

N^o 57/2022

To Ms Claire BAZY MALAURIE,

President of the Venice Commission

Your Excellency,

The undersigned associations,

The Romanian Magistrates' Association (AMR), a non-governmental, apolitical, national and professional organization of judges and prosecutors, declared “of public utility” by Government’s Decision No. 530 on 21 May 2008, email: amr@asociatia-magistratilor.ro, member of the International Association of Judges and of the European Association of Judges since 1994, represented by Judge Andreea Ciucă, PhD, as president,

The National Union of Romanian Judges (UNJR), email: office@unjro.ro, member of the Association of European Magistrates for Democracy and Freedom – MEDEL, represented by Judge Dana Gîrbovan, as president,

The Association of Judges for the Defense of Human Rights (AJADO), a non-governmental, apolitical and professional organization of judges, email: contact@ajado.ro, represented by Judge Florica Roman, as president,

The Romanian Public Prosecutors' Association (APR), a non-governmental, apolitical, national and professional organization of prosecutors, email: apr@mpublic.ro, represented by prosecutor Elena Iordache, PhD, as president,

send the following

OPEN LETTER

urging the Plenum of the Venice Commission to revise the draft opinion of the Venice Commission on the draft law Dismantling the Section for the Investigation of Offences committed within the Judiciary (SIIJ), due to the following reason:

1. The infringement of the article 3a² of the Rules of procedure – the overt lack of impartiality of the Venice Commission experts responsible for drafting the report.

2. The severe factual inaccuracies and the ostentatious oversight of essential aspects, such as the unprecedented pressure exercised by National Anticorruption Directorate (DNA) prosecutors upon judges and other prosecutors during the time when DNA prosecutors were responsible for the investigation of magistrates, this being the main reason for the creation of the Section for the Investigation of Offences committed within the Judiciary (SIJ).

1. The overt lack of impartiality of the experts who draft the opinion

According with the article 3a² of the Rules of procedure,

“1. Members shall act in a manner that is, and is seen to be, independent, impartial and objective with respect to any issue examined by the Commission”.

The way in which the consultations with the Venice Commission experts took place proves, beyond any doubt, their prejudice regarding the appropriate solution which should be adopted in Romania regarding the investigation of magistrates, mainly the absolute necessity to reinstate to the anticorruption prosecutors the competence to investigate again judges and prosecutors.

The Venice Commission experts have outright refused to analyse concrete and undeniable factual data, which proves that in Romania the anticorruption prosecutors abused their power and conducted their investigations in a way that exceeded unprecedented pressures on the magistrates.

Such abusive investigative measures are nowhere to be found in the western democratic Europe, and they have resulted in the resignation and suspension of a Romanian general prosecutor, of a sitting judge from the Romanian Constitutional Court, of a president's section from the Romanian Supreme Court, of the General Prosecutor of the Ploiesti District, and many more judges and prosecutors, especially at the level of appellate courts and the Supreme Court, all of whom were responsible for solving cases of high corruption.

All these magistrates were either acquitted or have had their cases dropped in the end, but only after grave obstructions of justice had already occurred.

It is utterly unacceptable that such pressures, which constitute an undeniable great threat to the rule of law, would be ignored by the Venice Commission's experts.

We further point out the fact that DNA (National Anticorruption Directorate) has refused to take responsibility for these errors and abusive practices, which were encouraged, reinforced, excused, with no doubt, by the attitude of European institutions.

The role of the Venice Commission is not that of shielding the alleged fight against corruption at all costs, but to promote and protect the rule of law, democracy and, implicitly, the independence of the judiciary against any threats or pressures.



ASOCIAȚIA PROCURORILOR DIN ROMÂNIA
A.P.R.

However, all of the discussions held and all of the concerns expressed by the members of the Venice Commission's delegation ignored the area of judicial independence, focusing solely, instead, on the DNA competency to investigate again magistrates, thus validating the abusive practices of this institution in its relationship to judges and prosecutors.

The members of the Venice Commission's delegation who drafted this note are the same as the delegation responsible for issuing "*Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary- the meetings involving this stage having taken place in May 12-14, 2021*".

At that time, we raised public awareness of the Venice Commission members' total lack of impartiality, due to the fact that they defyingly allowed to speak only associations which argued for the necessary dissolution of SIIJ, with no guarantees given to safeguard the independence of the judiciary, considering the previous abuses done by the DNA prosecutors against the magistrates.

Following the meeting in 2021, our associations – the Romanian Magistrates' Association (AMR), the Romanian National Union of Judges (UNJR), the Association of Judges for the Defense of Human Rights (AJADO) and the Romanian Public Prosecutors' Association (APR) – publicly condemn the parody organized by the Venice Commission, called "a meeting with the magistrates' associations", on the topic of the SIIJ dissolution.

In the press statement released at that time, we revealed that the AMR Chairman, Judge Andreea Ciuca, the only one who was given the floor from among these 4 professional associations, was allowed to speak for 3 minutes, and at the very moment she revealed, with specific arguments, some factual and legal errors in the previous opinions of the Venice Commission, as well as examples of pressures from the DNA investigations directed against judges and prosecutors, she was repeatedly interrupted Venice Commission's delegation, on the alleged account that "these facts are irrelevant to the Commission".

When she highlighted, as evidence of abuses, the Judicial Inspection's Report and one of the conclusions of the Superior Council of Magistracy's Plenum Decision no. 225/2019, she was again abruptly interrupted on the grounds that "these are 'details' that do not concern the reports of the Venice Commission".

These experts of the Venice Commission were the same that came for consultations in February 2022 regarding the new law to dissolve SIIJ.

They have manifested and expressed the same prejudice during this last consultation, leading the discussion only in the direction that the competence to investigate magistrates be given back to DNA, but ignoring obstinately again all the proofs regarding the severe violations of the independence of the judiciary done by the abusive way in which the DNA prosecutors conducted their investigations.

The Venice Commission rapporteurs have shown that they have not fulfilled their mission and that they are not concerned about the essence of democracy through law, which consists in the free debate

on issues impacting the rule of law and human rights, in mutual respect, in the need for an independent judiciary, ensured by effective guarantees, in assuming errors and correcting them, when appropriate.

2. The severe factual inaccuracies and the ostentatious oversight of essential aspects, such as the unprecedented pressure exercised by DNA prosecutors upon judges and other prosecutors during the time when DNA prosecutors were responsible for the investigation of magistrates, this being the main reason for the creation of SIIJ

The cases of judges and prosecutors who were investigated by DNA for the decisions they adopted were publicly discussed and debated in Romania since 2014, evidence being mounting in this regard by the proofs provided by judges, prosecutors and professional associations of magistrates. In these criminal investigations, by excising their competences, the DNA prosecutors analysed, by blatantly violating the independence of judges, the alleged illegality and unfoundedness of the judgments pronounced by judges or of the orders/measures adopted by the prosecutors.

The situation got to a point where DNA turned itself into a “super court”, above the courts of judicial review, and the DNA prosecutors in “super judges”, who could criminally investigate and send judges to criminal trials because in the opinion of these prosecutors the decisions of the judges were illegal and unfounded.

Penally investigating and sending a magistrate to trial for the merits and arguments of a decision s/he gave does not have consequences only on his or her career, but creates an enormous pressure and frightening influence on fellow judges and prosecutors, undermining the independence of the judiciary, the due process and the fairness of a trial.

There is also a recording made public which revealed that 5 DNA prosecutors from Oradea conspired to open, on invented charged, criminal cases against some judges from Oradea Court of Appeal in order to frighten the other judges.

The abuses of the DNA prosecutors against judges and prosecutors were done in a systematic way, situation that was documented and revealed by the Judicial Inspection’s Report no. 5488/IJ/2510/DIJ/1365/DIP/2018 concerning "the conformation to the general principles governing the activity of the judicial authority in cases entering the competence of the National Anti-corruption Directorate regarding magistrates or in relation to them", report which was approved by the Decision no. 255/15.10.2019 of the Plenum of the Superior Council of Magistracy.

The verification covered by the Judicial Inspection’s Report refers to the period 01.01.2014 - 31.07.2018, and, from the Superior Council of Magistracy’s decision to approve the Report, the following key conclusions arose:

- ◆ in total, the central and the territorial structures of DNA targeted 1.962 judges (351 of them handled criminal cases and 1.590 civil non-penal cases – among which a judge

of the Constitutional Court, 13 judges, members or former members of the SCM and 16 judicial inspectors);

- ◆ in 113 cases regarding judges and in 163 cases regarding prosecutors, the investigations were opened *ex-officio* by DNA;
- ◆ in numerous cases, the duration of the investigations was clearly excessive, reaching periods which frequently exceeded 3-5 years; the longest investigation was 12 years and 6 months in one case!
- ◆ undercover officers of the Romanian Intelligence Service, contrary to the law, carried out covertly criminal investigation activities in cases involving magistrates;
- ◆ DNA prosecutors opened criminal cases *ex officio* especially against judges and investigated them for the decisions pronounced in different cases;
- ◆ after SIIJ was created, in order to cover the fact that thousands of judges and prosecutors were under investigation for years, the DNA prosecutors closed cases with magistrates *en masse*. For example, a case opened *ex officio* in 2013 regarding prosecutors and judges from the Superior Council of Magistracy, in which technical surveillance measures were ordered, including for the family members of these investigated magistrates, was closed in 2018. A case regarding a judge, registered in 2006, was closed in 2018, after 12 years. Other cases were in the same situation.

The conclusions of the Decision no. 255/15.10.2019 of the Superior Council of Magistracy (CSM), as guarantor of the independence of justice, are devastating and should be followed by concrete measures for the defence of the independence of justice and of judges, beyond formal and principled statements:

- ➡ “The practices of the DNA prosecutors who handled cases involving judges in the manners described below represented forms of pressure on them, with direct consequences on the administration of justice.
- ➡ Thus, the technique of acting *ex officio* against judges and investigating them for the decisions pronounced in cases is an unacceptable fact, of an unprecedented seriousness, which undoubtedly represents a factor of pressure not only on the targeted judges, but on the whole professional body of judges.
- ➡ The suspicions regarding the manner of working practiced by the prosecutors from the National Anticorruption Directorate are also amplified by the fact that files that have been left inactive for a long period of time, after technical surveillance measures had been ordered previously for significant periods of time, were solved *en masse* by not sending them to trial,

just before the Section for the Investigation of Offences Committed by Magistrates started to operate.

- Such a practice raises serious questions about the reasons that justified maintaining cases pending for periods of time amounting to years and causes legitimate suspicions regarding the creation, in this manner also, of a pressure factor on the activity of the magistrates and, finally, on the right to a fair trial of the parties.
- The same approach can be seen in the practice of requesting files that are pending before various courts in order to evaluate the measures/decisions pronounced by judges from a possible criminal perspective. In fact, this manner of investigating represented a real intrusion in the independent power of the judge”.

Or, the answer to these clear pressures on the magistrates through the criminal investigations carried out by the National Anticorruption Directorate is represented by the establishment of the SIIJ through its way of regulation, 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."

For unknown reasons, the Venice Commission ostensibly ignores the serious pressures put on judges by the way in which the cases with magistrates had been previously investigated by DNA, including the investigations that focused exclusively at the judgments given by the judges.

Therefore, we are urging the Plenum of the Venice Commission to revise the draft opinion of the Venice Commission on the draft law Dismantling the Section for the Investigation of Offences committed within the Judiciary (SIIJ).

J Andreea Ciucă, PhD
President of AMR

J Dana Gîrbovan
President of UNJR

J Florica Roman
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