society there must ways to allow any action of a public authority to be challenged by an independent law court, according to art. 21 in the Constitution, which states that free access to justice may not be impeded by any law.

Although, according to art. 14 in Law no. 47/1992, on the organisation and operation of the Constitutional Court of Romania, as subsequently amended and supplemented, the jurisdictional procedure stipulated in the present law is supplemented by the civil procedure rules, to the extent to which they are compatible with the nature of the procedure before the Constitutional Court, this unique aspect does not equate to the availability of a default procedural relief defined by the domestic law, whereas a possible extraordinary legal remedy will still be formulated by the Constitutional Court, the only entity qualified, according to the law, to rule on the compatibility of said relief with the applicable jurisdictional procedure.

In the absence of an express legal basis, at present, Constitutional Court decisions, although generally binding, cannot be challenged whatsoever, not even if there are violations of rules on the legal composition of the judicial panel or of the law court, of rules on functional responsibility or rules that can refer to cases of incompatibility, and not even when the effects produced by these decisions can be in disagreement with the European and international legal order embedded in the national one.

Furthermore, Constitutional Court decisions cannot be challenged even in objective circumstances that appear as grounds to revise judicial orders and can reveal deeds of a criminal nature with decisive weight over the solution, deeds such as cybercrimes, forgery in deeds and even corruption or occupational offences.

It would be inconceivable for a Constitutional Court decision, employed in order to verify whether the requirements for citizens to exercise their legislative initiative are met, to confirm the poll results of the Romanian President election procedure or referendum results, not to allow being revised, insofar as certain circumstances, data or information could be falsified or altered, and for these results not to allow being challenged in any way, on the mere grounds that a Constitutional Court decision cannot be invalidated by any other means.

This is, however, a single example, whereas other similar examples, able to highlight situations or circumstances that could justify the existence of extraordinary legal remedies, resembling those in the civil and criminal procedures, can also be imagined in the context of settlements of unconstitutionality objections, unconstitutionality exceptions, judicial conflicts of a constitutional nature, which are no different from judicial conflicts pending before law courts, in the context of issuing an advisory opinion on the proposal to suspend the Romanian President from office or in cases of settlements for challenges filed against the constitutionality of a political party.

In regard to interpretative decisions, a former Constitutional Court judge argued that "The danger that a constitutional court might go beyond the scope of its jurisdiction

is always present, but the interpretative decision's underlying grounds stay within their clear and relatively rigid design limits. Defying these limits and grounds is, obviously, unconstitutional"[1].

As demonstrated by the practice of recent years, the Constitutional Court, not only in the case of simple decisions, which ascertain the unconstitutionality of a legal text, but also in regard to interpretative decisions, tends to impose even guidelines to judicial bodies, primarily to law courts, on how to apply its decisions, although the duties pertaining to the constitutionality review only allow checking the compliance of a legal text with the Constitution, something that can impair the principle of judges' independence and the exclusive jurisdiction of the High Court of Cassation and Justice in the area of consistent enforcement and interpretation of the law.

As a matter of fact, the doctrine has emphasized this aspect, highlighting that the legal standards comprised in the current regulatory framework in the field include the Constitutional Court's conduct, also in relation to interpretative decisions, since the requirements of the constitutional standards and of Law no. 47/1992 do not allow, in any scenario, the Constitutional Court to interfere with the area of the legislative power, and forbid it "to amend or supplement the provisions subject to review", not to mention denying it to interfere with the area of the judiciary, which are qualified to enforce the law, given that a constitutional judge cannot replace the case file judge, the only party qualified to interpret the law while it is enforced[2].

Evidently, these decisions are equally exempt from any challenge in cases where they settle litigious scenarios, such as judicial conflicts of a constitutional nature, the effects of which can ripple through civil rights enjoyed by persons not involved in such conflicts, such as individuals holding high-ranking offices and who, after being deposed, are denied any chances of defending themselves as part of these procedures or challenging the result of a procedure in court, via an effective legal remedy exercised before an independent and impartial law court within the judiciary.

The idea that a Constitutional Court decision cannot be subject to any legal remedy stems from the assertion that, during the activity of delivering constitutional justice, the Court could not commit any kind of errors, an argument that is not a strong enough, as reality shows practical cases when a decision of this nature may result in damages, for the repair of which the aggrieved party must benefit from an adequate tool in the proceedings.

Moreover, one cannot start from the irrefutable assumption that a decision of a public authority could not be challenged simply for being conclusive, since the rule of law cannot comprise actions and decisions of public authorities that are impossible to censor by any means. At the same time, if, as part of the activity of delivering civil justice, even conclusive decisions can be subject to extraordinary legal remedies,

[1] *M. Constantinescu*, Note to the article published by *M. Criste*, Discussions on compliant interpretation decisions of the Constitutional Court and their consequences upon the constitutionality review, Dreptul (*Law*) magazine, issue 10-11/1995, p. 41.

[2] *L. Barac*, A critical view of the Constitutional Court decisions delivered on the abuse of office offence, Part II, published on 26.02.2018 in *juridice.ro* online publication.

this principle should also characterise the activity of delivering constitutional justice, given that solutions delivered by a constitutional court, too, can contain procedural or judgement errors that can be incompatible with the core role and principles of constitutional justice or the applicable procedural rules.

The absence of a tool of this kind in the domestic legislation renders the provisions of art. 21 parag. (1) in the Constitution only partly effective in a series of situations where the decision delivered as part of a litigious or non-litigious procedure is visibly affected by a flaw likely to be detrimental to the legitimate rights, freedoms or interests of a person, who is also denied access to justice, precisely because Constitutional Court decisions cannot be censored in any way.

A significant issue of this kind must be met with a solution that takes into account the protections stipulated in the international conventions Romania is a party to, and particularly for the purposes of the values protected by the European Convention on Human Rights, especially since the dismissal of persons with high-ranking offices within the judiciary may question the independence of the judiciary as a state power, but also the basic rights these persons should be able to enjoy, as do all the other citizens.

As part of the decision delivered on May 5, 2020 by the European Court of Human Rights in the case *Kövesi vs. Romania*, it was, indeed, regrettable to ascertain a violation of the fundamental rights protected by the European Convention on Human Rights, by way of a procedure carried out against a high-ranking magistrate within the Public Ministry, a procedure concluded with a decision to dismiss them from the office they held.

Without a doubt, the judicial body members, as any other citizens, must be protected against the arbitrary manner of exercising the executive power, as only an efficient review of the dismissal endeavour by an independent judicial body can guarantee the effectiveness of this right, considering that the Constitutional Court of Romania, in its own decision delivered to settle a judicial conflict of a constitutional nature, highlighted that "(...) the administrative litigation court can only acknowledge the purview required to *stricto sensu* review the legality of the decree/ the refusal to issue said decree" and cannot review the dismissal proposal substance".

However, the Strasbourg Court concluded on the violation of art. 6 in the Convention, determined by the actual limits that the Constitutional Court decision imposed upon the plaintiff's possibility to exercise her right to access a law court.

This situation demands the urgent amendment of the Romanian legislation that regulates the procedure of appointing to and removing from high-ranking offices within the Public Ministry, also in line with the constant recommendations of international bodies, in the sense of enhancing certain guarantees of stability in the exercise of one's office, strengthening the role of the Department for Prosecutors within the Superior Council of Magistracy and making it possible, in such cases, but also in other similar cases, to revise Constitutional Court decisions following violations of the Convention ascertained by the European Court of Human Rights.

This delicate matter deserves clarifications from the national legislator, all the more as, in the area of litigations related to public offices, as well, the European Court's

recent practice seems to be departing from the older criteria created according to the case-law, in relation to the applicability of art. 6 in the Convention, by extending the scope of this article to all public servants, and not only to officials who had access, as per national legislations, to a domestic law court, by excluding those under a loyalty obligation towards the state, under a special trust-based relationship with the employing country or those who held a public authority position.

Any opposing solution appears to become the source of obvious discrimination among the various categories of officials or public servants, however, this discrimination has also led to changes within the Strasbourg Court's case-law, by extending the scope of art. 6 in the Convention, especially that the diversity of legal systems throughout acceding countries left public servants on unequal terms, whereas art. 47 in the European Union's Charter of Fundamental Rights does not restrict to a particular field the scope of the fair trial.

The likelihood for a Constitutional Court decision to be revised is not ruled out, even by way of exception, by the legislation of certain European states, as is the case with the Republic of Moldova, whose law on the organisation and operation of the Constitutional Court allows revising by the Constitutional Court itself, provided there are new facts and circumstances, unknown on the case settlement date. This legal remedy can be exercised by the Constitutional Court, *ex officio*, references to it being made in an older report of the Venice Commission[1], but also in a recent report[2], an example in this respect being Decision no. 16/15.06.2019 of the Constitutional Court of the Republic of Moldova, on revising Constitutional Court Decision no. 14/08.06.2019, Constitutional Court Decision no. 15/08.06.2019, Constitutional Court Opinion no. 1/09.06.2019 and Constitutional Court Opinion no. 2/09.06.2019.

Additionally, although a revision of recent decisions delivered by a Constitutional Court is regarded as detrimental to the independence principle, in a report published on 14.04.2020, the Venice Commission admits that a possible remedy within the countries' national legislation could be acknowledged in exceptional cases, dealing with criminal deeds committed by a judge and determined conclusively, being, however, preferable for a possible reopening of the case to take place before the same constitutional court instead of a different public authority, such as Parliament or the Supreme Court of a state[3], as provided by the civil procedure rules, which are generally applicable.

6.5. Such endeavours must not be overlooked, considering that the future consequences of Constitutional Court decisions upon the national legal system can be particularly significant, placing a national judge in a very difficult spot, that of choosing

[1] CDL-AD (2002)016, Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, parag. 66.

[2] CDLAD (2019)028, Republic of Moldova – Amicus Curiae Brief on the criminal liability on the Constitutional court judges, parag. 45-50.

[3] European Commission for Democracy through Law (Venice Commission), Compilation of Venice Commission Opinions, Reports and Studies of Constitutional Justice (Updated), Strasbourg, April 14, 2020, p. 98-100, within the section entitled "Re-opening of a case by the Constitutional Court".

between remaining loyal to the legal principles and the legal system which they are called upon to serve or the enforcement a generally binding decision the disregarding of which may expose them to possible disciplinary penalties, but which, in the absence of other reliefs, may determine them to depart from the general legal principles and which could not be mentioned as an excuse in case some kind of liability is entailed following the incrimination of Romania by the European courts.

This task is all the more difficult as, unlike all the players involved in the process of formulating, adopting, enacting and reviewing the constitutionality of the law, a Romanian judge shall not be exempt from liability even in cases of legislation flaws sanctioned by the European Court of Human Rights, finding themselves compelled to mount their defence in any type of recourse action taken by the state, even in a scenario where the incrimination of the Romanian state might bring to light the inconsistency of the national legislation with certain European or international standards on the protection of the fundamental human rights[1].

This is also the reason for which the newer doctrine has emphasized "the dilemma encountered by the judge called upon to apply Law in particular cases, as they find themselves equally under the spectrum of the provisions of art. 99 let. ș) in Law no. 303/2004, republished, on the statute of judges and prosecutors, according to which disregarding Constitutional Court decisions is a disciplinary offence, but also under the spectrum of rules regulating their mission in society, rules compelling them to ensure the supremacy of the law, as well as to apply Law in relation to its requirements and principles, without the possibility of going beyond the boundaries of Law (art. 4 in Law no. 303/2004, republished)"[2].

For good reason, the same author emphasizes that "the judge does not live inside an ivory tower, as they concurrently are a citizen of their country, having not only the

[1] According to art. 12 in Government Ordinance no. 94/1999, on the participation of Romania in the proceedings before the European Court of Human Rights and the Committee of Ministers of the Council of Europe and the State's regress following the judgments and friendly settlement conventions, as subsequently amended and supplemented, "(1) The state has a right of recourse against persons who, in conducting their activity, willingly compelled the state to pay the amounts set forth as per a decision of the Court or via a friendly settlement convention. (2) The civil liability of public servants shall be set forth under the common law conditions to be regulated by the law of the statute of public servants, as per an imputation order issued by the ministry of finance. The person in question may challenge the imputation order as provided by the administrative litigation law. (3) *Magistrates' civil liability is determined under conditions to be regulated by the Law on judicial organisation*. (4) Government members' civil liability is determined as provided by the Law on ministerial responsibility. (5) For the other persons, civil liability is determined under the conditions of the common law in the field. (6) *Under the conditions of the present ordinance, the Romanian President, deputies, senators and Constitutional Court judges shall not be liable*. (7) In all the judicial procedures conducted as per the provisions of the present article, the Government, represented by the Government agent, has the right to intervene, in compliance with the Civil Procedure Code".

[2] *L. Barac*, A critical view of the Constitutional Court decisions delivered on the abuse of office offence, Part II, published on 27.02.2018 in *juridice.ro* online publication.

right to try, thus conducting the judicial process, but also the obligation to make sure the judicial process they conduct integrates seamlessly with the social fabric.

Given the spectrum with its above-mentioned double nature, under which the judge carries out the judicial process, we realise that they are, in the presence of the said Constitutional Court decisions, in a much less favourable position than even the public servant, who, according to the law regulating their statute "is entitled to waive in writing, with justification, fulfilling their occupational duties if they consider them illegal, as they are not under the obligation to execute a visibly illegal order [art. 45 parag. (3) in Law no. 188/1999, republished]".

In a context where Romanian magistrates shall be, in the current period, subject to unprecedented challenges, as far as the enforcement of the law and of Constitutional Court decisions is concerned, it is critically important that, in the process of asserting law, one does not neglect the principle of the supremacy of the Constitution, written at art. 1 parag. (5) in the Romanian Constitution, or the principle of the supremacy of the law, written in the same fundamental document.

To that end, beyond complying with the statute specific to the office held, law court judges, as well as constitutional judges must display thoughtfulness and maturity, utmost moral and professional integrity in carrying out assigned missions, demonstrate forethought and the ability to see and understand the big picture, all of which would allow them to better face future actions, circumstances or events and better deal with a real need for social progress, in conjunction with the importance of their decisions which, added to other regulatory imperatives, are binding throughout society.

Support Provided to the Romanian Magistracy by International Bodies

Anca Gheorghiu*
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Motto:
"Our lives begin to end the day we become silent about things that matter".
Martin Luther King Jr.

The famous Ordinance 13, which was adopted by the Government in early 2017, but never came into effect, signalled the launch of attacks of unprecedented savagery against the judiciary in Romania, attacks focused on amending the legislation that regulates the operation of the magistracy, the so-called justice laws – Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on the judiciary organisation and Law no. 317/2004 on the Superior Council of Magistracy, amending the criminal legislation – the Penal Code and the Criminal Procedure Code, but also individually aimed at magistrates who criticised these legislative amendments.

This assault immediately alerted the international bodies, whereas Romania's statute of member of the European Union and the Council of Europe turned the situation into the subject of oversight reports and opinions that analysed the compliance of said legislative changes with the rule of law standards, as the essential value that must be shared by each member. These reports and opinions constantly warned on the danger of hampering the judicial system's independence and effectiveness of criminal laws in the fight against corruption.

Unfortunately, the offensive hit its target, since the justice laws and the criminal legislation were amended, and the magistrates who opposed, pursuant to the positions of responsibility they held within the judiciary, were removed from their management positions either by way of dismissal, as was the case with the former NAD Chief Prosecutor, or by being deterred from applying for a new term, as was the case with the Prosecutor General of Romania or the President of the High Court of Cassation and Justice.

The intensity of these attacks has decreased dramatically as of the middle of 2019, however, the situation has not been rectified to date, since these legislative changes

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are in effect and already enforced; under these conditions, reviewing the manner in which the events that marked the judicial system from 2017 to 2019 were reflected in the reports and opinions of international bodies is still quite a necessary exercise.

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The proposals to amend the justice laws were announced on **August 23, 2017** by the Minister of Justice, Tudorel Toader, and were taken over by Parliament, which set up in September a special commission that operated pursuant to an accelerated procedure as of October. The proposals were promptly criticised by civil society, received an adverse opinion from the Superior Council of Magistracy and were challenged by magistrates, by means of a memorandum signed by nearly 4.000 judges and prosecutors, but also by means of silent protests on the steps of law courts and prosecutor's offices.

The beginning of the process of amending these laws sparked concern within the European Commission which, in the report drawn up under the Cooperation and Verification Mechanism on **November 15, 2017**[1], ascertained the controversial nature of the legislative proposals in question and need for the legislative process to take place in full transparency and consider the Venice Commission's opinion: *"A controversy also emerged with the discussion of proposed revisions to the Justice laws since the end of August. When consulted, the Superior Council of the Magistracy has twice rejected drafts, noting issues like judicial independence. 6 Concerns have also been raised by the President of Romania and in civil society. There was also a petition issued demanding that the opinion of the Superior Council of the Magistracy be respected, signed by a majority of Romanian magistrates. The three Justice laws, dating back to 2004, regulate the status of judges and prosecutors, and the organisation and functioning of the courts, prosecution offices and the Superior Council itself. They have a direct impact on judicial independence and the justice system more broadly, and the laws as they stand were an important element in the positive evaluation by the Commission last January. Some of the proposed changes covered issues like the role of the Judicial Inspection and the personal responsibility of magistrates, as well as the appointment of senior prosecutors: issues which touch on judicial independence and where changes raised questions about whether the January 2017 report assessment with regard to progress on the independence of the judicial system would have to be reconsidered. The strong negative reaction from the judiciary and parts of civil society focused heavily on the issue of judicial independence. The capacity of the Government and the Parliament to ensure an open, transparent and constructive legislative process on the justice laws will be crucial. In general, a process in which the judicial independence and the opinion of the judiciary is valued and given due account, as well as drawing on the opinion of the Venice Commission, is a prerequisite for sustainability of reform and is an important element in fulfilling the CVM benchmarks"*.

In reality, the legislative process did not take place as described, which triggered a concerned response from the President of the European Commission, Jean-Claude Junker, and the Commission senior vice-president, Franz Timmermans, who, in their joint Statement from **January 24, 2018** on the recent developments in Romania[2],

[1] (*https://ec.europa.eu/info/sites/info/files/comm-2017-751_ro.pdf*).

[2] (*https://ec.europa.eu/romania/news/20182401_declaratie_comuna_presedinte_juncker_prim_vicepresedinte_timmermans_evolutii_romania_ro*).

reiterated the recommendations in the latest CVM report and requested that they be observed by the Romanian Parliament: *"The latest CVM Report identified the justice laws as an important test of the extent to which the legitimate interests of judicial and other stakeholders are given an opportunity to be voiced, and are taken sufficiently into account in the final decisions. Events since then have done nothing to address these concerns. The Commission calls on the Romanian Parliament to rethink the course of action proposed, to open up the debate in line with the Commission's recommendations and to build a broad consensus on the way forward. The Commission reiterates its readiness to cooperate with and support the Romanian authorities in this process"*.

The seriousness of the state of affairs in Romania also triggered a response from GRECO (the Group of States against Corruption within the Council of Europe), which adopted on **March 23, 2018** a report[1], during an *ad hoc* procedure that can be initiated, pursuant to Rule 34 in its Procedural Rules, in exceptional circumstances, such as those where actionable information is received in regard to institutional reforms, legislative initiatives or procedural changes that may lead to significant violations of the Council of Europe anti-corruption standards.

This report acknowledges the fact that, during the months of November and December 2017, the provisions of the draft amendments to the justice laws generated massive public protests, and provides recommendations on amending or abandoning some of these provisions: *"- the procedure for the appointment and revocation for the most senior prosecutorial functions other than the Prosecutor General, under art. 54 of Law no. 303/2004, include a process that is both transparent and based on objective criteria, and that the Supreme Council of Magistracy is given a stronger role in this procedure; - the impact of the changes on the future staff structure of the courts and prosecution services be properly assessed so that the necessary transitional measures be taken; - the implementing rules to be adopted by the SCM for the future decisions on appointments of judges and prosecutors to a higher position provide for adequate, objective and clear criteria taking into account the actual merit and qualifications; - the creation of the new special Judicial Crime Investigation Department be abandoned; - ensuring that the independence of the prosecution service is – to the largest extent possible – guaranteed by law, and assessing the impact of the intended changes on the future operational independence of prosecutors so that additional safeguards be taken, as necessary, to guard against interference; - avoiding the creation of new avenues for conflicts of interest and incompatibilities, particularly in connection with political activities and government functions; - various amendments affecting the rights and obligations and the liability of judges and prosecutors for judicial errors be reviewed so as to ensure sufficient clarity and predictability of the rules concerned, and to avoid that they become a threat to the independence of the judiciary"*.

The Venice Commission's Opinion on these legislative proposals was adopted on **July 13, 2018**[2], one thing that stood out beyond anything else being the problematic context in which the proposals were made: *"The legislative process took place in a context*

[1] (*https://rm.coe.int/raportul-ad-hoc-privind-romania-regula-34-adoptat-de-greco-la-cea-de-a/16807b7b7f*).

[2] (*http://www.forumuljudecatorilor.ro/wp-content/uploads/Avizul-Comisiei-de-la-Venetia-legile-justitiei-traducere-RO.pdf*).

marked by a tense political climate, strongly impacted by the results of the country's efforts to fight corruption. The Anti-Corruption Directorate (NAD) carried out a high number of investigations against leading politicians for alleged corruption and related offenses and a considerable number of Ministers or members of parliament were convicted. This successful fight against corruption was widely praised on an international level... This context makes any legislative initiative, which has the potential of increasing the risk of political interference in the work of judges and prosecutors, particularly sensitive".

Predictably, the opinion criticised these legislative proposals and made a series of recommendations to the legislator: *"- re-consider the system for the appointment/ dismissal of high-ranking prosecutors, including by revising related provisions of the Constitution, with a view to providing conditions for a neutral and objective appointment/ dismissal process by maintaining the role of the institutions, such as the President and the SCM, able to balance the influence of the Minister of Justice; - remove or better define the provisions enabling the superior prosecutors to invalidate prosecutors' solution for groundlessness; - remove the proposed restriction on judges and prosecutors freedom of expression; - supplement the provisions on magistrates' material liability by explicitly stating that, in the absence of bad faith and/or gross negligence, magistrates are not liable for a solution which could be disputed by another court; amend the mechanism for recovery action in such a way as to ensure that the action for recovery only takes place once and if liability of the magistrate has been established through the disciplinary procedure; - reconsider the proposed establishment of a separate prosecutor's office structure for the investigation of offences committed by judges and prosecutors; the recourse to specialized prosecutors, coupled with effective procedural safeguards appears as a suitable alternative in this respect; - re-examine, with a view to better specifying them, the grounds for the revocation of SCM members; remove the possibility to revoke elected members of the SCM through the no-confidence vote of the general meetings of courts or prosecutors' offices (including by the way of petition); - identify solutions enabling more effective participation, in the work of the SCM, of SCM members who are outside of the judiciary; - abandon the proposed early retirement scheme unless it can be ascertained that it will have no adverse impact on the functioning of the system; - ensure that the proposed measures of «screening» magistrates are based on clearly specified criteria and coupled with adequate procedural safeguards and a right of appeal to a court of law, and identify ways to strengthen oversight mechanisms of the intelligence services"*.

After a series of challenges filed with the Constitutional Court, the draft laws were ultimately adopted, but in disregard of the recommendations made by the international bodies, and came into force in **July** and **October 2018**.

The draft laws were analysed in the CVM Report of **November 13, 2018**[1], which stated the fact that they violated the previous recommendations and undermined the justice system independence: *"The amended Justice laws are now in force. They contain a number of measures weakening the legal guarantees for judicial independence which are likely to undermine the effective independence of judges and prosecutors, and hence*

[1] (*https://ec.europa.eu/info/sites/info/files/progress-report-romania-2018-com-2018-com-2018-851_ro.pdf*).

public confidence in the judiciary. This has been the focus of the negative reactions from the judiciary and civil society. Key problematic provisions include in particular: the establishment of a special prosecution section for investigating offences committed by magistrates, new provisions on material liability of magistrates for their decisions, a new early retirement scheme, restrictions on the freedom of expression for magistrates and extended grounds for revoking members of the Superior Council of Magistracy. None of these changes correspond to CVM recommendations. The one recommendation which specifically called for legislative change within the scope of the Justice laws concerned the appointment procedure for top prosecutors. This has not been implemented, and the cumulative impacts of legislative changes rather weaken the checks and balances underlying the operational independence of prosecutors, further strengthening the role of the Minister of Justice. The amendments also raise questions as regards the capacity of the prosecution to continue the fight against high-level corruption with the same degree of independence".

The Report highlighted, at the same time, the prejudice caused to the judicial system's independence by the endeavours of the Minister of Justice, who pursued the dismissal of the NAD Chief Prosecutor and of the Prosecutor General of Romania, notifying in that respect the Constitutional Court, as well as by the actions of the Government, which notified the Constitutional Court on the activity of the High Court of Cassation and Justice: *"At the same time as the legal amendments, specific decisions have underlined the consequences of the concentration of power in the hands of the Minister of Justice. This was the case first with the dismissal of the Chief Prosecutor of the National Anti-Corruption Directorate (NAD), at the request of the Minister of Justice. In a first stage, the President of Romania rejected the proposed dismissal, in line with the negative opinion of the Superior Council of the Magistracy. However, a Constitutional Court Decision in May* (Decision no. 358/2018 – AN) *on the dismissal procedure reinforced the trend of increased power for the Minister: following the ruling, the President was required to sign the decree implementing the dismissal in July. The concentration of power in the hands of the Minister of Justice was further underlined by the decision of the Minister to propose the appointment of a new Chief Prosecutor of NAD, despite a negative opinion from the Superior Council of Magistracy stating that the candidate failed to meet many key criteria. These developments also have consequences for the irreversibility of the fight against corruption. In addition, the procedure concerning the Chief Prosecutor of the DNA has been mirrored by other steps against key judicial institutions. Following the same pattern as the dismissal process for the NAD Chief Prosecutor, on 24 October, the Minister of Justice launched the process to dismiss the Prosecutor General. Earlier in October, the Chamber of Deputies had already referred the Prosecutor General to the Constitutional Court in relation to the working arrangement with the intelligence services. The Government also took the decision to refer the High Court of Cassation and Justice to the Constitutional Court. The convergence of action against these key judicial institutions has clear implications for judicial independence".*

The report also criticised the activity of the Judicial Inspection, which had initiated disciplinary reviews and investigations into magistrates that held management positions within major institutions of the judiciary and publicly opposed the changes brought to the justice laws, and for the first time warned about information from procedural documents drawn up by the Judicial Inspection being leaked to the media: *"The Judicial Inspection has now started to attract significant criticism. A series of disciplinary investigations*

were started against the heads of key judicial institutions – against the Prosecutor General, against the President of the High Court of Cassation and Justice, the former Chief Prosecutor of the National Anti-corruption Directorate, the Deputy Chief Prosecutor of the National Anti-Corruption Directorate, and a Head and Deputy Head of Section in the National Anti-Corruption Directorate. Many of the magistrates concerned were also seen as critical voices concerning ongoing legislative procedures. It should be noted that the Consultative Council of European Judges and the Venice Commission have both underlined the importance that judges should be free to comment in relevant public debates. The Judicial Inspection also conducted a series of controls at the office of the General Prosecutor and the National Anti-Corruption Directorate. The fact that in at least two cases, information reached the press before the end of the control was the source of particular controversy".

At last, the report also criticised the lack of reaction displayed by the Superior Council of Magistracy, who was not interested in defending the justice system independence against the pressures exerted upon it: *"In addition, there was no competition organised by the Superior Council to appoint a new management of the Judicial Inspection, although the mandate of the management team expired end of August 2018. The decision of the Government to solve the situation by adopting an Emergency Ordinance to nominate the current team* ad interim *– rather than leaving this to the Superior Council – did nothing to assuage concerns. The Superior Council of the Magistracy has not been able to act as an effective check and balance to defend the independence of judicial institutions under pressure, an important constitutional role highlighted in the January 2017 report. Divisions within the Council evident in its meetings with Commission services have made it increasingly difficult for the Council to be effective as a voice for the judicial system – notably when consulted on legislation – and as the manager of the judicial system. Even when the Council has come forward with a unanimous opinion, it has been ignored in significant cases. Although 2018 has seen judicial institutions, as well as individual judges and prosecutors, subject to particularly strong public criticism from Government and Parliament representatives, the Council has shown reluctance to take ex-officio decisions to respond to attacks on the independence of the judiciary. This risks that magistrates are dissuaded from playing their normal role as a branch of the state in expressing their views on issues relevant to the judicial system"*.

Under these conditions, the report recommended neither more, nor less than suspending the implementation of the changes brought to the justice laws.

Subsequently, on **April 25, 2019**, the Bureau of the Consultative Council of European Judges within the Council of Europe (CCJE) issued an opinion[1] in which recommendations are made to have the changes brought to the justice laws amended and reprobated the repeated and unprecedented attacks aimed by politicians at judges: *"As regards the role and functioning of the Superior Council for Magistracy (SCM), the CCJE Bureau recommends to reconsider the grounds for revocation of the SCM members and in particular to remove the possibility to revoke elected members of the SCM through a no-confidence vote of the general meetings of courts, including by way of a petition. The CCJE Bureau also concludes*

[1] (*http://www.forumuljudecatorilor.ro/wp-content/uploads/FJR-Avizul-CCJE-referitor-la-situatia-independentei-sistemului-judicar-din-Romania.pdf*).

that exclusion of the SCM members who are civil society representatives from all meetings of the SCM Sections – bodies entrusted with decision-making under the Amendments – runs contrary to the European standards. The CCJE Bureau consequently recommends that it is not appropriate to have such a limited role of civil society representatives in the work of the SCM and that should be reconsidered. As regards the material liability of judges, the CCJE Bureau is concerned about any decisive role, at the initial stage, of the Ministry of Public Finance, which is an executive body and cannot therefore be appropriate for assessing the existence or causes of any judicial error. The CCJE Bureau recommends that this should be fully reconsidered. Such claims, if any, should be exclusively decided before an independent court providing all the guarantees of art. 6 of the European Convention on Human Rights (ECHR). In addition to these procedural aspects, the CCJE Bureau recommends, as a very minimum, that the new definition of judicial error be supplemented by clearly stating that judges are not liable unless bad faith or gross negligence on their part has been established through a due procedure. The CCJE Bureau would like to further recommend considering only bad faith – and not gross negligence – as a possible ground for liability for judicial errors. As regards the establishment of a separate prosecutor office structure for the investigation of offences committed by judges, the CCJE Bureau recommends to abandon this idea entirely. The CCJE Bureau concludes that the new obligation imposed on Romanian judges, limiting their freedom of expression, is not necessary, raises many questions, may be subject to arbitrary and abusive interpretations endangering judicial independence, and recommends therefore to remove it. As regards the reported repeated and unprecedented attacks against judges directed by political actors, the CCJE Bureau condemns any statements, comments or remarks in Romania which overstep the boundaries of legitimate criticism and aim at attacking, intimidating or otherwise pressuring judges or demonstrating disrespect towards them, using simplistic, irresponsible or demagogic arguments or otherwise degrading the judicial system or individual judges. As regards the right of judges to stand against any policies or actions affecting their independence, the CCJE Bureau resolutely confirms the legitimate right of judges in Romania and elsewhere to stand against any policies or actions affecting their independence in a climate of mutual respect, and in a way which is consistent with maintaining judicial independence or impartiality". Similar recommendations were made by the Consultative Council of European Prosecutors Bureau within the Council of Europe (CCPE), in the opinion of **May 16, 2019**[1].

Lastly, on **June 21, 2019**, GRECO adopted a new report[2] in which it focused on how the recommendations made in the previous report had been implemented and found that, with the exception of the recommendation to eliminate the provisions which generated a state of incompatibility in relation to the political activities and the government functions a magistrate might carry out, eliminated from the draft law after it had been declared unconstitutional, none of the remaining recommendations had been implemented.

Despite the urging recommendations to abandon the changes brought to the justice laws, the Romanian authorities not only went on with their plan, but also adopted new

[1] (*http://www.mpublic.ro/sites/default/files/PDF/COOPERARE/avizul_ccpe_nr_16.pdf*).

[2] (*https://rm.coe.int/raport-de-follow-up-referitor-la-raportul-ad-hoc-privind-romania-regul/1680965689*).

amendments, by resorting to no less than 5 emergency ordinances that the Government adopted from **September 2018** to **March 2019**.

In regard to these emergency ordinances, the Venice Commission issued the opinion of **June 21-22, 2019**[1], in which it acknowledged that some of the provisions were designed to rectify flaws within the amending laws, as was the case of postponing the entry into force of the provisions on magistrates' early retirement, strengthening the criticism that had been brought to these provisions and the unpreparedness that characterised their adoption. The opinion also criticised the consecutive changes brought by the normatives, and the emergency ordinances, intended to amend the justice laws, changes that created the impression they had been drawn up to serve certain individuals: *"Frequent changes of rules concerning institutions and appointments to leading positions or dismissals from them, sometimes by legislation, sometimes by Government emergency ordinances, give the impression that the aim of those amendments is not a systematic reform of the system, but adaptation of the rules to specific candidates or situations"*.

As a general mention, it was ascertained in the opinion that emergency ordinances not only eliminated from the justice laws the previously criticised provisions, but also added to them new problematic provisions: *"The Venice Commission notes with regret that the most problematic elements of the 2018 reform, identified in the opinion of October 2018, either remained unchanged or were aggravated. The most important aspects of the on-going reform of the judiciary are the following: - most alarmingly, the Government continues to make legislative amendments by emergency ordinances. While the Constitution clearly indicates that this should be an exceptional measure, legislation by the GEOs became a routine. Fundamental rules of the functioning of key State institutions are changed too quickly and too often, without preparation and consultations, which raises legitimate questions about the soundness of the outcomes and of the real motives behind some of those changes. The resulting legal texts are not clear. This practice weakens external checks on the Government, it is contrary to the principle of separation of powers and disturbs legal certainty. The Venice Commission calls on the Romanian authorities to drastically limit the use of the GEOs. As to the further amendments to the three laws in the field of justice, they should be made through a normal legislative procedure; - the reasons for the creation of the special Section for the investigation of criminal offences in the judiciary (the Section), with loosely defined jurisdiction, remain unclear. Top prosecutors of this Section were appointed under a transitional scheme which de facto removed the prosecutors' wing of the Supreme Council of Magistracy (the SCM) from the decision-making process, which does not sit well with the institutional design of the SCM. It is uncertain to what extent the prosecutors of the Section and its Chief Prosecutor are under the full hierarchical control of the Prosecutor General. Since the Section would be unable to effectively deal with all cases within its competence, it risks being an obstacle to the fight against corruption and organised crime; - the scheme of appointment and dismissal of the top prosecutors remains essentially the same, with the Minister of Justice playing a decisive role in this process, without counterbalancing powers of the President of Romania or the SCM. It is recommended to develop an appointment scheme which would give the Prosecutors' Section of the SCM a key and pro-active role in*

[1] (*https://www.g4media.ro/wp-content/uploads/2019/06/draft-opinie-Com-Venetia-3-iunie-2019-2-1.pdf*).

the process of the appointment of candidates to any top position in the prosecution system; - it is possible to remove currently serving prosecutors with reference to the new eligibility criteria, arbitrarily chosen. The Venice Commission urges the Romanian authorities not to apply the new eligibility criteria to those prosecutors who were already in place when the respective amendments were made".

At last, on **October 22, 2019** a new CVM report[1] was published, stating the negative effects of the changes brought to the justice laws. As such, the report harshly criticised the way in which the Special Section for the investigation of magistrates operated: *"The implementation of the amended justice laws in practice has also confirmed the concerns raised in the November report in terms of the damage to the judicial system. In particular, the operation of the Special Section for the investigation of offences committed by magistrates has confirmed the fear voiced both inside and outside Romania that the section could be used as an instrument of political pressure. There are various examples where the Special Section exercised its powers to change the course of criminal investigations in a manner which raises serious doubts about its objectivity. These examples include cases where the Special Section launched investigations against judges and prosecutors who had opposed the current changes to the judicial system, as well as abrupt changes in the approach followed in pending cases, such as the withdrawal of appeals previously lodged by the NAD in high-level corruption cases. Management appointments to the Special Section have also been the cause of controversy. The result has been calls from many stakeholders in Romania that the Special Section should be disbanded"*.

The report also stated that the fact that the Special Section for the investigation of magistrates, which was intended to become operational by way of adopting the emergency ordinances, conducted investigations against European Union officials, outside the EU legal framework: *"In this context, it should also be mentioned that the Special Section registered a criminal investigation against several members of the Commission and of its staff following a complaint issued on 30 January 2019 accusing them of abuse in service, false communication of false information and the establishment of an organised crime criminal group in relation to the drafting of the November 2018 CVM report. That investigation also targeted the incumbent Prosecutor-General. The Commission recalls that in the territory of each Member State the members of the Commission and of its staff are immune from legal proceedings in respect of acts performed in their official capacity, by virtue of the Protocol on Privileges and Immunities attached to the Treaties. Despite the Romanian authorities thus lacking jurisdiction in these matters, the Special Section registered the case on 11 February and closed it only on 27 March, invoking «a lack of evidence»"*.

Likewise, the report both mentioned and criticised an investigation opened by the Special Section against the former NAD Chief Prosecutor: *"A key example concerned a criminal case against the former Chief Prosecutor of the National Anticorruption Directorate while she was a candidate to be European Public Prosecutor. The timing of the opening of the criminal case and the calendar of summons seemed specifically designed to frustrate this candidacy, and a decision by the High Court of Cassation and Justice on the preventative*

[1] (*https://media.hotnews.ro/media_server1/document-2019-10-22-23441049-0-raport-progrese-mcv-2019ro.pdf*).

measures applied qualified the case as unlawful. The fact that another case was registered involving the Prosecutor-General seemed to confirm the pattern of steps taken against senior magistrates critical of the Section".

At last, the report acknowledged flaws throughout the activity of the Judicial Inspection: *"The Superior Council of the Magistracy did not appoint a new interim management team and, therefore, the Chief Inspector remained ad interim until May 2019, when the Superior Council re-appointed the same Chief Inspector, despite the controversies. At the same time, since the last report, the pattern of disciplinary proceedings against magistrates, including the heads of judicial institutions who oppose the reforms of the judiciary, have continued, as did the leaking of documents. The recommendation of November 2018 has therefore become overtaken by events, but the underlying concerns remain fully applicable. Successive CVM reports have pointed to the pressure on magistrates and judicial institutions from public attacks from the political world and the media. Since the beginning of 2018, this has been compounded by the actions of the authorities responsible for disciplinary and criminal investigation of magistrates. The National Anti-Corruption Directorate has long been a particular focus of such pressure, as well as the office of the General Prosecutor. The period of reference also saw a sharp increase of pressure on the High Court of Cassation and Justice, which is competent for many high-level corruption trials. Two constitutional conflicts were launched by the Government against HCCJ regarding its interpretation of procedural rules on the constitution of criminal judges' panels. In addition, the Judicial Inspection filed a disciplinary complaint against its President and the judges section SCM called for her dismissal. These combined steps seem to have the objective of pressurising the High Court and when the HCCJ President announced her intention not to apply for a second term of office, she made clear that this was the reason".*

In this context, the report identified an involution concerning the fulfilment of the Cooperation and Verification Mechanism goals: *"Developments since the last report have shown again that major legislative changes, also outside the justice domain, rushed through using urgency procedures with minimal consultation, have damaged both the quality of legislation and public confidence in policymaking. Judges and prosecutors have continued to face misleading coverage and unduly personal attacks in the media, with mechanisms for redress falling short, ultimately affecting the reputation and the credibility of the justice system as a whole. Different branches of the State have again been in conflict, and increasingly these divisions are played out in the Constitutional Court, further increasing tensions and showing that loyal cooperation falls short".*

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The propriety of the critical tone these reports and opinions emanated towards the amendments to the justice laws and the towards the attacks it was subject to during the 2017-2019 interval was acknowledged by the European Court of Human Rights admitting, on **May 5, 2020**, the complaint that the former NAD Chief Prosecutor, Mrs Laura Codruța Kövesi, currently Chief Prosecutor of the European Prosecutor's Office, filed in relation to her dismissal from office, occurred on June 7, 2018, a dismissal that had been justified by her critical views concerning the changes brought to the justice laws. The Court acknowledged the fact that this dismissal was detrimental not only to

the plaintiff's freedom of expression, in her capacity of Chief Prosecutor, but also to the actual independence of the judiciary[1].

One must also underline the European Court's decision, adopted *ex officio*, not at the plaintiff's request, to settle the case under an urgency procedure; the urgent settlement can no longer be helpful to the plaintiff, whose dismissal is irreversible, but it does support the Romanian judicial system, in need of a prompt and firm acknowledgement of the serious attacks it had been subject to, but also of help to ask for its return to normality.

In the end, going through all these reports and opinions of international bodies, we may conclude that the remarks and recommendations made by these entities had a crucial role in counteracting attacks against the judicial system's stability and independence, supporting the Romanian magistracy in its efforts to continue to exercise its fundamental role of defending the rule of law, diminishing to some extent the deterring and inhibiting effect the political establishment's pressures had upon the judicial power.

[1] Available in English, on the Court portal (*http://hudoc.echr.coe.int/fre?i=001-202500*).

Justice from outside the Bubble. People of the Citadel and People of Justice

Veronica Sîrbu*

Motto:
"He who is different from me
does not impoverish me – he enriches me".
Antoine de Saint-Exupéry

During one of the screenings for "Oamenii Dreptății"[1], one lady told us that magistrates are the only ones capable *"of bringing the country out of its current state"*, *"our only hope"* and *"where we look for our inspiration and guidance"*.

At another screening, during the post-film discussions with the audience, one lady from the last line shouted in a shrilling voice, every few minutes, *"NONSENSE! NONSENSE!"*, while either I or my colleague was answering questions. I asked her what she meant by nonsense, to which she replied in disgust: *"give us a break, we know better"*...

These seem to be, in a purposely simplified manner, two extremes of a broad spectrum of perceptions of justice. From those seeing magistrates as superheroes to those comparing them to cogs within a machine set up to cause harm and send innocent people behind bars.

Both perspectives seem sometimes ridiculous, other times frightening, to those inside the other bubbles, harbouring their own beliefs bolstered like an echo by the members of their communities. *"Things will finally take a turn for the better"*, *"The young ones are naïve to think they can change anything"*, *"These are the so-called resilient magistrates! Where were they when (...)?"*, *"They're all the same"*, *"Like the rest of us, some of them are better, other are not so great"* etc. Each vision is mirrored by the 5-10-50-500 people within the community surrounding each and every one of us, on a daily basis, online and/or offline.

These pages host a personal opinion on how these "echo chambers" (do not) interact, based, in particular, on the experience over the past year.

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* Judge, Bucharest District 4 Local Court.

[1] Oamenii Dreptății. În dialog cu Liana Alexandru (People of Justice. Dialogues with Liana Alexandru) (Romania, 2019, 55', Romanian). Producer: Manifest Film. Director: Monica Lăzurean Gorgan. Editor: Andrei Gorgan. Director of photography: Eduard Pârvu. Music: Sam Wedgwood – Kaleidoscopes. Sound: Alexandru Văduva. Initiative: Veronica Sîrbu and Doru Toma. Entirely available online.

People of the citadel

In the fall of 2018, together with a few colleagues from the "Lideri pentru Justiție" (*Leaders for Justice*)[1] community, coming as a bubble of youth from nearly all justice tiers, we launched a film-project set to display a more humane facet of the system. We wanted to go beyond restrained statements and media news on dramatic convictions and searches.

Without going into detail, the goal of "Oamenii Dreptății" project was to elicit the interest in justice of as many non-jurists as possible, through a relaxed dialogue with relatively common faces. A natural interest stemming from the importance of justice in society instead of interest compelled by circumstances such as nocturnal emergency ordinances.

Introducing the film in several places in Romania, we got in touch with people by departing from our day-to-day method: without the formal authority stance from the law court and without the familiarity or intimacy between friends or acquaintances outside the law court.

The film quickly turned into more than we had hoped for, becoming a "pretext" for the audience to ask questions and (in)validate already formed opinions. For us, the project team, it was a way to informally collect – with no prior intention – opinions about justice.

If we were to attempt to look throughout social media groups of people with whom we do not have much in common, we would certainly find opinions quite different from ours. The same applies to court rooms, as well – you meet people from all walks of life, with different views.

However, in social media, contact is mediated to the extreme and non-palpable, we can easily consider that different people are out of reach for us and quickly label them. In the court room, rarely do people touch upon matters different from the case files under trial; and when they do, the discussion is brief and in relation to the subject of the litigation.

Face to face, outside a court room, unlike what happens online, contact is much more direct and arguments have to be presented tactfully and empathically; it is more difficult for people to be aggressive in expressing their opinion and basic politeness comes into play to take turns to speak and show respect, formally at least, especially if the host takes his or her role seriously.

Still, we often saw people coming to screenings to simply validate own opinions, being utterly difficult to convince them otherwise simply through film or the post-film debates.

Most in the audience had a positive perception of justice, and we expected not to see those not too fond of the topic among the film goers... The tranquil tone and young faces confirmed the positive opinions they already had, fiercely contradicting any "not

[1] Details about the community at *lideripentrujustitie.ro* and *facebook.com/leadersforjustice*.

to do" example, even if mentioned by us. Those with a firmly negative opinion could not be persuaded, with either scientific data or other individuals' personal examples, that reality looked different from their beliefs. Both attitudes were also displayed by people who had never entered a law court or a prosecutor's office before.

No doubt that, when people (litigants) believe justice does not work *at all*, they are wrong, while their subjectivity cannot be criticised, either. They may be starting with a negative presumption since, when entering the premises of certain law courts or prosecutor's offices, they see dark corridors, endless queues and basement archives "fitted" with mouse traps or poison. The first impression can sometimes be so strong that the final result is ignored. Moreover, I can only imagine the frustration from being delivered a solution contrary to your reality, either for lack of evidence or since you fail to understand why – In the eyes of the law and of the judge – the other party was right instead of you...

Over the past year, discussing with all these people, I have realised more than ever that the litigant's needs are easy to list: fairness, predictability (in terms of solutions and time to settlement) and respect, being treated with dignity.

The need for respect has a very wide spectrum, from physical and logistical requirements within the law court/prosecutor's office (the litigant's health or safety must not be jeopardised inside an old building, they must be able to find a functional restroom etc.) to the time they have to wait until they are heard or can look through a case file or the tone used by a judge or an archives registrar when speaking to them.

People of justice

Bubbles are numerous throughout justice, as well. In a very broad sense, we may say – with no negative or positive connotation – that each law court or prosecutor's office is a bubble in itself, with its own organizational culture, more or less deliberate or planned.

Magistrates – like all other people – are different and mirror the society they live in. Before they went to the law faculty, they all went to the same schools, they come from the same range of families (poor, rich, middle-class) and received the same upbringing back home (for the better or for the worse). They did not land from another temporal dimension but, just as doctors, IT experts or politicians, jurists reflect the environment they originate from.

They are those who prefer longer words and decisions and believe justice needs a shade of mystery in order to maintain its authority. They are those who plead for total transparency and communication, recalling a dictum from the faculty years saying that the judge must think thoroughly, like a philosopher, but speak the simple language of a peasant.

Among magistrates we find those believing their professional role is limited to settling case files and others who think they must get involved beyond the law court. There are people in the system daily posts on social media, while others fail to see its

usefulness. There are those who voice their complaints through all communication channels and those who hope to see improvements, limiting themselves to office talk. There are the more pragmatic and active ones and those leaning towards theorising and reflection. Introverts and extroverts.

The list can go on to develop into an entire book, the categories being enumerated as mere examples, with no intention to run out of them or to stick positive or negative labels to them. Among them there are nuances we do not even think about, many being those that choose not to make their opinions known, for various reasons.

Even the steps of Bucharest Justice Palace hosted various bubbles of jurists: the magistrates who have been rallying under the independence of justice over the past 3 years, the lawyers who protested in February 2019 for an increase of their fees, the clerks who protested in January 2020 against the elimination of special pensions and the few magistrates who showed in January 2020 a sign of solidarity with the case of their colleagues in Poland. From the former manifestations, the management of Bucharest Court of Appeal promptly distanced itself, via statements, while from the latter it did not; that is another proof that various bubbles do exist within the same system from which people expect consistent action.

In addition to those inviting to open dialogue, I have sadly noticed a few times, that there are also those who take difference of opinions as hostile attitude. Persons who, if you firmly opposed one argument of theirs once, would then refuse a productive professional relationship.

Nevertheless, what I have most enjoyed over the past years were people who, under the daily "breaking news" whirlpool, have kept the system afloat and sometimes even taken it closer to modern justice. Colleagues who, regardless of their choices concerning the various protests and the multiple personal differences, continued to display professionalism at work and collaborate with colleagues who had cast a different vote during a general assembly.

While in 2017 proposals were being made to politically subordinate the Judicial Inspection (and, by default, the entire system), significant steps were being made to implement the electronic case file in cities such as Brăila and Galați. Just as huge individual efforts are being made, as I write these lines, by certain colleagues, towards a digitisation that should make it possible to avoid jostles in pandemic situations and more.

While some folks wage war with political statements and sarcastic memes, some presiding judges struggle to better split a clerk's tasks between two judges or those of two clerks between three judges, some archives registrars try to choose the more effective mouse poison or to dispose as fast as possible of old case files to make room for newer ones, and some colleagues set up digital means to save litigants the burden of huddling into the building basement archive.

Sadly sometimes, and happily other times, litigants are interested in these daily dilemmas of those in the judiciary just as much as any of us is interested in a person asking us on the street to take a minute for a survey on our favourite yoghurt. Even more so, a person with no legal studies and rooted into a daily routine that does not allow

them to further comprehend notions such as "constitutional conflicts" and "specialised panels", is very likely to place inside the same mental drawer called "Justice" both the latest news on what case files are on the docket during a pandemic and the latest statements on justice made by a parliamentarian.

Differences are sound, they strengthen us as a society, but constant disagreements among members of the system must not distract from the purpose for which I go to the office every day: contribute as much as possible to a modern justice and treat litigants equally, with dignity and respect. Both those up to date on the latest specialised articles concerning their issue and those submitting a long handwritten request...

Justice or PR?

I have seen over the past year, more than before, that beliefs and mentalities cannot change with a mere film or online campaign, with a smart slogan or an article. Not for the better, at least. To denigrate, it will suffice to have a well-placed and recurring speech against a backdrop of social turmoil and hatred that only awaits a target. However, in order to build, it takes the repeated, individual and collective effort of all outside, and primarily inside, a system.

Naturally, justice must be everlasting and unfailing, instead of winning popularity contests. Paradoxically – though anchored in current realities and not hidden in an ivory tower – justice must, still, keep its distance from daily, yearly or electoral waves of interests.

If, at some point, most of the country's population would only comprise – for the sake of assumption and argument – thieves and murderers, justice would still have to subscribe to the human rights, to sanction thievery and crime and defend honesty, be it in the minority. It would not be a popular justice for the majority, but it would be a functional and fair one.

Undoubtedly, this is easier written than done, since reality shows us that a law that favours criminals shall not be called "the criminals' law", being enough to place, before a criminal investigation, a procedural hindrance more or less obvious to the non-jurist public.

What I mean is that justice and the principles underlying a solid rule of law must be relatively unflinching before public surveys, whereas the reality shows that these principles, too, are put into practice by people. Like those we see on our way to work day in, day out, and not people teleported from a parallel universe of justice and perfection, or from a dimension of malice and avarice. In the meantime, the recipients of justice are people, as well, like those we find in a supermarket, in the underground or in the country.

If we want to improve the image of justice, we must start upward from the base of the hierarchy of needs and make sure people know about what we do, both the aspects that are fine and those in need of improvements. To put it in a cliché nutshell – less talk, more action. Or talk about already done things. Actual funds for logistic upgrades instead of plans and speeches repeated every year on Justice Day...

There are many things not visible, for instance, the fact that we set longer timeframes for court appearances due to insufficient court rooms for each judge, we are at times ineffective also because we work in constant rumble, with countless interruptions, in court room vestibules crossed every day by tenths of people etc. Citizens, though, are deaf to background reasons and apologies, wishing to receive the judicial service they are entitled to. That goes for any other field; as a rule, we do not care if the physician is happy or has advanced equipment, but we do care for them to place an accurate diagnostic and cure the patient. Performance standards have been raised everywhere in society, hence it is normal to have higher expectations from the judiciary and justice in general...

Justice will move forward at a speedy rate, both in reality and as perceived within various bubbles, whereas the system as a whole (including, in addition to prosecutor's offices and law courts, the political establishment – the Ministry of Justice and Parliament) will be more concerned with the respect and dignity due to litigants and less with statistics and statements.

Super- or antiheroes?

I have personally received, over the past year, on social media, both messages of gratitude (more than mere positive, gratulatory thoughts from a friend) and adverse ones, impossible to render here. All of them, from complete strangers.

In my day-to-day life outside the office I have numerous times witnessed debates on any given topic, in relation to which no one at the table had had any direct and relevant experience, but firmly argued about it, with the belief of someone who had broadly researched that topic.

These pages come as a plea for decency, balance and zero labelling, whether such labels are assigned to colleagues or to those outside our extended bubble. With very few pathological exceptions, I doubt anyone actually intends to cause harm. Or they at least have their own reasoning for "the lesser evil" they cause.

Something all these bubbles, of litigants and of those within the system, have in common the desire to live in a better society and to have a functional justice system. "Better" and "functional" undoubtedly have varying meanings throughout the spectrum, but we essentially wish for the same things...

Instead of waiting in vain for these perfect and omniscient people, who will change everything for the better, to climb, from time to time, some steps or a pedestal, each of us can periodically take a step towards being better professionals and better citizens, even if this means sometimes saying that the emperor is naked and incur the wrath of the "emperor", whether by that we mean a colleague, a family member or the head of an institution.

Throughout all categories of people we find, every now and then, such "emperors" who take advantage of the existence of bubbles to divide and conquer; they even help to create or maintain these idea "foes". Those in a group rejoice at making a clever

remark towards their "opinion opponents", whereas the "naked emperor" continues to pursue their own plans or blatantly ignores their own duties...

Concerning this last idea, I suggest being empathetic towards our peers, while in no way being tolerant towards unlawfulness. The greatest amount of tolerance towards personal and opinion differences, absolute intolerance towards iniquities and wisdom required to distinguish between them, making an improvised use, in context, of the famous American prayer...

It is much easier to break down arguments made by "the others" and denigrate their endeavours, when they no longer serve one's own interests, however, both "some" and "the others" would work in perfect harmony if the golden rule for all actions were "the citizens' best interest", similar to that of minors in family law, speaking in relative terms.

I would say, aware of the irony in the wording, that we could even see past the "activism" of a social media post or in a written article and get informed on the concrete and legal steps one can take in real life, in the society we actually live in and not in the ideal one hosted by our imagination. Along the lines of "1 is higher than 0", it sometimes suffices to take a step on the path towards a better society, as we need not conceive a perfect plan from the outset...

The "amount" of liability and accountability is somewhat constant in society. We cannot expect *others* (whoever they may be) to solve *everything*, as we would then no longer be responsible for *anything*. There is nothing in particular that I or somebody else can do – a unique action or gesture of a single person – that would radically change for the better the judiciary or any other social system. As romantic as this idea may sound, hope placed as such in any kind of person – be them a magistrate, a politician, a physician etc. – is unrealistic...

Add One Step!

Alina Gioroceanu*

Motto:
"Rage, rage, against the dying of the light!"
Dylan Thomas, Do Not Go Gentle into That Good Night

1. Overture

I had never imagined myself wearing a black robe and a bib, asking brief and clear questions, uttering specific measures, like a referee in the middle of the pitch, calling for gravity and the session to order. I have always wanted to sit in the desk in the back, which reveals a wide enough angle to be able to watch, in silence, the display of gestures, to catch the voices of all actors, with their tone and variations and, of course, to go unnoticed. The place and the time did not matter, as I paid no attention to them (with few exceptions, I find it difficult even now to memorise dates of family events), but only to the actors and the plot of the play. Throughout this story which, here and now, flows backwards in my mind, I want to believe that, in addition to the inevitable dose of randomness, the seed of a revealing emotion had already been planted within, that it was not only by chance that today I wear Themis' insignia: I have felt the pain of injustice endured by my peers, in my heart, like a personal burden, the echo of dishonesty has reached me dissonant and repulsive, whereas spite towards human issues, under cultural make-up or brutally expressed, nearly always hidden beneath hats too fancy and too wide, has left me irreversibly disappointed.

I, therefore, hold the office of judge. Although I refrain from stating "I am a judge", precisely for my aversion towards existential equivalences and curtailments (I learnt during my teenage readings that the Being I cherished could not boil down to a perceptible, objective, material outer level), I am trying to speak the language of the one asking me about my profession. So, "I am a judge". For some, I can only be a judge. But I am a professor, as well. Chronologically, I am first a professor, a philologist. When I decided I would follow the path of the second coming, I was a lecturer with the Faculty of Letters within Craiova University and was teaching contemporary Romanian language courses. In the eyes of my inner circle friends, I was a careless philologist, with a short timetable, keen on reading at random hours, in the dead of night, wasting my day on useless articles, a fisher of signs from wordless dialects, with irrelevant wages

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and expecting to beat the same 30-minute path between the university and home, day in, day out until I retired.

It was not the prospect of Kantian monotony what led to the return to my first desire, that of attending the courses of a law faculty, but the lack of any landmarks, of predictability and transparency, the absence of rules, clear and stable criteria that would form the basis of any institutional decision, the far from admiration academic chaos I had fallen victim to. At my workplace, the regulatory gap or, to be more accurate, the gaps in familiarity with, transposition and strict enforcement of regulations were replaced by decision-making mechanisms propelled by interests and affinities. Of all kinds. During days with educational activities, I would rush up the university stairs, with no desire for brief and shallow encounters. As I had no meddling in tendencies, translated for some as *involvement*, I would come down the same stairs with a sense of relief. Most often than not, excessive theorising, the lack of pragmatic ends for one's professional activity turned into an overwhelming feeling of worthlessness. The irony of Nassim Taleb[1], to which I shall return, by way of exemplification, is not accidental: in the academic circles where I operated, the tenure is permanent (for that reason, so coveted, as well), knowledge being seen as an enterprise, a property, with permanent owners for whom culture often worked as the surface coating. Contrary to its intentions, academic activity does not foster freedom, but control and lack of structure. Being the only one they know, my fellow professors cannot imagine there might be a predictable world, stranger to "Mr X (head, inspector, important person etc.) said", with rules, where professors are not always right. Just as fellow magistrates are unable to grasp that the world is alive outside law courts and prosecutor's offices, as well, that there is life beyond procedural codes, too, even despite them, whereas the robe and the bib are, for some, odd, ancient and hilarious garments one can poke fun at.

Naturally, the switch to the judiciary came as compensation. I was wading in a chaotic sea, looking for a fulcrum, a rule, a modicum of trust. Or, at least for an explanation, for some sort of balance. And not just for me.

I am writing these lines, without too much hope, during days of pandemic, when we stay home for both shelter and workplace. For me, *home* was a daily standby, although the pressing need for time spent outdoors had turned its space into a garrison. I had ended up a migrant by trade.

2. Act one. *Liberta*

The dire need for freedom and balance led me to the door of the Law Faculty (the tuition fee, in relation to the amount of my salary, did not allow me to attend the courses

[1] *N.N. Taleb*, The Black Swan: The Impact of the Highly Improbable, Bucharest, Curtea Veche, 2009. The academic environment analysis, however, in regard to renowned academics and their cultural role, to taking over the teaching and cultural mission, to the mirage of university career, of the position of power granted to you, with an emphasis on the vulnerability and ambiguity in the selection of the faculty, is carried out by *L. Nastasă-Kovács* in several articles and, in detail, in his paper One university contest procedure and three characters: Constantin Noica, Mircea Eliade and Ion Zamfirescu, Mega Publishing House, Cluj-Napoca, 2019.

of a state university, not even those of the one where I was teaching, so I decided to attend a private university) and then towards the halls of the National Institute of Magistracy (INM). With my second child barely born two months and a half before, dependent on his mother and carried right until I entered the hall, I took my entrance exam. Next came the courses and exams, myself constantly against the clock, sleep deprived and compelled to get back home.

As far as I am concerned, the courses did not strictly tackle the enforcement of judicial doctrines, or judicial procedures, there were also courses in spoken *legalese*, as I had got used to call the law jargon. I had attended faculty as part of a distance learning program, whereas the rule of law system was being transposed into written legalese. At INM, I discovered that legalese can be spoken, as well. During the first year, I was an average user, proficient in comprehension, reading and writing, not so much in speaking. I regret nothing, though, from the exercise of listening. I thus had the opportunity and pleasure to know my younger colleagues with their critical and fighting spirit, to notice educational approach triumphs and failures and perfect my own teaching endeavours, to go beyond the text and the formal approach ("why are all these trainers so fond of the illiterate *ca și*?") and to interpret rules, facts and social needs. I could chip in and learn from people as young as my students, from their midst. And the effort was, in those years of my life, considerable. I won't dwell on it too much, but I felt like competing in a rally. I only cared about not going violently off course in the curves, surviving and getting to the finish line. I had become an engaged observer who took steps further on a daily basis.

After these came graduation and the daily migration. Then the tenure certification and the daily migration. Home, law court, university and back home. I have thus found out that modern migration is not far from the old one: today's finder-travellers, the modern migrators, are propelled by the same incentives: finding better living and employment conditions, which is why you can only picture them in the crazy rush of motor traffic or the noisy whoosh of plane flights.

I identified myself with those migrators, given that I had to periodically walk the same paths for the better part of eight years. This, however, requires you to possess and refuel a daily tank of hope. I can say that, unlike our emigrants or immigrants, who look for their path outside their native culture, I am a domestic migrant, enjoying the luxury of leaving behind my own problems every morning and voyaging towards other people's problems.

Any case, matter, issue that awaits me, every day, at the end of the road, is only a portion of a world imagined by a different mind, just as any culture is a projection of a collective mentality and inherently contains a string of questions, dilemmas, sciences and beliefs more or less peculiar.

I shall render, with the same words, the confession I had made in the past before: what saved me the trouble of taking the trip, the taxing sense of otherness, the other's "event horizon", were music and stories. Inside the "sonorous aquarium" of the cockpit, to paraphrase Eco, in the light cast by my own nature, I recaptured shadows and memories from childhood, I listened to novel voices, I patiently waited to reach a

"foreign" land in order to face the "untamed", unsettled worlds holographically lifted from among dated and numbered pages.

The story has stayed the same[1], regardless of the law court I had to get to: you park the car, take a final breath of urban air, get through the entrance fort of the polite "border guards", greet, take your Kafkian gasp of dust settled on the court registry, open the computer to see any new deliveries from ECRIS, while you mechanically take coffee sips. If there is no need to put on the robe and enter the court room, you're confined to the office waiting for inevitable case files to drop by. It only takes an ounce of imagination to recreate the string of human inabilities, excesses, defeats and unfulfillments. They all spread throughout words, between case file covers.

Not long ago, not being used to the law court activity, the description was not familiar to me. Once it turns into routine, you notice that worlds replicate one another and intertwine, whereas the brutified world, having disposed of rules and lying beyond the institutional boundary, bounces into the model world inside. Yes, the storylines coincide, deviations included. Where you hope to find empathy and civilisation, you are met with indifference and cruelty, where you seek respect for one's peers and shared values you are faced with cynicism and disdain, where truth and virtues should reign supreme mechanisms to elude them are in place.

At a smaller, but non-exhaustive, scale, I wonder whether our natural state is actually that of peregrines. It trains the mind to scout for perspectives, that mind in search for an answer. We know all too well this is an enticing topic in the literature of various peoples, precisely since any journey opens a man's eyes to endless possibilities. We travel and we seek. We leave. But do we find anything? Do we return? We'll see. We cling to Iona's words, as construed by Marin Sorescu, *"we'll somehow break into the light"*[2]. That *somehow* makes all the difference.

I asked myself *whether* precisely those internal "boundaries", the fragile and fuzzy institutional limits are the reason behind our countrymen's exodus. Now I am ever more certain this is the cause. It was not free movement and the flexibility of national borders that compelled many people to leave, since others "had fled" before, when they were deeply charted, but this vague perimeter, a greenish mist spreading among us and blocking institutional bounds from sight.

As far as I am concerned, I chose to stay. My chance was temporary migration, saving me on the inside and stemming, though, from the frailty and volatility of internal boundaries.

Lastly, doomed to leave my seat in the classroom, I kept on watching. I had become, however, an expert observer and, at the same time, an actor. I finally understood that

[1] Also see the web page (*http://pravaliaculturala.com/article/de-profesie-migrant/*), last accessed on April 14, 2020.

[2] The frequently quoted final line of the Iona character, in the play bearing the same name by writer Marin Sorescu, born in Craiova (acc. to *M. Sorescu*, Iona, Ed. Scrisul Românesc, Craiova, 2006), available at (*http://ctt.ro/wp-content/uploads/2012/11/Marin-Sorescu-Iona.pdf*), last accessed on April 16, 2020.

place and time do matter or, even more, are critical: *tempus regit actum* and *locus regit actum*. Contrary to Ovidius' ancient dactyl, for whom time consumed everything[1], my time was a saviour feeding me renewed energy.

3. Act two. *Winter is here, winter has come*

The daily marathon continued, interrupted by social isolation weekends (therefore, I had a wish, a need and the training for the medical advice during the pandemic, or I could claim the capacity of precursor of the #stayhome prompt, a solitary *avant la lettre*), dedicated to survival and revival. Outside some brief personal syncopes, not a moment had I doubted that the second road, whose outlines became ever more visible, would be the guarantee of never again having the feeling of steps taken into shifting sands. I was afraid I would have to defend my end before that "middle earth", the inhabitable part I hoped I would one day enjoy, afraid that it, too, might subside to an inevitable and miserable destructuring law so noticeable at the university. I was surviving between hope and fear, between construction and de-construction, between time that builds and time that ruins. That was the benefit or the disadvantage of taking part in two different professional worlds. The dynamics of relationships among colleagues, the ironic replies, the cynical and insipid advice were all pushing me towards a clear-cut decision, that of gaining some time for myself, that is, choosing *what* I had "to be".

That is how I faced the earthquake in late January 2017, the winter of the fatidic Ordinance 13. What it meant for society, the emotion of taking to the streets and the solidarity of those marching collectively are best depicted by journalists[2]. The siege against law courts and prosecutor's offices had been instituted.

I lived through that moment at the peak of my physical and mental strain. It turned into a permanent alert. The arms of the balance were in peril, the "middle earth", governed by Themis, built under the principle of moderation, was on the verge of turning into shifting sands. The total disdain for dialogue and transparency, that doubled the adoption of this normative, was a cause for concern, as was the immense rush that one could gather from its wording. The measures did not concern me directly, but I was projecting its effects upon everything I knew, I could see case file pages crumbling

[1] *Ovidiu*, Metamorphoses, Ed. Gunivas, Chișinău, 2007 (XV: 234). Digital version available on the web page (*http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0029%3Abook%3D15%3Acard%3D153*), last accessed on April 16, 2020.

[2] Journalists painted in various shades the adoption of Emergency Ordinance no. 13/2017, as well as the subsequent attempts to obtain immunity from criminal prosecution and civil society's protests. See the web pages: *https://www.digi24.ro/stiri/actualitate/justitie/legea-gratierii/cel-mai-mare-protest-fata-de-oug-13-anuntat-pentru-duminica-in-capitala-663703*; *http://www.ziare.com/stiri/proteste/de-ce-continua-rezistenta-pentru-ca-atacul-si-minciuna-nu-s-au-terminat-1453367*; *https://www.g4media.ro/schimbare-majora-de-tactica-ordonanta-de-urgenta-pentru-salvarea-lui-dragnea-anuntata-asumata-si-negociata-la-bruxelles.html*; *https://www.aktual24.ro/jurnalist-roman-interviu-pentru-liberation-eu-am-avut-rolul-scanteii-care-a-declansat-protestele-din-bucuresti/*; *https://www.g4media.ro/live-video-dan-tapalaga-co-fondator-g4media-ro-sustine-un-discurs-despre-libertatea-de-exprimare-in-comisia-libe-a-parlamentului-european.html*, last accessed on April 16. 2020.

and injustice striking precisely the victims of those who, by the legislator's will, regained their innocence. I was hearing opinions from colleagues and journalists and despised the lack of opinion. I was mixing frustration, indignation and emotion, sizing up in my head the dark shadow that would not fade away and had brought so much torment in my life. I had once before seen how triumphant that shadow can be, how vile, naïve, focused on trivial advantages and devoid of morals some can be, how easily they sell themselves or accept the inevitable.

A new and easily transmittable virus, but with less victims than the old virus of rust and ruin, of inner filth, which had struck the world I knew, locked down the entire planet and rendered the people prisoners in their own homes. As was the case with most universities, Craiova University held its elections for the top management positions. And, like everywhere else in the country, also capitalising on the new legal provisions that allow individuals to hold an office eternally, this university opted for continuity[1]. To the bitter detriment of all. At least in Iaşi University, where they re-elected as chancellor the former Minister of Justice, prof. Tudorel Toader, a former Constitutional Court judge, notorious for his conceit in emphasizing the titles and offices he held, as well as for the *ex cathedra* tone of judicial explanations, there had been minimum opposition, a reaction of the academic community and a student collective ready to start a change[2].

Elections at Craiova University had been in early 2016, as well. Elections for the chancellor offices, for representatives in the faculty council, for the senate, and the related election campaign for the office of dean. At a faculty level, the fight for the chancellor chair was only lightly felt, despite there being grumbling voices that dared stating their opinions publicly and informed us by e-mail on the candidates' relative flaws; wild, devoid of any honour and dignity was the fight for the dean office.

I did not have any great expectations, but I could not accept encountering, in major positions of the intellectual world, mere literates, to quote unmerciful Paul Goma on intellectuals rallied under a short-lived barrelhouse revolt, running their mouths in a flustered speech.

Two persons had run for the office of dean, which was supposed to be granted following a contest procedure held before a commission, which also included the new chancellor. Both of them had held the vice-dean office: A.M.P. and E.P. Once the former dean had advanced to vice-chancellor, A.M.P. remained interim dean, a position that

[1] Information available on the web page (*https://www.hotnews.ro/stiri-esential-23672893-cezar-ionut-spinu-reales-rector-universitatii-din-craiova.htm*), last accessed on April 17, 2020.

[2] Student Silvian Emanuel Man blew the whistle on the *power networks* and stated his action: *"Is, first and foremost, a public protest against professor Tudorel Toader lack of long-term vision for the university, as he was a de jure chancellor only a third of his term. During the other two thirds, he preferred playing politics and be detrimental to the image of the academic community by mingling the three offices (chancellor, professor and minister) and disregarded his calling as a jurist. I don't think any more explanations on this topic are required. Toader would be a good general administrative manager. A chancellor, he would not. A chancellor must have vision and be loyal to the academic community"* (*https://www.g4media.ro/un-student-candideaza-pentru-functia-de-rector-al-universitatii-alexandru-ioan-cuza-condusa-de-tudorel-toader-multi-profesori-nu-pot-iesi-din-paradigma-retelelor-de-putere-in-univ.html*), last accessed on April 16, 2020.

heralded the preferences of the newly set up management for who should be placed at "the helm of the faculty". At the same time, rumours started spreading on the fraudulent means A.M.P. had resorted to in order to reach their current office at the faculty, one of them quite serious, concerning the fact that they failed to meet the requirements to enter the contest procedure for a university position. Therefore, there were objecting voices. But I could not take them for granted, I needed evidence. Perhaps they existed somewhere.

Without being provided by the law, the election methodology had imposed a so-called consultation of the faculty team, meaning another voting procedure. The female candidates published, at the time, the CVs and the management plan. Their content suggested that the teams had been formed, at least within one kernel, and people had been primed for offices. An office meant not only decision-making responsibility, but also access to resources, to information, that is, to money. One could sadly realise, as early as then, that the next chapter had already been written. But the favourite could not be anointed without a jot of scandal, as we all understood right then and there, as the crusade of e-mails swiftly followed.

We were prompted one typical morning by a message with unknown sender. Text analysis, provision of information, document-based evidence. Therefore, our good anonymous informer (or maybe several?) let us know that "the weakest academic link in our Faculty wished to be our dean". There were allegations of forged deeds, as candidate A.P. apparently graduated faculty after 7, instead of 4 years, neglecting to state that she defended her Bachelor's degree thesis not upon completing the 4 years of faculty, but after some 3 additional years.

We found attached a copy of the Bachelor's degree thesis, the series and year were visible, as were the grade averages by academic year, the grades, also for the subject matters she taught, with the added mention that there was no other academic with grades and grade averages so low, implying unlawful means used by Mrs A.P. to get to her current status, given that she defended her "delayed" Bachelor's degree thesis in January 2000 and was admitted for doctoral studies in November.

We were no more, no less than reminded of a common sense tautological requirement: "A dean must be a dean: they must be knowledgeable and have sound morals!"

The non-signatory had high aspirations: inform the press, inform the judicial advisors who would then analyse the papers and notify the law court. Proper concern, but to what end?

At the end of it, our anonymous and thoughtful colleague, made us aware of a minor, recurring and recurrent aspect (also visible during student admission sessions): as an interim dean, she failed to make sure the faculty web page (honourably maintained by her own husband, as ordered by vice-chancellor N.P.) displayed the candidacies and the related documents or the announcement on the referendum that was in store. They later added references and links to demonstrate we were the only faculty in that position.

A swift reply came not from the accused, but from vice-chancellor and former dean N.P. Calling boldly upon the brazen anonymous ones (being quite certain there were

several, not just one guy speaking in bombastic plural so as to share with us their concerns), but sending the e-mail to us all, he explained his support for A.M.P., while unjustly crucifying another female colleague who had previously had her back. He listed what she had set right, how she had heroically helped the faculty, plus the usual assurances of availability, openness, class, high standards of progress and cultivation. Nothing on the "subject" of the anonymous discontent. From his untouchable semi-god chair he supported, as a member of the new management team, one candidate to the detriment of another.

The anonymous one kept strong and returned with explanations and interpretations, and futile moral essentials. Yes, Mr N.P. was defending his pupil, despite explanations being demanded from someone else, from Mrs A.M.P. herself, who might have provided minimum arguments for her choice. Yet she did not, neither then back then, nor later.

There was, therefore, a recipe for holding on to the high office you desired while showing no virtues: keep silent, ignore inconvenient questions, a well-placed protector, choose the right individuals, just as insensitive to transient rebukes. It worked.

In this second short e-mail, besides the trivial irony, a path was revealed, showing why A.M.P. "had a meteoric uplift under dean N.P.", why she was depicted as the saviour of the newly opened music department (set to host, as a matter of fact, offices of key figures: an Opera director, a Philharmonic director with political connections, as regularly displayed in the press[1]), although it had taken her almost the same amount of time to submit the doctoral thesis and defend her Bachelor's degree thesis.

Then there were dates and facts mentioned, the accusation of having managed to enter the Faculty of Letters by skipping the contest procedure, as she came on 1.10.2010 from the Department of Applied Foreign Languages, where she taught a foreign language, without taking any exam. Through continuous skills upgrade she became vice-dean in April 2014, that is, she graduated faculty after 7 years, finished her doctoral studies after 8 years, while 4 years after joining the faculty she became vice-dean. It was implied that the lecturer office, made available through contest during her own mandate, in February 2015, had not been granted "on merit".

Only in the subsequent intervention, by further details, it was revealed that the tendered office was personally removed by the (still) interim head of department. Sorina Sorescu had, indeed, resigned as director, under conditions that, to quote our anonymous fellow, made Mr N.P. "kiss the bier in forgiveness". Yes, Sorina Sorescu had also died and could no longer testify. In fact, Sorina Sorescu left this world so disgruntled and so devoid of trust in humanity that one could hardly forget her stifled,

[1] One of them became notorious by stating that mothers taking their children to protests "deserve a bullet to the head", as journalists identified the local filiation and connections (*https://www.digi24.ro/stiri/actualitate/social/directorul-filarmonicii-oltenia-mamele-cu-copii-la-proteste-merita-macar-un-glont-in-cap-979944*; *https://www.libertatea.ro/stiri/scandal-pe-muzica-simfonica-in-masonerie-antoniu-zamfir-seful-operei-din-craiova-l-a-dat-afara-pe-liderul-orchestrei-dan-bozgan-cei-doi-sunt-frati-in-loja-armonia-72-orientul-c-2756739*; *https://jurnaldecraiova.ro/managerul-gabriel-zamfir-glont-in-cap-neindeplinirea-obiectivelor-din-proiectul-de-management/*), last accessed on April 20, 2020.

slightly faded voice, which carefully tweaked every sound when uttering her sorrow. She did not use to show weakness, even when a terminal cancer was chewing up her body despite several surgical procedures. Nevertheless, she spoke positively about surgeries, which she saw as life-extending events.

Despite not being drawn by the office, but an earnest and devout professor, with a passion for literature, who trained and guided students for national contests, concerned with literary criticism and book writing, she had applied for the head of department office at N.P.'s suggestion. Then, given her nature, she read carefully the regulations and refused to follow some discretionary orders and work as per ideas disseminated by the said hierarchic superiors. Furthermore, in her short remaining time among us, she opposed all of their personal ideas that defied regulations. At any risk, including the frequently occurred risk of drafting and redrafting department documents, that she happened to be asked for right after gruelling chemotherapy sessions. I was there: the endless pressure and indignity she had been subject to made her resign.

The empty seat was filled, in interim, by A.M.P.

Then, Sorina left this world. At least she no longer saw the ensuing savagery, no longer lived to feel the dismay, fear and revulsion many of those left standing felt.

As if under orders, in the e-mail war, in the defence of the protected, but defenceless one, warriors emerged on all flanks: the ladies co-opted in the management team, the heads of departments, candidates for offices. With pace and coordination. Some three other colleagues dared to launch a call to normality. In vain. The will of the team already announced and appointed in interim prevailed. Nothing could prevent its victory.

What followed was painted out in ludicrous brushes in a play, suggestively authored by Ion Luca Craiovale, which we received – how else? – once again, by e-mail, shortly after the chancellor made his option known. The characters were voicing their own lines, which they had personally sent to our electronic inboxes. Even today it still impresses me, by means of the clever choice of "masks", which has been and still is, also in relation to my colleagues' subsequent conduct, evidence to an excellent knowledge of human nature[1].

Over the following years no improvements took place, quite the opposite. The distinguished professors understood that, in order to have something to gain, they had to stay as close as possible to the winning team. Which one that was, what they did in the past, how they operated and what they pursued no longer mattered. Very few refused any affiliation.

The cold wave had set in among us, the shadow grew wider.

Ordinance 13 was only there to tell us that such people and others alike, spread within all state institutions, who would never feel an ounce of remorse, whom their own decisions would never mark with dark rings, would never be held accountable for their deeds. I would later find out that Ordinance 13 was merely a legal abstract of all things already happening, our "bad luck", the deceiving "understanding", the criminal

[1] (*http://comediamoravurilor.blogspot.ro/*), last accessed on April 17, 2020.

"forgiveness" or the bloody compromise, that is, the false humanity, the phantom haunting and blocking the democratic institutions. Who should bring justice? Who should get justice? Who cared anymore?

Many took to the streets. It no longer mattered whether out of desperation, with or without hope. They invaded the streets, in the dead of winter, in the cold, in the hundreds of thousands. And not just the victims that would have been directly affected by the ordinance, but also those who understood that the rush to adopt indicated a minority who intended to elude the law and deform the truth, behind a screen of decision-making excuses, all who realised the impact of the strike, the immense injustice that was about to take shape.

It would have and was going to take shape, with the help of the ill-suited – those who serve puny private interests to the detriment of the general one – appointed to key offices, to decision-making positions, but at a slower pace, imperceptible to the most. We had already experienced the sham elections held at Craiova University. But when they tried to adopt the government ordinance, impatience raised a red flag. Somebody was running out of time.

4. Act three. *Let the sun shine in*

Between the general emotion and the exercise of street protests, I understood I was not alone. To draw attention upon what was going on, fellow magistrates quietly sat on the steps of law courts and prosecutor's offices. Gradually, discussion groups subsequently formed on social media, debating upon the legislative changes, the positions to be put forward, the opportunity of protests, the manner in which institutions of the judiciary were reacting to those changes. Disappointed by the activity of professional associations in defending the judicial system's independence, many colleagues refused to become members of any professional association, leading to numerous statements being individually owned and signed.

Certain associations of magistrates were set up in those days, while others were already there; I did notice, though, that only one, *The Romanian Judges' Forum*, was united and involved: it drew up and proposed for debate statements and memoranda, owned by most, it generously drafted documented legal opinions to accurately inform the court as an *amicus curiae.* I neither knew the judges who belonged to the association, nor was I curious to find out who they were, but I did take an interest in their ideas and was free to adopt them or not.

In actual fact, all the interventions I had within discussion groups stemmed from the desire to stay together, to remember why we were together, not to lose courage and not to waste energy in sterile chats with no outcomes. That is, finding more than mere colleagues – people who share a belief, subscribed to the same values, not only to the trade.

My courtroom activities did not take place in Craiova, but, with what energy I had left from my everyday marathon, I found the time to attend the meetings hosted by

the steps of law courts in Craiova. In exceptional cases, we met in Bucharest, as well. In those days, it was hurtful to see the weakness of certain colleagues who, while openly rebuffing all the legislative changes that hog-tied the legal system, with fallouts upon the judicial process and litigants' interests, could not find the energy to climb a mere step. We could lose it all back then, but we could not lose faith in truth and freedom. However, like most of my colleagues, I had not pictured this to be a long-lasting battle of attrition that would accompany the will to shed some light upon Craiova University. The light, though, was dimmer and dimmer in the judiciary, as well.

As of January the following year, that is, early 2018, the wander I had started to southern and western law courts turned East. I had advanced to Olt County Court, the 2nd Civil and Administrative and Fiscal Litigation Division. Therefore, I had a lot to clear up in administration. And I also wanted to know whether the anonymous ones (it would have been so good if there had been several of them, as they stated, to quote and reinforce N.P.'s words) told the truth.

For two years, the Romanian Language and Literature Department that included both myself and A.M.P. and N.P., had become ever shadier. Three persons, acting as the department council, as per the lax provisions in the university regulations, made the decisions. Rarely did we find out what they decided, when some member was kind enough to inform us. The new head of department, since their appointment, had not called for any meeting which, as a matter of fact, no regulation actually set forth. We knew even less about the faculty council's decision, which were never posted or published on Craiova University website. That is how university provisions came to reflect the principles in the Law on national education, primarily the principle of transparency. Anytime, and I mean anytime, Ordinance 13 or others alike can go by unnoticed here.

I had carefully read the provisions of Law no. 544/2001 *on communicating information of public interest*, also for the recent promotion exam, which is why, two years ago, in April 2018, I requested from Craiova University as follows: copies of the full protocols and decisions of the Council of the Faculty of Letters within Craiova University, from January 1, 2013 to, and including, that date, when the latter received my request to provide information of public interest, registered in the records of Craiova University, and, if such full protocols and decisions of the Council of the Faculty of Letters within Craiova University were not to exist, Craiova University would expressly state that fact; as per the Regulation and Charter of Craiova University. I also requested that those decisions be published on the University website.

Later on, I received two sets of documents. Upon reading them, I realised that I had not received even one decision of the Faculty of Letters Council over the entire 5-year period; instead, they sent me three excerpts from a University Senate decision (which, as a matter of fact, I had not requested) and excerpts from the protocols of the Faculty of Letters Council, dated 2013-2017, submitted to the Craiova University Senate, to the Chancellor's Office, to the Management Board or to other departments. The best part of the documents included unrefined protocols, most of them unsigned, in sprawling handwriting... My first reaction was to take it all as a joke, like an ironic reply to the misjudgement of asking that they submit faculty papers.

As for publication, it wasn't even mentioned. All that was left to do was to acknowledge the authenticity of said documents, however, to do so, I was compelled to resort to official channels, to file a request to provide information of public interest with a law court, including the request that Craiova University be ordered to publish, on the institution's webpage, the decisions of the Council of the Faculty of Letters within Craiova University, from January 1, 2013 to date.

Not only did the University admit, in court, that those were the decisions of the Faculty of Letters Council, it also admitted that it rendered them relevant in the subsequent decisions, at a management board and senate level. It not only acknowledged the fact that those protocols contained decisions, but also failed to take any step against the individuals responsible for those administrative jokes, with consequences in regard to spending public money and the careers of its own employees. Furthermore, the protective chancellor chose continuity: the same vice-chancellor N.P. is part of the university management team, exercising their second term and, perhaps, the same dean A.M.P. watches over the faculty's future. In terms of finalising the contest procedure for appointment to the dean's office, nothing has been "disclosed" to date that might clear off the institutional mist.

The only "satisfaction" was that, between the case file covers, in court, the documents submitted were safe, away from any intervention, outside the Ovidian time that alters and devours.

Since the submitted documents did not contain all the information regarding the council's activity, I saw no legal obstacle to issuing a new targeted request for that information, among which the number of merit salary bonuses funded for the Romanian Language and Literature Department (D7), the academic rank of persons receiving a merit salary bonus, their length of service and the date when that salary bonus was granted; the notices to attend, protocols and decisions of the Romanian Language and Literature Department, as well as those of the D7 Department Council, the institution's balance sheets, broken down by department and faculty, from 1.01.2013 to date. I did not receive all those documents, but I did receive the ones I needed. I could link data, corroborate evidence, as they say in court.

I sent scans of the protocols to my colleagues at the faculty. It was their right to know about them. Upon talking to some of them, I understood they were afflicted by some sort of blindness. They noticed nothing. Some even refused to read them. One female colleague confessed that she was frail, had quite enough health issues and was not able to fight against them, despite knowing what they were capable of, given what Sorina had gone through. That was precisely the point, we knew! Another female colleague told me she couldn't make out what was written in there. She was a faculty council member, though. Others seemed miffed at having been presented with an issue that they had to think about, having to be aware, perhaps, not of their fear, but of the accepted compromises, weakness and inability. If somebody else could fix it for the benefit of everyone, without the slightest sacrifice, even better[1].

[1] The fear of losing one's job appears to justify the silence of officials in nearly all public institutions (*https://republica.ro/formele-fricii-si-efectele-ei*), last access on April 15, 2020.

At the same time, I had begun to realise that people teleporting themselves on a daily basis in court and whom we collectively confronted from the steps represented essentially this: the world with negotiable values, the world of the ignorant, the proud and the greedy who, on their way to chimeric peaks, no longer paid attention to the steps. We had taken different paths, but I looked fearless at the journey, even if mine went beyond the steps of Craiova University.

5. Final act. *Le vent nous portera*

The sue petition, like any other legal action, had a faith of its own. It passed the first instance court and reached the second appeal phase (with the change of venue request admitted by the High Court of Cassation and Justice). Ultimately, it became become devoid of purpose in regard to the request to submit the decisions, given that the institution had acknowledged that the documents submitted to the case file, the palpable ones, were its administrative documents and the University was ordered to publish the Faculty of Letters Council's decisions containing data that have to be made public *ex officio*.

During all this time, with my eyes murky from the daily toil, struggling to make heads or tails of the data and facts comprised in the submitted pages, I was rebuilding the decision-making narrative of the Faculty of Letters, certain it had stayed the same, regardless of the ruler, for the flame of passion that went to battle could only have originated in the belief and desire you invest in maintaining and continuing a success story, with lucrative results. It is a sad story, about individual will, fictions incompatible with administrative offices, lack of cooperation, assisted silence, amateurism, cowardice, despisal of one's colleagues, one's students, of what higher education and scientific research should mean.

Yes, the distinguished anonymous fellows were right, the facts turned out to be true to a hair and others, more serious, emerged. One of the grimmest and meanest was the fact that the merit salary bonuses set to be granted to colleagues that had truly laboured for the trade, following a selection and approval procedure, were distributed

About the same fear we are constantly told by historians, writers, sociologists, psychologists (e.g. *A. Cristophe*, Psychology of Fear, Meridiane Publishing House, 2019, *R. Zink*, The Installation of Fear, Humanitas Publishing House, Bucharest, 2015, *J. Delumeau*, Fear in the Western World. 14th-18th centuries. A fortress under siege, Meridiane Publishing House, 1986, *J. Delumeau*, Sin and Fear. The Emergence of a Western Guilt Culture (13th–18th Centuries), Polirom Publishing House, Iași, 1997 etc.). The explanation is convenient and accepted by most. However, I believe fear is not the prevailing force: in relation to the facet theory, pragmatically formulated within a framework governed by the politeness principle (*P. Brown, S. Levinson*, Politeness: Some universals in language usage, Cambridge University Press, 1987), the public system official's or employee's lack of reaction stems from the will to avoid the decision/response threatening their positive face (good public image/reputation), caused by becoming aware of their own culpability, of compromise and the environment in which they became complacent. As such, they will try to preserve their positive face not by way of a direct and proper reaction towards the abuse, but by continuing to accept the compromise and ignore the truth, the standard.

in a partly discretionary manner, bypassing procedures. The head of department and the fresh dean got to enjoy them, sans contest and sans approval. Beyond that, clues and more clues about facts and intents. Among them, decisions to put out to national competition vacancies for certain individuals, some lacking any merit for academic activity. For the sake of current and future students, such departures should have been corrected. But was there anyone willing to risk their or someone else's office for a proper gorgeous new beginning? I later found out there wasn't, not even those outspoken characters in the habit of building their public image on faked respect for correctness, truth and justice. It is impossible to risk it all in the name of truth, when your bank rate looks more important to you. Their desire for justice was, therefore, an act in a play, *à la* Craiovale.

But a story so gloom is an unimaginable burden and an additional reason for perpetual strain, especially when you see the damage and know your duties.

My fellow professors failed to understand that the murkiness of their own faculty, established by the colleagues whom they entrusted with a representation mandate, impaired them badly, that all are made vulnerable by the chosen ones' administrative and decision-making conduct. The deadline by which a concerned party may file a preliminary complaint, to request the invalidation of said decision, runs from the date when that party is notified on the grounds for invalidating an administrative decision (which were plenty, some acknowledged and adjusted, one being that the faculty's decision-making body had not been set up with the legal number of students)[1]. It may actually be the decision that sanctioned their academic chair. Making decisions public (such as publishing them on the website) has its reasons: the document is deemed known as of its publication and, once the deadline has expired, invalidating a decision is quite difficult. The refusal to publish will only prolong vulnerability: by covering their own mistakes, these chosen ones jeopardise their colleagues' careers.

I could not help myself wondering what would have been had these fellow professors, whether or not joined by their students, had taken to the steps – plenty of them in front of Craiova University. They chose to tell the truth via anonymous texts.

[1] Art. 7 in Law no. 554/2004 on administrative litigations: *"Preliminary Procedure – (1) Before approaching the jurisdictional Administrative Litigations Court, the person considering him/herself aggrieved with respect to a right or legitimate interest, by a specific administrative decision, shall request the issuing public authority, or the higher authority along the chain of command, within thirty (30) days of notice of such decision, to rescind all or part of such decision. On thorough grounds, the aggrieved person, as recipient of the document, may also file a preliminary complaint, in the case of unilateral administrative decisions, beyond the deadline set forth in parag. (1), but no later than 6 months after the decision date of issuance. (...) (3) Also entitled to file a preliminary complaint is any person aggrieved with respect to a right or legitimate interest by a specific administrative decision regarding a third subject of law. A preliminary complaint, in the case of unilateral administrative decisions, shall be filed within 30 days from the date when the aggrieved person has been notified, by any means, on the content of said decision. On thorough grounds, a preliminary complaint may also be filed beyond the 30-day deadline, but no later than 6 months from the date when he or she was notified by any means, on the content of said decision. The 6-month deadline stipulated in the present paragraph, as well as the one stated at parag. (1), are statutes of limitation".*

Then, they kept silent. Had they owned it, under a name and a signature, as magistrates did, *wouldn't* that inert and frustrated mass have gone stronger? Failing an exercise of freedom, I doubt I'll find out any time soon.

I only had the breath of hope of meetings on the steps. But I would find out, in early November 2018, that tension could also go up. I was then drafting the reply to the statement of defence as part of the motion to request information of public interest from Craiova University, then the judicial panel I was running was assigned a sue petition. *The Romanian Judges' Forum Association* was taking to court *The Judicial Inspection*, requesting that the latter… communicate certain information of public interest, according to Law no. 544/2001.

Let me rephrase, a beginner, which I was (four years had passed since my bar examination and less than one since my promotion) had to settle a case file where the parties were magistrates with sizeable length of service, some of whom, I knew, wrote specialised articles on maters I had not even managed to form an opinion about, whereas others could check my entire professional activity upon the referral of any displeased party.

Following my daily ritual, that morning, if I'm not mistaken, hardly had I arrived to court when I read the sue petition without even getting to sit down. I sat down. I thought. Not about myself, but about the case file. First of all, I had to file a motion for disqualification. A proper ruling in a case file entails that the case judge is beyond any doubt that might regard a lack of independence and impartiality. It is hard to imagine how impartiality would be perceived, in this particular instance, by the observer I once was. But it was not my duty to anticipate, but only to gather reasons that might merge into grounds for apparent impartiality. I filed that motion and added the required explanations. It was dismissed. Nothing to say there. I was going to do my duty, but in such a way that not only the audience, but both parties, as well, precisely since they supposedly abided by the same values of the profession, would have no doubt that the "incidental" and "alternative" judge, which I was, held the balance scales correctly.

I understood that my duty, at that moment, was to detach myself from the discussion group (I no longer read posts and stopped taking part in debates so as not to be in any way biased) and give up acting as a judge. Even if I basically saw no impediment (the value of independence must be observed by the entire pool of magistrates, while disregarding it is one of the grounds for which the Judicial Inspection can be notified), I was aware of the power of conjecture and, despite the fact that I was denying myself the chance to feed on an ounce of hope, I could not allow for any skewed interpretation. The parties in the case file became A and B, as any parties in any case file. When I received the defendant's statement of defence, I had just filed a reply to the statement of claims as part of my own request to provide information of public interest, and one of the defendant's defences coincided with my own. The court of second appeal would have been the same if legal remedies had been filed. Again, to erase any doubt on the ruling I was about to deliver, I filed a motion for disqualification from ruling. It ended up the same.

A motion to communicate information of public interest should represent a simple court case. Likewise, exceptions (to which I had also replied in my own action) should

not generate complex legal reasoning. The issue, in that particular case file, was that the exception claimed and, pertaining to it, the requests to notify the Constitutional Court and the Court of Justice of the European Union entailed a continuous screening and a reconsideration of the initial reasoning, in relation to the motions and defences being gradually added.

Like many of my colleagues, I believe that a judge, in order to do a thorough job, must make use of all the tools provided by the law so that they may settle a case. In all respects and even if, at some point, in sifting through the reasons, one aspect might seem evanescent and be easily overlooked by a mind that cuts back to essentials. Within any chaos that has to be mitigated, a butterfly's imperceptible battering of wings can create a hurricane. This common metaphor inherited from mathematician Edward Lorenz (the "butterfly effect"), borrowed by sciences and literature, would also depict the manner in which I chose to tackle a case file, so as not to neglect the influence any minor aspect has, via procedural steps, upon shaping the decision. The exception in need of clarification concerned the representative status of the Judicial Inspection chief inspector, whose term had been extended via an emergency ordinance issued by the Romanian Government.

In that scenario, that case and that given context, the Constitutional Court of Romania[1] and the Court of Justice of the European Union were notified on the matter. Olt County Court appealed to the Court of Justice of the European Union and, for the first time ever, a Romanian law court, at the request of the Romanian *Judges' Forum Association*, asked *whether the Cooperation and Verification Mechanism, set forth as per Decision 2006/928/EC of the European Commission from December 13, 2006, must be considered a document adopted by an institution of the European Union, for the purposes of art. 267 in TFEU, which may be subject to interpretation by the Court of Justice of the European Union*. Other questions concerned the *content, nature and timeframe of the Cooperation and Verification Mechanism, set forth as per Decision 2006/928/EC of the European Commission from December 13, 2006, as well as the binding nature, for the Romanian state, of the requirements stated in the reports drawn up under this Mechanism*[2].

[1] (*http://m.ziare.com/stiri/instanta-sesizeaza-ccr-in-cazul-ordonantei-date-cu-dedicatie-pentru-sefii-inspectiei-judiciare-bratul-armat-al-lui-tudorel-toader-1542900*), last accessed on April 18, 2020.

[2] The remaining questions, in a logical sequence, on the settlement of the case, are as follows: "Shall art. 19 parag. (1), the second paragraph, in the Treaty on the European Union be interpreted for the purposes of the member states' obligation to set forth measures required by effective legal protection in the areas regulated by the Union law, namely guarantees of an independent disciplinary procedure for judges in Romania in Romania, erasing any risk entailed by any political influence upon the performance of disciplinary procedures, such as the direct appointment by the Government of the Judicial Inspection management, even in interim? Shall art. 2 in the Treaty on the European Union be interpreted for the purposes of the member states' obligation to abide by the rule of law criteria, also requested in the reports under the Cooperation and Verification Mechanism (CVM), set forth as per Decision 2006/928/EC of the European Commission from December 13, 2006, in the case of procedures of direct appointment by the Government of the Judicial Inspection management, even in interim?" (*http://www.ziare.com/tudorel-toader/ministrul-justitiei/fara-precedent-tribunalul-olt-sesizeaza-curtea-de-justitie-a-ue-pentru-a-afla-daca-cerintele-mcv-sunt-*

I have no knowledge on what grounds, with no motion to disqualify having been filed, it was requested and admitted to change the venue of the case. I couldn't see how and why the grounds of the motion for disqualification appeared in the media[1]. At the risk of having all the documents in the case file cancelled, which could be ordered by the court of appeal while ruling for the change of venue (that motion was on trial, against the clock, during those days), I did my duty: I substantiated and notified the Court of Justice of the European Union on the preliminary questions, and afterwards I drew up the ruling to divest.

After all the waiting, the time came for the European Supreme Court to make itself heard and settle the disputes se. Six case files (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19) were merged by the Court under a single case, designated "The Romanian Judges' Forum Association et al." The parties made their pleas, the European Union member states and its relevant institutions submitted written conclusions. The advocate general's conclusions were expected[2], but the procedure had to be suspended due to the pandemic.

I want to believe that this entire stand-by climate shall have the effect that the sun and the moon halting had in Joshua's biblical times. Followed then by a healing utterance.

Meanwhile, throughout the districts of Mediocristan, time slowly goes by. In order to take shape, Hydra's heads need time and nurturing, inside obscure laboratories, far from inquisitive eyes. The journalistic sensational raves about the successes of some prosecutor displayed as "major scalps hanging by their belt"; still, corrupt heads keep turning up as the corruption epidemic spreads. Precisely because one ignores the setting in which they emerge, the common small-town fraud, the minor scab already heading to the hub, on the path to grandeur.

6. In lieu of conclusions. *Forever young*

In the near future, when people will have come out unrestricted from their inner solitary confinement, we all hope not for a resumption of the prior institutional activity, but for its responsible revival, in an effort to appreciate time. Justice not delivered in TIME is not justice. The words belong to Paul Goma, the Romanian dissident with no propensity for compromise, struck down by the virus to blame for the current pandemic, in a time when the European Court of Human Rights did not urge the Romanian courts to observe reasonable deadlines: *"I don't want to find solace in the idea that, one day,*

obligatorii-pentru-statul-roman-1547578; *https://www.realitatea.net/stiri/actual/tribunalul-olt-sesizeaza-curtea-de-justi-ie-a-ue-pentru-a-afla-daca-cerin-ele-mcv-sunt-obligatorii_5dcc9274406af85273d77358*; *https://adevarul.ro/news/eveniment/tribunalul-olt-sesizeaza-curtea-justitie-ue-afla-cerintele-mcv-obligatorii-statul-roman-1_5c504063df52022f75216dd7/index.html*), last accessed on April 15, 2020.

[1] According to (*https://www.stiripesurse.ro/forumul-judecatorilor-si-rezistenta-de-la-olt-cand-magistratii-forteaza-legea-la-limita-abuzului_1319628.html*), last accessed on April 15, 2020.

[2] (*http://www.ziare.com/stiri/magistrati/incep-pledoariile-finale-in-procesele-privind-sectia-speciala-si-mcv-de-la-cjue-intrebarile-la-care-trebuie-sa-raspunda-guvernul-1594234*), last accessed on April 18, 2020.

after my demise, the truth will have been revealed and justice will have been served to me. I have no use for posthumous justice"[1].

Somehow, the issue conveys more than that, for justice not delivered in due time not only becomes futile and ravages the victim, but also invites the offenders to build themselves new tools allowing them to commit even greater wrongdoings the effects of which will be even more difficult to erase. One of the outcomes is the humiliation of the brave soul that dared challenging them and the deterrence of all who might dare to exercise a right.

And how did the institutions of the state react to all the endeavours taken upon myself? How did Craiova University react? Though ordered to publish the Faculty of Letters Council decisions as of 2013, it has not published them to date. That is how a prestigious public institution, to actually quote its legal representative, reacts to a court decision. Moreover, to deny access of other employees, as well, to the decisions of their own faculty, the university has become even hazier. Against the law, by way of a senate decision, it was set forth that the protocol of a meeting held by the council of a faculty or department (the counterpart of a decision[2], in the sense stipulated by the *Education Act*, given that, as per their own statements in the trial, those were the only administrative documents issued by the council) was an internal administrative document, not a public one, hence not subject to public information. Other documents, too, skipped publication, in disregard of art. 222 parag. (4) in Law no. 1/2011 and art. 5 in Law no. 544/2001[3], such as the institution's financial sources, budget and balance sheet, or its budget implementation.

In order not to initiate in court the administrative procedure of invalidating a series of administrative documents concerning the office held by dean A.M.P. (in the hope of mending at least one injustice, an illegality, of all those hiding among the faculty's documents), as in, to neutralise the particular interest I had iterated, Craiova University put out to national contest a lecturer office comprising the subject matters I taught

[1] *P. Goma*, The Colour of the Rainbow 77: the Earthquake of the People. Codename "Bearded man", s.l., Autura Autorului Publishing House, 2009, p. 536; the digital copy is available on the webpage (*http://paulgoma.free.fr/paulgoma_pdf/pdf/LRP_Culoarea_si_Barbosul.pdf*), last accessed on March 25, 2020.

[2] Art. 69 in Craiova University Charter expressly states that a faculty council *adopts decisions, as provided by art. 57 in the Charter, more specifically, with the present members' majority vote, if the number of those present is at least two thirds of the total number of members. Decisions* are also referred to in art. 214 parag. (4) in Law no. 1/2011 *on national education*: *"The duties and jurisdictions of the higher education management structures and offices are set forth in the institution's university Charter, according to the law. Decisions of university senates, of faculty and department councils are made with the present members' majority vote if the number of those present is at least two thirds of the total number of members. The members of these management structures have an equal right to cast a deliberative vote".*

[3] Art. 222 parag. (4) in Law no. 1/2011: *"The annual budget implementation of higher education institutions shall be made public"*; art. 5 parag. (1) in Law no. 544/2001: *"Each public authority or institution has the obligation to communicate ex officio the following information of public interest: a) the normatives that regulate the organisation and operation of the public authority or institution; (...) e) the financial sources, budget and balance sheet"*.

and for which I could apply. On that occasion, they admitted that the Faculty of Letters Council had operated without being legally set up.

Those who admitted they were illegally receiving the merit salary bonus did not have the honour to waive it.

Chancellor C.I.S., also being the only candidate, was re-elected. His team comprises the same vice-chancellor and, most likely, the same dean. The media say that CIS, together with the former Minister of Justice, Univ. Prof. Dr. Tudorel Toader, is one of the chancellors who, in a time of pandemic, wish to amend the standards and directly propose the members of the National Council for Attestation of University Titles, Degrees and Certifications (CNATDCU), with the outcome of directly controlling this institution, which decides promotions within universities, who becomes doctoral thesis advisor, as well as how to distribute the research money reserved for doctoral schools and the faith of notorious plagiarisms[1]. Power networks can thus prove their influence and effectiveness in several areas of work. Ultimately, power has a fractal build-up; so does corruption[2].

The National Council for Attestation of University Titles has not submitted any reply. Some of the individuals mentioned above are members of this scientific authority.

The Ministry of National Education submitted the notification directly to Craiova University, which became aware, as such, of its own irregularities. They then sent me the university's reply, which I already knew. Therefore, instead of taking a halfway stand, without commencing any review, the Ministry chose to own the reply of the institution it was supposed to verify. Only after I had contacted them and highlighted the errors once again, in reference to laws and regulations, making use of the provisions of Law no. 571/2004 *on the protection of personnel within public authorities, public institutions and other establishments, who report infringement*[3], did they communicate that they

[1] The data is available on the web page (*https://www.edupedu.ro/12-rectori-vor-sa-controleze-cnatdcu-cum-se-bat-pe-puterea-de-a-decide-unde-merg-fondurile-doctorale-si-afacerile-plagiatelor-fosti-ministri-si-rectori-la-cel-putin-al-2-lea-mandat/*), last accessed on April 18, 2020.

[2] In the paper An eulogy of stupidity. Psychology applied to daily life (Polirom Publishing House, Iași, p. 295), Vasile Pavelcu highlights moral inequality among people, which varies like physical height, stating that *"an elite has the right to exist as long as its spirituality level rises above the level of general mediocrity".* Variations could be, therefore, placed within that fractal model of Mandelbrot, in a direct conditional relationship with the act of corruption, which can only be the outcome of a morality level (of a so-called elite) below the general mediocrity level of the masses.

[3] Art. 3 – *"For the purposes of the law herein the following words and phrases shall have the following meanings: a) «public interest whistleblowing» means a notification made in good faith of any deed entailing any infringement of the law, of the professional ethics or of the principles of good administration, efficiency, effectiveness, economy and transparency; b) «whistleblower» means the person making a notification according to subsection a) and who is employed by one of the public authorities or institutions or by the other establishments stipulated by art. 2"*; Art. 5 – *"The reporting of law infringements perpetrated by the persons mentioned in art. 1 and 2, stipulated by the law as disciplinary misconduct, offences or criminal offences constitutes public interest whistleblowing and refers to: a) corruption offences, offences similar to corruption offences; offences directly connected with corruption offences, counterfeiting, offences involving*

included Craiova University in the Supervisory Body's plan. But, for the eyes afflicted by blindness, the occurrence of some miraculous healing is not to be expected. In the end, the inspector positions are held by the same persons, immune to detecting conflicts of interests, tolerant towards political biases and incompetence, towards infringements of the law in regard to access to information and decision-making transparency, towards assessing staff in the recruitment, selection and promotion processes for the sake of appearances, towards infringements of administrative procedures or setting forth internal procedures in breach of the law.

The Court of Accounts – Dolj Chamber of Accounts had a somewhat speedier response. I had requested that they keep in mind art. 21 parag. (1), in relation to art. 2 let. a) and c) in Law no. 94/1992 *on the organisation and operation of the Court of Accounts*, art. 29 in Law no. 273/2006 *on public finance* and Law no. 82/1991, the *Accounting law*, and consider conducting an inspection in order to check legal use of budgetary resources. In reply, they transcribed, in detail, the legal provisions and were in the process of reaching a decision. I don't know what they intend to do.

The specialised prosecutor's office directorate did not docket the referral, indicating the fact that it has not even been read so as to outline the issue in fact. They sent it to the local prosecutor's office. After a considerable period of time, the referral returned to the specialised directorate, qualified to settle it. It was too late. There are persons who will never get their justice. In the meantime, I filed a new referral, the two case files being merged as they concerned the same deeds. As for their fate before a local structure, it remains to be seen. When the pandemic ends. *Somehow*, things will get settled.

Ultimately, the state institutions, once they've become undermined and inert, will only convey a message of distrust and deterrence to all who might ever intend to do their duty and notify them.

Given that information from the case file concerning the communication of information of public interest, requested by *The Romanian Judges' Forum Association*, pending settlement, by myself, at Olt County Court, were leaked to the media, I referred the matter to the prosecutor's office, as per the provisions of art. 304 in the Criminal Code *on the disclosure of secret occupational or non-public information*, during the same

misuse of office or work related offences; b) offences against the financial interests of the European Communities; c) preferential or discriminatory practices or treatment within the activity of establishments stipulated by art. 2; d) breach of stipulations regarding incompatibility and conflict of interests; e) abusive use of material or human resources; f) political bias in exercising job responsibilities, with the exception of persons that are elected or politically appointed; g) infringements of the law regarding access to information and decisional transparency; h) breach of legal provisions regarding public procurement and non-reimbursable funds; i) professional incompetence or negligence; j) non-objective personnel evaluation in the recruitment, selection, promotion, demotion and dismissal processes; k) breaches of administrative procedures or establishment of internal procedures by breaching the law; l) issuing of administrative or other papers serving special or clientelistic interests; m) faulty or fraudulent administration of the public and private patrimony of public authorities, public institutions and of the other establishments stipulated by art. 2; n) breach of other legal provisions involving the principle of good administration and of the protection of public interest".

days when the matter was referred to the Court of Justice of the European Union. The Court is in the process of ruling, however, to date, I have not been summoned for statements by the prosecutor's office of competent jurisdiction. I do not know whether the case file has been *somehow* settled.

I am getting closer to the moment when my testimony comes to an end. Some believe that, once they enter the profession, magistrates wait for retirement, in tranquillity, facing no challenges, no battles to wage in solitude, requiring no courage or permanent refinement. By now, I have learnt, however, that the struggle never ends, that you start afresh at any moment. I understood that a magistrate stops being a magistrate when he or she comfortably lies down in the chair and believes the journey is complete, having climbed the last step. I want to believe that a magistrate is not merely a person possessing knowledge and delivering judgements, but one possessing something more important than knowledge, like imagination, one who is creative and emphatic, enjoying that *inner intuition* Sartre speaks about and using the *sympathetic intuition* mentioned by Bergson.

Imagine that my place is taken by any observer, more or less naïve, more or less objective, seated in any desk, or that the narrator is replaced by any free individual in good faith. I could hardly be the only one. I would like to see magistrates recalling all these observers, objective or otherwise, who watched them sitting on the stairs of justice palaces or prosecutor's offices and, in this group photography, draw a step. In my mind, there is one more step. It is *another* step, one we shall climb tomorrow. It is the step today no one can climb on because the climb won't end today. Imagine that spot having collected all the hope of those who gathered and cheered in front of justice palaces, the hesitation and surprise of the naïve observer in the last desk, the expectation of the objective one in the first desk, who never gives up believing in the healing and potential of humanity. The step is there, above, it is born every morning; it allows us to go beyond our own limitation, for others live their own lives beyond us, too. It is the step that does not belong to us, the step on which we have no reserved seat, one that cannot be rendered via procedural provisions, bears no name among the notions of substantive law, but which can only be supported by the other steps. Just as real as an inspired judicial fiction is the step that, in reality, we've been protecting and has united us.

In the morning, when we climb the steps of law courts or prosecutor's offices, we should imagine that, beyond those we see and know, there is another *step*.

Young Magistrates' Viewpoint on the Justice System

Alinel Bodnar*

Motto:
"Unlimited power in the hands
of limited people always leads to cruelty".
Alexandr Soljeniţîn, The Gulag Archipelago

1. The evolution of the justice system

From 1990 onwards, the justice system has taken critical and irreversible steps towards implementing the rule of law principles. The young magistrates who joined the system every year wanted to see justice revamped, and each class fully understood the importance of professionalism and thorough training. That way, they have brought their contributions and helped unfold the independence of the judiciary. They have permanently fought to secure genuine independence for themselves, aware that magistrates' independence is a fundamental right of each person and a guarantee that all rights and freedoms are observed.

Despite having to face all sorts of unjustified attacks, magistrates continued their mission, knowing that the independence of the judiciary is the basic prerequisite for the proper functioning of the State. They knew that a consolidated state upholding the rule of law must, first and foremost, benefit from an independent justice. Years went by and the decisions delivered by magistrates left conclusive marks upon the legal system. Citizens' trust in the legal system reached ever higher peaks, and society began its development across all sectors and tiers. At the same time, magistrates became more and more inconvenient and had to constantly put up with pressures exerted by influential individuals. The delivered solutions started grinding ever more at the political establishment, revealing the existing "filth" reprobated by all citizens. The attacks grew stronger and fiercer and a huge and aggressive propaganda was put in motion in relation to the rulings delivered. Nevertheless, despite the proliferation of attacks, with ever more diverse attack strategies, the legal system was mature enough to survive, and what was built could not be obliterated.

Even if the attacks can be credited for having caused certain fissures, magistrates displayed integrity and did not abandon their guiding principles. They refused to be compromised, knowing that the spirit of justice and truth is a one-way street. This

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spirit constantly fuelled their confidence and let citizens know they were equal before the law.

Such experiences have shaped and continue to shape, conclusively, the character of numerous individuals, from both a professional and personal standpoint. It was demonstrated that the prospect of an ideal society, free from corruption, manipulation and lies, can be a reality. It turned out that the pest thriving on numerous areas of work can be terminated, and this hope has become more vigorous than ever.

2. The assault on justice. The magistrates' reaction

Well aware of the efforts made by the magistrates who had taken this path before our class, during the speech held on 20.02.2018 at Cotroceni Palace[1], we showed the entire society our intention to continue the mission of unconditionally subscribing to the principles that make up the rule of law. We are most certain that integrity, hard work and the incentive of reaching excellence shall help magistrates to freely fulfil, under any circumstance, the mission of delivering justice, without giving in to possible pressures or interferences.

Our class completed its professional training throughout an extremely tense period for the legal system. During our training and development at the National Institute of Magistracy, as of 2014, Romania experienced a period in which the attacks targeting the legal system became ever more aggressive. The attacks intensified and the battles were waged at ever greater scales. The rule of law principles were put to a very serious test and, at times, disregarded. The public space was flooded with debates on the rule of law and the independence of the judiciary. Justice was in the public spotlight. There were frequent mentions of actions contrary to the democratic principles and values carried out by the legislator and the cabinet. Ample contradictory debates were held on the legal system reform. Large street protests, and even protests of magistrates, were organised. Most of the legislative amendments adopted by the Romanian Parliament and Government, in regard to the criminal laws[2] and the justice laws[3] were challenged.

There was true chaos, and young magistrates could have been misled and civil society could have been left in utter obscurity. However, most magistrates and citizens understood the measure of the current battles. They realised at once that the assault upon justice is, in reality, an assault upon the fundamental rights and freedoms. We

[1] The Romanian President, Mr Klaus Iohannis, welcomes the graduate magistrates of the National Institute of Magistracy (*www.presidency.ro/ro/media/anunturi-de-presa/primirea-de-catre-presedintele-romaniei-domnul-klaus-iohannis-a-magistratilor-absolventi-ai-institutului-national-al-magistraturii*).

[2] For an analysis of the proposals to amend the criminal legislation and their effects upon the activity of judicial bodies and public order stability, see *C. Coadă*, Changes brought to the Penal Code and the Criminal Procedure Code. Avoiding a heralded disaster*, supra*, p. 41-91.

[3] For a presentation of the most controversial legislative changes and the events that took place between August 23, 2017 and October 22, 2019, see *D. Călin*, Changes brought to the justice laws during the 2017-2019 interval. The serious impairment of the rule of law principles. Remedies, *supra*, p. 1-40.

all understood that our identity and the development of our society lie in the strength and authority of the values we foster and respect. For that reason, despite all the surrounding pressures and leverages, a dignified defence was mounted for the values of the rule of law and the independence of the judiciary. The harmonised assault upon the justice system did not have the expected outcome. The adverse proposals to reform the justice system and the criminal laws were fully adopted. As such, the justice system could not be turned into an arena where only the strongest would win and only the influential be privileged. Quite impactful was the responsible action of citizens and magistrates, who protested by any means so as to warn about the fact that the reform endeavours had gone adrift.

The magistrates' position statements reflected their interest in observing the fundamental rights and freedoms of individuals. Each magistrate had made a vow to defend these rights and freedoms and fulfil their duties with honour, in good conscience and unbiased. This particular vow compels them to take steps when ascertaining the danger that certain legislative proposals could become a hindrance to fulfilling their undertaken obligations.

We have come to the conclusion that magistrates cannot passively watch behaviours contrary to the rule of law principles. We have a duty to bring to everyone's attention to the consequences we may all be exposed to if certain legislative proposals are adopted. Making our viewpoints known is a matter of general interest. We cannot make use of our obligation of reserve when society shows deeds likely to affect and endanger the judicial process and the idea of justice itself.

Indeed, we have a duty to comply with the laws of the country, but when there are legislative proposals contrary to the pre-eminence of law, which tend to protect excessively and in an unacceptable way certain interests, ignoring society's general interests, *we must take a stand*. Prior to the entry into force of such laws, we must make sure that we can freely fulfil our mission to deliver justice whereas the rights and freedoms we are bound to defend stay unaffected. As long as our stand is in the interest of justice, it shall also be in the interest and for the protection of all individuals.

The public space has kept spinning the idea that magistrates must only enforce the law and may not express their opinion on legislative proposals. Yes, our mission is to enforce the law, however, when you know that certain proposals can become genuine obstacles to fulfilling undertaken obligations, *you can no longer remain indifferent*. You cannot limit yourself to the mere settlement of case files, instead, you have to get involved in all steps related to defending the rights and freedoms of citizens. It is wise to draw attention and reveal the price to be paid for enforcing an unjust law. No one can deny the magistrate this right!

Defending the fundamental rights and freedoms entails not only enforcing the law. It is equally important to also express a viewpoint on the legislative proposals. An unfair law can prevent us from assessing, in an objective and balanced manner, the various interests contained by a particular case. We may end up being compelled to only tip the scales in favour of particular interests, leaving our citizens to realise their rights have been infringed upon. Still, by acting responsibly, we can prevent such scenarios

in which magistrates are compelled to enforce an unjust law. We must permanently make sure that the law complies with the balance required to exist between defending the interests of persons who commit antisocial deeds and defending the interests of victims or of the entire society.

If the law itself is a means to unjustifiably defend certain interests, the desire to serve justice becomes a mere illusion...

Despite the absence of the institutional support desired in the fight for an independence justice, the magistrates' solution was not to give up. We could hear the voice of the first impulse telling us to retreat within our own state of comfort and not fight against the masquerade; it was the most convenient option. Still, I understood that it meant collusion to the destruction of values I believed in, an attitude that we refused to embrace. A proactive attitude is absolutely necessary in times like these.

I witnessed many legislative proposals being drafted to excessively favour individuals who commit antisocial deeds. To support the recitals of legislative proposals, many times a single partial truth, removed from context, was revealed in relation to case files settled by magistrates. The ideas of those who had committed deeds against society were disseminated among a huge audience. The media structures, ruled by individuals *at odds* with the law, conspired against the democratic values so as to generate false majorities. With no facts and evidence at hand, they began delivering parallel justice on television. Certain opinion leaders began casting judgements and exonerating where judges delivered a sentence or incriminating people whom judges had ruled to be pardoned.

They did not or would not get in touch with reality, but did intend to use the law in order to dictate the *only* way by which justice should be served. They pretended they were the only ones holding the key to the idea of justice while, in reality, they made incessant use of a well-orchestrated rhetoric and failed to judge based on facts and evidence. That rhetoric relied on thin rumours and the voice of a simulated majority. Their wish was to see justice delivered strictly in line with the items on their agenda, not based on evidence, but pursuing interests.

They initially wanted to hinder magistrates from using certain evidentiary means. They intended to bottleneck their activity as much as possible so that felons should not get caught. The proposed procedures became a tiresome burden for the justice system and it was nearly impossible to carry out your activity under such conditions. People of that nature were interested in mammoth reforms, but contrary to the principles justice has to be built upon. They wanted to subject any institution to reform, *in their image and likeness*, instead of targeting the enhancement of these institutions. We have ended up living these times because influence now belongs to people unaware of the responsibility of their office or the pressure exerted by such responsibility. We witnessed the time of *people who, under the pretext of Parliament's sovereignty, saw themselves entitled to wield unlimited power, while being so limited they only their rhetoric, but civil society and magistrates realised their interest*.

Justice was not invented to protect the vanity of unscrupulous people, eager to believe they have a guaranteed favourable solution at all times. Justice cannot operate only partially and investigate only the deeds of particular persons. A justice that only

endorses those who commit antisocial deeds or influential individuals is unimaginable. Justice ceases to exist if the law itself compels magistrates to tip the scales strictly to the detriment of vulnerable persons and general interest, regardless of the actual issue in fact. Justice is where defences are mounted for the fundamental rights and freedoms of *all* people, and the law must pursue the same goal.

Adopting a law is not enough; let us remember the injustices from the communist era (committed under the rule of tyrannical laws or enslaving decrees). The law must be well-made and compliant with particular standards, and the quality of a law depends on each and every one of us. It is up to us to make sure the law is accurate and fair, so that it may ensure balance in society. One cannot legislate anything, anyhow and anytime, and the Parliament's sovereignty is not absolute, but a power in itself limited and subscribed to law and to the rights we have as individuals.

It is easy to use a sovereignty of this nature (poorly understood) and, by way of a few lines in the text of the law, to order change and project a justice system underpinned by certain interests. It is easy to project an ideal vision on settling one matter, but in complete disregard of the consequences of those decisions upon the entire system and upon the fundamental rights and freedoms of all people. The extremely difficult thing is to enjoy enough balance to adopt a reasonable regulation for the entire society.

The legislator and the executive must be partners and assist justice in enforcing the law, instead of throwing spanners in its works, as they many a time have done. The law must be clear, predictable and fair, and not be amended whenever somebody's interest is at stake. Furthermore, it is critical that the representatives of the other powers in the state show gestures of trust and support to the Judicial Authority. Such gestures would come as genuine confirmation of the support for an independent justice and evidence of loyal, thorough and transparent collaboration.

These ideals are values of the rule of law. In a state upholding the rule of law, the power of all representatives of various authorities is regulated and limited[1] *by law*, that is, by means of all existing laws and standards. At the same time, this power is limited by the citizens' *acknowledged rights*. Rule of law means not only complying with the law adopted by a sovereign body, but compliance with a set of mechanisms[2], also by such a sovereign authority of that level. Any departure from these principles must be detected and met with penalties so that proper order may be restored.

The rule of law principles are absolutely essential, as they ultimately guarantee the values of justice and truth. Rule of law *means* the laws are adopted in good faith, in the society's general interest. It *means* the law has enough clarity, accuracy and predictability so as to be known, understood and abided by each person, to the letter, after being made public. It *means* legal order is coherent and stable, as in the laws do not

[1] For details on the manner in which all powers in a state are subscribed to law (the entirety of legal standards) and to the people's rights, see *I. Deleanu*, Constitutional institutions and procedures – in Romanian law and comparative law, C.H. Beck Publishing House, Bucharest, 2006, p. 71-72.

[2] For a comprehensive presentation of the rule of law prerequisites and mechanisms, see *I. Deleanu*, Constitutional..., op. cit., p. 79-93.

contradict one another and are not amended based on particular conjectural interests; the laws must be correlated among them so as not to invite the risk of speculating upon inconsistencies. It *means* there are effective and independent means for reviewing the activity of representatives of public authorities and entailing their liability. It *means* the power representation granted to our chosen ones is not considered by them the unlimited freedom to do whatever they please and they are fully aware of their duty to show restraint and self-imposed limits, so that the citizen should remain the primary benchmark dictating the limits of rights and freedoms. It *means* genuine moral and political values are regulated for the entire society, also across the highest tiers within authorities. It also *means* that justice is independent, for this aspect underpins the observance of all the mechanisms above and guarantees one is not arbitrarily denied their rights and freedoms.

Each of us must make sure that all the rule of law mechanisms that can guarantee us that the state we live in is a consolidate state upholding the rule of law work properly. Only such a consolidated state upholding the rule of law can be a fierce weapon against arbitrariness and ensure utmost protection for all of us. If one of these mechanisms backfires, each citizen (the magistrate included) must exercise their right to protest or to otherwise draw the authorities' attention upon possibly having our rights and freedoms compromised. The rule of law standards are an essential guarantee of our freedom and equality in society. If such standards were not to be complied with, our rights would have no practical value[1].

3. Consulting with magistrates

We eagerly followed the parliamentary debates on the justice laws and the criminal laws and, when arguments were being requested for certain amendments, the reply was that things obviously had to be that way (as they preached), despite sufficient evidence brought forward pointing to the opposite. And that is how discussions ended, which is unfathomable and against any logic of consultations. They abused the power granted with the office any person will only temporarily hold. They failed to own conclusions based on arguments and the practical effectiveness of the regulations and failed to justify their own conclusions whatsoever. The strongest cliché arguments were to stop abuses and strengthen the independence of the judiciary, while pursuing quite the opposite. These were arguments that distorted reality precisely in order to corrupt it and reach the conclusions they wanted to be reached.

Consulting with magistrates, while having always been welcome, as it allows contributing significantly to the adoption of a good law, was only simulated. The political actors involved in the draft amendments to the legislation wanted more of a simulated debate and consultation simply to give the general public the impression of having

[1] Rights may only have practical value if they are acknowledged by law; the human rights must be embedded in institutions, within the legal standards of man's social ambient, and not merely in rhetoric or in the axiological system of morals; see *I. Deleanu*, Judicial fictions, All Beck Publishing House, Bucharest, 2005, p. 414.

resorted to consultations. They only wanted to justify themselves before society and international bodies[1] for having observed the democratic principles. They summoned a few experts to the debates only to later on reach the same conclusions they had been fixated on since the start of consultations. They thus intended to mislead the public opinion in regard to the fact that laws are adopted following ample consultations, while reality was totally different. Still, responsible citizens quickly realised the actual intentions of those who had set up the debates, while street protests and magistrates' protests grew ever stronger. They sent a clear message that there would no longer be any tolerance towards conducts departed from the rule of law values and from the responsibility that comes with the mission entrusted to magistrates in a democratic society.

Unsubstantiated criticism was voiced towards magistrates who publicly expressed a viewpoint or protested and all sort of false accusations were made[2]. Certain opinions of magistrates who opposed the new changes were described as contrary to the obligation of reserve and the idea of imposing unjustified restrictions was brought ever more often forward. These restrictions were, in reality, part of a "prior procedure" of checking and screening opinions through a *filter of compliance* with a particular agenda. Numerous magistrates were attacked for having become too inconvenient, whereas those greedy of power started taunting them, but magistrates did not lose their nerve.

Those who protested were accused of supporting the so-called abuses of magistrates. It even got to the point where a special section (SS!) was set up under the pretext of the need to protect magistrates' independence. However, rhetorical remarks remained unsubstantiated and no examples were mentioned of case files where judges had allegedly delivered abusive solutions due to claimed pressures from prosecutors. The strongest arguments were that certain abuses existed. With no concrete proof. Their rhetoric alone had become unquestionable proof...

Even under these circumstances, magistrates continued to express their viewpoint. Conscience must not ever be put to sleep!

Relentless efforts were made to intimidate, to simulate opinion majorities and to claim, on behalf of persons allegedly persecuted by prosecutors, that young magistrates had apparently created an abuse system that infringed upon human rights and freedoms. It was an ambiguous period during which certain representatives of the other stately powers made strong use of manipulation and corruption of the rule of law values. There was no honesty in their actions!

They employed any tool to mount society against magistrates that could not be contained. Enormous resources were used to unleash propagandistic exaggerations difficult to comprehend and impossible to counteract, given that too much information

[1] For a presentation of the way in which the events during the 2017-2019 interval were reflected in reports and opinions issued by international bodies, see *A. Gheorghiu, A.L. Zaharia*, Support provided to the Romanian magistracy by international bodies, *supra*, p. 273-283.

[2] For a presentation of cases in which magistrates were under disciplinary or criminal investigation and such procedures were used as tools to intimidate and exert pressure upon them, see *B. Pîrlog, S.M. Lia*, Guide on the harassment of inconvenient magistrates, *supra*, p. 187-210.

on the work of magistrates had been perverted. Absurd allegations were part of a surge of clichés rapidly spreading throughout the public space.

Despite all that, society and magistrates could not be manipulated. The haste, the lack of actual consultations and the obscure reasons used to support the adoption of the new changes added even more to outlining the public perception according to which the purpose was to excessively favour particular individuals; the assault upon justice was backed by people for whom the law and justice had become troublesome.

Looking back, we see that only persons who have (or have had) a controversial relationship with ethics and morals attacked the judicial system, when they felt powerless before an independent justice. Such persons do not want justice and truth triumph above their own selfish motives. Magistrates automatically become inconvenient when certain influential people struggle with an issue and are helpless against upright magistrates whose line of thinking cannot be so easily reconfigured. Integrity and professionalism strengthen magistrates' position, as they were not appointed in line with interests of powerful people in order to be manipulated.

4. Freedom of expression – a guarantee of the rule of law

The experience of these years has taught us the utmost importance of magistrates expressing their viewpoint on any proposal to change the legislation. We are a segment of society, people first and foremost, and our knowledge may contribute to the development of society on sound principles. During our practical work, we encounter on a daily basis various situations in which we enforce the law and are able to foresee possible consequences of legislative proposals. This experience forces us to also issue a public warning when necessary. Our experience and knowledge may ultimately contribute to the adoption of a balanced solution for the entire society. Magistrates have direct contact with contexts where laws are enforced and can ascertain whether something has to be changed, as well as understand the practical consequences of a law coming into effect. By expressing an opinion, the door is opened to argument-based debates beneficial to society as a whole.

Magistrates' protests are preceded by ample reflection on the ascertained issues. Various assumptions are presented on how the legislative proposals can influence activity within the judiciary. Extensive debates take place among magistrates, within the system. Argument-based discussions are held on the criticism that can be raised towards the law, followed by conclusions later on disseminated in the public space. These conclusions cannot possibly stay exclusively within! They must be brought to public attention. We are interested in finding the best solution and providing the most efficient response; we do not pursue public praise when expressing our opinions. We want to raise everyone's awareness on the outcomes of enforcing a particular law. We want to protect people's best interests, which compels us to employ all available resources required to communicate our conclusion to the entire society.

Even if certain magistrates do not promptly react in the public space, that does not mean they are ignoring the issues brought forward by other colleagues. Sometimes, the

matters in the case files distributed among magistrates for settlement forces them to be more reserved and not to publicly take a stand; trust in the justice system is thereby maintained. Other times, the sheer number of case files and their complexity prevents them from publicly joining their colleagues' endeavours, while their support does exist and inspires confidence. Under these conditions, when a viewpoint is presented or a protest is voiced, it is enough for only a portion of magistrates to do so for society to realise that the message conveyed must be taken into account. And in that regard citizens have shown they are interested in the magistrates' standpoint. They further disseminated the message of judges and prosecutors, proving they are concerned with the sound course of justice and are ready to defend justice when needed.

Indeed, the freedom of expression of magistrates is limited and must be exercised with plenty of caution; this limitation is intended to ensure the litigants' respect towards and trust in the work of magistrates. When magistrates point out to legislative proposals that can hamper fundamental rights and freedoms, people's levels of respect and trust actually increase. This contributes to making citizens aware of the dangers they are exposed to and developing a civic attitude that is necessary in a democratic society. This way, in balanced manner, limited by the obligation of reserve, we get closer to citizens and show that we truly understand their troubles.

The obligation of reserve must not suppress the freedom of our conscience! What prevails is the possibility of having and expressing even a minority opinion, which ultimately is a critical element of a democratic society relying on the spirit of openness. We are entitled to warn about the catastrophic consequences of certain legislative proposals.

We need magistrates taking part in the public debate on the correct functioning of society. A wrong functioning impairs the fundamental human rights and freedoms and we have to find the most suitable methods to express a relevant viewpoint; that, in a manner that is balanced and not in line with a particular political agenda. Moreover, magistrates must be free to point out that certain actions taken within the judiciary may intersect with the political establishment and it is nearly obvious there are subtle moves towards implementing an agenda contrary to the rule of law values.

We cannot limit ourselves strictly to reactions to legislative changes concerning financial stability (wages and pension).

The reaction against interferences and attacks targeting the rule of law values must not be exclusively left to be handled by the Superior Council of Magistracy which, in certain circumstances, failed to take prompt action or acted with no practical effectiveness[1]. That is why each and every one of us must have a swift and efficient reaction, within the bounds of the interdictions and incompatibilities we are subject to. Only an attitude of this nature will show that we are firm in our efforts to protect the fundamental rights and freedoms.

[1] For a detailed presentation of the manner in which the members of the Superior Council of Magistracy fulfilled their duties during the 2017-2019 interval, see *D. Călin*, Evolution of the Superior Council of Magistracy. Between efficiency and indifference, *supra*, p. 143-186.

We have to permanently fight for an independent justice, as it is prerequisite of the accurate appraisal of issues presented by litigants when asking justice for help. We have to make sure magistrates can freely exercise their duties, according to their own conscience and professional training and cannot be influenced, subjected to pressures or receive instructions elsewhere. Magistrates' independence must be protected both in theory and in practice, both by means of legislation and by the public statements of persons seeing themselves as opinion makers or holding public offices. An independence of this nature is essential as it ensures adequate protection for everybody. For magistrates, this is not a privilege, but a major responsibility that generates immense pressure and entails balance, ownership, rigor and objectivity. There are many challenges and inner battles fought in solitude. Behind papers, a man's freedom and wealth are at stake. However, by fighting for a fair law which does not infringe upon citizens' rights and freedoms, we, too, make sure we carry out our work as part of an independent judicial system; the independence of justice is a fundamental right.

Regardless of the times that will come upon us, we are not allowed to relegate ourselves into a state of comfort and let uncertainty overwhelms us. We must not be disoriented or misled, even if it is easy to grow tired waging such battles. We have all the resources required to go on.

Beyond the numerous case files and their high complexity, combined with the thoughts that engulf us when trying to adopt the best ruling strategy in order to find out the truth and rule conclusively in the case file, we need to resort to this proactive attitude. The fundamental rights and freedoms cannot be fully protected strictly inside a pair of thick covers. Justice does not only come down to case file pages. We must see what happens beyond them, as well, for those things may influence at some point what we will eventually see between the covers.

We need to understand the dynamic of society and discover the petty interests of persons' intent on thrashing the independence of the judiciary and the rule of law values. Outside law courts and prosecutor's offices, the world may be moving at a different pace, and we have to understand this pace and let society know the direction is wrong. Let us not hesitate to take action this way. The general interest of a state upholding the rule of law must be defended despite all the political feuds in pursuit of power.

5. The idea of justice. Professional development

The fact that, in dissent, justice auditors took to the streets in front of the National Institute of Magistracy on 18.12.2017, and during all the protests in front of Bucharest Court of Appeal and other law courts throughout the country, proved that they wanted to join the mission of supporting the rule of law values and the independence of the judiciary. They demonstrated they were fully convinced that the rule of law values are non-negotiable and were always prepared to take a stand when these values are disregarded. They understood that only these values and an attitude as such would help them on the path do deliver justice, as they are the building blocks independence rests upon. They showed determination and bravery, but also the will to sacrifice their

own time to defend the independence of justice and hand over the torch to the future generations.

More and more magistrates sharing this perspective started turning up...

The perspective of an ideal society, free from corruption, manipulation and lies can be a reality. The pest that has infested numerous areas of activity can be exterminated, and this hope has become more ardent than ever.

All of the magistrates' actions were fuelled and backed by the most important judicial and moral principle: justice! This principle is so hard to define and difficult to understand, but I shall try to show you in a nutshell what the idea of justice and mission of delivering justice mean to me. I shall try to develop as clearly as possible these ideas, as they also stood behind my choosing a career in the magistracy. I am certain these thoughts are shared by many fellow magistrates.

At the beginning of studies at the law faculty, like any other young man with not so much experience, you circle around the idea of justice, as you do around a cliché. Justice and freedom are resounding echoes in our heads; are endowed, by nature, with the spirit of justice. You do not have much concrete knowledge of your professional future. Still, you do want to contribute significantly to the justice serving process. You have chosen law as you want to know the rules and acquire the knowledge needed for an accurate and balanced interpretation of the reality you see. The spirit of justice within thrusts you in that direction.

You have seen a lot of mistreatment around you and intend to contribute to a change of mentalities. Justice demands that you act and clear up any concerns. You've seen corruption, manipulation and lies in spades, but you want to be different. You have had enough uncertainty and corruption in Romania forcing people to be pessimistic about their future. You think you will become and upright, professional lawyer or magistrate and you will be worthily defending the rights and freedoms of your peers. You are certain you will ultimately contribute to changing the people around you for the better. The education that you receive during university years persuades you ever more that the moment when you actually contribute to achieving this ideal will come. You are not really brave enough to give concrete examples about how you are going to do that; and you can't really do that! You have a well-defined purpose, but your thoughts cannot be uttered through words in those moments.

Further, you ask yourself a lot of questions when you are dealing with the injustice throughout society. You need as many clarifications as possible and, during your studies, as you literally get shaped and ripe, produce better and better conclusions and you are ever more satisfied with the explanations you obtain. At first, the answers on the idea of justice dance around in your head as they are not coherently organised yet. However, one by one, the answers subsequently begin to emerge concurrently with in-depth study and passing each exam.

The ideas on delivering justice gradually nest in your mind and start taking shape with the passage of time. Then, by piecing out all the answers, you ultimately draw conclusions that set your mind at ease and hive you hope. As the years during which you

are stern and upright go by, you accumulate the foresight of your own experiences, as well as of experiences acquired from others. In-depth study gives you the opportunity to grow. The rigidity of professors during the faculty years plays a decisive part in your becoming and the sophistication of your nature. The view on delivering justice becomes more and more fitting. Any fluctuations towards the extremes get weaker. The spirit of righteousness, a vindictive one in the early days, becomes balanced and mature. It has been shaped so as to prevent you from following your first impulse and cast out any prejudice that might cloud your judgement. The young jurist is thus steered to the right path of balance and responsibility. Chaos and inner uncertainty fade away, while personal experience and professional training determine decisively the judicial and moral direction of the young jurist.

All these genuine experiences critically refine our character and weigh into the makeup of our personality. They help strengthen integrity and professionalism. The experience accumulated during times of intense study, intermixed with other activities, contributes to our development and makes it easier for us to assimilate critical knowledge. We were not trained to merely pass a few exams, instead, we were trained for the justice-delivering mission.

Justice is not solely related to *professional training*. It also depends upon *how we are built up as persons*. It also takes into account *the way in which we choose to see ourselves in relation to the others*. It requires that our nature be underpinned by the values of integrity. Let us be upright! Persons of substance! These values are essential as we carry them around wherever we might go and whatever we might do. It has nothing to do with shouting out certain principles. It demands that these principles become a way of life. It compels us to analyse the others with a kind heart, empathy and balance so as to make the best decision; not to pursue our own interests.

These values and an attitude of this nature helped magistrates withstand the assault on justice. They helped them enjoy an unburdened conscience in the battle they were waging for the triumph of righteousness. The evidence of righteousness built up in our minds and modelled by means of intense study could not be questioned.

Throughout this entire period, the personality of each and every one of us was put to the test. We could have been left astray and all the values we once believed in could have been blown away. Nevertheless, the idea of justice properly understood and the inner force strengthened upon such values helped each and every one of us raise above all the attacks. And they shall help us going forward...

Regardless of what is in store, if we have done the right thing, as Russian writer Alexandr Soljeniţîn used to say, "A clean conscience will sparkle in your eyes like a translucent mountain lake"[1].

[1] *A. Soljeniţîn*, The Gulag Archipelago, vol. 2, Univers Publishing House, Bucharest, 2008, p. 466.

6. Conclusions. Perspectives

All the facts presented only partially reflect the lived experiences. I could not even claim I managed to cover everything about the topics on debate; it is nearly impossible! They significantly exceed a single person's power of comprehension. I have only provided my own perspective on the legal system, on the battles and struggles that happen and on the values that help us remain righteous, regardless of what goes on around us.

I have summarised the most relevant moments that I have lived through. I have reached conclusions that led me to believe that only integrity and professionalism will help us be upright in any circumstance. Attacks against the rule of law values will surely exist in the future; persons who commit antisocial deeds will always fight against an independent justice, which shall try to hold them accountable.

These battles, however, must toughen us and acknowledge to us that integrity and professionalism remain the building blocks for the career of any judge or prosecutor and will help them carry out their activity freely. In the end, it is in turbulent times that a person's steadfast belief in the fundamental values truly emerges and can be revealed. Scandals come and go, but integrity, responsibility, sternness and no compromise are the fundamental values that remain for ever, provided that you possess them. Moments such as these are not to be desired, but when they do occur, your only option is to fight and stay righteous; you cannot give up the fundamental values defining your private and professional life.

The belief in the fundamental values will help us always act with dignity and impartiality. Under any conditions, we can continue to be an example of professionalism, dedication and exceptional human and professional value, both for society and for the generations to come. And I shall not give in to the illusion of adopting, by means of bombastic words, some unrealistic ideals. This perspective fuels my hope that we can build every day upon the foundation of justice so as to effect the change we desire. We have all the inner resources to take action. We have the potential!

We are confident we will manage to add a solid building block to the edifice of truth and the endeavour of delivering justice in society.

Conclusions

Raluca Alexandra Prună

"Injustice anywhere is a threat to justice everywhere".
Martin Luther King Jr.

This book is more than a collective volume written by magistrates, judges and prosecutors, who left their robes aside to be vocal in defence of justice in Romania. The book is a testimony of a consistent political attack against justice throughout the 2017-2019 interval, a guide for the survival of magistracy faced with this unprecedented and well-organised onslaught targeting a power of the state.

The Romanian society must not forget the date of January 31, 2017. It is, first of all, the date when an older, but a more subtle siege formally commenced with the nocturnal adoption of an emergency ordinance. The siege was owned by the government, throughout it no holds were barred and no rules were abided by, it was launched not only against magistrates enforcing justice and revealing judicial truth, but also against the rule of law and citizens. The democratic game rules started being rewritten during the game, to favour certain people in a position of power. Secondly, it is the date when justice was denied the quality of public service, robbed of the blindfold that kept it impartial and asked to become biased. The entire State apparatus was formally requested to stoop to serving private interests at odds with the law and the judicial system enforcing it, whereas the defences of certain individuals against the effects of criminal laws started bypassing law courts as per the legal procedures and resorted to changes in the law intended to undermine the said court procedures. Finally, it is also the date when all of Romania's interests, including citizens' safety, come second to the goal of saving a handful of individuals. On January 31, 2017, Romanian people took to the streets, straight into a cold winter night, to condemn de adoption of an emergency ordinance that they had taken as a declaration of war from the current government.

The siege followed for nearly three years, across well-planned stages of justice undermining justice and disintegration of its organising laws, led by the government and the Parliament majority. The society reacted by means of massive protests that filled the streets with protests by hundreds of thousands of demonstrators for weeks on end. The magistracy itself showed it had the antibodies required to defend justice as a public service against an unparalleled political attack. The requests signed by thousands of magistrates and protests on the front steps of law courts and prosecutor's offices became a hallmark of defending the rule of law in Romania. For if there is no

justice, there can be no rule of law, either. The magistrates who waded in for this book accurately diagnose the events and also propose the only possible cure: reverting to the stomped principles and re-placing justice on a pedestal of European and international best practices.

Why is justice important?

It is a known fact that justice is one of the fundamental powers in a state upholding the rule of law. Justice, though, may just be the power lying on the thinnest ice. The rules on organising and financing justice depend on the other powers of the state. The effectiveness of democracy relies on the fine balance reached by the powers of the State. For a young democracy such as Romania's, justice is all the more important as it provides the foundation on which we are to build a sustainable rule of law.

The genuine reformation of the judicial system means a solid foothold, anchored in non-negotiable principles and bordered by red lines that cannot be trespassed. In Romania, this reform was a formal and intense process within the negotiations for the country's accession to the European Union. As a direct participant in these negotiations, the goal of which was to guarantee the independence of the judiciary, I know it was an arduous process. The Justice and Internal Affairs issues were negotiated last, right after the adoption in the summer of 2004, after a nearly four-year reform, of a set of justice laws on organising the judicial system, the status of magistrates and the Superior Council of Magistracy[1]. We became a member state, set to prove that adopting that set of laws would lead to sustainable effects, the independence of the judiciary as an irreversible process and an effective control of corruption. To that end, a cooperation and verification mechanism (CVM) was set up and permanently used by the European Commission to assess Romania's post-accession progress, with a view to completing the judiciary reform and enforcing a solid corruption prevention and control policy[2]. The mechanism was conceived as a support transitional measure for Romania to reinforce the said objectives, with a ten-year maximum lifespan. Throughout these ten years, since its accession, Romania did make progress, fluctuating at times on account of the government. Nevertheless, as in January 2017, the status of justice and the efforts to control corruption had been making constant progress, as concluded by the latest reports. All the more regrettable is that this entire progress and the whole argument of long-lasting and sustainable changes were sacrificed for group interests in January 2017. The last CVM report, published in October 2019[3], reiterates a rollback from the

[1] The set of justice laws comprised Law no. 303/2004 on the status of judges and prosecutors, Law no. 304/2004 on the judiciary organisation and Law no. 317/2004 on the Superior Council of Magistracy.

[2] The cooperation and verification mechanism was set up as a transitional mechanism, as per the European Commission Decision of December 13, 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 (2006/928/CE), following the Council of Ministers conclusions from October 17, 2006.

[3] (*https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_ro*).

progress made in previous years and the European Commission's concerns about the rule of law in general and the course taken by the reform of the judiciary and the fight against corruption.

Is the siege over? Is there peace now?

As I am writing these lines, justice is no longer under any siege, and neither the governing circles, nor the party that launched the siege make any more aggressive statements. As at this date silence has long fallen, only to be broken by fake news on justice and a debate shift from the attack upon the rule of law to magistrates' privileges. It cannot, thus, be said for sure that the justice undermining strategy is a thing of the past. The effects of the 2017-2019 siege continue to emerge. The justice laws adopted by the besiegers are entirely in force – including the provisions condemned as usurping independent justice.

As at the date these lines are being penned down, though a new government has been in place for nearly 10 months, the laws the old majority passed through Parliament, as per a special procedure and aided by a special commission, are still generating disastrous for the state of justice in Romania. Today, we are witnessing political hesitations to mend what was broken and restore the solid foundations justice was deprived of in 2017.

I shall not delve into what had to be done. By means of professional associations, Romanian Judges' Forum in particular, or on their own behalf as they did in this book, but also as active participants in the life of our citadel, magistrates wrote exactly what needs to be done. Our institutional partners from the European Union, by way of the annual reports under the Council of Europe's cooperation and verification mechanism (GRECO[1], the Venice Commission[2]), by way of ad hoc reports or opinions on the 2018 changes to the justice laws, identified everything that infringed upon the independence of the judiciary.

Under these conditions, it is surprising to see that people interested in destabilising justice are now vocal in challenging the constitutional elections or in relation to the 2004 organic laws enacted by Romania in the field of organising justice. Through the racket, such voices only wish to hide from public scorn the exclusive purpose of this siege – defending outside law courts, with unequal weapons targeting the rule of law, people undergoing criminal court proceedings. The 2018 changes brought to the organising laws were most extensive and aimed at bringing the magistracy and justice in Romania to their knees – from the provisions on doubling the magistrates' initial training period at the National Institute of Magistracy to special mechanisms investigating judicial

[1] The Group of States against Corruption (GRECO), a Council of Europe body, the Ad hoc Report of March 23, 2018 on Romania (*https://rm.coe.int/ad-hoc-report-on-romania-rule-34-adopted-by-greco-at-its-79th-plenary-/16807b7717*).

[2] The Venice Commission (the European Commission for Democracy through Law), a body affiliated to the Council of Europe, dealing with constitutional issues. The opinion on October 20, 2018 on the amendment of the justice laws (*https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)017-e*).

crimes – both unprecedented in any other European Union member state. The full effects of all these changes are visible today, since no provision was repealed. And every passing day makes it more difficult to strike the pre-2017 balance. I am not saying that justice before 2017 was a perfect system – it still was a poorly funded system, overwhelmed with millions of case files, at times with excessive delay until settlement. All these remain issues not at all unique to Romania. Many of the European Union's judicial systems are facing the same challenges. By 2017, a level of securing the judicial system independence had been reached. What makes the judicial system in Romania stand out post-2017 is the frail and perilous state to which it had been brought.

From 2017 onwards, we have been witnessing the careful shaping of an anti-justice story. The media, as well as society influencers have rooted into the collective mentality false issues of justice. Nowadays, in dialogues on the independence of the judiciary and its significance, it often happens that arguments are brought on magistrates' special status. Justice has been whirled into the public debate on how to fairly distribute limited budget resources, a trend that, sadly, keeps gaining ground.

What would peace look like? A positive agenda for justice

A reversal to the pre-siege state and the correction of the laws must be done in stages. First, **the repealing, as a matter of urgency, of the most controversial provisions**, such as the dissolution of the Judicial Crime Investigation Department and the reconsideration of the duration of training with INM (the National Institute of Magistracy), followed by the **adoption of a new set of justice laws reaching a consensus** among magistrates, the political establishment and society. Nothing is to be invented, no time must be lost. It can all be done within a reasonable timeframe. There are both draft laws to start from, subject to ample debates among magistrates in the Superior Council of Magistracy, professional association and the general public, as well as published proposals of the professional associations and Council of Europe experts via GRECO and the Venice Commission. These would be the first two stages deemed urgent and necessary. We know what we have to do, but are still short of political will.

A positive agenda for justice entails not only mending what was ruined and restoring for justice its operating parameters, able to guarantee fairness in the enforcement of the rules underlying the deployment of justice, but also **diagnostic** and **construction** so as to effectively guarantee a quality judicial process, as well as a positive narrative on the role of justice within a society built upon law.

For too long, justice in Romania has been stuck in the foundation laying and re-laying stage. After the siege of these recent years and the past year of inaction and hesitation, **faith in justice** must be restored. Not at all by chance, Eurobarometers of recent years show a decreasing faith in justice, down from 53% in 2016 to 47% in 2020[1]. One must

[1] Faith in justice has been following a downwards path since 2016, according to the Eurobarometers employed on a yearly basis in EU member states (*https://ec.europa.eu/romania/sites/romania/files/raportul_national_eb_86.pdf*; *https://ec.europa.eu/romania/news/20200710_tablou_bord_justitia_ue_ro*).

reinforce within the public mentality the idea of justice as a public service, regaining public trust in this system and the independence of the judiciary. Justice-related public policies cannot be optional, but mandatory for any political platform. In addition, fake news must be controlled by reiterating the truth about justice and those who serve it. It must be said that representatives of the other powers of the state can simultaneously exercise several remunerated functions, whereas magistrates must comply with the strictest rules on incompatibilities. The law allows members of the legislator to exercise their core profession (physician, attorney, engineer, notary) and members of the Executive to exercise, under certain conditions, other remunerated activities, including holding shares or stocks in trading companies, subject to certain requirements on conflicts of interests. Magistrates are forbidden these by law. Magistrates also have an obligation of reserve, which also makes it difficult to defend one's profession and justice as a power of the state and a public service. The magistrates' obligation to refrain from any "defamatory manifestation or speech towards the other powers of the state" was added to this obligation of reserve, as per the 2018 legal amendments. The effect is a legal weakening of justice as a power of the state, given that magistrates cannot go public and condemn fake news about justice and the severe slippage of the other powers. It becomes the duty of the more informed public and (ideally) the representatives of the powers of the state, bound to cooperate loyally, to condemn false speeches on justice and those enforcing it. Ultimately, our political establishment must deal with the fact that a prolonged attack against justice leads, in the medium and long run, to a loss of public faith in the State itself.

A short-term positive agenda entails a **diagnostic**, an up-to-date X-ray of the justice system. One must identify the reasons why justice in Romania is overwhelmed by the immense caseload. I shall only mention the often poor-quality legislation, leading to numerous unconstitutionality exceptions and inconsistent interpretations of the law, and the lack of legislative predictability. Organic laws, such those on the organisation of the judiciary, cannot be amended every few years. Numerous other reasons are already described by the magistrates themselves in this volume.

An efficient public service cannot exist in the absence of a **coherent construction policy**. The judicial system architecture must be anchored within an unequivocal constitutional framework[1] and organising laws unable to be altered depending on a given political context. The judicial architecture must reflect the broader needs of the judicial system and receive adequate funding. The chronic shortage of resources within the justice system is a well-known topic. One of the devastating effects of the latest changes to the justice laws is a dire human resource crisis set to reach its peak in 2021. The lack of financial resources forces the judiciary in Romania to operate

[1] A constitutional clarification is required for the alleged subordination of prosecutors to the minister of justice, the latter appearing to be revered by Decision 358/2018 of the Constitutional Court. The Court mentions in its decision that *the minister of justice does not enjoy administrative authority but, on the contrary, he or she has unlimited jurisdiction in terms of authority upon prosecutors. […] The notion of authority carries a significant weight, being defined as the power to issue orders or bind someone to comply, however, in the given constitutional context, it regards a decision-making power to draw a path for prosecutors' careers.*

within insecure premises, without computerisation, and to deprive both magistrates and other participants in the act of justice of the gravity required to serve justice and citizens of a quality service. Previous attempts at financing justice, to a fair extent, from legal stamp duties were negated by a constant refusal in Parliament.

A positive agenda for justice endows the judicial system with the necessary tools – clear and predictable laws that facilitate the ascertainment of judicial truth and do not obstruct by way of convoluted procedures the enforcement of justice. Paradoxically for a country where justice is endlessly subject to attacks, providing access to justice is frequently mistaken in Romania for the judicial system operational lockdown for reasons that should not reach a magistrate's desk. It becomes, therefore, necessary to reconsider the jurisdictions of law courts, to better balance the caseloads among jurisdiction tiers and to redesign the judicial map exclusively based on effectiveness criteria.

All these elements are integral parts of an ambitious agenda needed by an independent and functional justice system in Romania.

I would like to conclude on an optimistic note. Not because we might have reached a political consensus concerning justice in Romania, nor as I might believe that a reversal to the state before the siege is easy to achieve. I am optimistic given that, for the most part, Romania has an active and involved pool of magistrates. A magistracy collective for whom the rule of law and the protection of fundamental rights – such as the right to access justice – are actual beliefs instead of mere strings of words in the Constitution and conventions. This volume is testimony to, and supported by the consistent voice of the Romanian magistracy who, on behalf of the rule of law principles and the general interest of having an independent, functional and effective judicial system, knew better than to give in to an exclusively political siege.

It is vital for us to proceed with urgency. Time has come for the other powers of the state, as well, to take action, and for magistrates to be allowed to put on their robes once again and no longer be forced to stand guard at the gates of justice and the citadel.

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* The numbers in bold indicate the page number.