Nº 140/5.07.2020

July, 2020

To the European Commission

The National Union of Romanian Judges (NURJ), legally represented by Judge Dana Gîrbovan, as President,

The Romanian Magistrates' Association (AMR), a professional and national, apolitical, non-governmental organization, stated to be of „public utility" through the Government Decision no. 530/21 May 2008, member of the European Association of Judges (EAJ-AEM) and the International Association of Judges (UIM-IAJ) since 1994 - – with the headquarter in Bucharest, Regina Elisabeta Boulevard no. 53, District 5, e-mail amr@asociatia-magistratilor.ro , tax registration code 11760036 -, legally represented by Judge dr. Andreea Ciucă as interim President,

The Association of Judges for the Defense of Human Rights (AJADO), legally represented by Judge Florica Roman as President,

The Romanian Prosecutors' Association (APR), legally represented by Prosecutor Elena Iordache, as President,

send the following

Report on the State of the Justice System and of the Rule of Law in Romania

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I. The Impact of the COVID-19 Pandemic on the Rule of Law and on Judicial Activity
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III. The Status of Prosecutors. Appointments to Management Positions despite the Negative Opinion of the Section for the Prosecutors
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I. The Impact of the COVID-19 Pandemic on the Rule of Law and on Judicial Activity

1. General Overview

1.1 Judicial Activity during the State of Emergency

As a consequence of the establishment of the state of emergency by the Decree of the President of Romania no. 195/6.03.2020, the courts' management departments were obliged to adopt decisions and to order urgent and precise measures, in order to respond as soon as possible to the legal provisions applicable during the state of emergency.

The Decree of the President of Romania no. 195/2020, which established the state of emergency, and the Decree of the President of Romania no. 240/2020, which extended the state of emergency, establish that only express "especially urgent cases", they will continue to be tried during the state of emergency.

The "special urgency" was neither defined in these decrees nor in other acts adopted by the Parliament or the Government during the state of emergency.

Therefore, the categories of especially urgent cases which continued to be tried during the state of emergency were established by the Superior Council of Magistracy – the Section for Judges. When adopting the decision, the Section for Judges took into account the need to ensure a uniform practice regarding the way of determining the cases which were to be tried during the state of emergency.

Yet, in criminal matters, the especially urgent criminal cases which were to be tried during the state of emergency were established in the Decree of the President of Romania no. 195/2020 [article 43 para. (1)].

The trial of the cases which were not especially urgent was suspended by law during the state of emergency, the measure of legal suspension being provided by the Decree of the President of Romania no. 195/2020, both for criminal cases [article 43 para. (2)] as well as for non-criminal cases [article 42 para. (6)].

1.2 Administrative Measures. Access to Justice via Electronic Files

According to article 42 para. (1) of Annex 1 to the Decree of the President of Romania no. 195/16.03.2020, the Superior Council of Magistracy (SCM) had the competence to give guidance to the management departments of the courts of appeal in order to ensure a uniform practice regarding the way of determining the list of cases which were to be tried during the state of emergency.

During the state of emergency, the courts made an express recommendation to the parties and lawyers, as well as to other participants in civil and criminal proceedings, to send the documents to the files (or in connection with the files) by means of rapid communication provided by law (fax, e-mail).

There are a number of courts that use a computer program called "File Info", which sets up electronic files for each case. "File info" allows judges, parties and lawyers to access all documents in the files, electronically. To this end, the documents submitted by the parties in paper format are scanned and entered in the ECRIS software, from where they are automatically taken and included in the electronic file.

In the especially urgent criminal cases that were tried during the state of emergency, the hearing of the persons in the custody of prisons, as well as in the custody of other authorities (the police) was carried out, in most cases, through the videoconference system. There are courts in which this system was practiced even before the establishment of the state of emergency, if the person in custody agreed to this method of hearing and insofar as it did not infringe upon his rights and interests.

In some courts it has been recommended, by the management department or by the president, that the court hearings in civil cases be held by videoconference, during the state of emergency, if the parties agreed to it and if the judge considered that this method ensured compliance with the principles governing the civil proceedings.

Art. 33 of the Decree of the President of Romania no. 195/2020 provided for the possibility to organize work at home. This working method was used by the courts and decisions of the management board of the court and/or decisions of the presidents of courts were issued for the organization of working from home. This working method was efficient, the judges and clerks having the possibility to access the ECRIS software and the "File Info" software, on the basis of passwords assigned to them in compliance with security rules.

2. The Impact of the Measures Adopted in the Context of the COVID-19 Pandemic on the Rule of Law and on Human Rights

The Constitutional Court of Romania decided that some provisions from the Government Emergency Ordinance no. 1/1999 were unconstitutional, on the grounds that they were not clear enough to allow citizens to regulate their conduct in accordance with the law. Over 300,000 contravention fines have been applied based on these unconstitutional provisions during the state of emergency.

By its Decision no. 152/2020, the Constitutional Court also held that:

"*the most urgent measures which the President may adopt are administrative in nature and may concern only matters governed by law*".

100. *However, the Court notes that among the most urgent measures the President has ordered, for example, the direct acquisition by central public authorities and legal entities in which the state is a majority shareholder of materials and equipment necessary to combat the epidemic (…) the non-commencement of statutes of limitations and of mandatory procedural time-limits of any kind and, if they started to run, their suspension, the provisions of Article 2.532, paragraph 9, second sentence, of Law No. 287/2009 on the Civil Code or other legal provisions to the contrary not being applicable [Article 41 of the Annex], the continuation of the judicial activity of the courts only in especially urgent cases, in which case they may set short time-limits, including from one day to the next or even on the same day [Article 42 paragraph (1) and (2) of the Annex], the suspension de jure of civil cases without it being necessary to take any procedural step in this regard [Article 42 paragraph (6) of the Annex], the interruption of time-limits for lodging appeals [Article 42 paragraph (7) of the Annex], the limitation of prosecution activities and of the activities of judges of rights and freedoms [Article 43 paragraph(1)], the suspension de jure of criminal proceedings pending before the courts, including those pending before the preliminary chambers [Article 43 paragraph (2)], the establishment of the competences of the Ministry of Foreign Affairs [Article 48].*

101. *These provisions, which the President has considered to be "most urgent and directly applicable measures", are not provided for in Article 26 of the Government Emergency Ordinance No. 1/1999 and represent, expressly [Article 32, Article 37, Article 41] or implicitly, derogations from the legislation in force at the time of the establishment of the state of emergency. The President has ordered, on one hand, the suspension or non-application of legal provisions or, on the other hand, the amendment and supplementation of certain laws, his orders having an impact on fundamental rights and freedoms (the right to work, economic freedom, free access to justice etc.).*"

The Court found that the President acted in an abusive manner, in breach of his legal powers, by amending or suspending laws by the decree establishing the state of emergency, his actions violating fundamental rights and freedoms. The Parliament, in its turn, limited itself to approve the measure, without fulfilling its obligation to verify compliance with the requirements that the Constitution and the law imposed on the President's decree and to sanction the *ultra vires* exercise of his legal powers.

The judicial activity was therefore regulated during the state of emergency, not by law, but by an administrative act of the Romanian President, which is in flagrant contradiction to the principle of the independence of the justice system and to the separation of powers.

Immediately after the ruling, the Constitutional Court became the target of extremely aggressive and devoid of merit attacks, starting with the President and the Prime Minister, then continuing with other political leaders and many others, which proves that the frequently invoked rule of law principles, which they claim to respect and defend, are mere slogans.

The Romanian Magistrates' Association (AMR) together with the National Union of the Romanian Judges (UNJR), the Association of Judges for the Defense of Human Rights (AJADO) and the Romanian Prosecutors' Association (APR) issued a press release outlining the following:

"*The Constitutional Court has given a predictable decision, anticipated by a number of legal professionals, through articles or specialized annotations. (…)*

By its decision, the Constitutional Court held a mirror up to the institutions and showed them their weaknesses in knowing their own competences and limits: The Government, in the middle of a pandemic, adopted an unconstitutional GEO and failed to establish legal sanctions for those who do not respect the rules; The President legislated by the decree establishing the state of emergency, violating the exclusive competence of the Parliament; in its turn, the Parliament left the President's conduct unsanctioned, fully ratifying his decree.(…)

It is important for all political forces and various commentators who encourage autocracy to know that the rule of law is not suspended during the state of emergency. This is emphasized by all international institutions, which draw attention to the possible autocratic tendencies that may appear during such periods."

II. The Status of Judges and Prosecutors. Its Deterioration by Hasty Legislative Changes Not Accompanied by Any Minimum Consultation of the Magistrates. Attacks of the Government Against the Judges

In 2020, the attacks on the independence of the judiciary worsened, from two points of view:

1. The adoption of legislation seriously affecting the status of judges and prosecutors, without a minimum consultation and without the opinion of the Superior Council of Magistracy.

2. Political statements, including from the Prime Minister, directly targeted against judges, referring both to their status and to decisions pronounced in cases which regarded the Government's activity.

1. Changes to the Status of Judges and Prosecutors

1.1 Amendments to the Disciplinary Liability of Judges Through the Government Emergency Ordinance No. 23/2020

Article IV, point 26 of the Government Emergency Ordinance no. 23/2020 introduced Article 68^1 in Law No. 101/2016, with the following content: “The failure to comply with the time-limits provided for in this law or with the provisions contained in this law concerning the remedies or measures that may be ordered by the court constitutes a disciplinary offense and is sanctioned by law”.

By the same emergency ordinance, new procedural rules were also introduced, as well as rules directly concerning the activity of the judiciary.

Despite the fact that this ordinance included rules directly affecting the status of judges, it was adopted not only without any consultation of the magistrates, but also without the Government asking for at least the opinion of the Superior Council of Magistracy, even though this was compulsory according to law.

The seriousness of establishing a new disciplinary offense by an emergency ordinance, without the opinion of the Superior Council of Magistracy, is unprecedented.

By adopting Article 68^1 of the Emergency Ordinance No. 23/2020, the Government imposed a disciplinary offense derogating from the sanctioning regime applicable to judges and prosecutors, as defined by Article 99 of Law No. 303/2004. This offense has an objective nature and, more gravely, applies exclusively to judges in public procurement cases.

By imposing adherence to the time-limits stipulated by the normative act under threat of a disciplinary offense (consisting in the failure of respecting the time-limits stipulated by this normative act), the judge is obliged to make an impossible choice between his or her being disciplinarily sanctioned and respect for the requirements of a fair trial and for the rights of defense belonging to citizens.

Practically, if the judge were to approve evidence which cannot be administered within the short time-limits laid down by law, thus respecting the fundamental right to a fair trial and the rights of defense, his or her disciplinary liability would still be incurred, as it is regulated as an objective liability, independent of the absence of any fault.

It is also important to stress that although the results of the referendum from the 25th of May 2019 promoted by President Iohannis banned the adoption by emergency ordinances of any laws regarding the justice system, after his party came to power, it promoted the Government Emergency Ordinance no. 23/2020.

This proves once again that justice is simply being used cynically as a weapon in electoral battles, a reality regarding which we have repeatedly issued warnings.

The National Union of the Romanian Judges (UNJR) together with the Romanian Magistrates' Association (AMR) and the Association of Judges for the Defense of Human Rights (AJADO) have asked the Romanian Ombudsman to request the Constitutional Court to verify the Emergency Ordinance No. 23/2020, and it was declared entirely unconstitutional as a result of this undertaking.

1.2 The Reiterated Proposal of the Rule Instituting the Disciplinary Offense by the Government Emergency Ordinance no. 23/2020, in an aggravated form, by the draft law no. PL-x nr. 354/2020

After the Emergency Ordinance no. 23/2020 was declared entirely unconstitutional, by the draft law PL-x no. 354/2020 the institution of the same disciplinary offense was reiterated, for an objective liability, which is incurred in the absence of any fault, the only condition being that a case be resolved beyond the 30-day time-limit set by law. Moreover, the new draft law institutes an aggravated form of liability, as the application of the most severe disciplinary penalties is also expressly imposed: suspension from office, downgrading in professional rank or exclusion from magistracy.

Beyond the obvious violation of the status of the judge, this regulation creates nothing other than an instrument to remove inconvenient judges from judging public procurement cases, any penalty from the ones provided for in the draft law having the direct and immediate effect of removing the judge from judging these types of cases.

There was no consultation of the magistrates in this case also, despite the adoption of rules which affect their statute in a serious and visible manner.

1.3 The Adoption of a Succession of Legislative Drafts Regarding the Annulment of the Magistrates' Occupational Pensions, Initiatives Which Were Accompanied by a Spiteful Public Discourse Against them

As we have mentioned before on different occasions, in Romania the subject of justice is heavily politicized and populist arguments are used by different parties in order to gain votes.

One such subject now, which scores big political points, is "eliminating the special pensions".

In Romania there are a few categories of people that have "special pensions" (the correct term would be "occupational pensions"): police, military personnel (where are also included those that worked in the secret intelligence agencies), pilots, mayors, members of the Parliament, magistrates.

Since the trust of people in the judiciary is decreasing constantly, the easiest prey from these politicians to score political points were the magistrates.

For several months, a disinformation and shaming campaign was conducted against us, the magistrates being blamed by the Government and the PNL party leaders that, because of these pensions, the budget of Romania is jeopardized.

Due to these threats, the magistrates in Romania were protesting at the beginning of 2020 by using different methods. One such protest is for many tribunals and appeal courts, for example, to suspend their activities for several weeks.

Also, the Superior Council of Magistracy reacted publicly on multiple times, urging the Government not to abolish/modify the pensions without a proper consultation with the magistrates.

Nevertheless, the Parliament adopted at the end of January the law which eliminates the retirement pensions of judges and prosecutors. The Supreme Court challenged the law in front of the Constitutional Court and, on May 6th, the Court declared that the draft law was unconstitutional, as it was expected.

Even when the draft law was adopted, a part of the press wrote that it was just an electoral measure and a way of turning the citizens against the magistrates. The members of the parliament were aware of the jurisprudence of the Constitutional Court and some of them admitted from the beginning that the law adopted is unconstitutional.

Basically, despite the law was clearly unconstitutional, they adopted it anyway in order to say after that the magistrates (including the Constitutional Court) don't want to give up their privileges.

A second draft law was adopted recently.

On June 17, The Parliament has passed a bill on the taxation of all special pensions by up to 85%, with the draft being endorsed by all parliamentary parties, but mostly following an agreement sealed between PSD and PNL.

According to the draft, after the amendments in the special committees, the special pensions, including the ones of military pensioners and of magistrates will be taxed by 85% if they are higher than RON 7,000 and by 10% for those ranging between RON 2,000 and RON 7,000.

Even that the new bill is affecting the military pensions, too, the Prime Minister Ludovic Orban declared, soon after the bill was adopted that: "*In my view, the only pensions that can make a compromise from this principle of contributivity are military pensions - and this category includes former intelligence services*

officers, A/N - , because they are in the service of the nation all their lives and the pension is a service pension. "

According to the official statistics, in Romania are over 170.000 retired people from police and military (9.000 only from SRI) – and their special pensions will be kept –, and only 3.800 former magistrates.

The Supreme Court challenged this law in front of the Constitutional Court, too, and a decision is expected. In the meantime, the attacks against magistrates and the Constitutional Court are growing alarmingly.

2. **Political Statements, Including From the Prime Minister, Directly Targeted Against Judges, Referring Both to Their Status and to Decisions Pronounced in Cases which Regarded the Government's Activity**

As I have pointed out in the previous section, in recent months there has been a real campaign aimed at demonizing judges and prosecutors, starting with the issue of their pensions, which is regulated, for that matter, by the law on the status of judges and prosecutors.

Against this background, of the loss of confidence in judges and prosecutors, Prime Minister Ludovic Orban launched a specific attack against a panel from the Bucharest Court of Appeal, as he was dissatisfied with a decision pronounced by it.

Specifically, in case no. 2197/2/2020 of Section VIII competent in administrative and tax proceedings, the enforcement of the Government Decision No. 380/2020 amending the Government Decision No. 34/2009 on the organization and functioning of the Ministry of Public Finances was suspended, as far as Article I point 3 — the Annex is concerned, regarding the abolition of the General Legal Directorate and the replacement of this structure by two new structures — the Legal and Legislation Directorate and the Litigation Directorate, the suspension of the enforcement of the Government decision being ordered until the court ruled on the merits.

On the 24th of June 2020, referring specifically to this court ruling, Prime Minister Ludovic Orban said:

"We're talking about a suspension until the court rules on the merits. *I cannot help wondering what the issue is in this procedure. The management of a ministry must organize its ministry as it deems necessary*. We are not encountering the first decisions of this nature and *here I really urge judges to judge more carefully*, because in drawing up Government decisions on the organization and functioning of ministries, of central administration authorities, the leaders of these institutions have the legal possibility of organizing their activity in departments and general directorates, as they think is best. If Government decisions are suspended in this way, the reform of the administration will be delayed because who knows when the case will be judged on the merits. *It seems to me that the suspension of a decision related to the reorganization of the Legal Directorate is not correct*."

The suggestions made by the Government to judges to judge "*more carefully*" specific cases pending before the courts, combined with actual indications to judges about solutions that should be given in these cases, represent a clear and unacceptable pressure factor both on the judges from the case concerned and on the other judges specialized in administrative proceedings, whose role is, by definition,

to verify the legality of administrative acts and, consequently, to censor illegal administrative acts, including the ones issued by the Government.

It is alarming that the Romanian Prime Minister wants to have a series of administrative acts excluded from the control of the courts and, because this is not allowed by law, he tries to get this result *de facto*, by public requests addressed directly to judges.

For this reason, three professional associations – ARM, NURJ and AJDHR – on June 29, 2020, requested the Section for Judges of the Superior Council of Magistracy to defend the independence of the judiciary from the statements made by Prime Minister Ludovic Orban.

III. The Status of Prosecutors. Appointments to Management Positions despite the Negative Opinion of the Section for the Prosecutors

According to provisions of article 54 of Law 304/2004 (with amendments), their appointment is made by the President of Romania at the proposal of the Minister of Justice, with the *advisory opinion* of the Section for Prosecutors.

For the purpose of appointment, the Minister of Justice shall organize a selection procedure.

As long as these appointments are obviously within the reach of the political factor, naturally, the assumption that the persons holding these positions do not enjoy real independence is justified.

Only amending the legal provisions on the appointment of high-ranking chief prosecutors, to the exclusion of any political entity from the procedure of such appointment, can be a correct solution.

Not long ago, at the beginning of this year, the President of Romania - Klaus Werner Iohannis, stated that, at future appointments to be made at the head of the Public Ministry, he will follow the recommendations of the Venice Commission and consider the opinion of the Section for prosecutors from the Superior Council of Magistracy.

However, later, the President of Romania re-evaluated his statement and ignored the recommendation of the Venice Commission, appointing the candidates proposed by the Minister of Justice, although they had received negative (consultative) opinions, the President of Romania arguing that "Minister Cătălin Predoiu's proposals were very well elaborated and very well motivated, while the opinion of the Superior Council of Magistracy was partially quite superficial."

Therefor it is obvious that the topic of independence of justice is just an electoral tool for politicians, the appointments of the prosecutors being a perfect example of their duplicity.

IV. Aspects Regarding the Section for Investigating Crimes Within the Field of Justice

The establishment of this section - as a specialized structure within the Prosecutor's Office attached to the High Court of Cassation and Justice (art. 88^1 paragraph 1 of Law no. 304/2004) was supported by magistrates, judges, and prosecutors, being claimed for excessive, sometimes abusive practices carried out by the National Anticorruption Directorate in cases involving crimes committed by magistrates. The Section for Investigating Crimes within the field of Justice was established as an additional means of guaranteeing the independence of judges, as stated by the Romanian Constitutional Court by Decision no. 33/2018:

"147. Concerning the establishment of the Section for Investigating Crimes within the field of Justice, at the level of the highest national prosecutor's office the Court notes that it aims to create a specialized structure, with a specific object of investigation, ***and is a legal guarantee of the principle of independence of justice, in terms of its individual component, the independence of the judge****. In this way, an adequate protection of the magistrates against the pressures exerted on them, against the abuses committed through arbitrary notifications / denunciations is ensured and a unitary practice is ensured, at the level of this prosecutor's office structure, regarding the criminal prosecution for crimes committed by magistrates."*

Following the Order of the Chief Prosecutor of the National Anticorruption Directorate no. 10/31 January 2014, within this direction, the Anti-Corruption Service in Justice was established, which functioned until October 26, 2018, when the Section for Investigating Crimes within the field of Justice became operational within the Prosecutor's Office attached to the High Court of Cassation and Justice.

According to the data contained in *the Judicial Inspection Report no. 5488 / IJ / 2510 / DIJ / 1365 / DIP / 2018 regarding the observance of the general principles governing the Activity of the Judicial Authority in cases within the competence of the National Anticorruption Directorate targeting magistrates or in connection with them approved by the Decision of the Plenum of the Superior Council of Magistracy no. 225 of 15.10.2019* concluded that:

"***The practices of DNA prosecutors who investigated cases with judges in the ways mentioned below represented forms of pressure on them, with direct consequences in terms of the administration of justice.***

Thus, the technique of ***ex officio referrals against judges*** *and* ***their investigation for the solutions provided*** *in the cases is an unacceptable fact, of unprecedented gravity, which undoubtedly represents a factor of pressure not only on those concerned but on the entire professional body of judges.*

The suspicions on the way of working of the prosecutors within the National Anticorruption Directorate are also amplified by the fact ***that cases that were left in operation for a long time, after previously having been ordered in them technical supervision measures for significant periods, were solved in block, by not to indict, even before the operationalization of the Section for Investigating Crimes within the field of Justice.***

Such practice raises serious questions as to the reasons which have justified the retention of cases for a period of years and raises legitimate suspicions as to the establishment and, in this way, of pressure factor on the work of magistrates and, finally, on the right of the parties to a fair trial.

The same coordinates include the practice of requesting cases pending before the various courts in order to evaluate the measures/solutions pronounced by judges from a possible criminal perspective. In fact, this manner of investigation was a real intrusion into the judge's freedom of assessment. "
The way of notifying and conducting investigations by the National Anticorruption Directorate in cases with magistrates has led to a continuous decrease in trust in the act of justice, and by setting up the Section for Investigating Crimes within the field of Justice, among citizens, there has been an increase in the degree of trust among prosecutors.

This was largely due to two factors:

- that the Section operates within the Prosecutor's Office attached to the High Court of Cassation and Justice, totally detached from the National Anticorruption Directorate;

- a transparent and totally objective way of recruiting prosecutors working in this section, respectively appointing the chief prosecutor of the section (through a competition organized by the Superior Council of Magistracy before a commission composed of members of the Superior Council of Magistracy judges and prosecutors).

To be a prosecutor in this section, the effective seniority as a prosecutor must be at least 18 years old and have at least a degree of prosecutor's office attached to the court of appeal. In no other structure of the Public Ministry, whether they are executive or management positions (including that of general prosecutor), there are such restrictive conditions, conditions that must be met cumulatively with those of good professional training, impeccable moral conduct, not to have been disciplined for the past three years.

All this: *the conditions* to be a prosecutor in the Section for Investigating Crimes within the field of Justice, *the evaluation* and the procedure followed to work in this section (with maximum objectivity and transparency in the selection of candidates), were regulated to cover the requirements of professional and moral quality of prosecutors and to ensure the conduct of fair, objective investigations without outside influence. As we have shown - as provided in the law - the Section for Investigating Crimes within the field of Justice is the only prosecutor's office structure in which the political factor has no competence in appointing the prosecutors who compose it.

Or, the answer to these pressures on the magistrates through the criminal investigations carried out by the National Anticorruption Directorate is represented by the establishment of the Section for Investigating Crimes within the field of Justice through its way of regulation.

Also, the establishment of the Section for Investigating Crimes within the field of Justice meets the standards of independence of judges upheld by the C.J.E.U. in that their responsibility "presents the necessary guarantees to avoid any risk of using such a regime as a system of political control of the content of judicial decisions".

The arguments in support of the abolition of the Section for Investigating Crimes within the field of Justice (the fact that it has a large number of cases pending or the fact that it has withdrawn two appeals in two criminal cases) are incorrectly presented and insufficient to substantially motivate the development of this section.

The Section for Investigating Crimes within the field of Justice operates with a small number of prosecutors and without an appointed chief prosecutor (the duties of the chief prosecutor have been delegated to the deputy chief prosecutor), because:

- although following a competition organized and held in 2019 the position was occupied by the candidate who had the best evaluation, from June 2019 to October 2019 The Plenum of the Superior Council of Magistracy could not meet in session to form the majority as a constant number (always the same) of members refused to attend meetings to block this appointment;

- in May 2020, the Plenum of the Superior Council of Magistracy rejected the proposal to organize competitions for the position of chief prosecutor of the section and the positions of prosecutor within the section,

thus, clearly and constantly pursuing the blocking of the activity of the Section for Investigating Crimes within the field of Justice as a further argument in support of the need to abolish the section.

We consider that the entire campaign against the existence and functioning of the Section for Investigating Crimes within the field of Justice has as its source precisely its functional independence, effectively removed from the sphere of political entities, independence which we find has become uncomfortable.

In support of the above arguments, it is worth mentioning two more issues that can clarify the will of the magistrates regarding the abolition of the Section for Investigating Crimes within the field of Justice:

- first - during the consultations ordered and carried out by the Superior Council of Magistracy among the judges, unanimously the judges of the High Court of Cassation and Justice and in an overwhelming majority those of the Court of Appeal were against the dissolution of the Section;

- by decision no. 101 of May 28, 2020, the plenum of the Superior Council of Magistracy approved negatively the legislative proposal of the Minister of Justice to abolish the Section for Investigating Crimes within the field of Justice

V. The Abusive Request for the Dismissal of the Romanian Ombudsman. The Precedent From 2012

1. Brief Considerations Regarding the Institution of the Romanian Ombudsman

The Romanian Ombudsman is an autonomous public authority, independent from any other public authority, having the aim of defending the rights and freedoms of natural persons in their relations with public authorities.

According to law, the Ombudsman cannot be subject to any imperative or representative mandate. No one can force the Ombudsman to obey his instructions.

However, the mandate of the President of this institution is closely linked to the political will: the dismissal of the Ombudsman, as a consequence of the violation of the Constitution and the laws, is decided by the Chamber of Deputies and the Senate, in a joint session, with the vote of a majority of the deputies and senators present, at the proposal of the permanent bureaus of the two Chambers of the Parliament, based on the joint report of the judicial committees of the two Parliament Chambers.

In 2003, in the context of the revision of the Romanian Constitution, the Ombudsman received the right to refer the laws and emergency ordinances to the Constitutional Court in order for it to verify their constitutionality before their promulgation by the President. This new role gives the Ombudsman the responsibility and power to monitor the Government's activity of adopting normative acts and to maintain a balance of power between the Parliament and the Government regarding the legislative process in accordance with the provisions of the Constitution and the laws in force.

The abusive adoption of emergency ordinances is one of the most serious and constant problems regarding the rule of law in Romania.

As early as 2012, the Venice Commission expressed concern about the “widespread use of emergency ordinances of the Government” as a risk to democracy and the rule of law. During its visit to Romania, the delegation of the Venice Commission noticed that only in 2011, 140 emergency ordinances were adopted, which represents a reason for "serious concerns" and " an abuse of this instrument", as is shown in the document.

The Venice Commission also shows that these events and several statements made during the summer show "an alarming lack of respect" among the representatives of some state institutions for the status of other institutions - among them the Commission also includes the Constitutional Court[1].

All the European reports on the justice system - including those issued under the CVM - reiterate this criticism of the Romanian legislative process.

[1] https://romanialibera.ro/actualitate/eveniment/raportul-comisiei-de-la-venetia--guvernul-a-luat-masuri--problematice--din-punct-de-vedere-constitutional-in-perioada-referendumului--vezi-reactia-monicai-macovei-287585

In the CVM report of January 2015, the European Commission stressed that:

‘‘Even if it is understandable that the Ombudsman has a margin of discretion as to the circumstances in which it is appropriate to refer the unconstitutionality of emergency ordinances to the Constitutional Court, this self-imposed limitation creates a gap that cannot be replaced by other actors in the current institutional framework in Romania"[2].

However, the majority of the persons appointed as Ombudsmen were reluctant to exercise their role provided by law, of referring exceptions of unconstitutionality to the Constitutional Court. From 2004 until now, the Ombudsman has sent the Constitutional Court 104 such requests.

2. The Activity of Ms. Renate Weber, the New Romanian Ombudsman, From the Date of Her Appointment to the Present Day

On the 4th of July 2019, a new Ombudsman was appointed, Ms. Renate Weber, supported by the then ruling party ALDE.

From the date of her appointment to the present day, the Ombudsman sent the Constitutional Court 25 requests (exceptions and objections of unconstitutionality), of which 11 were accepted, 3 were rejected and 11 are pending.

In other words, 25% of all referrals to the Constitutional Court since 2004 until the present day have been made by the current Ombudsman.

This activity is all the more remarkable as the context is particularly difficult: 2020 began tumultuously with the adoption by the Government of no less than 25 emergency ordinances in one night (an absolute record even for Romania), the COVID pandemic revealing subsequently both the authoritarian propensities of the authorities and the abuse of power and major legislative vulnerabilities in the field of human rights protection and of rule of law protection during the state of emergency and alert.

During this period, the People's Advocate institution was very active, as shown by the increased number of ex officio proceedings, but also of **petitions received, which tripled**.

All of action was published on the institution's website in the section ***Actions of the People's Advocate related to decisions on the state of emergency and the state of alert.***[3]

Among the actions that provoked the harshest attacks on the Ombudsman are the following:

A) The Ombudsperson notified the Constitutional Court with the exception of unconstitutionality regarding certain articles from the **Government Emergency Ordinance**

[2] http://ec.europa.eu/cvm/docs/com_2015_35_ro.pdf, p. 6
[3] http://www.avp.ro/index.php?option=com_content&view=article&id=526&lang=ro-ro&Itemid=208

no. 1/1999 on the state of siege and the state of emergency, as the legal text was totally lacking in predictability and clarity, which determined the impossibility of the recipient of the law to establish what's the correct conduct to follow, in the absence of a rigorous description of a misdemeanor. Moreover, **the misdemeanors were not set by laws, but by military ordinances.** The Constitutional Court admitted the exception of unconstitutionality and ***found that the provisions on misdemeanors were unconstitutional*****.**

B) Constitutional Court judges ruled on June 25th that isolation at home, quarantine and hospitalisation cannot be imposed based on ministerial order, even if the persons in question are infected with the novel coronavirus. They say these measures are restricting individual rights and freedoms and that imposing restrictive measures can only be established by a law that clearly regulates them. The ruling of the Constitutional Court comes after a complaint by the Ombudsman referring to some provisions of a law on healthcare reform from 2006 and the government emergency order on measures to prevent and combat the effects of the COVID-19 pandemic.

C) The law regarding the "special pension" was referred to CCR by the Ombudsman and the High Court of Cassation and Justice. Romania's Constitutional Court (CCR) decided on Wednesday, May 6, that the law that cancels the so-called "special pensions," namely pensions not based on recipients' contributions, is unconstitutional. The second draft law, regulating "super-taxation" was also referred to CCR, a decision in expected in mid of July.

3. Public Attacks on the Romanian Ombudsman

As a result of the actions previously mentioned, attacks of maximum intensity on the Ombudsman began.

You have below some declarations from politicians, mostly from the Prime minister, Ludovic Orban:

- "*It is serious that the attacks on the Constitutional Court generated by the Ombudsman have deprived the state authorities of the necessary tools to ensure compliance with the rules and, on the other hand, have created many situations that are likely to increase the epidemiological risk*. (...)",
- "*Furthermore, attacking at the CCR (Constitutional Court of Romania, ed. n.) regulations through which fines were issued to those who did not respect the law showed that the Ombudsman has placed itself on the side of the 1% of the population who did not respect the law and who were fined for not respecting the law*."
- *"Citizens were responsible, they understood, they were careful, and they complied with the rules***,** *even if there is a citizen in Romania, named Renate Weber, who is said to be the People's Advocate, who would have preferred a higher number of deaths"*
- *"Ms. Weber has become a pro-Russian and a pro-Chinese. She notified the Constitutional Court about the cutting of special pensions, initiated by us, and the Constitutional Court declared that it is unconstitutional. We will tax pensions by up to 90%".*

The Government party – PNL submitted, on Monday, to Parliament, the request for the removal from Ombudsman office of Renate Weber.

"*We have initiated the procedure today to remove the Ombudsman, Mrs. Renate Weber. (…)The removal request has been submitted today with the Standing Bureau, and it has two counts, in principle. The first one refers to the conflict of interests Mrs. Renate Weber is facing right now, as she is supposed to serve the state and the people while she acts against the state and the people. Basically, when she attacked the Constitutional Court of Romania, Mrs. Renate Weber was basically protecting her own special pension as Ombudsman, and the second count refers to the fact that she exceeded her attributions by establishing that torture mechanism against the COVID hospitals, and we detailed on the two aspects. The request has a clear legal nature as well," Florin Roman stated, before the meeting of the Executive Bureau of the PNL, which takes place at the headquarters of the party*.[4]

The Ombudsman did not want to comment on the request for her removal from office, she is waiting for the parliamentary procedure to unfold, a press release from the Ombudsman sent to AGERPRES on Monday reads. "*We specify that, according to the laws in forces, the Ombudsman office and the Deputy Ombudsman office are of the same level with the office of minister or secretary of state and do not benefit from service or special pensions*," says the release.

The request to revoke the Ombudsman, accompanied by extremely harsh attacks against her, proves that the political power in Romania does not intend to respect the independence of any institution, as they are being attacked as soon as they step out of the line of government policy.

Such attacks will discourage – again – the Ombudsman from fulfilling his mission. His role is not to defend the state. On the contrary, his role is to defend the rights and freedoms of citizens in their relations with the state. Such actions that are manifestly contrary to democracy and the rule of law must be publicly sanctioned, including at a European level.

VI. Tireless and Constant Attacks Against the Constitutional Court. History of the Court's Decisions by which the Involvement of the Intelligence Services in the Justice System Was Eliminated

In 2020, the Constitutional Court was the subject of inadmissible attacks as a consequence of pronouncing decisions that manifestly disturbed the current political power.

The virulence of these attacks is not new, however, as the Constitutional Court became the target of such attacks since 2014, when it pronounced a series of decisions regarding the so-called "Big Brother" laws, which clearly disturbed the interests of the intelligence services.

The attacks continued as the Constitutional Court, despite facing pressures, continued to pronounce a

[4] https://www.nineoclock.ro/2020/06/23/aldes-tariceanu-after-liberals-initiate-procedure-to-revoke-the-ombudsman-its-time-we-notify-ep-ec-and-venice-commission-of-attacks-against-democratic-institutions/

series of historical decisions by which the interference of the intelligence services was eliminated, decisions which we will briefly mention in the following.

We reiterate that as of 2015, the signatory associations have made a serious effort to defend the independence of the judiciary from the interference of intelligence services. These efforts were supported by statements of European associations, including MEDEL.

May 2015, MEDEL stated that it "*shares the same deep concerns of the judges and prosecutors from Romania who took a stand against the unlawful involvement of the Romanian Intelligence Service (SRI) in the judiciary process. This situation is a threat to the democracy in Romania therefore we call on all Romanian authorities to take immediate actions in protecting the independence of the judiciary and reestablishing the rule of law so every Romanian would have the confidence that has part of a just and fair trial*."[5]

In March 12, 2016, MEDEL called again for "*the immediate ceasing of any kind of interference of secret services in the judiciary in Romania*", underling that "*In the context that SRI is part of the criminal investigation and it is also involved in the courts, corroborated with the failure of authorities to clarify transparently these matters, this raises serious doubts about the respect for basic human rights and the guarantee of a fair and just trial of any person accused by the state. The most recent attacks to the Romanian Constitutional Court, for ruling unconstitutional the article used by prosecutors to delegate SRI to conduct acts of penal investigation, confirms that there is an unhealthy involvement of SRI in the judiciary process*."[6]

On the other hand, the Constitutional Court pronounced this year two decisions regarding the measures taken by the Government to combat the COVID-19 pandemic, measures which have violated constitutional provisions, the separation of powers and fundamental rights and freedoms.

We recall that on April 17th the Parliament adopted a resolution "EU coordinated action to combat the COVID-19 pandemic and its consequences" that emphasized that "all measures taken at national and/or EU level must be in line with the rule of law, strictly proportionate to the exigencies of the situation, clearly related to the ongoing health crisis, limited in time and subjected to regular scrutiny"[7].

[5] http://www.unjr.ro/2015/05/25/european-magistrates-concerned-about-the-influence-of-intelligenceagency-over-the-judiciary-process-in-romania/
[6] http://www.unjr.ro/2016/03/16/medel-declaration-is-europe-under-siege/
[7] https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html

1. ***Decisions related to the activity of Romanian Intelligence Service (SRI) and to the interference of secret services in the judiciary***

   a. **Decisions nr. 440/2014, 461/2014 and 17/2015 related to the "Big brother" laws and cyber security**

This package of decisions of the Constitutional Court concerned the so called "Big Brother" legislation that included Law no. 82/2012 regarding data retention[8], legislative proposal amending and supplementing Government Emergency Ordinance no.111 on Electronic Communications[9] and the Romanian Law on Cyber Security.[10]

The last decision raised particularly aggressive attacks from intelligence services.

On 21 January 2015, the CCR declared unconstitutional the Romanian Law on Cyber Security. One of the main reasons underlying the CCR's decision was that the national authority in the field of cyber security should rather be a civilian body than the National Centre for Cyber Security (Centrul Naţional de Securitate Cibernetică) which was operated by the Romanian Intelligence Service (Serviciul Român de Informații, SRI). As explained by the CCR, since "*the National Cybersecurity Centre is a military structure as part of an intelligence service, hierarchically subordinated to the management bodies of this institution, and therefore under direct military administrative control, it is obvious that such entity does not meet the requirements with regard to the guarantees necessary for ensuring the respect for the fundamental rights relating to personal, family and private life and the secrecy of correspondence*."[11]

Following the Constitutional Court's decision, George Maior the Head of SRI reacted with a cascade of questionable declarations. Among other things, he attacked the Constitutional Court for its verdicts regarding its surveillance laws, and declared that everyone opposing these laws will be responsible for the next terrorist attack: *"I want to warn very seriously that there is also a moral responsibility somewhere in the state, in connection with the national security of the Romanian citizens – not of the state, I am not talking about the state anymore – and that when a catastrophe happens I will know who to point my finger at".*[12]

[8] www.ccr.ro/files/products/Decizia_440_20141.pdf
[9] www.ccr.ro/files/products/Decizie_461_2014.pdf
[10] www.ccr.ro/files/products/Decizie_17_2015_EN_final.pdf
[11] www.ccr.ro/files/products/Decizie_17_2015_EN_final.pdf
[12] https://www.hotnews.ro/stiri-esential-19192755-george-maior-seful-sri-noi-critici-pntru-curtea-constitutionala-exista-raspundere-morala-undeva-stat-legatura-securitatea-cetatenilor-sper-nu-opune-sri-ului-curtea-constitutionala-considerat-exista-an.htm

In March 2015 Toni Grebla, judge of the Constitutional Court was detained by DNA for 24 hours. He was charged several offences. In June 2019, four years later, he was acquitted by a final decision of the Supreme Court.

Being asked if he was a target because of the Big Brother laws on which CCR was going to decide, Grebla stated: "*Coldea and others from SRI, together with DNA, felt that the Big Brother laws were very useful to them in order to make superficial executions, and they were upset about this. The effort of investing in appropriate equipment and software was more than USD 200 million, so they had to give an example to CCR, and they gave this example through me*".[13]
Former **President of the Romanian Constitutional Court Augustin Zegrean** stated that Toni Grebla is "***a victim of the system***", and **all the judges of the Court suspected he is innocent**. "*It was a quite long period in communism and after this, but of course things should get normal, this crazy thing should stop, because sending someone to court, **someone who was a judge of the Constitutional Court, detaining him for 24 hours, to make him be afraid, is not a minor thing**. Then, forcing him resigns in order for you to be able to investigate him. What happened to him is not right*"[14] Augustin Zegrean added.

On *February 2020*, the Constitutional Court ruled again that the emergency ordinance 26/2019 that required the mandatory registration of prepaid mobile phone SIM cards and public Wi-Fi users is unconstitutional. The ruling of the Constitutional Court comes after an exception of unconstitutionality was notified to the Court by the Ombudsman[15].

b. Decision 26/2019 regarding secret protocols between prosecutors and the national domestic intelligence (SRI)

The secret protocols between the General Prosecutor's office and the intelligence service were signed between 2009 and 2016 and some have been declassified.

The existence of such protocols causes particular concern in Romania.

The country's history under the now discredited Ceausescu regime meant that in the years that followed, the intelligence services have been precluded from participating in the criminal justice system to avoid a repeat of the repression of that era, when the then "Securitate" used the courts to impose their will.

[13] https://www.nineoclock.ro/2018/05/14/former-ccr-judge-toni-grebla-acquitted-by-the-supreme-court-in-the-case-related-to-the-ostrich-farm-grebla-judges-are-proving-that-they-judge-by-evidence-not-by-targets-established-by-sri-and-dna/
[14] https://www.nineoclock.ro/2018/05/14/former-ccr-judge-toni-grebla-acquitted-by-the-supreme-court-in-the-case-related-to-the-ostrich-farm-grebla-judges-are-proving-that-they-judge-by-evidence-not-by-targets-established-by-sri-and-dna/
[15] http://legislatie.just.ro/Public/DetaliiDocument/207580

A Romanian law from 1992 stated that the SRI "cannot carry out criminal investigation actions apart from issues of national security, when they are permitted to play a supporting role".

In October 2018, the President of the House of Deputies notified to the Romanian Constitutional Court (CCR) what he perceived as being a conflict of powers between Parliament and courts on the one side, and the National Prosecutor's Office on the other side.

On 16 January 2019, the Romanian Constitutional Court announced it had found such a conflict. In Decision 26/2019, the CCR found that there is indeed a legal conflict of constitutional nature, but that it is between the NPO and Parliament on the one side, and the courts on the other.

The CCR explained that the breach of the Constitution has been systemic and lasted sufficiently long for the Court to identify a "*legal paradigm*", meaning "*a set of rules and concepts instituted and accepted by legal thought*" which implies continuity because it involves legal traditions that do not tolerate any disagreement.

The Court takes note that such practices infringe upon the legal security of citizens and thus ordered all prosecutors' offices and courts of the land to verify in all pending trials if criminal procedural rules have been observed and "*to take appropriate legal measures*".

c. **Decisions no. 51/2016, no. 55/2020** related to the involvement of SRI in criminal cases

On 16 February 2016, the CCR decided to strike down as unconstitutional the provisions of Article 142(1) of the Code of Criminal Procedure allowing the SRI to engage in wiretapping in criminal cases. Pursuant to those provisions, technical surveillance ordered by a prosecutor upon a court warrant could be performed "by a criminal investigation body or by specialised workers from police or other specialised organs of the state." [16]

This decision – no. 51/2016 - directly affected the SRI because it was not considered a criminal investigative body.

Before the Court's ruling, the SRI had conducted technical surveillance at the request of the prosecutor's office and other agencies in cases involving not only national security but also corruption, tax evasion, and any other crimes.

[16] The Decision no. 51/2016 regarding the objection of unconstitutionality against the provisions of Art. 142(1) of the Code of Criminal Procedure para. 38, 16 February 2016, available at: https://www.ccr.ro/files/products/Decizia_51_2016.pdf.

As a journalist noted, "*Many of NAD's cases involve wiretapping, which is done by the Intelligence Service who has the necessary infrastructure. But the system contains very few checks and balances. Nobody really knows if the Intelligence Service is controlling in any way the flow of information, deciding what to give away and what to hold back. The wiretapping needs to be approved by a court at the request of a prosecutor, but the quantity of potential information is so big that the power to truly decide what should be used and what shouldn't stays with the ones harvesting it – namely, the Intelligence Service*. "[17]

For years latter, in 2020 the Constitutional Court rules on **Decision 55/2020** that "*The provisions of Article 139 paragraph (3), the final sentence of the Code of Criminal procedure - which allow audio-video recordings to be used as evidence in criminal proceedings - are constitutional in so far as they do not concern recordings resulting from the carrying out of activities specific to the gathering of information, which involve the restriction of the exercise of fundamental human rights or freedoms, carried out in accordance with legal provisions, authorized according to Law no. 51/1991*" .

The Court underlines that "*the purpose for which activities in the field of national security are used is different from the one in criminal proceedings. The former activities focus on knowing, preventing and removing internal or external threats for the purpose of protecting national security, while the others are intended to lead to the prosecution of offenders. Thus, according to a systematic and teleological interpretation, it follows that Law no. 51/1991 and the Code of Criminal procedure have different ends, which are also reflected in the purpose for which activities specific to the gathering of information involving the restriction of the exercise of fundamental human rights or freedoms/the technical supervision measure are authorized*" .

The Court stated that "*the regulation of the possibility of conferring the quality of evidence to records resulting from activities specific to the gathering of information involving restrictions on the exercise of fundamental human rights or freedoms is not accompanied by a set of rules which allow the legality of such records to be challenged effectively.* ***By simply regulating the possibility of conferring the quality of evidence to these records, without creating the appropriate framework for challenging their legality, the legislator has legislated without complying with the requirements of clarity and predictability***".

The decision of the Constitutional Court has a particular impact, taking into account the fact that in Romania the issuing of national security mandates has been done on a large scale. Between 2009 and 2016, the High Court issued more than 26.000 such interception warrants, rejecting only one such request. Mandates were issued for six months and could be extended for up to two years and were used in a totally unpredictable manner as evidence in criminal proceedings, sometimes after a long period from the date they were obtained, without the possibility for the accused persons to challenge their legality.

[17] https://katoikos.world/dialogue/understanding-romanias-anticorruption-hunt.html See also https://edri.org/intelligence-organisations-get-more-surveillance-powers-in-romania/

2. *Decisions rules by the CCR in the pandemic context*

On May 6, 2020, The Constitutional Court of Romania decided that some provisions from the Government Emergency Ordinance no. 1/1999 were unconstitutional, on the grounds that they were not clear enough to allow citizens to regulate their conduct in accordance with the law. Over 300,000 contravention fines have been applied based on these unconstitutional provisions during the state of emergency. We already referred to this decision (please see section I.2 of the report).

On June 25, 2020, The Constitutional Court has issued a new ruling, disliked by many, but in perfect accordance with similar decisions handed down by other European courts.

Constitutional Court judges ruled that isolation at home, quarantine and hospitalisation cannot be imposed based on ministerial order. They say these measures are restricting individual rights and freedoms and that imposing restrictive measures can only be established by a law that clearly regulates them.

In a similar way, The France Constitutional Council ruled on May 11, 2020, that the Constitutional court considered that some elements were in violation of, *inter alia*, the constitutional rights to an effective remedy and to privacy. Among other issues, the Council considered that decisions to quarantine or isolate persons for a period over 12 hours a day should be authorized by a judge.[18]

Nevertheless, even the decision of CCR is an impeccable ruling it was used by the Government as a new opportunity to launch a violent attack on the Constitution Court, with the obvious aim to infringe the independence of constitutional judges.

Judge Dana Gîrbovan – President of the National Union of the Romanian Judges (UNJR)
Judge Dr. Andreea Ciucă – Interim President of the Romanian Magistrates' Association
Judge Florica Roman – President of the Association of Judges for the Defense of Human Rights (AJADO)
Prosecutor Elena Iordache – President of the Romanian Prosecutors' Association (APR)

[18] https://www.conseil-constitutionnel.fr/actualites/communique/decision-n-2020-800-dc-du-11-mai-2020-communique-de-presse?fbclid=IwAR2BESSZHEoWyfSCWpQQVvcCwLyjdIRld7WkPXzsFMXA0rAWzRwvx_2Ukek