ATITUDINI

Situation Regarding the Romanian Judicial System at the end of 2018

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Abstract:

By the Decision 2006/928/EC of December 13th, 2006 of the European Commission was established a Cooperation and Verification Mechanism of progress made by Romania created for achieving specific benchmarks in the field of the judicial reform and the fight against corruption. Within this mechanism it was noted that the European Commission had identified unresolved issues, in particular regarding the accountability and efficiency of the judiciary system of Romania.

In the context of Romania joining the European Union in 2007, the justice system of the former communist state seems to have changed and efforts were made to be aligned with those of the democratic states of Western Europe. But all this happened until 2017.

In this article we will present the state of facts concerning the bills on Romanian Judiciary, the repeated and unprecedented attacks on the judges and prosecutors in 2018 and how some of the amendments of the Criminal Code and Criminal Procedure Code adopted by the Romanian Parliament contravene to the rule of law.

The obstacles that the current Government imposes on the fight against corruption and, more broadly, the risks to the independence of judges and the possibility for prosecutors to pursue their careers serenely, do not make it possible at present, to put end to the Cooperation and Verification Mechanism.

Rezumat:

Prin Decizia 2006/928/CE a Comisiei Europene din 13 decembrie 2006 a fost instituit un Mecanism de cooperare și verificare a progreselor înregistrate de România pentru realizarea unor repere specifice în domeniul reformei judiciare și al luptei

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împotriva corupției. În cadrul acestui mecanism, Comisia Europeană a identificat aspecte nerezolvate, în special în ceea ce privește responsabilitatea și eficiența sistemului judiciar din România.

În contextul aderării României la Uniunea Europeană în 2007, sistemul judiciar al fostului stat comunist părea să se fi schimbat, ca urmare a eforturilor făcute pentru a fi aliniat cu cele ale statelor democratice din Europa de Vest. Dar toate acestea s-au întâmplat până în anul 2017.

În acest articol vom prezenta situația curentă cu privire la modificările aduse legilor privind sistemul judiciar român, atacurile repetate și fără precedent asupra judecătorilor și procurorilor din anul 2018 și modul în care unele dintre amendamentele aduse Codului penal și Codului de procedură penală, adoptate de Parlamentul României, încalcă statul de drept.

Obstacolele pe care actualul guvern le pune luptei împotriva corupției și, în general, riscurile pentru independența judecătorilor și posibilitatea procurorilor de a-și desfășura cariera fără influențe exterioare și în condiții de stabilitate nu fac rezonabilă, în prezent, înlăturarea Mecanismului de cooperare și verificare.

Keywords: judicial system, Judicial Inspection, Superior Council of Magistracy, magistrates' liability regime, status of judges and prosecutors, Venice Commission, European Commission, freedom of expression of the judges and prosecutors, GRECO, Romanian Constitutional Court

1. State of facts concerning the bills on Romanian Judiciary

1.1. Introduction

During 2017 and 2018, three bills were adopted for the generically called laws "of judiciary", i.e. Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on judicial organisation, and Law no. 317/2004 on the Superior Council of Magistracy, all republished, subsequently amended and supplemented.[5]

A significant number of amendments, which were heavily criticized by the *European Commission for Democracy through Law (Venice Commission)*, *the Group of States against Corruption (**GRECO**)* or by *the European Commission* are extremely harmful for magistracy, being necessary to postpone or suspend the enforcement of the concerned provisions until the date of their complete review, or, as the case may be, the abrogation of those provisions which are in force.[6]

In principle, the legislature and the executive from Romania should immediately consider the Opinion issued on October 20, 2018, by the Venice Commission so that the destruction of magistracy is avoided. This is

[5] Law no.207/2018 for the amendment and supplementation of the Law no. 304/2004 on judicial organisation was published in the Official Gazette of Romania, Part I, no. 636 of 20 July 2018, being enforced three days after its publishing date. Law no. 234/2018 for the amendment and supplementation of the Law no. 317/2004 on the Superior Council of Magistracy was published in the Official Gazette of Romania, Part I, no. 850 of 8 October 2018, being enforced three days after its publishing date. Law no.242/2018 for the amendment and supplementation of the Law no. 303/2004 on the statute of judges and prosecutors was published in the Official Gazette of Romania, Part I, no. 868 of 15 October 2018, being enforced three days after its publishing date.

[6] For details, **Dragoș Călin, Ionuț Militaru, Claudiu Drăgușin**, Aktuelle Gefahren für die Justiz in Rumänien, in Betrifft JUSTIZ no. 132 von Dezember 2017, pp.217-219.

enlightening for the compliance with the standards of the rule of law in Romania in numerous aspects regarding the amendments made to the laws of judiciary, and it cannot be endlessly disregarded, the recent public developments seriously endangering the independence of the judiciary and the trajectory of Romania within the European Union and the Council of Europe, as previously ascertained by the European Commission and GRECO.[7]

We recall that The Romanian Constitutional Court refused to implement the recommendations of the Venice Commission, arguing in the following sense:

"29. In respect of the request submitted by the author of the unconstitutionality referral to set a deadline for debates next to issuance by the Venice Commission of the legal opinion on the bills regarding Romanian judiciary, regulated through Law nr. 303/2004, Law nr. 304/2004 and Law nr. 317/2004, opinion which was asked for by the President of Romania on the 3rd of May 2018, one day before the Constitutional Court was lodged with the present complaint case, Plenum of the Court, reiterating those stated in the Decision nr. 33/23.01.2018, par. 54-55, holds as it follows:

The standpoint asked for is related to the main capacity of the international body, consisting of providing legal opinions to asking Member States with regard to already enacted legislation or amending bills, context in which the Venice Commission may be lodged with by subjects as the Parliament, the Government or the President of the State, according to article 3 point 2 of the Statute adopted on 21st of February 2002 by The Committee of Ministers.

30. Given the stage of the constitutional procedure regarding the Law nr. 317/2004 on Superior Council of Magistracy, meaning the law was finally enacted by the Parliament and may be submitted to the constitutional check, *the Court finds that given its competence to perform the check exclusively according to the Constitution provisions, the legal opinion of Venice Commission cannot be redeemed via this procedure*.

The recommendations of the international body could have been implemented exclusively in the parliamentary process of enacting or amending living legislation, the Constitutional Court being enabled to perform the compliance check of already enacted law with the Constitution, certainly not to balance the opportunity of one or another legal solution, power strictly granted to the legislative according to its policy of amending the existing judiciary laws."[8]

2. Targeted criticisms regarding the amendments of the three laws

• According to the Opinion of Venice Commission of October 20, 2018, the

[7] For a radiography of the Romanian magistracy and Romanian politics, see **Reinhard Veser**, Staatsanwälte entlässt man nicht, in Frankfurter Allgemeine Zeitung, October 27, 2018, https://search.proquest.com/docview/2125503809?accountid=134368 [last accessed on November 17th, 2018]; **Thierry Portes,** La Roumanie, pays d'un seul parti, in Le Figaro, December 18, 2018, http://premium.lefigaro.fr/international/2018/12/17/01003-20181217ARTFIG00212-la-roumanie-pays-d-un-seul-parti.php [last accessed on December 19th, 2018]; **Michael Peel, Valerie Hopkins**, EU steps up criticism of Romania over rule of law, in Financial Times, https://www.ft.com/content/0b74c360-d862-11e8-a854-33d6f82e62f8 [last accessed on November 17th, 2018].

[8] See Romanian Constitutional Court, Decision nr. 385/2018 on Law nr. 317/2004, regarding the reasoning on rejecting the setting of deadline debates after the issuance of the opinion of Venice Commission. The same reasoning is to be found in the Decision nr. 357/2018 on Law nr. 304/2004.

legislature and the executive from Romania are bound **to immediately rethink the system of appointing/ discharging the prosecutors in senior management functions**, in order to provide the conditions for a neutral and objective appointment/discharge process by maintaining the role of some of the authorities, like the President and the Superior Council of Magistracy (CSM), which are capable of counterbalancing the influence of the Ministry of Justice. Mrs. Laura Codruța Kovesi was discharged from her office of Chief Prosecutor of the National Anticorruption Directorate under the Decree no. 526/2018 issued by the President of Romania as a result of the Decision no. 358 of 30 May 2018 of the Romanian Constitutional Court.[9]

Moreover, Venice Commission suggested that, in the context of an ampler reform, the principle of independence should be added to the list of principles which govern the activity of the prosecutors.[10]

• The limitations proposed with regard to the **freedom of expression of the judges and prosecutors** should be eliminated, and the provisions regarding the **material liability of the magistrates** should be reviewed, modifying the mechanism of deploying the recourse action.

Through Opinion no. 934/2018, Venice Commission, with regard to the freedom of expression of the magistrates, considered 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. 130. 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.51 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?*"[11]

The lawmaker failed to comply with its obligation set forth by the Romanian Constitutional Court to identify and regulate those infringements of the rules of substantive or procedural law which are within the scope of the notion of judicial error in the sense of the considerations from Decision no. 252/2018, but it has kept a general definition in principle of the judicial error, referring to other necessary regulations in order to supplement such definition.

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[9] "The Romanian Constitutional Court has backstabbed the Romanian President in his efforts to protect the independence of the chief anti-corruption prosecutor. On 30 May 2018, the Constitutional Court ordered the President to dismiss the chief anti-corruption prosecutor via presidential decree. Before, the President had refused the proposed dismissal by the Minister of Justice based on an Advisory Opinion of the Superior Council of Magistracy that stated that the reasons brought forward against the chief prosecutor were not substantiated enough to justify a dismissal." See **Bianca Selejan Guțan,** The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court, https://verfassungsblog.de/the-taming-of-the-court-when-politics-overcome-law-in-the-romanian-constitutional-court/ [last accessed on November 17th, 2018].

[10] CDL-AD(2014)010, paragraph 185.

[11] See the web page https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)017-e [last accessed on November 17th, 2018].

Even though, as a result of bringing the law into line with Decision no. 45/2018, the lawmaker has regulated a procedure by which the recourse action is not automatically initiated – mentioning that the initiation of the recourse action takes place after submitting a consultative report of the Judicial Inspection[12] and after "own evaluation" of the Ministry of Public Finance – the omission of the regulation by law of a clear procedure through which such "own evaluation" should be carried out is capable of causing unpredictability in enforcing the rule.

This aspect is also rendered evident in the Opinion of Venice Commission, which states that criteria are not provided for carrying out own evaluation of the Ministry of Public Finance, a body of the central public administration, and that such institution, which is not part of the judicial system, does not represent the best solution with regard to its inclusion in this procedure, not being possible for it to have a role in the assessment of the existence or causes of the judicial errors. These could be established through disciplinary proceedings.

• It is necessary for the legislature and the executive **to cancel the establishment of a separate prosecutor's office structure for the investigation of the offences committed by judges and prosecutors.**

The European Commission's latest Cooperation and Verification Mechanism (CVM) report, released on November 13, 2018 notes that Romania has reversed the progress of its judicial reform and the fight against corruption and comes with new recommendations to remedy the current situation.

The Section for the Investigation of the Judiciary Offences was established as part of the Prosecutor's Office attached to the High Court of Cassation and Justice, which shall allow to forward tens of files of high-level corruption on the dockets of the National Anticorruption Directorate by simply filing fictitious complaints against a magistrate, destroying a significant volume of DNA activity constantly appreciated by MCV Reports.[13]

While, under Decision no.33/2018, the Constitutional Court dismissed as unfounded the unconstitutionality criticisms regarding the effects which the enforcement of this new prosecutor's office structure generates on the jurisdiction of other already existing structures, the regulation of rules which refer to the statute of the prosecutor, creation of a new discriminatory regime not founded on objective and rational

[12] The Judicial Inspection is a structure with legal person status organised within the Superior Council of Magistracy, lead by a Chief Inspector, appointed after a competition organised by the Superior Council of Magistracy. The Judicial Inspection acts according to the principle of operational independence, performing, through the judicial inspectors appointed under the law, analysis, verification and control tasks in the specific fields of activity. For details, **Dragoș Călin, Ionuț Militaru, Claudiu Drăgușin**, Romanian Judicial System. Organization, Current Issues and the Necessity to Evoid Regres, in Tsukuba Journal of Law and Politics, 75/2018, pp.1-14.

[13] In the Report regarding the progress made by Romania in the Cooperation and Verification Mechanism (November 2017), the European Commission stated that "*in general, a positive assessment of the progress achieved in the reference objective no. 3 (fight against high-level corruption) is based on an independent National Anticorruption Directorate, which to be capable of carrying out its activity with all the available instruments and to continue to obtain results*." In this report it is provided that the National Anticorruption Directorate continued to obtain results despite the fact that it had dealt with significant pressure. Moreover, the European Commission states that *"in case of pressures with negative effects on the fight against corruption, the Commission might be constrained to revaluate such conclusion."*

criteria, the modality of regulating the institution of the chief prosecutor of this section or the jurisdiction of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice to solve the conflicts of jurisdiction which occur between the structured of the Public Ministry, still, in the Opinion of October 20, 2018, Venice Commission suggested to reconsider the establishment of a special section for the investigation of the magistrates.

Alternatively, it was proposed to use specialized prosecutors at the same time with efficient procedural safeguard measures. Venice Commission established that "The use of specialized prosecutors in such cases [corruption, money laundry, trade of influence etc.] was successfully engaged in many states. The concerned offences are specialized and can be better investigated by specialized personnel. Moreover, the investigation of such offences often requires persons with special expertise in very specific fields. Provided that the deeds of the specialized prosecutor are subject to an adequate judicial control, it brings many benefits and there are no general objections to such system." *CDL-AD (2014)041, Interim Opinion regarding the draft law on Special State Prosecutor's Office of Montenegro, paragraphs 17, 18 and 23*[14].

In the Ad-Hoc Report on Romania (Rule no. 34) adopted by GRECO, during the 79th Plenary Reunion (Strasbourg, 19-23 March 2018), it was indicated that the section appeared as *"as an anomaly in the current institutional set-up, in particular 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. It has also been pointed out that this body would be immediately overburdened due to the (draft) arrangements providing for the immediate transfer of many cases from other prosecution services, whilst its small staff is not commensurate to dealing with them (15 in total according to draft legislation). 34. Moreover, this new section would be dealing with criminal offences even if other persons are involved, together with magistrates (e.g. civil servants, elected officials, businessmen etc.), according to the wording of the intended amendments to article 88[1] paragraph 1of law n°304/2004. As many have pointed out, this could lead to conflicts of jurisdiction with the existing specialised offices (DNA, DIICOT, military prosecutor's offices), even though the authorities recall that such conflicts are normally sorted out by the Prosecutor General. More importantly, there are also fears that this section could easily be misused to remove cases handled by the specialised prosecution offices or interfere in sensitive high-profile cases if complaints against a magistrate were lodged incidentally in that case as it would automatically fall under the competence of the new section (a decision would then need to be taken to split that case under the general criminal procedure law on the grouping/splitting of cases, for it to remain in the hands of the originally competent prosecutors)."*[15]

[14] Please, go to http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)041-e [last accessed on November 17th, 2018].

[15] See the web page https://rm.coe.int/ad-hoc-report-on-romania-rule-34-adopted-by-greco-at-its-79th-plenary-/16807b7717 [last accessed on November 17th, 2018].

• The lawmaker from Romania should **waive the provisions which set forth a double period of training at the National Institute of Magistracy (four years instead of two years).**

In the opinion of Venice Commission published on October 20, 2018, doubling the period of training at the National Institute of Magistracy, combined with other modifications (like changing the structure of the panels, anticipated retirement etc.) could seriously affect the "efficiency and quality of the judicial process". Moreover, the institutional blockage that could be generated by the aforementioned provisions affects even the application of justice and its independence both in the institutional component, which regards the good operation of the judicial system, and also in its personal component, which refers to the independence of the judge.

• Based on the new provisions, **meritocracy shall be eliminated from the magistracy**, for example, the actual promotion in the superior prosecutor's offices and courts being done based on subjective criteria, i.e. "assessment of activity and conduct within the last three years", at the High Court of Cassation and Justice being doubled by a formal interview before the Plenary of the Superior Council of Magistracy, eliminating the practical and/or theoretical written examinations and enforcing a visible promotion control system.[16]

By maintaining only the interview examination for applicants, the professional standards are relativized, with effect on the quality of the activity of the Supreme Court judges, and the subjectivism dose is enhanced. On the other hand, the subject of the interview, as it is provided at Article 52^4, paragraph (1) of Law no. 303/2004, is identical to that of the verifications carried out by the Judicial Inspection in the procedure provided by the Regulation regarding the promotion in the position of judge at the High Court of Cassation and Justice. In other words, all the data which are the subject of the interview are found in the Report prepared by the judicial inspectors upon the verifications whose subject is precisely this: "integrity of the applicants and the way in which the applicants relate to the values like the independence of legislative and impartiality of judges, motivation and "their human and social" skills.

The inequity in regulating the procedures of promoting to superior courts is all the more obvious as the degree of professional exigency should be directly proportional to the hierarchy of the law courts in the Romanian judicial system, being necessary for the activity at the supreme court to be carried out by judges who have proven that they have thorough theoretical and practical knowledge in the specialization for which they apply.

With these decisions, the international deeds which set forth the fundamental principles regarding the independence of judges – importance of their selection, professional training and conduct and of objective standards necessary to be complied with both when entering the profession of magistrate and upon enforcing the promotion modalities – are also blatantly disregarded.

The Committee of Ministers of the Council of Europe has constantly recommended to the governments of the member states to adopt or consolidate all the necessary measures to promote the role of judges, in an individual way, but

[16] The written examination was eliminated from the competition for promotion in the position of judge at the High Court of Cassation and Justice.

also of magistracy, in an aggregate way, in order to promote their independence, by especially applying the following principles: "(...) any decision regarding the professional career of judges should be based on objective criteria, the selection and promotion of judges should be based on merits and depending on their vocational training, integrity, skills and efficiency" (please, see the Committee of the Ministers of the Council of Europe, *Recommendation no. 94/12 of 13 October 1994, with regard to the independence, efficiency and role of judges*).

Any "objective criteria" which are intended to guarantee that the selection and career of judges are based on merits, considering the vocational training, integrity, capacity and efficiency" cannot be defined but in general terms. First of all, it is intended to provide content to the general aspirations for the purpose of "appointing based on merits" and "objectivism", aligning the theory to reality. The objective standards are required not only to exclude the political influences, but also to prevent the risk of favouritism, conservatism and "nepotism", which exists to the extent that the appointments are made in an unstructured manner. Although adequate vocational experience is a prerequisite condition for promotion, the seniority in the modern world is no longer generally accepted as the dominant principle of determining the promotion.

In the Ad-Hoc Report on Romania (Rule 34) adopted by GRECO during the 79th Plenary Reunion (Strasbourg, 19-23 March 2018), it was considered as follows: *"31. The intended amendments still contain a proportion of subjectivity in the selection and decision process concerning promotions, which contemplates a two-phased promotion procedure, the latter phase consisting of an assessment of one's past work and conduct. The amendments also provide for the CSM to develop and adopt rules on the procedure for organising such assessments including appointments to the responsible commission and the particular aspects to be assessed. The GET heard fears that this new system would leave more room for personal or political influences in career decisions, which could impact the neutrality and integrity of the justice system and it would thus be essential that the CSM develops appropriate rules to guard against such risks, including clear and objective criteria to guide the future decisions of the selection commission."*[17]

• **Retirement of the Romanian magistrates shall be possible at the age of 42-43.**

The amendment introduces the possibility for such retirement of the judges of prosecutors who have 20 to 25 years of seniority in magistracy to be possible even before reaching the age of 60. A massive retirement among magistrates[18] automatically leads to an

[17] See the web page https://rm.coe.int/ad-hoc-report-on-romania-rule-34-adopted-by-greco-at-its-79th-plenary-/16807b7717 [last accessed on November 17th, 2018].

[18] See **Romanian Judges' Forum Association – White paper – Amendments to the laws of judiciary – potential collapse of the Romanian magistracy,** a study available at http://www.forumuljudecatorilor.ro/index.php/archives/3137 [last accessed on November 17th, 2018]. The replies received from various judiciary authorities are found at 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 [last accessed on November 17th, 2018].

overburdening of the courts and to actual blockages of the judicial system operation. Therefore, the concerned regulations have a direct impact on exercising the fundamental right of access to justice and the right of the citizens to case solving within a reasonable period, being contrary to Article 21 of the Romanian Constitution (delays in solving the files because of the necessity to re-docket the cases as a result of judges before whom evidences have been directly submitted or who have participated in court investigation or debates ceasing their activity, dismissal of the cases as a result of expiring the limitation periods etc.).

In the Opinion of Venice Commission, it was stated that such amendment represents a real danger for the continuation of the fight against corruption in Romania. The quantum of the pension calculated for the retired judges and prosecutors currently exceeds the quantum of the indemnity received by the judges and prosecutors in office by 30% thanks to more favourable fiscal provisions.

• **The introduction of the panels consisting in three judges (instead of two) for solving the hearings, and of the panels consisting in two judges to judge the appeals against the decisions delivered by the judges of rights and freedoms and the judges of preliminary chamber from the courts of appeals** has a direct impact on the good operation of the courts and on their degree of burdening them, and it implies a significant reduction of the time allocated to judges in order for them to reasons the decisions, provided that the number of judges from these courts remains the same, a fact which indirectly affects the settlement of the cases within a reasonable period. Moreover, in the absence of an impact study regarding the effect of such provision on the human resources of the courts and on the settlement of the cases within a reasonable period and especially on the degree of burdening the courts, the legislative solution induces a risk of blockage which the law courts are subject to.

• **The role and prerogatives established by the Constitution for the Superior Council of Magistracy, as a collegiate body, is modified** although the rearrangement of the roles and prerogatives between CSM Plenary and CSM Sections affects the constitutional role of CSM and exceeds the constitutional prerogatives specific to the Sections contrary to Article 125, paragraph (2), Article 133, paragraph (1), and also to Article 134, paragraphs (2) and (4) of the Romanian Constitution. If it were to accept the possibility for the prerogatives of the Plenary of the Superior Council of Magistracy, meaning of the Superior Council of Magistracy as collective and representative body, to be distributed to the twosections of the Superior Council of Magistracy, it would mean that two structures of Superior Council of Magistracy type would operate *de facto* – one for the judges and one for the prosecutors.[19] On one hand, this legislative solution denies the constitutional role

[19] The Superior Council of Magistracy is composed of 19 members: a) 9 judges and 5 prosecutors, elected in the general assemblies of judges and prosecutors; b) 2 representatives of civil society, specialists in the field of law, who enjoy high professional and moral reputation, elected by the Senate; c) the President of the High Court of Cassation and Justice, the Minister of Justice and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, as *ex officio* members. The Superior Council of Magistracy functions in Plenum, but also in two sections: the judges' section and the prosecutors' section. The Judges' Section of the Superior Council of Magistracy consists of: a) 2 judges from the High Court of Cassation and Justice; b) 3 judges from

established by the constituent lawmaker for the Superior Council of Magistracy as the sole constitutional authority representative for the magistrates, and, on the other hand, it would determine the significant exacerbation of the decisional "corporatism" of the sections, an aspect which would affect not only the independence of judiciary, but also the constitutional principle of fair cooperation within the court authority, such fair cooperation resulting from the fact that the decisions concerning the independence of the court authority, except the disciplinary ones, are taken in Plenary, with the participation of the representatives of the magistrates, but also of the representatives of the institutions with significant prerogatives in and with regard to the court authority (President of the High Court of Cassation and Justice, General Prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice and the Minister of Justice). The constituent lawmaker has established a constitutional authority within the framework of the court authority which collectively exercises, in its aggregate, a wide series of constitutional and legal prerogatives, while the sections exercise only those prerogatives which the Constitution has expressly entrusted to them, and also other legal prerogatives, but which are closely connected to the constitutional role provided at Article 134, paragraph (2) of the Constitution. In other constitutional systems, where the constituent intended to make a net distinction between the professional staff of the judges and the professional staff of the prosecutors, distinct judicial councils were established precisely under the fundamental law. In France or Belgium, which are traditional constitutional models also for Romania, the presidents of the supreme courts have been speaking out within the last years for the unity of magistracy within the same council.[20]

Even though the assessment made by Venice Commission converge towards separation of the careers in magistracy, the only way by which the strict separation of the careers of judges and prosecutors is possible without the risk of declaring unconstitutional such modification is represented by a constitutional revision.

Moreover, the representative members of the civil society are excluded from most of the decisions, especially considering the new distribution of prerogatives between sections, although the Superior Council of Magistracy is a collective body, which should operate as a rule and not as an exception in composing all of its members.

• **The reorganisation of the Judicial Inspection shall unjustifiably enforce the prerogatives of the head inspector** who shall appoint, among the judicial inspectors, those who shall occupy the management positions (as a result of a simple evaluation of the management

the courts of appeal; c) 2 judges from the county courts; d) 2 judges from the district courts. The Prosecutors' Section of the Superior Council of Magistracy consists of: a) 1 prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice or from the National Anticorruption Directorate; b) 1 prosecutor from the prosecutor's offices attached to the courts of appeal; c) 2 prosecutors from the prosecutor's offices attached to the county courts; d) 1 prosecutor from the prosecutor's offices attached to the district courts. For details, **Dragoș Călin, Ionuț Militaru, Claudiu Drăgușin**, Romanian Judicial System. Organization, Current Issues and the Necessity to Evoid Regres, in Tsukuba Journal of Law and Politics, 75/2018, pp.1-14.

[20] For more details, please, see Judges' Forum Review no.1/2017, pages 15-16 - http://www.forumuljudecatorilor.ro/index.php/archives/2706 [last accessed on November 17th, 2018], and also the webpage https://www.courdecassation.fr/venements_23/derniers_evenements_6101/magistrature_bertrand_37040.html [last accessed on November 17th, 2018].

projects specific to each management position), practically controlling the selection of the judicial inspectors, managing and controlling the inspection activity and the disciplinary investigation activity, being the main authorising officer and the only holder of the disciplinary action. All these modifications are aspects which indicate a qualification of the professional standards imposed to the management of the Judicial Inspection with the consequence of eliminating its operational independence.

This trend generates negative effects with regard to the quality of the activity of the Judicial Inspection in the field of liability of the magistrates, and, consequently, it is capable of endangering the independence of the justice and the constitutional role of the Superior Council of Magistracy of guarantor of the independence of judiciary. The enforcement under the law of a provision which, on the one hand, promotes the subjectivism of the head inspector in appointing the management of the Judicial Inspection and, on the other hand, enforces a complete dependence of all the management mandates within the Inspection on the mandate of the head inspector, is an infringement of the principle of providing security of the judicial reports in exercising the management mandates by the respective judicial inspectors.

The activity of the Judicial Inspection raises many concerns in terms of public perception, because following strictly online the statistics of the High Court of Cassation and Justice rulings in disciplinary matters (as the current SCM no longer publishes on the site its rulings in disciplinary matters since 2017, despite orally assumed transparency) one can find that between January 2017 – September 2018 were upheld 29 disciplinary actions and another 27 rejected, all concerning judges, while with regard to prosecutors 11 were upheld and 12 were rejected, the percentage of ”innocent found magistrates” being of 50% out of the total submitted to disciplinary SCM panels (sometimes the High Court of Cassation and Justice overturned SCM judgements initially confirming the approach of the Judicial Inspection). Some of High Court rulings even found the disciplinary proceedings formally invalid, which shows blatant systemic deficiencies or flagrant miscarriages, unconceivable for the performance level expected from the Judicial Inspection. In the same reference time, more than 75% of Judicial Inspection’s deeds concerning virtual misconduct of magistrates were rejected, a major part of them as time barred.

Moreover, as numberless disciplinary deeds are targeting the General Prosecutor of Romania or the Chief Prosecutor of the Anticorruption Directorate, as well as their deputies alongside other magistrates who publicly and individually fought the bills on Judiciary, while national and international relevant bodies (Venice Commission, GRECO, European Commission) also found it inappropriate, especially since no final disciplinary sanction was enforced to each of them, it is obvious that the Judicial Inspection activity reflects a negative impression.

For example, the Prosecutors’ Section of SCM delivered ruling nr. 376/ 26.06.2018 as outcome of settling on the Judicial Inspection report nr.2314/IJ/588/ DIP/2018 and found there are no clues on breaching the art. 17 of the Judges and Prosecutors Conduct Code by Augustin Lazăr, General Prosecutor of the Prosecutor’s Office attached to the High Court of Justice and Cassation, rejecting the proceeding against him.

The same Prosecutors’ Section of SCM delivered rulings with majority on 13th June 2018 and 25th July 2018

resulting in rejection of disciplinary proceedings against Laura Codruța Kovesi, Chief Prosecutor of the Anticorruption Directorate.

On the 13th September 2018, a similar rejection ruling was delivered with regard to Marius Constantin Iacob, Deputy Chief Prosecutor of the Anticorruption Directorate and Carmen Simona Ricu, Chief Section Prosecutor within the Anticorruption Directorate.

On the 27th June 2018, a similar rejection ruling was delivered with regard to Florentina Mirică, another Chief Section Prosecutor within the Anticorruption Directorate.

The High Court of Justice and Cassation delivered the final judgment nr. 54/26.03.2018 which overturned a SCM disciplinary ruling (file nr. 11/IJ/2017) against judge Ioan Fundătureanu from Pitești Court of Appeal as unsubstantiated.[21]

The European Commission's latest Cooperation and Verification Mechanism (CVM) report, released on November 13, 2018 notes that Romania has reversed the progress of its judicial reform and the fight against corruption and comes with new recommendations to remedy the current situation:[22] *"Justice laws:* suspend immediately the implementation of the Justice laws and subsequent Emergency Ordinances; revise the Justice laws taking fully into account the recommendations under the CVM and issued by the Venice Commission and GRECO. *Appointments / dismissals within judiciary:* suspend immediately all ongoing appointments and dismissal procedures for senior prosecutors; relaunch a process to appoint a Chief prosecutor of the DNA with proven experience in the prosecution of corruption crimes and with a clear mandate for the DNA to continue to conduct professional, independent and non-partisan investigations of corruption, the Superior Council of Magistracy to appoint immediately an interim team for the management of the Judicial Inspection and within three months to appoint through a competition a new management team in the Inspection; respect negative opinions from the Superior Council on appointments or dismissals of prosecutors at managerial posts, until such time as a new legislative framework is in place in accordance with recommendation 1 from January 2017."

2. The repeated and unprecedented attacks on the judges and prosecutors

In December 2017, more than one thousand of Romanian judges, prosecutors, and trainee magistrates silently protested in front of their institutions, holding their robes or the Constitution, but most of them showing printed versions of the common oath they took when sworn into office at the beginning of their career.[23]

In essence, the protests came after the Parliament adopted the so-called "justice laws", consisting in substantial changes in the three main laws affecting the organization and the statute of the judiciary without taking into consideration

[21] See the web pages http://www.ziare.com/stiri/csm/csm-i-a-taiat-salariul-unui-judecator-care-a-criticat-intr-un-editorial-decizia-ccr-in-cazul-ordonantei-13-1505807 and https://ziarulargesul.ro/sanctionarea-unui-judecator-pitestean-anulata-de-inalta-curte/ [last accessed on November 17th, 2018].

[22] See the web page https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en [last accessed on November 17th, 2018].

[23] See, for details, http://video.euronews.com/mp4/EN/NW/SU/17/12/19/en/171219_NWSU_2502163_2502229_66000_232813_en.mp4 [last accessed on November 17th, 2018].

the firm opposition of more than half of the judiciary. Moreover, the silent protests concerned the announced changes in the criminal codes which would dramatically limit the investigation powers of police and prosecutors, as well as the possibility to protect the victims and identify criminals, no matter the nature of the crime (murder, theft, rape, corruption etc.).

Bucharest, Cluj, Constanța, Timișoara, Iași, Galați, Craiova, Pitești, Brașov, Bacău, Baia Mare, Suceava, Botoșani, Brăila, Satu Mare, Oradea, Călărași, Miercurea Ciuc, Zalău, Slatina, Târgoviște, Târgu Mureș, Tulcea, Piatra Neamț, Sf. Gheorghe are the main cities where magistrates protested against the actions of the Parliament.

During and after these protests, there were some voices in the news that challenged the right to protest, saying that the law forbids judges and prosecutors to protest in any way, the Judicial Inspection having been recently notified with regard to the participation of some judges to the most recent protest staged on the steps of Bucharest Court of Appeal on 16th of September 2018.

To begin with the domestic law, we must say that the law only forbids political reunions by judges and prosecutors, not any sort of public reunion and gathering. Therefore, art. 9 from the Statute of Judges and Prosecutors states that judges and prosecutors cannot be members of political parties, nor carry out or participate in political activities, being also forbidden to publicly state or in any way show their political preferences.[24]

Romanian judges and prosecutors did not protest against a political party or another (an activity strictly forbidden without a doubt),[25] but against public policies adopted in the field of justice, affecting them directly as main stakeholders, along with each and every citizen or resident of the country.

Therefore, the question is not whether they can, but rather why and when magistrates absolutely should protest, as the independence of the judiciary is not a privilege of judges and prosecutors, but a fundamental right of every person.

In reply to all social movements fighting the current legislative changes, on June 9, 2018, the Social Democratic Party and government partners organized a large-scale rally against the magistrates in Bucharest (with over 150,000 participants). The messages explicitly targeted justice, with the rationale that the political power would prevail over the independence of "unreformed" institutions, calling for the termination of the so-called "abuses" not only as a form of pressure on magistrates who have criminal cases, even in the deliberation stage, which is a very dangerous precedent. The hardness of the political discourse, from the cataloguing of magistrates to generalizing statements as "corrupt", "Stalinist," "secular," "tortured," culminating in the absolutely unacceptable name of "rats" to the principles of democracy and to the whole "scenario" of the political rally,

[24] "The passage, in 2004, of the SCM, from an extreme to another, from total dependence to total independence, resulted in an increased autonomy of the judiciary, and in a greater authority of the SCM within the judicial system, but it had little effect on transparency and accountability. Moreover, even in such an autonomous form, *the Romanian Judicial self-governments system was not sufficient for Protecting the true Independence of the judiciary against repeated assaults from the political sphere*." See **Bianca Selejan-Guțan**, Romania: Perils of a "Perfect Euro-Model" of Judicial Council, in German Law Journal, Vol. 19 No. 07, 15 December 2018, pp.1707-1740.

[25] For details, please see the web page http://www.forumuljudecatorilor.ro/wp-content/uploads/Protestele-magistratilor-din-Romania-18-21-decembrie-2017.pdf [last accessed on November 17th, 2018].

the "props" used and the so-called "will of the people" to circumvent the "elected" by the legal means of attracting criminal liability, associated with the statement of "street "," to the end "outlines the image of a serious threat to the independence of justice. Also, in a TV show following this event, the President of the Chamber of Deputies, Nicolae Liviu Dragnea, threatened the DIICOT prosecutors not investigating a pending complaint in the performance of their duties, accusing them of "risking to pay hard" for the solution.[26]

After Decision no. 358 of 30 May 2018 of the Romanian Constitutional Court,[27] prosecutors are being put under the complete and unlimited control of the Minister of Justice, ignoring the role of the Superior Council of Magistracy in managing the career of these magistrates. As long as a chief prosecutor can be revoked by the discretionary appreciation of a politician, even if he is the Minister of Justice, any form of independence is excluded, as it creates an excessive political influence.[28] According to Annex IX of the Accession Treaty, Romania

[26] See the web page http://www.digital journal.com/news/world/romanian-judges-protest-ruling-party-chief-s-attacks/article/524407 [last accessed on November 17th, 2018]. The Romanian Judges' Forum Association sent to the Superior Council of Magistracy a request to defend the independence of the judiciary against the attest attacks of the leading representatives of the legislative and executive power, which materialised in the speeches of some political leaders on 9 June and 10 June, respectively. For details, *TCA Regional News*, Chicago, June 11, 2018, https:// search.proquest.com/docview/2052750933? accountid=134368 [last accessed on November 17th, 2018].

[27] "(…) According to the Court's own organic law on organisation and function (Article 2 §3), "the Constitutional Court decides only as regards to the constitutionality of acts on which it has been seized and cannot change or complete the controlled dispositions". **A fortiori**, the Court should have no power to impose a certain content of an act of a political authority. If the Court cannot oblige the Parliament to adopt a certain legal text, it cannot dictate the President to issue a decree with a certain content, as both are elected authorities with high democratic legitimacy. by this highly controversial decision, the Constitutional Courts contradicts its own case law regarding the presidential powers in relation with the judiciary. In 2005, the Court firmly stated that "if the President of Romania had no right to examine and appreciate on the proposals made by the Superior Council of Magistracy for the appointment of judges and prosecutors in leading positions or if he/she had no right to refuse, by motivated decision and at least only once, such appointments, the role of the President according to Articles 94 §c and 125 §1 of the Constitution would be devoid of contents and importance". This is all the more true, I would add, when the dismissal proposal comes from a minister and the Superior Council of Magistracy advises against it. The present decision means, besides devoiding of contents and importance the role of the President, the total overlooking of the role of the Superior Council of Magistracy in a case that is strictly related to the judiciary's internal matters. (…) This ruling of the Romanian Constitutional Court proves, firstly, how easily a Constitutional Court majority (6 to 3 in the present case) can be used as a tool by the political power, by disregarding its own case law and the basic principles of constitutional review in the wider meaning. Secondly, this ruling aims at the heart of the Romanian constitutional system as a whole, by transforming it from a semi-presidential one (a directly elected President with more limited powers than in a presidential system) into a hybrid parliamentary one (a directly elected President with a merely formal role). The potential precedent created by such a decision would mean the devoiding of contents of all powers of the President by future similar decisions, should the President be in conflict with the political majority that controls the Court. This type of political involvement is unacceptable for a Constitutional Court that is considered the guardian of the Constitution and the enforcer of the rule of law in a constitutional democracy." See **Bianca Selejan Guțan**, The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court, https:// verfassungsblog.de/the-taming-of-the-court-when-politics-overcome-law-in-the-romanian-constitutional-court/ [last accessed on November 17th, 2018].

[28] See **Venice Commission, Opinion no. 731/ 2013 CDL-AD (2014)010 on the draft law on the review of the Constitution of Romania**: "184. The Venice Commission acknowledges that there are no international standards Requiring the independence of the prosecution service. At the same time, the Commission stresses, as it did in its Report on the European Standards as regards the

undertook the obligation to ensure the effective independence of the National Anti-Corruption Direction, violated through the revocation of its chief prosecutors at the discretion of the Minister of Justice.

The story of this decision goes back on 22nd of February 2018, when Justice Minister Tudorel Toader announced the start of the dismissal procedure regarding the head of DNA, stating as reasons authoritarian behaviour and prioritization of solving the cases with a media impact.

In the substantiation of the negative report issued on the Justice Minister's demand to have the DNA Chief Prosecutor dismissed from office, the CSM's Section for Prosecutors stated in Decision **no.52/27 February 2018** that the dismissal request makes no mention of any legal prerogative infringed, the managerial component concerned not being specified.

Likewise, according to the substantiation, even though the Justice Minister said that his dismissal request concerns all the components of the DNA Chief Prosecutor's managerial prerogatives, **"one notices the existence of a generic listing of the managerial components, without concrete individualisation: of the resources illegally used, of the behavioural deficiencies, of the legal prerogatives that were not carried out (…)"**

Following the Head of State refusal, based on SCM decision, to dismiss the DNA Chief Prosecutor Laura Codruța Kovesi, the Government lodged a request for the Constitutional Court to settle on a constitutional conflict between the Justice Ministry and the Presidency, the Decision nr. 538 being delivered on 30th of May 2018 and establishing that there is a constitutional conflict between those two afore head mentioned and that the Head of State must sign the decree dismissing DNA Chief Prosecutor Laura Codruța Kovesi.

Hence, the CCR decision also announced what measures must be taken so that this institutional conflict between the President and the Justice Minister would cease to exist, indicating to the Head of State the dismissal of the DNA Chief Prosecutor.

"Thus, regardless of the authority that generated the juridical conflict of a constitutional nature, it has the obligation, within the coordinates of the rule of law, to observe and comply with the things noted by the decision of the Constitutional Court. In this case, the Court notes that the fulfilment of the conditions regarding the regularity and the legality of the procedure indubitably results from the address through which the Romanian President refused to comply with the proposal to dismiss Ms Laura Codruța Kovesi from the office of Chief Prosecutor of the DNA. Consequently, the Romanian President is set to issue the decree dismissing from office the Chief Prosecutor of the National Anticorruption Directorate, Ms Laura Codruța Kovesi," the substantiation reads.

Independence of the Judicial System: Part II: Prosecution Service, that "only a few of the countries belonging to the Council of Europe have a prosecutor's office forming part of the executive authority and subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. [...] Also, it is important to note that in some countries, subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases. Even in such systems, however, the fundamental problem remains as there may be no formal safeguards against such intervention. The appearance of intervention can be as damaging as real interference [...]."

The Constitutional Court decided:

"*1. Notes the existence of a juridical conflict of a constitutional nature between the Justice Minister and the President of Romania, generated by the latter's refusal to comply with the proposed dismissal of the Chief Prosecutor of the National Anticorruption Directorate, Ms Laura Codruța Kovesi.*

2. The President of Romania is set to issue the decree dismissing from office the Chief Prosecutor of the National Anticorruption Directorate, Ms Laura Codruța Kovesi. Final and generally mandatory. The decision will be communicated to the President of Romania, the Prime Minister and the Justice Minister, and will be published in the Official Journal of Romania, Part I," the document, which has 133 pages, reads.

In the reasoning of its decision regarding the institutional conflict between the President and the Justice Minister, the Constitutional Court shows that the Head of State assumed prerogatives that he does not have when he rejected the dismissal of DNA Chief Prosecutor Laura Codruța Kovesi, thus blocking the minister's authority over the activity of prosecutors.

"Based on the analysis of the Romanian President's address, through which he refused to comply with the proposed dismissal of National Anticorruption Directorate Chief Prosecutor Laura Codruța Kovesi, the Court establishes that the Romanian President noted the regularity and legality of the dismissal procedure, his only objections having to do with the advisability of the measure. In this context, the Court notes the existence of a juridical conflict of a constitutional nature between the Justice Minister and the President of Romania, generated by the latter's refusal to comply with the proposed dismissal of the Chief Prosecutor of the National Anticorruption Directorate, Ms Laura Codruța Kovesi," reads the CCR reasoning.

The Romanian Constitutional Court shows that, since President Klaus Iohannis had no objection regarding the regularity of the dismissal procedure, it means the procedure met the legality criteria, however the President assumed prerogatives he does not have.

"The President of Romania should have issued the decree dismissing from office the Chief Prosecutor of the National Anticorruption Directorate. Refusing to issue it, the Court is set to establish whether the President of Romania created a blockage in what concerns the exercise of the Justice Minister's authority over the activity of prosecutors. In this sense, it can be said that, by assuming a *contra legem* role, the President of Romania impeded the fulfilment of the Justice Minister's own constitutional prerogative, blocking it without the Constitution giving him such a prerogative. Consequently, the President of Romania's conduct of not exercising his prerogatives in line with the Constitution resulted in the Justice Minister's impossibility to exercise the constitutional prerogatives conferred by Article 132, Section 1, of the Constitution."

The CCR states that an institutional gridlock between the two authorities thus resulted, impeding the completion of the Justice Minister's proposal to have Laura Codruța Kovesi dismissed.

"The Justice Minister's authority over the activity of prosecutors imposes similar constitutional effects in regard to the act issued in connection with the prosecutor's career, an aspect nevertheless refused by the President of Romania, who chose not to allow the Justice Minister's proposal to follow its natural constitutional course, blocking it and thus creating an obvious situation of institutional blockage between the two authorities," the reasoning reads.

The CCR decided on May 30, 2018 that Romania's President is to issue the decree to remove chief prosecutor of the National Anticorruption Directorate (DNA) Laura Codruța Kovesi from office, following the finding of a legal constitutional conflict determined by the head of state's refusal to follow up with the Justice Minister's request to remove the DNA head form office.

The Romanian Constitutional Court debated the request to solve the judicial constitutional conflict between the Justice Minister and Romania's President, firstly, as well as that between the Government and Romania's President, secondly, determined by the head of state's refusal to follow up with the request to remove chief prosecutor of the DNA Laura Codruța Kovesi from office.

The Court decided that the Prime Minister holds the right to notify the CCR for the settlement of a legal constitutional conflict.

In respect to the Justice Minister's quality as part within the legal constitutional conflict, it was established that the latter is expressly nominated through the article 133, the paragraph (1) of the Constitution, which stipulates the following "Public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice."

"The Court decided that, in case of the dismissal of the prosecutor from leadership positions, stipulated by the article 54, the paragraph (1) of the Law No.303/2004, the Justice Minister acts within some strict limits imposed by law, in the form of cases that objectively justify the dismissal of the prosecutor from a management position. The President of Romania, under the provisions of the article 94 letter c) of the Constitution, doesn't have a discretionary power within the dismissal procedure, but a power to verify its regularity. It results that the prerogative of the President of Romania to revoke the prosecutor from a leading position is exclusively limited to a control regarding the regularity and legality of the procedure," the CCR says.

In the CCR view, the President doesn't have the constitutional authority to bring forth opportunity arguments in relation to the dismissal proposal initiated by the Justice Minister under the law.

"Or, in this respective case, Romania's President refused to issue the dismissal decree of the chief prosecutor of the National Anticorruption Directorate (DNA) on opportunity grounds, and not on legal grounds, which created a blockage in respect to the Justice Minister's exerting his authority over the prosecutors' activity. Therefore, the conduct of Romania's President, that of not exercising his authority according to the Constitution, determined the Justice Minister's impossibility to exercise his constitutional authority granted by the article 132, the paragraph (1) of the Constitution, which determined a legal constitutional conflict," the release mentions.

The CCR also shows that, taking into account the its jurisprudence, it also established the constitutional conduct that must be followed in this case, namely the issuance by President Klaus Iohannis of the decree to remove chief prosecutor of the DNA from office.

In the official communiqué issued on May 30 announcing its decision on the existence of a juridical conflict of a constitutional nature between the Justice Minister and the Romanian President, generated by the Head of State's refusal to comply with the proposed dismissal of the DNA Chief Prosecutor, the Constitutional Court pointed out that the Head of State is set to issue the decree dismissing from office the Chief Prosecutor of the National Anticorruption Directorate.

"The President of Romania is set to issue the decree dismissing from office the Chief Prosecutor of the National Anticorruption Directorate, Ms Laura Codruța Kovesi. The decision is final and generally mandatory and will be communicated, in line with Article 36 of Law no.42/1992, to the President of Romania, the Head of the Romanian Government, and the Justice Minister, and will be published in the Official Journal of Romania, Part I," the Constitutional Court's communique reads.

Following the dismissal serial of high-ranking prosecutors, Justice Minister Tudorel Toader presented on 25th October 2018 the report regarding the managerial activity of the Chief-Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, announcing he started the procedures for the removal from office of Prosecutor General Augustin Lazar.

Toader added that the facts listed in the report are "intolerable" for the rule of law, and Lazar's managerial activity violates his constitutional and legal obligations. "We consider that the actions and deeds listed in this report, intolerable for the rule of law, show that Mr Augustin Lazar's managerial activity violates his constitutional and legal obligations. Given the circumstances, the continued occupation and exercise by Mr Lazar of the highest office of the Public Prosecution Service is no longer tenable. All the evidence presented support the seriousness of the behaviours, the public messages of the attorney general who, through the management implemented, hijacked the activity of the Public Prosecution Service away from its constitutional role," said Toader.

The assessment report on Augustin Lazar's activity has been handed to the Superior Council of the Magistracy and its Section for Prosecutors has heard the Prosecutor General on November 13.[29] Currently, the request was communicated to the President of Romania.

3. Some of the amendments of the Criminal Code and Criminal Procedure Code adopted by the Romanian Parliament contravene to the rule of law

3.1. Introduction

In Romania, the amendments made to the Criminal Code and Criminal Procedure Code, despite numerous calls of the Romanian magistrates and European and international organisations addressed in all the possible forms, in hundreds of latest actions, seem to leave perplex the entire civilized world.

[29] The Romanian Judges' Forum Association and the Movement for Defending the Status of Prosecutors have requested the minister of Justice, Tudorel Toader to abandon the procedure for revoking the Prosecutor General Augustin Lazar. Such a procedure, that basically bypasses the guarantor of the independence of justice, namely the Superior Council of Magistracy, the role of which is simply decorative and disobeys the right to defence of a prosecutor subjected to being revoked, was deeply criticized by the Venice Commission, the GRECO and the European Commission and jeopardizes Romania's path in the European Union and in the European Council and the very democratic existence of the Romanian state, not to mention the negative and discouraging signal sent to an important part of the Magistrates Body. In the context of altering and amending the package regarding the functioning of the judicial system in Romania, the Venice Commission underlined, throughout the Opinion no. 924/2018, the necessity of ensuring the autonomy of prosecutors' offices from the perspective of the way of appointing and revoking from office of the head prosecutors, so that they can ensure the protection of magistrates from political meddling. For details, *TCA Regional News*, Chicago, Oct 25, 2018, https://search.proquest.com/docview/2124689261?accountid=134368 [last accessed on November 17th, 2018]. More than 2,000 judges and prosecutors expressed their support to the request to Minister of Justice Tudorel Toader to abandon the procedures for removing Romania's attorney general.

They were adopted under emergency proceedings, without an actual dialogue with the relevant actors, without serious impact studies or the involvement of all the technical experts that could have provided support during the action, mainly the international ones.

We shall provide below the critical aspects concerning the amendments of the Criminal Code and the Criminal Procedure Code adopted by the Romanian Parliament, which are reasoned by the lawmaker as necessary for concordance with the decisions of the Constitutional Court, Directive 2016/343/EU of the European Parliament and Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, but which contravene to the rule of law.

Contrary to the generally undertaken goal, the individual situation of the President of the Romanian Senate criminally charged by the High Court of Cassation and Justice is mentioned in the initial form of the explanatory memorandum of one of the concerned projects: "a concrete case which illustrates these aspects is the one made public, that of the current President of the Senate, former Prime Minister, candidate for the presidency of Romania, who had been intercepted almost all the time from 2008 until 2014 (…), even though he was not charged for any offence resulted from those interceptions, but they were used to prove indirect facts in a file of false testimony".[30] As a result of numerous public remarks which correlated with the amendment of the laws with the settlement of individual issues of the politicians from the majority coalition in the final form of the explanatory memorandum, all those explanations disappeared.[31]

3.2. Aspects regarding the Law for the amendments and supplementation of Law no. 286/2009 on Criminal Code, and also of Law no. 78/2000 for the prevention, discovery and sanctioning of corruption acts

3.2.1. Amendment of the abuse of office offence

In reality, we are dealing with a *de factor* decriminalisation of this offence provided at Article 297 of the Criminal Code, and the elements introduced by the lawmaker are not related to the constitutionality of the rule: reduction of the punishment at maximum 5 years of imprisonment (from 7 years in the standard form provided at Article 298 of the Criminal Code, and from 14 years in the aggravated form provided at Article 13^2 of Law no.78/2000), and exclusion of the possibility to prohibit rights, like the one of being elected or of occupying the position which facilitated the perpetration of the offence, an aspect which is not included in any decision of the Romanian Constitutional Court and it is not justified in any way by the initiator of the law.

The effects which this amendment is going to cause should be regarded, on the one hand, in relation to the periods of limitation and, on the other hand, by reference to the characteristics of the offence and deployment of the criminal trial and to the incidence of other criminal

[30] For more details, please see http://media.hotnews.ro/media_server1/document-2018-04-18-22400602-0-expunere-motive-psd-modificare-cpp.pdf [last accessed on November 17th, 2018].

[31] See http://www.cdep.ro/proiecte/2018/300/70/3/em373.pdf [last accessed on November 17th, 2018].

law institutions, like extended confiscation.

The reduction of the punishment has as immediate effect the calculation of the period of limitation considering a different category of offences regarded by the lawmaker as being less serious, a five year limitation period being applicable and possible to extend to seven years and six months, if the criminal investigation of a person is initiated in the case. By comparison, the aggravated version currently has a limitation period of ten years, which may be extended up to 20 years, in case of a special limitation. The immediate effect of such amendment shall be represented by the ascertainment of the expiry of the limitation period for the offences which were committed prior to 2011, irrespective of the fact that they are in the criminal investigation phase or trial phase. A similar effect which can be statistically analysed was generated by the amendment of the provisions of Article 215, paragraph (5) of 1968 Criminal Code through a reduction of the punishment from 15 years to five years. The reduction of the punishment, having as consequence the reduction of the periods of limitation of the criminal liability, is not in any way substantiated or deducted from acute and current social needs. On the contrary, the frequent number of such offences and the continuous infringement of the law by persons occupying different public offices do not justify such legislative intervention, which, in addition to the fact that it encourages the violation of the criminal law due to the relaxation of the conditions for incrimination, makes possible the occurrence of another type of abuse committed without any unfair material advantage through which the public and private institutions can be practically stripped.[32]

The proposed incrimination builds the foundation of an autocratic system, because it does not allow the punishment of forms of abuse of office alien to obtaining patrimonial advantages, consolidating organised crime networks engaged in knowingly stealing the public resources or undermining the Romanian State and the general interests of the society, taking advantage of the insufficient general regulatory framework regarding the national safety of Romania.

Last, but not least, it should be considered that the abuse of office is usually observed after a longer period of time since its perpetration, whether during controls carried out by administrative authorities or as a result of them being found by the new management of the institution. Therefore, there is the possibility for the judicial authorities to find

[32] The Romanian Judges' Forum Association draws attention to the adverse consequences that the amendments to the Criminal Code on reducing the limitation periods may have on the way in which the judicial authorities will fulfil their legal duties, as well as the legitimate interests of the society, considering that these changes will not result in eradicating "abuses", but rather in preventing the investigation of criminal cases, especially complex ones. Finding, investigating and judging, within the limitation period, corruption offenses and assimilated offenses involving high-ranking civil servants may become illusory, devoid of any practical result of preventing and combating criminal phenomena. In the absence of impact, sociological research studies and criminological assessments, there will be a quasi-immunity for these civil servants, without an objective and reasonable justification. Under these circumstances, the Judges' Forum Association warns that the legislative amendments concerning the limitation terms may have the effect of violating at least nine articles in the Romanian Constitution. Reducing limitation periods makes the investigation of these offenses illusory and not effective, thus violating the provisions of Art. 16 paragraphs 1 and 2 of the Constitution: "(1) Citizens are equal before the law and the public authorities, without privileges and without discrimination. (2) No one is above the law". For details, *TCA Regional News*, Chicago, July 6, 2018, https://search.proquest.com/docview/2064835806?accountid=134368 [last accessed on November 17th, 2018].

out about the existence of the offence after 1-5 years as of its perpetration. The actual investigation of the crime until indictment often implies the submission of technical evidence, like the expertise, which can take a long period of time, hearing numerous witnesses, reviewing the deeds, preparing letters rotatory when the funds are outsourced, evidence which is impossible to submit within short periods of time, by complying with the rights of the parties.

The introduction of the qualified purpose as specific element by inserting the collocation "for the purpose of obtaining a material patrimonial advantage" as an element which is not invoked in a decision of the Constitutional Court is not in accordance with the value protected by the concerned rule and has no objective justification, causing a damage being sufficient in order to qualify the wilful misconduct of the officer as offence.

The abuse of office was incriminated in order to ensure the defence of the social relations regarding the compliance with the job tasks in the public institutions, the infringement of the legal provisions by the public officer and damage causing being considered sufficiently serious in order to be within the scope of the criminal law. Making the existence of a crime contingent on obtaining the material patrimonial advantage would cause sanctioning of an offence through which, for example, the officer has obtained RON 50,000.00 (approximately EUR 10,000.00) by infringing the legal provisions and failure to punish an offence through which the officer has wilfully caused a damage of RON 1,000,000.00 (approximately EUR 200,000.00), but he has not obtained any benefit for himself. Moreover, there is the possibility for the public officer to intend to obtain a non-patrimonial advantage by committing the offence, a situation which is excluded by the lawmaker based on the adopted amendment. Given the current incrimination conditions, many of the offences with high degree of social danger shall eschewed by the incidence of the criminal law, in cases when the perpetrator does not act for the purpose of obtaining a material benefit.

The modification of the text infringes the provisions of the UN Convention against corruption adopted at New York on 31 October 2003 and ratified by Romania under Law no. 365/2004. The proposed text also departs from the relevant European template, which makes of the existence of the qualified purpose (of obtaining an undue material advantage) a condition for the aggravation of the criminal liability of the perpetrator so that and from a certain perspective the introduced incrimination conditions determine the further departure from the relevant international policy focused on fighting corruption, which endangers precisely the democracy.

Making contingent the acquirement of the advantage for "himself/herself, spouse, relative or in-law up to 2nd degree, inclusively) and excluding the most frequent form of abuse, which implies to obtain a material advantage (currently incriminated by Law no. 78/2000) for another person or through the agency of intermediaries, represent aspects that were not sanctioned by the Romanian Constitutional Court. Moreover, the provisions of Article 13^2 of Law no. 78/2000, in the form which also punishes the acquirement of an advantage for a third party, were declared constitutional.

The introduction of a condition regarding the subjective position of the perpetrator in relation to the beneficiary of the product of the offence is capable of unjustifiably restrict the area of incidence of the offence by excluding any persons who would have relations based on interests with the perpetrator, other than

those who have the capacity of spouse, relative or in-law up to the 2nd degree, inclusively. Such condition is neither imposed through jurisprudence of the Constitutional Court. nor through the explanatory memorandum, therefore, clearly resulting that the proposed legislative solution is randomly promoted, without taking into account that Romania has undertaken at international level the obligation to sanction such offences even for the benefit of a third party and without considering the fact that, currently, the intrusion of persons in the criminal chain, committing offences by using "straw men" and focusing on the interests of criminal groups which are obviously not connected through family relations are frequent modalities of committing not only the abuse of service, but also of other types of offences, like taking bribe, tax evasion, money laundry etc. This leads to the exclusion from the field of enforcing the criminal law those offences which are within the notion of abuse of office, but which were committed for the benefit of distant relatives, in favour of a business partner, an agreed company, a group of interest or within the interest of a person who is going to reward at a certain time the public officer with cash, without being possible to establish the connection with the offence of abuse.

The form adopted by the lawmaker is the same with the provisions of Article 301 of the Criminal Code which prohibit, without being necessary the infringement of a legal provision, for the officer to take decisions or award contracts to the family members also listed at Article 297 of the Criminal Code. Moreover, the punishment for the two offences has an identical maximum level of five years of imprisonment, and, surprisingly, in case the officer does not infringe the law and the provisions of Article 301 of the Criminal Code applies the prohibition of the rights for a period of three years is mandatory.

In a practical explanation, if a public officer awards a contract to the company managed by his daughter, which manufactures the assets and could enforce the contract and participates in the auction without infringing the law, he could be punished in the same way, but without prohibiting any of his rights.

By modifying the material element from "failure to comply with a deed" into "the refusal to comply with a deed", there shall be excluded all those situations in which the public officer leaves uncovered a deed which should have been complied with, but he does not express his refusal or such attitude is not requested to him, especially in case the public officer is the manager of the institution, a case in which we could imagine that the number of persons who could request him to express his intention of not complying with the deed is very limited.

The reduction of the periods of limitation for the offences for which the law provides more than 10 years of imprisonment, but less than 20 years of imprisonment, from 10 years to 8 years, is capable of affecting the imputation of liability to the offenders who have committed offences against the financial interests of the European Union resulting in extremely serious consequences.

Under Decision no. 619/2016, the Romanian Constitutional Court assessed that the *lawmaker has the jurisdiction to incriminate offences which are considered a threat for the social values protected by the Constitution*, an expression of the character of the rule of law and democracy, *or to decriminalise offences when the necessity of using the criminal means is no longer justified, but it is obvious that his assessment margin is not*

absolute (please, see Decision no. 2 of 15 January 2014).[33]

Also in the same respect, the Court has pointed out that the assessment margin of the lawmaker, when calling into question the limitation of a constitutional right, in this case Article 23 of the Constitution (Decision no. 603 of 6 October 2015, paragraph 23) or not sanctioning the infringement of social relations which would result in a threat with regard to the rule of law institutions, democracy, human rights, social equity and justice, is limited, being subject to a strict control of the Constitutional Court (Decision no. 2 of 15 January 2014).

Under Decision no. 392/2017 whose separate opinion has not been initially published based on the order of the President of the Constitutional Court, Mr. Valer Dorneanu,[34] the Constitutional Court admitted the exception of unconstitutionality and ascertained that the provisions of Article 248 of 1969 Criminal Code are constitutional to the extent that the collocation "defectively complies with" from these provisions refers to "complies by infringing the law". In the reasoning it was stated that *"the lawmaker is bound to regulate the (financial) value threshold of the damage and the intensity of the damage of the legitimate right or interest resulted from the perpetration of the offence in the content of the criminal rules regarding the offence of abuse of service, its passivity being capable of determining the occurrence of situations of incoherence and instability contrary to the principle of security and legal relations, in its structure concerning the clarity and foreseeability of the law."*

The Constitutional Court of Romania has invoked the Report regarding the relation between the political liability and criminal liability of the members of the Government adopted during the 94th plenary session of Venice Commission of

[33] Thus, the criminal policy measures should be promoted by complying with the values, exigencies and principles enshrined based on the Constitution and expressly and unequivocally undertaken by the Parliament. Therefore, the Constitutional Court continuously emphasizes in its decisions the fact that "incrimination/ decriminalisation of offences or reconfiguration of constitutive elements of a crime is related to the lawmaker assessment margin, a margin which is not absolute, being limited by the constitutional principles, values and exigencies" (Decision no. 683 of 19 November 2014 published in the Official Gazette of Romania, Part I, no. 47 of 20 January 2015, paragraph 16, and, *ad similis*, Decision no. 54 of 24 February 2015 published in the Official Gazette of Romania, Part I, no. 257 of 17 April 2015). Also in this respect, the Court has pointed out that the assessment margin of the lawmaker, when calling into question the limitation of a constitutional right, in this case Article 23 of the Constitution (Decision no. 603 of 6 October 2015, paragraph 23) or not sanctioning the infringement of social relations which would allegedly result in a threat with regard to the rule of law institutions, democracy, human rights, social equity and justice, is limited, being subject to a strict control of the Constitutional Court (Decision no. 2 of 15 January 2014.

[34] **According to Resolution no. 1/2017 issued by the Romanian Constitutional Court**, the attachment to the case file and the publication of the dissenting and concurring opinions shall be at the discretion of the President of the Constitutional Court, although no law allows such a deviation from the legal obligation to publish these opinions. **The Report on separate opinions of constitutional courts, adopted by Venice Commission** at the 117th plenary session of December 14-15, 2018, refers to a decision of the Constitutional Court of Romania of June 22, 2017 which settle rules of drawing up a separate or competitive opinion and forbids sententious, provocative or political considerations: *"46. It is important that a disrespectful 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 or concurring judge. A solution, as had been adopted in Romania for instance by a decision of the Constitutional Court in June 2017 as explained above, allowing the President of this Court to prevent the publication of separate opinions that are considered to bring criticism to the Court, or are considered to be judgmental or ostentatious or political in nature – **is problematic and should be avoided**."*

11 March 2013, but there are indications regarding an erroneous receipt of the recommendations, because the spokesperson of Venice Commission, Mr. Panos Kakaviatos, replied to a request for clarification of essential aspects upon the initiative of Romanian journalist[35], stating as follows: *«The Report regarding the relation between the political and criminal responsibility of the ministers refers, according to its title, only to the situation of the ministers. (…) It provides: (…) Venice Commission considers that the national criminal provisions regarding the abuse of service, excess of authority and other similar expressions should be interpreted in narrow sense and applied with a high threshold so that they can be invoked in cases where the offence is serious, like, for example, serious crimes against the national democratic processes, infringement of fundamental rights, undermining the impartiality of the public administration etc. (paragraph 102). (…) Therefore, the nature of the offence is decisive, and the threshold which it refers to is in no case a financial one. Moreover, this threshold definitely applies only to the general rules from the criminal law on the abuse of office or excess of authority, and not also to other crimes like corruption, money laundry or abuse of trust».*

Without conferring capital value to this clarification originating from the spokesperson of Venice Commission, what can be undoubtedly concluded is that the *Romanian Parliament should request, for the rigorousness of the legislative process, a viewpoint of Venice Commission prior to attributing to its recommendation the modification of the criminal policy of Romania*, starting from an expression used in a certain context that may be assigned different interpretations.[36]

Thus, the "high threshold" appears to refer to the concrete social danger at a high level in terms of damaging the social (patrimonial or non-patrimonial) values, and not at a minimum financial value which to reflect the abstract social danger of the crime.

3.2.2. Supplementation of the provisions regarding extended confiscation

By introducing Article 112^1, paragraph 2^1 – *"(2^1) The decision of the court should be based on certain evidence, beyond any doubt, of which to result the involvement of the convicted person in the criminal activities which generate assets and money."* -, a standard is created for extended confiscation similar to that for conviction, i.e. for special confiscation, in this way limiting the scope of Directive 2014/42/EU of the European Parliament and Council of 3 April 2014 on the freezing and confiscation of the instrumentalities and proceeds of the crime in the European Union.

Paragraph 15 of the Preamble of Directive 2014/42/EU imposes the special confiscation in a separate way and under other conditions, in relation to the extended confiscation, stating that "it

[35] **Liviu Avram**, "Adevărul" Newspaper of 24 September 2017, *Venice Commission: "In no case there is a financial threshold for the abuse of office", see* http://adevarul.ro/news/politica/comisia-enetia-ln-niciun-caz-nu-e-vorba-pragfinanciar-abuzul-serviciu-1_59c7b6035ab6550cb87c4d6d/index.html [last accessed on November 17th, 2018].

[36] Professor Vlad Perju (Boston College) indicates that the documents from the Venice Commission were wrongfully interpreted and that wrong references were inserted when doing the comparative research with the judicial system in France and Germany. For details, **Vlad Perju**, *Constitutional analysis of the Decision no.358/2018,* study available at http://www.contributors.ro/reactie-rapida/analiza-constitutionala-a-deciziei-ccr-3582018/ [last accessed on November 17th, 2018].

should be possible, provided that a definitive sentence of conviction for a crime is given" – an institution which corresponds in the national law to the provisions of Article 112 of the Criminal Code and to the similar provisions of the special legislation on the special confiscation. With regard to extended confiscation, paragraph 21 expressly stipulates that it should be possible in case a court considers that the concerned assets are the result of criminal activities. This does not mean that it should be ascertained that the concerned assets are the result of criminal activities. For example, the member states may provide that it is sufficient for the court to evaluate, based on the probabilities, or to reasonably presume that it is significantly more probable for the concerned assets to have been obtained as a result of criminal activities than of other activities. The court should review the specific circumstances of the case, including the available offences and evidences based on which a decision could be taken with regard to confiscation. Moreover, Article 5, paragraph (1) of the directive provides that "the member states adopt the necessary measures in order to allow full or partial confiscation of the assets of a person convicted as a result of committing a crime which is susceptible of directly or indirectly generating economic benefits when, based on the case circumstances, including on *de facto* elements and available evidence, like the fact that the value of the assets is disproportionate in relation to the legal income of the convicted person, a court considers that the concerned assets resulted from criminal activities."

3.2.3. Amendment of the criminal law principle according to which the discontinuation of the course of the limitation should cause effects in relation to all the participants to the committal of a crime. Significant reduction of the duration of the special limitation period

Article 155, paragraph (2) of the Criminal Code was amended in the sense that "*[a]fter each discontinuation, a new limitation period starts to elapse in relation to the person in favour of whom the limitation period starts to elapse as of the moment when the procedural document is communicated."*

Thus, this effect shall be limited only to the person in relation to which the a procedural document was communicated, a fact which infringes the principle of equal rights, considering that two persons in similar situations (for example, co-authors of a crime) may be subject to different legal consequences, if the judicial body of criminal investigation or the law court communicated a procedural document only to one of them. In jurisprudence, it was ascertained that there is not always that all the participants in committing a crime are known, especially when they are instigators or final beneficiaries of the benefit of the crime. The proposed provision is capable of favouring precisely these participants who are whether the abettors of the crime or the beneficiaries of the crime, often showing a high degree of social danger in relation to the other partners.

Moreover, the amendment enforced through paragraph (3) of paragraph 155 of the Criminal Code significantly reduces the duration of the special limitation period, at the same time with the reduction of the general limitation periods and the punishment limits for some of the categories of crime. The effect of this amendment consists in the fact that numerous persons who have committed crimes shall not be held criminally liable, in this way affecting the constitutional balance between the rights of the persons suspected of committing crimes and the general interests of the society.

3.2.4. Obligation to enforce the decision of the Constitutional Court as a more favourable criminal law

Article 173 of the Criminal Code was supplemented with four new paragraphs, i.e. paragraphs (2) – (5), having the following content: "*(2) The decisions of the Constitutional Court which have general mandatory character are also assimilated to the law in accordance with paragraph (1). (3) The obligation of enforcing the decisions of the Constitutional Court as a more favourable criminal law, provided at paragraph (2) refers to both their operative part and considerations. (4) The execution of the punishments, educative measures and safety measures established under the law subjected to the control of constitutionality provided at paragraph (2), and also all the criminal consequences of the court decisions regarding these offences are reviewed ex officio, in an urgent manner, within maximum 15 days as of their publishing in the Official Gazette of Romania, Part I. (5) The review provided at paragraph (4) shall be done also at the request of the convicted person, who may submit the request at any time."*

But these provisions infringe Article 147, paragraph (4) of the Romanian Constitution, which, with regard to the decisions of the Constitutional Court, enshrine that "as of the publishing date, the decisions are generally mandatory and they are valid only for the future." Practically, the decisions of the Constitutional Court are transformed into laws, which can whether retro-activate or ultra-activate, also being possible for them to represent grounds in choosing a decision as a more favourable criminal law in a given case. But the decisions of the Constitutional Court may be assimilated to laws and they may not acquire retroactive character.[37]

3.2.5. Partial decriminalisation of such offences which are provided as crimes of corruption or office when they are committed by a public officer or in relation to such officer

The abrogation of Article 175, paragraph (2) of the Criminal Code ("*within the meaning of the criminal law, the person who exercises a service of public interest for which he/she was vested by the public authorities or who is subject to their control or supervision with regard to the compliance of the respective public service is considered public officer*") determine the decriminalisation of the offences committed by or towards these persons by the officer, and contravenes to the obligations resulting from Chapter III of UN Convention against corruption by reference to the definition of the "public agent" from Article 2 of the Convention.

Under Decision no. 2/2014, the Constitutional Court of Romania has established that the Romanian legislation on fight against corruption and abuse of office committed by public officers is compliant with the requirements of the relevant international regulations, which, according to the provisions of Article 11, paragraph (2) of the Constitution, upon ratification, they become part of the domestic law. Notions like "public agent"/ "member of the national public meetings"/ "national officer"/"public officer" have correspondents in the valid Romanian criminal legislation in the notions of "public officer" and "officer"."

[37] With regard to the law non-retroactivity principle, under Decision no. 126/2016, the Constitutional Court established that it is valid for any law irrespective of its field of regulation, the only exception allowed by the Constitution being the more favourable criminal or contravention law.

This legislative amendment also contravenes to Directive 1371/2017/EU regarding the fight against frauds directed against the financial interests of the Union by means of criminal law, which, at point 10 of the explanatory memorandum states that "with regard to the crimes of passive corruption and misappropriation, it is necessary to introduce a definition of the public officers which to contain all the relevant officers irrespective of the fact that they occupy an official position in the Union, in the member states or third party countries. The natural persons are increasingly involved in managing EU funds. In order to adequately protect EU funds against corruption and misappropriation, it is necessary for the definition of the "public officer" to include persons who do not occupy an official position, but who were entrusted and similarly exercise a public service function with regard to EU funds, like the contractors involved in the management of such funds." Moreover, Article 4, paragraph (2), letter b) of the Directive states that "within the meaning of this directive, public officer means: "any other person who was entrusted and exercises a public office function which involves the management of the financial interest of the European Union in member states or third-party countries, or taking decisions concerning them."

3.2.6. Encouragement of the criminal phenomenon by conditions for not punishing the briber

According to the newly introduced provisions, Article 290, paragraph (3), shall have the following content: *"(3) The briber is not punished, if it denounces the offence prior to the notification of criminal investigation body in this respect, but no later than 1 year as of the date of its committal."*

The valid for imposes a single condition for not punishing the briber: the circumstance in which the offence is denounced by the briber before the notification of the criminal investigation body with regard to the deed of bribery. There cannot be any reasonable and proportional justification to protect those persons who were bribed by guaranteeing the fact that, after one year, they shall no longer be held criminally liable. The requirement according to which the denunciation should be submitted within one year as of committing the bribery offence infringes the provisions of Article 1, paragraph (3) of the Constitution regarding the rule of law, which impose to the lawmaker to adopt criminal policy measures so as to defend the public order and safety by adopting the necessary instrumentalities for the purpose of decreasing the criminal phenomenon, with the exclusion of any regulations capable of encouraging this phenomenon.

3.2.7. Trade in influence. Unjustified removal of many activities from the sphere of criminal illegality

Article 291, paragraph (1), was amended as follows: "*(1) Claiming, receiving or accepting promise of money or other material favours, whether directly or indirectly, for himself or others, committed by a person who has influence or suggests that has an influence on a public officer and promises that he shall determine him/her, a promise followed by the intervention to that officer in order to determine him/her to comply, not to comply or to expedite or delay the compliance with a deed which falls within his/her job tasks or to comply with a deed contrary to such tasks, shall be punished with 2 to 7 years of imprisonment."*

Therefore, the possibility to obtain non-material favours which could take various forms is legislated, and, therefore, as a result of the new regulation, multiple activities are unjustifiably removed from the sphere of criminal illegality (granting

a title or a distinction, promotion in career offering an eligible position on the lists of candidatures of a party in case of local or parliamentary elections etc.). The introduction of the condition for the promise to be followed by the intervention to the public officer contravene to the obligations undertaken based on the ratification of the Criminal Convention of the Council of Europe on corruption with regard to the incrimination of the trade in influence (please, see Article 12 of the Convention – the states should adopt legislative measures in order to provide as offence "irrespective of the fact that the influence is exercised or not, or the alleged influence determines or not the desired result").

3.3. Aspects regarding the Law for the amendment and supplementation of the Law no. 135/2010 on the Criminal Procedure Code, and also for the amendment and supplementation of the Law no. 304/2004 on judicial organisation

3.3.1. Right of the defendant to be notified with regard to the date and time of carrying out the criminal investigation or hearing by the justice of the peace. Possibility acknowledged to the suspect or defendant to participate in any criminal investigation or hearing, upon his request

The introduction, in this respect, of letter b[1]) in Article 83 of the Criminal Procedure Code implies that all criminal investigation activity – including hearing of the injured parties, civil parties, carrying out searches or other deeds – shall be performed in the presence of the defendant. In this way, all the elementary principles of a criminal investigation prior to the trial are contradicted, transforming the criminal investigation activity in a public activity lacking any confidentiality. For example, the prosecutor shall notify the defendant with regard to the fact that he shall do a search at the domicile of another defendant or person, without any guarantee of keeping the confidentiality.

On October 12, 2018, The Constitutional Court declared only the final formulation unconstitutional, which means the part with the announcement of the conduct of the criminal investigation remained. If the final thesis there is the phrase *"absence does not prevent the act", "per a contrario, we understand that the absence prevents the act from being performed. So the investigator expects the defendant to come and come in for a hearing or research on the spot? Until now, prosecutors have announced the lawyer, not the defendant. Tell him to participate? Or, how can the rapist participate in the hearing of the victim ?!" Some of the constitutionally validated articles might be negative in practice. A recording done by a witness to a conversation carried out by a defendant with another person in a private place cannot be used in the criminal proceedings because the witness is neither a party nor a principal procedural subject".*[38]

At the same time, the amendment of Article 92, paragraph (2) of the Criminal Procedure Code regarding the possibility acknowledged to the suspect or defendant to participate in carrying out any criminal investigation or hearing upon his request is capable of indirectly limiting

[38] See Experts: What are the harmful changes to the Code of Criminal Procedure that have passed the Constitutional Court filter, or have not been challenged before the Court, https://www.g4media.ro/experts-what-are-the-harmful-changes-to-the-code-of-criminal-procedure-that-have-passed-the-constitutional-court-filter-or-have-not-b een-challenged-before-the-court.html [last accessed on November 17th, 2018].

the right of the injured person/injured party to participate in the judicial proceedings, who, under these conditions, may opt for waiving any procedural right for this consideration, the right of the suspect or defendant to assist, including to listen to it being enshrined without any restriction. Therefore, provided that the parties have no proportionate rights, the principle of equality of arms, a guarantee of the right to a fair trial provided at Article 21, paragraph (3) of the Romanian Constitution, is infringed.

The proposed amendments infringe Directive 2012/29/EU of the European Parliament and Council of 25 October 2012 of establishing minimum rules regarding the rights, support and protection of the victims of criminality, and of replacing the framework Decision no. 2001/220/JAI of the Council. This Directive enforces for the member states the obligation to regulate (an obligation which results from the mandatory character of directive transposition) the criminal proceedings so that "to avoid the contact between the victim and the members of his/her family, on the one hand, and the author of the crime, on the other hand". An increasing number of measures should be made available to the practitioners in order to prevent the sufferance of the victims during the judicial proceedings, especially as a result of the visual contact with the author of the crime, with the members of his/her family, with his/her partners or the persons from the audience.

Most of the courts and prosecutor's offices from Romania do not have the infrastructure which to allow the separate circuit of the victims and authors of the crime or of their family members or separate waiting rooms or special premises for hearing the vulnerable victims/witnesses or the necessary equipment for hearing through audio and video means, and also other structure elements of the building in which the prosecutor's office or the court operates in order to technically equip them so that the enforcement of measures for the protection of the victims not to be illusory in case the presence of the defendant cannot be limited under the decision of the judicial body as compared to the formulation of the criticized text. In its economy, the text practically excludes the decision of the judicial body, the procedure to be followed exclusively depending on the manifestation of will of the procedural parties/subjects, the presence of the defendant being mandatory to the hearing of the victim/ witness, even though vulnerable, in case of the expressly manifested option in the case of the defendant/suspect ("request"), while the option of the victim/witness is deducted from the lack of express manifestation of the request to receive a statute of threatened or protected person.

3.3.2. Adoption of the absolute criterion "beyond any doubt". Extension of the standard of evaluation of the submitted evidence from a "rational doubt" to an irrational doubt

The amendment of the provisions of Article 103, paragraphs (2) and (3) of the Criminal Code, in the sense that the conviction is ordered only when the court is convinced that the accusation was proven beyond any doubt, infringes Article 124, paragraph (1) of the Romanian Constitution with regard to the application of justice.

The Constitutional Court of Romania has stated that the collocation "beyond any reasonable doubt" confers to the criminal procedure an equitable character, because, beyond the fact that, according to Article 4, paragraph (2) of the Criminal Procedure Code, any doubt in forming the conviction of the judicial bodies is interpreted in favour of the

suspect/defendant, the principle of free assessment of the evidence not being absolute, but limited by the existence of compensating means which to ensure a sufficient balance between accusation and defence.

The concept of reasonable doubt is of European-jurisprudence nature, the meaning being found, for example, in the Decision of 11 July 2006 delivered by the European Court of Human Rights in the case *Boicenco versus Republic of Moldova* (paragraph 104), according to which the standard of proof "beyond a reasonable doubt" allows its deduction also from the coexistence of sufficiently grounded, clear and consistent conclusions or similar and incontestable presumptions of fact."

3.3.3. Exclusion from evidence of the recordings made by persons, other than those expressly and strictly provided by the law

Article 139, paragraph (3) of the Criminal Procedure Code provides as follows: "*The recordings provided in this chapter and made by the parties and the main procedural subjects represent means of evidence when they concern own conversations or communications with third parties."*

Thus, by limiting the recordings made only by parties and main procedural subjects, the recordings made by persons, other than those expressly and strictly provided by the law, are excluded. For example, if a person films the moment when another person receives an undue favour, that video may not be used as evidence, because the video is made by one of the parties to the file.

3.3.4. Obligation to communicate and allow to all the persons who were incidentally recorded, even though they do not have procedural capacity, to have access to recordings

The new regulation of paragraph (1) and (2) of Article 145 of the Criminal Procedure Code enforces procedural rights for the persons who have no procedural capacity in a judicial proceeding in progress, like the right to listen to his/her own interceptions and to watch the recordings. This provision could become impossible to enforce in case it is not possible to identify third parties, because they use PrePay cards.

3.3.5. The interceptions obtained based on national safety warrants already submitted as evidence in the files in progress can no longer be used

A new article is introduced in the Criminal Procedure Code, i.e. Article 145^1, which, at paragraph (4), provides as follows: *"If, according to the data and information obtained based on the technical monitoring warrants, grounded evidence or indications with regard to the perpetration of a crime other than those provided at paragraph (2), the data and information shall be submitted to the prosecutor who may proceed according to Articles 140 and 141, which shall be adequately applied."*

The rule infringes the constitutional principle of the legal activity, provided that it stipulates that the interceptions obtained based on national safety warrants and already submitted as evidence in the files in progress may no longer be used as a result of enforcing the new law. According to Article 15, paragraph (2) of the Constitution, the law orders only for the future, and the only exception from this principle is the more favourable criminal law. Therefore, a new law can exclude the use of means of evidence submitted by complying with the valid law upon carrying out the procedural deed. On the other hand, the provisions of Article 145^1, paragraph (1) of the Criminal Procedure Code, which restricts the use as evidence of the interceptions obtained based on

national safety warrants, could affect the principle of legality of the criminal trial, considering that it excludes the possibility of proving serious crimes, like the offences perpetrated with violence.

3.3.6. Introduction of a maximum limit of one year during which the criminal investigation bodies are bound to order the initiation of the criminal investigation with regard to a person or to close the case

Under the new regulation, Article 305 of the Criminal Procedure Code is supplemented in the sense that, after paragraph (1), a new paragraph, i.e. paragraph (1^1), is introduced, having the following content: *"(1^1) In the other situations, other than those mentioned at paragraph (1), the criminal investigation body orders the initiation of the criminal investigation with regard to the offence. Within maximum one year as of the date of initiating the criminal investigation with regard to the offence, the criminal investigation body is bound whether to proceed with the criminal investigation with regard to the person, if the legal conditions to order such measure are complied with, or to clause the case."*

The introduction of a maximum one year limit, during which the criminal investigation bodies are bound to order "the initiation of the criminal investigation with regard to the person" or to close the case, seriously affects the possibility for the criminal investigation bodies to investigate the serious crimes whose complexity does not allow the collection of all the evidence necessary to prove the guilt during this interval.

There are numerous situations in which the authors of extremely serious crimes were not identified within one year as of the initiation of the investigations. Closing the case in this situation eliminates the possibility of continuing the investigations and, practically, eliminates the fundamental right of the party injured by the crime to obtain the criminal liability of the author and the repair of the prejudice, this being equal to the denial of the obligation of the state to carry out an actual investigation precisely with regard to the crimes which affect the most important social values protected by the law, with the consequence of also infringing the provisions of Article 1, paragraph (3) of the Romanian Constitution.

The new regulation also infringes the provisions of Article 22 of the Romanian Constitution, because the state shall no longer guarantee an actual protection of the right to life, the right of physical and psychical integrity of the person.

3.3.7. Possibility of declaring the appeal in cassation only in favour of the convicted

The provision included in Article 438, paragraph (1^1) of the Criminal Procedure Code contravenes to the provisions of Article 16 of the Romanian Constitution by excluding the possibility of invoking also in favour of the other parties of the regulated motifs, being capable of causing a discrimination between them in the absence of an objective and reasonable justification. On one hand, the provision is capable of defeating the equal rights with regard to the access to justice, and, on the other hand, of transforming the appeal in cassation into ordinary means of appeal, causing an unjustified overlapping with the provisions regarding the appeal.

3.3.8. A new case of revision: not signing the decision of conviction by the judge who participated in solving the case

Article 453, paragraph (1) of the Criminal Procedure Code was supplemented with letter g), which provides as motif for revision "the failure

to draw-up and/or sign the decision of conviction by the judge who participated in solving the case."

The case of revision introduced under Article 453, paragraph (1), letter g) of the Criminal Procedure Code is not equivalent to a "judicial error", which to justify a derogation from the principle of security of legal relations by denying *res judicata* authority of a definitive court decision.

The regulation of a case of revision for a reason other than that of correcting the errors in fact or in law and the judicial errors from a definitive court decision is an infringement of the provisions of Article 1, paragraph 5, of the Romanian Constitution, and Article 20 of the Romanian Constitution by reference to Article 6, paragraph 1 of the European Convention of Human Rights, in their content regarding the security of the legal relations, and of Article 124, paragraph 1 of the Romanian Constitution regarding the application of justice.

The definitive character of a court decision determines a positive effect, i.e. *res judicata* power. Moreover, also as result of delivering a definitive ruling, a negative effect is caused in the sense that a new investigation and trial is hindered for the solved complaints and offences, a fact which has enshrined *non bis in idem* rule known under the name of *res judicata* authority." Therefore, the superior courts should use their right of reformation only to correct the errors in fact and in law, and the judicial errors, and not so as to proceed with a new case review.

The affectation of the case by the national legislation should be limited, being necessary for this principle to be derogated only in required based on substantial and imperious motifs (European Court of Human Rights, the decision of 7 July 2009, case *Stanca Popescu versus Romania*, paragraph 99, and the decision of 24 July 2003, case *Ryabykh versus Russia*, paragraph 52).

4. Conclusions

Therefore, in Romania, as effect of enforcing the amendments made to the laws of judiciary, the number of magistrates shall be reduced (on short term, by at least 25%, if no measure is found to fight the effects of early retirement), de-skilled by waiving the meritocratic promotion exams, overworked, by increasing the volume of activity. It will be possible for it to be supervised through the agency of the head of Judicial Inspection and the special Section for the investigation of the judiciary offences within PICCJ. The magistrate prosecutors shall lose *de facto* their independence, the control over them being implicitly exercised by the Ministry of Justice, a political factor, which shall be allowed to offer them guidance with regard to efficient prevention and fight of crimes.

It is obvious that all these amendments made to the laws of judiciary and submitted to the President of Romania for promulgation or, as the case may be, already valid, are not at all necessary in a judicial system of a democratic state, not being in any way beneficial for the judicial system or society. On the contrary, they are extremely harmful for magistracy, being necessary to postpone or suspend the application of the concerned provisions heavily criticized by Venice Commission or GRECO until the date of their complete revision or, as the case may be, to abrogate those provisions which are valid.

The Romanian Judges' Forum Association has requested multiple times to the Ombudsman to immediately notify the Constitutional Court with regard to the provisions of these regulatory deeds which affect, according to Venice Commission, the independence of justice. The Ombudsman, Mr. Victor Ciorbea, has replied not even formally, although he has the express prerogative of notifying the

Constitutional Court with regard to laws and ordinances, and it is not limited to the protection of human rights, being required for his role to be extremely active in defending the rule of law and, therefore, the international commitments made in this respect by the Romanian State (see the Opinion no. 685 of 17 December 2012, CDL-AD(2012)026, Venice Commission).

We also mention that, with the constant statements of the Minister of Justice and representatives of the legislative, contrary to Article 11 of the Constitution, GRECO Report by which it was required for Romania to refrain from adopting amendments to the criminal legislation which to contravene its international commitments and to undermine the internal capacities to fight against corruption is minimalized, and the necessity of notifying Venice Commission is disregarded.

The Superior Council of Magistracy appears not having any kind of reaction with regard to the amendments made to the laws of judiciary and Section for judges replies without reasoning to the discourse of an ambassador who raises real issues regarding the activity of the Judicial Inspection, in the situation where, purely statistical, by studying the covered agenda of the meetings of the disciplinary sections and the website of the High Court of Cassation and Justice (because the decisions of the sections of the current CSM in the disciplinary fields are no longer public since 2017, despite the undertaken transparency), it results that, from 2017 until 2018, 29 disciplinary actions were admitted and 24 disciplinary actions were dismissed, all of which concerning judges, and 11 disciplinary actions were admitted and 11 disciplinary actions were dismissed, all of which concerning prosecutors, the percentage of magistrates found not guilty being of almost half (50%) of those judged by the disciplinary sections (some of the initially admitted disciplinary actions were dismissed by the High Court of Cassation and Justice). All these realities inevitably attract public comments, the freedom of expression being inviolable, according to the Constitution.

It is inadmissible for the Superior Council of Magistracy not to have any kind of reaction with regard to the constant unfounded statements of various public persons, including of the Prime Minister Viorica Vasilica Dancilă, with regard to the fact that “half of the magistrates from Romania have had for years files through which they were probably influenced to order sentences established outside the court room”, provided that, in half of the cases, we are talking about fictive complaints, some of the anonymous and abusively filed by parties discontent with the sentences given in the files, and no influence on any judge has ever been punctually proven.

The Superior Council of Magistracy should continue to consolidate its activity in defence of the reputation of the magistracy in a coherent and efficient way, as it was required by the European Commission, being bound to demonstrate the commitment towards transparency and responsibility, in complying with the constitutional role of CSM, and not to passively assist to magistracy being made less credible, including by propagating the message sent by various public persons with regard to the fact that the justice is made under the pressure or influence of external factors capable of affecting the independence and impartiality of judges.

It is about the agitation from the domestic public space related to the ambiguity intensely promoted through media of the “illegal character” of the protocol between the Romanian Intelligence Service and the Prosecutor’s Office attached to the High Court of

Cassation and Justice for the purpose of cancelling all the efforts of the criminal judiciary from the last few years, to the extent that the existence of actual underlying issues for which legal remedies exist anyway in individual cases is not proven.

The Romanian Judges' Forum Association stated that, in case of a reasonable suspicion of infringement of the functional competence in carrying out the criminal investigation, the verification of the legality of submitting the evidence is within the exclusive jurisdiction of the criminal courts, considering that all magistrates have the right of access to classified information, and the attorney of the defendant may be provided such access upon request. Moreover, there is an actual necessity of tempering an actual public hysteria on this subject, which is susceptible of concretizing in a direct pressure on the law courts, for example, in order to acquit all the criminals found based on information provided by the Romanian Intelligence Service.

An intervention of the legislative in this field, exclusively and indistinguishably generated only by this context of the "secret protocols", would cause serious prejudices to the criminal investigation of several serious offences, like those or organised crime and terrorism, because the technical measures executed by the Romanian Intelligence Service at the direction of the prosecutor's offices or law courts have not concerned only the corruption offences, these being only those which have mostly fed the "conspiracy theory" because of the capacity of the active subjects of public officers, senior officers or officials.[39]

A similar message was issued, on 4 October 2018, by the Section for Judges of the Superior Council of Magistracy, which stated that "the independence of judiciary, provision of the right to a fair trial and taking the decisions of the judicial authorities only under the law represent requisites for all the judicial bodies involved in the activity of providing justice. The compliance with the exigencies of the law implies carrying out procedural activities only under the law, and the subsequent deeds concluded in order to comply with the law should rightfully observe the regulatory provisions in strict accordance with the prerogatives assigned by the law to all the involved entities. The assessment of the exceedance of such prerogatives and also of the performance of judicial activities under deeds which disregard such legal exigencies is exclusively within the competence of the judge called to enforce the law in the concrete case and to ensure all the guarantees of a fair trial."[40]

In a press release issued on 14th of October 2018, supported by hundreds of judges and prosecutors,[41] Romanian Judges' Forum Association requested the other two legislative and executive powers to take into account as soon as possible the preliminary Opinion delivered by Venice Commission on 13th of July 2018, in order to avoid the dissolution of magistracy.

On 15th of October 2018, the Romanian Government enacted the

[39] *For more details,* ***Romanian Judges' Forum Association – White Paper – Cooperation protocols between the Romanian Intelligence Service and various judicial authorities with jurisdiction in criminal matters,*** *a study available at http://www.forumuljudecatorilor.ro/index.php/archives/3390 [last accessed on November 17th, 2018].*

[40] Please, see the web page https://www.csm1909.ro/ViewFile.ashx?guid=5740561a-de72-46a9-b913-b75c66e451f9|InfoCSM [last accessed on November 17th, 2018].

[41] For details, see the web page http://www.forumuljudecatorilor.ro/index.php/archives/3407 [last accessed on November 17th, 2018].

Emergency Ordinance nr. 92 for amending a whole range of regulations in the justice area,[42] such as the postponement till the 1st of January 2020 of the provisions concerning the anticipated retirement scheme as well as the settlement of first and second appeals in a three judges' panel. The urgent legislative action was claimed to be taken in order to ensure the proper functioning of judiciary as a public service on a short and medium term, taking into account that failing to follow this step would impair the courts' proper functioning, would inexcusably delay the cases settlements, leading to major consequences as breaking the very principle of dealing with cases in a reasonable time; the reasoning keeps emphasizing the necessity of taking into account that the anticipated retirement scheme will predictably impact massively on proper functioning of courts and prosecutor's offices, efficiency and quality of the justice service, leading to a substantial decrease of active magistrates as the new enacted law regulates simultaneously an increase of INM training period as well as the necessary seniority to run for a promotion. In practice, the disaster on human resources has been postponed for 1 year, 2 months and 15 days.

Even if the Emergency Ordinance also regulated the participation of civil society representatives' members of Superior Council of Magistracy with voting rights to the Plenum sessions, the provision must be read in line with each section's new assignments, who literally took over the majority of Plenum's competencies, so that this participation will become merely symbolic.

Apparently, in order to comply with Venice Commission preliminary Opinion, the Government removed the provision which had previously enabled the revocation of an elected SCM member, when most judges or prosecutors in the courts/prosecutor's offices that the member represents withdraw confidence in his/her respect. Nevertheless, a sort of new *probatio diabolica* has been instead implemented, rendering the approach almost impossible as long as any step in this direction is confined to the corresponding SCM section findings, based on a report drafted by the Judicial Inspection, concluding that the member object of the revocation procedure did not observe properly, in a serious, persistent and unjustified manner his/her duties prescribed by law.

On the other hand, the emergency ordinance doesn't refer to any other negative issues underlined in the Opinion. On the contrary, although the Venice Commission suggested reconsidering the set-up of a new special section for investigating magistrates, in total defiance the Government enacted the Emergency Ordinance nr. 90/2018 in order to operationalize it.[43]

The Emergency Ordinance nr. 92/ 2018 also regulates in new areas not linked whatsoever to the preliminary Opinion of the Venice Commission.

Some of the new provisions have been harshly criticized by Romanian law specialists, such as the ones increasing the seniority as a prosecutor necessary to promotion for an office within The Prosecutor's Office attached to High Court of Justice and Cassation, the Directorate for the Investigation of Organized Crime and Terrorism and the National Anticorruption Directorate, the seniority for being appointed General

[42] Published in the Official Gazette of Romania, Part I, no. 874 of 16 October 2018.

[43] Published in the Official Gazette of Romania, Part I, no. 862 of 10 October 2018.

Prosecutor, First Deputy and his Deputy within The Prosecutor's Office attached to High Court of Justice and Cassation, Chief Prosecutor and his/her deputies within the National Anticorruption Directorate, Chief Prosecutor and his/her deputies within the Directorate for the Investigation of Organized Crime and Terrorism, as well as the seniority for being appointed chief section prosecutors.

According to article VII of this emergency ordinance, *„The prosecutors who, at the time of coming into force of this regulation, serve within the Prosecutor's Office attached to High Court of Justice and Cassation, the Directorate for the Investigation of Organized Crime and Terrorism and the National Anticorruption Directorate as well as within other prosecutor's offices, shall leave their present offices unless they comply with the conditions regulated by the Law nr. 303/2004 regarding the magistrates' status, as it has been further amended".*[44]

On request of the Prosecutor's Office attached to High Court of Justice and Cassation, the Directorate for the Investigation of Organized Crime and Terrorism and the National Anticorruption Directorate, the above stated provision was subject of interpretation by the Prosecutor's Section of SCM in the 17th of October session.

Unanimously the latter recommended a non-retroactive interpretation, in a sense that the freshly stipulated conditions for exercising an office as a prosecutor within the Prosecutor's Office attached to High Court of Justice and Cassation, the Directorate for the Investigation of Organized Crime and Terrorism and the National Anticorruption Directorate, as well as within other prosecutor's offices could only be observed for the future.

An opposite interpretation, not out of question completely within the Ministry of Justice would lead to the *de facto* dissolution of the National Anticorruption Directorate (which would be left without 57 prosecutors out of 150, meaning almost 40% of their entire professional body) as well as of the Directorate for the Investigation of Organized Crime and Terrorism, these units benefiting of many young, uncompromising and professional prosecutors [45].

The Romanian Judges' Forum Association and the Movement for the Defense of the Prosecutor's Status have asked the courts to address some questions to the European Union Court of Justice regarding Romania's obligation to comply with the recommendations of the Cooperation and Verification Mechanism (MCV) of the European Commission. Professional associations of magistrates have argued that Romania, a member of the EU, must comply with the European Commission's recommendations, that Romania is obliged to immediately suspend the procedures for the dismissal of senior magistrates, and the Government should not interfere with the SCM's attributions and should not have appointed the interim leadership of

[44] **Ingrid Heinlein**, Korruptionsbekämpfung in Rumänien am Ende? Was die Regierung Rumäniens unternimmt, um die Strafjustiz zu schwächen und von diesem Vorhaben abzulenken, in Betrifft JUSTIZ nr. 136 von Dezember 2018.

[45] One can see the National Anticorruption Directorate press release, accessible from the link https://www.g4media.ro/exclusiv-dna-a-trimis-un-punct-de-vedere-csm-in-care-avertizeaza-ca-noile-conditii-de-vechime-impuse-procurorilor-anticoruptie-nu-pot-fi-aplicate-retroactiv-deoarece-ar-incalca-legea-fundamentala.html [last accessed on November 17th, 2018].

the Judicial Inspectorate by emergency decree.[46]

On October 12, 2018, the Romanian Constitutional Court rejected 64 of the 96 changes to the Criminal Procedure Code. Only 32 of the amendments passed the Constitutional Court's examination, according to a press release. The decision is not motivated and published.

The rejected amendments include: the annulment of evidence obtained illegally, the disposition that a judge should rule a conviction only when the court believes that the charge has been proven beyond any reasonable doubt, the disposition that

[46] Lia Savonea, the new Superior Council of Magistracy President: "Specifically, given the errors present in the last report, we must be clear that *we cannot obey such recommendations blindly like religious injunctions*, and not comment on them, or discuss them. Especially when they contain verifiable things that contradict the provisions of the law and the Code of Criminal Procedure. They were obvious". **The four questions that the FJR asks the Olt Tribunal to address to the ECJ**: "*First question*: Can the Cooperation and Verification Mechanism established by European Commission Decision 2006/928 EC of 13 December 2006 be regarded as an act adopted by an institution of the European Union within the meaning of Article 267 TFEU, and be subject to the interpretation of the Court of Justice of the European Union? (…) *Second question*: Are the content, nature and temporal extent of the Cooperation and Verification Mechanism established by the European Commission Decision 2006/928/EC of 13 December 2006 covered by the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005? Are the requirements set out in the reports drawn up under this Mechanism binding for the Romanian State? (…) *Questions 3 and 4*: Must the second paragraph of Article 19 (1) of the Treaty on European Union be interpreted as requiring Member States to lay down the necessary measures for effective legal protection in the areas covered by European Union law, namely guarantees of a procedure independent discipline for judges in Romania, removing any risk related to the political influence on the conduct of disciplinary procedures, such as the direct designation by the Government of the leadership of the Judicial Inspection, even on a provisional basis? Must Article 2 of the Treaty on European Union be interpreted as requiring Member States to comply with the criteria of the rule of law also required in the reports of the Cooperation and Verification Mechanism established under Commission Decision 2006/928/EC of the European Parliament and of the Council December 13, 2006, in the case of procedures for the direct designation by the Government of the management of the Judicial Inspection, even on a provisional basis?" **The four questions MASP requests CA Alba Iulia to address to the ECJ**: '*First question*: Must the Cooperation and Verification Mechanism established by European Commission Decision 2006/928/EC of 13 December 2006 be regarded as an act adopted by an institution of the European Union within the meaning of Article 267 TFEU and be subject to the interpretation of the Court of Justice of the European Union? *Second question*: Is the content, nature and temporal extent of the Cooperation and Verification Mechanism established by the European Commission Decision 2006/928/EC of 13 December 2006 covered by the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005? Are the requirements set out in the reports drawn up under this Mechanism binding for the Romanian State? *Third question*: Must the second subparagraph of Article 19 (1) of the Treaty on European Union be interpreted as requiring Member States to determine the measures necessary for effective legal protection in the areas covered by European Union law in the case of revocation procedures high level prosecutors with a political factor – the Minister of Justice of Romania, in violation of the Cooperation and Verification Mechanism, established in accordance with the European Commission Decision 2006/928/EC of 13 December 2006, and of the Reports it? *Question 4*: Must article 2 of the Treaty on European Union be interpreted as requiring Member States to comply with the criteria of the rule of law as required by the Cooperation and Verification Mechanism reports established pursuant to Commission Decision 2006/928/EC To the European Commission on December 13, 2006, in the case of procedures for the dismissal of high level prosecutors, ordered by a political factor – the Minister of Justice in Romania?". See, for details, https://www.g4media.ro/upon-request-from-magistrates-associations-courts-should-to-refer-questions -to-the-european-court-of-justice-regarding-romanias-lack-of-compliance-with-the-mcv-recommendations-savo.html [last accessed on December 27th, 2018].

a defendant should be convicted exclusively for the charges on which he was sent to court, preventing searches if the investigators don't mention what or who they are looking for, the obligation to erase the electronic data that are not connected to the investigated crime and the possibility of cancelling a final sentence if one of the judges who issued it didn't sign it.

Changes that passed the Constitutional Court's say that: public communication related to criminal cases during the prosecution and judgement phases is forbidden; a person can't be convicted exclusively based on denouncements, without other evidence; a person can't be arrested based on general and abstract arguments, the effective threat needs to be proven; denouncers get lower sentences only if they make the denouncement in maximum one year from the moment they found about the crime.[47]

The law for changing the Criminal Procedure Code must now return to the Parliament for review.

The amendments adopted by the Romanian Parliament with an extraordinary speed[48] exceed the desiderate stated by the representative of the legislative, that of not doing more than an agreement between the legal provisions and the decisions of the Constitutional Court and Directive 2016/343/EU, passing within an area of analyses of opportunity from the viewpoint of the state criminal policy, which means a careful pondering with regard to the necessity of actually protecting the social values considered by the antisocial offence perpetrated by the public officers, i.e. protection of the integrity of the public patrimony.

A radical change of the optics of the lawmaker with regard to the criminal liability of the public officer should be the result of a serious debate in the legal environment and society in order to avoid any possible negative consequences, like making vulnerable the social relations which should be grounded on the faith in the activity of the public officers, in no way determined by infringing he provisions of UN Convention against Corruption adopted at New York on 31 October 2003.

With regard to the Criminal Code, the modification of the offence of abuse of office or supplementation of the provisions on extended confiscation raises issues related to the compliance with international obligations. The amendment of the criminal law principle, according to which the discontinuation of the course of limitation should cause effects towards all participants in committing a crime, and the significant decrease of the special limitation period, causes the impossibility of holding criminally liable numerous persons who committed crimes, affecting the constitutional balance between the rights of the persons suspected of committing crimes and the general interests of the society.

The obligation to enforce the decisions of the Constitutional Court as a more

[47] See *Experts: What are the harmful changes to the Code of Criminal Procedure that have passed the Constitutional Court filter, or have not been challenged before the Court,* https://www.g4media.ro/experts-what-are-the-harmful-changes-to-the-code-of-criminal-procedure-that-have-passed-the-constitutional-court-filter-or-have-not-been-challenged-before-the-court.html [last accessed on November 17th, 2018].

[48] By joking a little, Napoleon, Justinian or Hammurabi, the greatest lawmakers of all time, were surpassed by the working pace and efficiency of the Parliamentary Commission.

favourable criminal law, partial decriminalisation of those offences which are provided as crimes of corruption and office when they are perpetrated by a public officer or towards such officer, i.e. encouraging the criminal phenomenon by conditions for not sanctioning the briber or by unjustifiably removing several activities from the sphere of criminal illegality, in case of trade in influence, are harmful aspects included in the regulations newly inserted in the Criminal Code.

With regard to the Criminal Procedure Code, the right of the defendant to be notified with regard to the date and time of the criminal investigation or hearing done by the justice of peace, the possibility acknowledged to the suspect or defendant of participating in any criminal investigation or hearing, upon his/her request, and the extension of the standard of assessment of the submitted evidence from a "rational doubt" to an irrational doubt shall have negative effects on the criminal process the same as the exclusion from the evidence of the recordings made by persons other than those expressly and strictly provided by the law, or the obligation to communicate and to allow to all the persons who were incidentally recorded, even though they do not have a procedural capacity, to have access to recordings,

The interceptions obtained based on national safety warrants and already submitted as evidence in the files in progress shall no longer be used, and the enforcement of a maximum one year limit during which the criminal investigation bodies are bound to order the initiation of the criminal investigation with regard to the person or to close the case, shall determine the closure of millions of cases.[49]

The possibility of declaring the hearing in cassation only in favour of the convicted and the regulation of a new case of revision, i.e. not signing the decision to convict the judge who participating in solving the case, are to be considered with unconstitutional effects.

Therefore, in Romania it shall be possible to misappropriate the funds of the public budget, but also the funds originating from the European Union, without any of such offences to continue to be criminally punished, and the judicial cooperation in criminal field with EU member states shall be affected.

With regard to the public context in which these new provisions were regulated, we remind that, on 9 July 2018, the protest organised by the Social Democratic Party (PSD) called "Stop the judiciary abuses" took place, an occasion when Romanian politicians of first rank (President of the Senate, President of the Chamber of Deputies, Prime Minister) expressed messages expressly focused on judiciary, with the *disclosed reasoning that the political power should have precedence over the independence of the "unreformed" institutions,* the call for ceasing the so-called "abuses" representing only a form of pressure on the magistrates who work on criminal files, precisely during the deliberation phase, which represents an extremely dangerous precedent.

[49] Bucharest Police communicated to Ziare.com the number of files with unknown author older than one year existing on 1 September 2018 on the dockets of the divisions from Bucharest: 103,931 files for stealing, 109 files for rape, 3,912 files for robbery, 38 files for murder, 25 files for attempt of murder, 6 files for robbery followed by the death of the victim and 6 files for hitting or deadly injuries. All these files are to be automatically closed as a result of enforcing the new legislative amendments. For more details, please, go at http://www.ziare.com/stiri/justitie/exclusiv-cifre-oficiale-sute-de-mii-de-criminali-talhari-hoti-violatori-vor-scapa-ca- urmare-a-deciziei-psd-alde-1528278 [last accessed on November 17th, 2018]. Bucharest population accounts for approximately 10% of the population of Romania.

The harshness of the political speech, starting with the classification of the magistrates in generalizing allegations as "corrupt", "Stalinist", "secret police officers", "torturers", culminating with the absolutely unacceptable name of "rats", is an extremely serious deviation from the principles of democracy, and the entire "scenario" of the political protest, the "props" used and the so-called "will of the people" so that "those elected" to be avoided by the legal means of being held criminally liable, associated with the declaration of "street fight" "until the end" shapes the image of a serious threat for the independence of judiciary.

All these aspects are not specific to a rule of law, and they should be regarded together with the amendments to the laws of judiciary (court organisation, statute of judges and prosecutors, operation of the Superior Council of Magistracy) without impact studies and forecasts, ignoring the notices or recommendations from the European or international bodies which that state participates in (Venice Commission, GRECO), but also with the actual dismissal of the magistrates who occupy positions at the top of magistracy (please, see the case of Laura Codruța Kovesi), based on the simple will of a politician, albeit the Minister of Justice.

The Opinion from Venice Commission of October 20, 2018, is clarifying for the compliance with the standards of the rule of law in Romania in many aspects regarding the amendments to the laws of judiciary, and it cannot be endlessly disregarded, the recent public developments seriously endangering the independence of the justice and the evolution of Romania in the European Union and the Council of Europe, as the European Commission and GRECO have previously ascertained.

According to Article 11 of the Romanian Constitution, Romania undertakes to rightfully comply in good faith with its obligations under the treaties which it is part of. The treaties ratified by the Parliament according to the law are part of the domestic law. Romania has accessed the European Council (EC) as a result of the decision of 4 October 1993 enforced under the Resolution no. 37/ 1993 of EC Committee of Ministers.

Therefore, according to the Opinion of Venice Commission of 13 July 2018, the legislative and executive from Romania are bound to immediately rethink the system of appointing/dismissing the prosecutors occupying top management positions in order to provide the conditions for a neutral and objective appointment/ dismissal process by maintaining the role of some of the authorities, like the President and the Superior Council of Magistracy, capable of counterbalancing the influence of the Minister of Justice.

The legislative and executive should eliminate the limitations proposed with regard to the freedom of expression of the judges and prosecutors, and review the provisions regarding the material liability of magistrates, modifying the mechanisms of carrying out the regress.

It is necessary for the legislative and executive from Romania to review the establishment of a separate prosecutor's office structure for the investigation of the crimes committed by judges and prosecutors and to give up the mechanism proposed for anticipated retirement (the Romanian judges and prosecutors shall be allowed to retire even at the age of 42-43, with 20 years of actual seniority on such positions), if it cannot be guaranteed that it shall have no adverse effect on the operation of the judicial system.

Finally, it is also reminded that Romania delays the ratification of Protocol no. 16 to the Convention on the defence of human rights and fundamental freedoms, whose text was adopted by the Committee of the Ministers on 10 July

2013, and it was opened for signing on 2 October 2013 at Strasbourg, providing the possibility for the highest jurisdictions of the contracting parties to request an advisory opinion to the European Court of Human Rights when it assesses that a certain case on their dockets raises a serious issue regarding the interpretation or enforcement of the Convention or its protocols.

In the Opinion adopted on 20 October 2018 (No 930/2018), the Council of Europe's Venice Commission "expresses concern that many draft amendments to the Criminal Code and the Criminal Procedure Code in Romania seriously weaken the effectiveness of its criminal justice system to fight corruption offences, violent crimes and organised criminality". The Venice Commission recommends that the Romanian authorities conduct an overall re-assessment of the amendments in both codes through a comprehensive and effective consultation process in order to come up with a solid and coherent legislative proposal benefiting from a broad support within the Romanian society and taking fully into account the applicable standards, and to follow the guidance of the Constitutional Court.

The opinion underlines that although the public debate has focused on the risk that they may undermine the fight against corruption, their impact is much wider. According to the Commission, the reform could significantly affect the criminal justice system and its effective and efficient operation, the investigation, prosecution and adjudication of other serious and complex forms of crime.

The opinion criticises the excessive speed and the insufficient transparency of the reform process, especially because there were more than 300 amendments, many of them radically reforming criminal policy. The haste in their adoption had a negative impact on the quality of the legislation, which contains contradictions that could cause legal uncertainty in the future. The Commission also stresses that a more comprehensive process of discussion with legal practitioners and society at large would have been necessary, in particular considering that the amendments were questioned by actors such as the High Court of Cassation and that they were very divisive in Romanian society and institutions. In addition, considering the clashes between institutions (for example, the President of the Republic, the High Court of Cassation and the Prosecutor General versus the Parliament), the Commission highlights the need for more time to search for a broader support for the legislative package.

The Venice Commission recommends to the Romanian authorities, as far as the Criminal Procedure Code is concerned:

- to thoroughly review the amending law as a whole to ensure that the reform will not have a negative impact on the functioning of the criminal justice system;

- while all the amendments should be thoroughly reviewed, to amend in substance the rules on communication on on-going criminal investigations (Article 4), starting a criminal investigation (Article 305), evidentiary thresholds and inability to use certain forms of evidence (Articles 139, 143, 153, 168), and the right to be informed of and participate in all prosecution acts (Articles 83 and 92);

- to reconsider the final and transitional provisions.

The Venice Commission recommends to the Romanian authorities, as far as the Criminal Code is concerned:

- to reconsider and amend the provisions regulating corruption-related offences, in particular bribery (Article 290) – the Opinion stresses that the draft amendment would discourage bribe givers from co-operating with law

enforcement -, influence trading and buying (Articles 291 and 292), embezzlement (Article 295) and abuse of service (Article 297);

- to reconsider and amend some other provisions with a more general impact, such as those on the statute of limitations (Articles 154-155) – according to the Opinion, the proposed amendment creates a high risk that in complex cases the crimes at issue be time–barred before the investigation and trial can be carried out-, false testimony (Article 273) and compromising the interests of justice (Article 277 CC);

- to reconsider and amend the provisions on extended confiscation measures (Art. 112^1) and the definition of public servant (Art. 175), ancillary penalties (Article 65), in order to bring them in line with the country's international obligations.

The European Commission's latest Cooperation and Verification Mechanism (CVM) report, released on November 13, 2018 notes that Romania has reversed the progress of its judicial reform and the fight against corruption and comes with new recommendations to remedy the current situation:[50] "*Criminal Codes* - freeze the entry into force of the changes to the Criminal Code and Criminal Procedure Code; reopen the revision of the Criminal Code and Criminal Procedure Code taking fully into account the need for compatibility with EU law and international anti-corruption instruments, as well as the recommendations under the CVM and the Venice Commission opinion".

[50] See the web page https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en [last accessed on November 17th, 2018].