ATITUDINI

Current vulnerabilities in the functioning of the Romanian judiciary system

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Abstract: *On August 23rd, 2017, by a PowerPoint document presented at a press conference, the Minister of Justice proposed a new set of amendments to the "laws of justice" (Law no. 303/2004, Law no. 304/2004 and Law no. 317/2004), without impact studies and prior consultation on key legislative issues, to ensure decisional transparency regarding the magistrates (judges and prosecutors) and the civil society.*

The draft was communicated to the Superior Council of Magistracy, and in its meeting of September 28th 2017 the Plenum issued a negative opinion on the whole project, taking into account the votes expressed in numerous general assemblies of the judges and prosecutors from the courts and prosecutor's offices, where they were rejected, in overwhelming proportion, among other things, all substantive changes to the draft law, reorganization of the Judicial Inspection as a structure with legal entity within the Ministry of Justice, the amendments of the decisions for al the nominations at the top of the judiciary system (General Prosecutor of the Public Prosecutor's Office attached to HCCJ, first deputy and assistent, the chief prosecutor of the NAD, his deputies, the chief prosecutors of the Prosecutor's Office attached to the HCCJ and the NAD, as well as the chief prosecutor of DIICOT and his deputies), the proposed amendments regarding the magistrates' liability regime, the changes of the recruitment system of the magistrates - the age limit (30 years) for admission to the National Institute of Magistracy and the required seniority in another legal profession of at least 5 years, the amendments regarding the exams for promotion in executive positions, maintaining the court budget at the Ministry of Justice, as well as the establishment within the Public Prosecutor's Office attached to HCCJ of a specialized directorate with exclusive competence to carry out criminal prosecution for the offences committed by judges and prosecutors, regardless of their nature and gravity.

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There are difficult years yet to come, and the support of the European Commission under the Cooperation and Verification Mechanism of Romania's progress in achieving specific benchmarks in the field of judiciary reform and the fight against corruption will be essential.

Rezumat: *Ministrul Justiției a prezentat, într-o conferință de presă din 23 august 2017, un document PowerPoint un nou set de amendamente la "legile justiției" (Legea nr. 303/2004, Legea nr. 304/2004 și Legea nr. 317/2004), fără studii de impact și fără o consultare prealabilă asupra chestiunilor esențiale, care să asigure transparența decizională față de magistrați (judecători și procurori) sau societatea civilă.*

Proiectul a fost comunicat Consiliului Superior al Magistraturii, iar în ședința din 28 septembrie 2017 Plenul a emis un aviz negativ asupra întregului proiect, ținând seama de voturile exprimate în numeroase adunări generale ale judecătorilor și procurorilor de la instanțe și parchete, în care au fost respinse, în proporție covârșitoare, între altele, toate modificările de esență ale proiectului legislativ, privind reorganizarea Inspecției Judiciare, ca structură cu personalitate juridică în cadrul Ministerului Justiției, modificările privind numirile la vârful justiției (procurorul general al Parchetului de pe lângă ÎCCJ, prim-adjunctul și adjunctul acestuia, procurorul șef al DNA, adjuncții acestuia, procurorii șefi de secție ai Parchetului de pe lângă ÎCCJ și ai DNA, precum și procurorul șef al DIICOT și adjuncții acestora), modificările propuse privind regimul răspunderii magistraților, modificările sistemului de recrutare a magistraților – limita de vârstă (30 de ani) pentru admitere la Institutul Național al Magistraturii și cerința vechimii în altă profesie juridică de minimum 5 ani, modificările privind examenele de promovare în funcții de execuție, menținerea bugetului instanțelor judecătorești la Ministerul Justiției, precum și înființarea în cadrul PÎCCJ a unei direcții specializate având competența exclusivă de efectuare a urmării penale pentru faptele săvârșite de către judecători și procurori, indiferent de natura și gravitatea acestora.

Vor urma ani dificili, iar sprijinul Comisiei Europene, în cadrul Mecanismului de cooperare și verificare a progresului realizat de România în vederea atingerii anumitor obiective de referință specifice în domeniul reformei sistemului judiciar și al luptei împotriva corupției, va fi esențial.

Keywords: judicial system, Judicial Inspection, Superior Council of Magistracy, magistrates' liability regime, status of judges and prosecutors, admission in magistracy

1. Introduction

Romania is traditionally a democratic state, the standards of democracy being established mainly by the Constitution Bills of 1866 and 1923, but after 1945 the rule of law was flagrantly affected by the establishment of a deeply undemocratic communist regime where citizens' rights and freedoms were an utopia, private property was disregarded, the state confiscating the houses and lands of millions of people, and the intellectual elite of the country was physically eliminated, tens of thousands of teachers, judges, doctors or civil servants being murdered or thrown into prisons, the law becoming just a simple coercion instrument meant to force citizens to have the same vision as the leaders of the socialist society.

Starting January 1st, 2007, Romania, a semi-presidential republic, according to the Constitution of 1991, became a member of the European Union. Article 148 (2) of the Romanian Constitution accepts the priority of the application of

European Union law[4]. Romania also joined the Council of Europe on October 7th 1993, becoming a party to the European Convention on Human Rights and Fundamental Freedoms (June 20th 1994) and to the 14 additional Protocols. If there are inconsistencies between the pacts and treaties on fundamental human rights to which Romania is a party, and domestic laws, the international regulations prevail, including the case law of the European Court of Human Rights, unless the Constitution or domestic laws contain more favorable provisions, according to art. 20 paragraph (2) of the Romanian Constitution.

In all Member States there must exist impartial, independent and efficient judicial and administrative systems, inter alia, endowed with sufficient means to fight corruption. The judicial system inherited from the communist era was deeply reformed, thanks to the 1991 Constitution, revised in 2003, and the secondary legislation adopted on the matter, concerning the judicial organization, the status of judges and prosecutors, and the Superior Council of Magistracy, although the period up joining the European Union has been characterized by multiple violations of the judges' independence, with a judiciary system which seemed unstable and ineffective.[5] However, by the European Commission Decision 2006/928/EC of December 13th 2006 which established a Mechanism for cooperation and monitorizing of progress made by Romania created for achieving specific benchmarks in the field of the judicial reform and the fight against corruption[6] it was noted that the European Commission had identified unresolved issues, in particular regarding the accountability and efficiency of the the judiciary system of Romania.[7]

Concering Romania, the latest Report of the Cooperation and Verification Mechanism (2017)[8] expressly recommends, "for further improvement of transparency and predictability of the legislative process, as well as for strengthening the internal guarantees of irreversibility", "the Romanian Government and Parliament (...) should ensure full transparency and **take into due account of consultations with relevant authorities and interested parties in decision-making and legislative work** related to the Criminal Code and the Criminal Procedure Code, anti-corruption laws, (incompatibilities, conflicts of interest, illicit wealth), the laws

[4] See, *D. Călin*, The Constitutional Court of Romania and European Union Law, in International and Comparative Law Review 2015, tome 15, no.1, pp.59-86; *D.-M. Șandru, C.-M. Banu, D.A. Călin,* The Preliminary Reference in the Jipa Case and the Case Law of the Romanian Courts on Restriction on the Free Movement of Persons, in European Public Law, Issue 4, 2012, pp. 623-641

[5] For details, see *H. Dumbravă, D. Călin*, Die mühsame Demokratisierung der rumänischen Justiz, in Betrifft JUSTIZ no. 100 von Dezember 2009, pp.200-204, available at http://betrifftjustiz.de/wp-content/uploads/texte/Ganze_Hefte/BJ%20100_web.pdf [last accessed on October 17th, 2017], as well as and *H. Dumbravă, D. Călin*, The Evolution of the Judicial System in Romania during the Past 60 Years, in Judges' Forum Review no. 1/2009, pp.123-131, study available on http://www.forumuljudecatorilor.ro/wp-content/uploads/Art-18-forumul-judecatorilor-nr-1-2009.pdf [last accessed on October 17th, 2017].

[6] Published in the Official Journal of the European Union L 354 of December 14th 2006.

[7] By Decision no. 2 of January 11th, 2012, the Constitutional Court of Romania considered that, by being a member of the European Union, Romania has the obligation to apply this mechanism and follow the recommendations established by this framework, according to the provisions of art. 148 paragraph (4) of the Constitution, according to which "the Parliament, the President of Romania, the Government and the judicial authority shall guarantee the fulfilment of the obligations resulting from the accession documents and from the provisions of paragraph 2".

[8] See the web page https://ec.europa.eu/info/sites/info/files/com-2017-44_en_1.pdf [last accessed on October 17th, 2017].

of justice (relating to the organization of the justice system), as well as the Civil Code and the Civil Procedure Code."

2. Current vulnerabilities in the functioning of the Romanian judiciary system

In the context of Romania's joining the European Union, the justice system of the former communist state seems to have changed and to be aligned with those of the democratic states of Western Europe. On the one hand, many young magistrates have entered into the judiciary system, the National Anticorruption Directorate has consistently achieved good results, and hundreds of corrupt politicians and magistrates have already been finally convicted. On the other hand, the mechanism for cooperation and verification of Romania's progress in achieving specific benchmarks in the field of judiciary reform and the fight against corruption has not been lifted even after 10 years from the EU accession, and the assault against those who struggle with the scourge of corruption is in full action.

Although in a society still grinded by corruption, it seems necessary to increase the institutional capacity to fight it, including the recovery of damages, which discourages this phenomenon, thus the Romanian politicians proposed in January 2017 to pardon or reduce penalties for crimes, including for corruption.[9] More than 600,000 citizens went out on the streets, so the draft of the emergency ordinance in this matter, adopted in the cold winter night, was abandoned for the moment.[10]

In another register, the Ministry of Justice and the Superior Council of Magistracy have proposed amending the laws of justice, starting the protest of 2,000 magistrates, in the autumn of 2015. Left in stand by, but these changes have been reaffirmed in 2017,[11] regarding among other placing the Judicial Inspection under the control of the Ministry of Justice, although asserting and guaranteeing the independence of judicial inspectors implies the exclusion of any involvement of political actors, including the minister of justice, who is a member of a political government; removing the meritocratic promotion[12] in courts and prosecutor's offices (replacing the tough promotion competition with a highly

[9] The Romanian Judges' Forum Association's reaction was immediate. See webpage https://rlw.juridice.ro/11226/the-romanian-judges-forum-association-ref-the-projects-of-emergency-government-ordinances-concerning-the-collective-pardon-and-the-amendments-of-the-criminal-code-and-the-procedural-criminal.html [last accessed on October 17th, 2017].

[10] See webpage https://www.nytimes.com/2017/02/09/world/europe/romania-corruption-coruptie-guvern-justitie.html?mcubz=3 [last accessed on October 17th, 2017].

[11] See webpage http://english.hotnews.ro/stiri-top_news-21966904-opinion-romanian-minister-tudorel-toader-39-counter-reform-the-judiciary-why-proposals-announced-justice-minister-are-poisonous.htm [last accessed on October 17, 2017].

[12] Currently, the promotion system involves an exam focused in principle on a written test, in which predefined answers are being drawn; some correct, other incorrect ones are signaled. The examinee would have to pick the correct answer. The degree of difficulty is high and the competition is also high, often reaching up to 8 or 10 candidates for one place. This form of examination has the advantage that reduces subjectivity of the assessment. Knowing that such a system is not perfect, however, in the organizational context of contemporary Romanian society, it ensured a meritocratic promotion to higher levels of the judiciary (except the High Court of Cassation and Justice – the highest court, where the promotion system is different) as long as the examiner's subjectivity could no longer be manifested. In essence, the papers are assessed using a computer program. The new proposed system of promotion aims to change the examining philosophy by introducing an analysis of candidates' papers from a certain period of time before the exam, and also by inserting an interview that the candidate has to pass before a commission set up at every court of appeal, each commission being composed of different persons. In such a system where the evaluation will be made by different persons in different commissions, it will

non-transparent and subjective assessment of judicial acts); the return to the magistracy, without previous assesment, of persons who had for at least 10 years the office of judge or prosecutor, including in the communist era;[13] reducing the attributions of the National Institute of Magistracy on the formation of younger generations of magistrates;[14] the creation of a specialized directorate within the Public Prosecutor's Office attached to the High Court of Cassation and Justice, having as object the criminal investigation of the magistrates[15]; but also the creation of filters that prevent the prosecution of a

be difficult to have uniformity of evaluation. In addition, a high degree of subjectivity is introduced, the exigency of the evaluation depending on the composition of the commission. These practices (favors in assessment) were widely manifested in the communist era at every scale and especially where a job position was in play and, unfortunately, there has been not enough historical time to be sure that such practices were completely eradicated from the social mentality. So, it would be wise to assume that they still remain applicable to a rather broad extent. That is why the current system of promotion (far from perfect) is still preferable to the new one proposed.

[13] There are several angles from which such a problem can be viewed. Firstly, we point out that currently there are still enough people in the judiciary that have their studies completed during the communist era. Secondly, there was also a problem related to corruption in the judiciary (judges and prosecutors), the phenomenon being significantly diminished in the last 10-15 years, under the impulses of the activity of the National Anticorruption Directorate, as well as under the impact of Romania's accession to the European Union and the Verification and Cooperation Mechanism. Thirdly, recruiting magistrates before 2000 was often done through a simple interview, which does not guarantee the requirement of a high degree of professionalism. In addition, such magistrates were witnesses of extraordinary changes in the legislation from 1994 onwards and subsequently more pronounced after 2007, through the incidence in the national legislation of the European Convention on Human Rights and by the introduction into national law of mandatory legal rules of the European Union. All of those added up to the elements which make very difficult to adapt to such a new and complex juridical environment, putting such magistrates in a very serious professional difficulty. Since 2004, with the adoption of new legislation on the organization of the judiciary that changed the accession in magistracy by imposing very difficult exams, there has been a change of generations and a change of mentality (pro-European) among magistrates manifested by the entry into the system of many young people, much less permeable to corruption of any kind and much more qualified to deal with new complex juridical reality, along with the retirement of generations formed during the communist period. Anyway, at present there is still a significant number of magistrates from these older generations. In this context, a law such as the one proposed would allow the return of former retired magistrates or of ones that exited the system for other various reasons (even suspicions of corruption, for instance).

[14] Currently, after graduating from college, a graduate can attend the admission exam in the magistracy, organized by at the National Institute of Magistracy. The exam is known among the juridical professions to be a very difficult and a very objective one. If admitted, a graduate student goes through a 2-year study period and a one-year internship (3 years in total) before becoming an acting magistrate with full rights and obligations. Having in mind that the Romanian educational system, including in the legal field, has many areas in which it can be improved, the National Institute of Magistracy was created as an educational body through which an initial training is carried out during 3 years of study, for future magistrates (judges and prosecutors). The institute also carries out the training during the profession through various seminars. What is affected by the draft law is the importance of the Institute related to the exams for the accession to the magistracy and also related to the initial training of future judges and prosecutors. By introducing the proposed changes, its role diminishes and that will also result in lowering the level of professional training of future magistrates.

[15] The creation of a specialized department within the Prosecutor's Office attached to the High Court of Cassation and Justice, having as object the criminal investigation of the magistrates, is a measure that conveys to the public a feeling of mistrust in the efficiency of the current legilation and at the same time can prove to be an instrument of pressure on magistrates if the guarantees of organizing such a structure are not transparent and effective. The problem from this point of view is that it is creating a wrong image for the magistracy, first of all. It induces the idea that the phenomenon of corruption exists within this professional category more than in others, since there are no specialized directions for doctors, teachers, parliamentarians, etc. In the Romanian system there are specialized departments for criminal investigations, but these are related to facts / crimes, and not to professional

judge or prosecutor for offenses committed in the performance of their duties or in connection with them, possible only after the approval of the Section for Judges or Prosecutors or of the Superior Council of Magistracy, as the case may be.[16]

Excluding the President of Romania from the procedure of appointing prosecutors in main management positions within the Prosecutor's Office, which has been accepted so far as an expression of the constitutional principle of the separation of powers in the state, with the attribute of mutual powers of control, and not as a privilege given to the chief of the State can not be objectively justified unless the Minister of Justice is given the task of issuing a simple consultative opinion, and not that of proposing to the Public Prosecutor's Office of the Superior Council of Magistracy a person to be appointed in a leading office.[17] Also, the change of the admission conditions at the National Institute of Magistracy is capable of producing in time its abolition and the impossibility of recruiting eminent students of the law faculties for the positions of judge or prosecutor.[18]

All these changes will affect the career and professional activity of magistrates for a long time and will cause imbalances in the judiciary system, which have been repeatedly condemned by the European Commission, and there is the risk of a wave of dissatisfaction within the professional body.

Contrary to the recommendations of the Cooperation and Verification Mechanism, the Superior Council of Magistracy has not taken any further steps to provide adequate support to the magistrates, who criticized that

categories. For example, there is the National Anti-Corruption Directorate investigating corruption, no matter who does it. On another level, this provision should be considered together with those by which the Minister of Justice can appoint almost all of the heads of the prosecutor's offices, and the latters will acquire the power to intervene in the investigations of the their subordinates, by initiating, conducting or closing the investigations. Within this framework, the Minister of Justice who is a politician shall have at his or her disposal a mechanism to initiate and close investigations against judges and prosecutors. Currently, the principle is that the prosecutor, when investigating, has an independent status regarding his or her investigation activities.

[16] Until now, such a filter exists but only when a search warrant is issued or an arrest is called for, but the Superior Council of Magistracy almost never opposed to an investigation against a magistrate, if the prosecutors asked it. A similar mechanism that can stop an investigation exists for members of the Parliament. In their cases, most often the requests made by the prosecutors to the Chambers of the Parliament, in order to approve the investigation, are denied. Romanian society has been advocating (and we think it is a right call) for such approvals to be eliminated from the legislation, as they may be used in order to stop criminal investigations. We feel that such a filter is not necessary, at least not in this moment where the Romanian society asks for a strong fight against corruption.

[17] In Romania, we have a long experience with members of the Parliament and ministers of justice that had tried to influence judicial decisions. In the past 13 years, from 2004 on, such a practice has diminished, mostly because the mechanisms of appointing heads of the prosecutors' offices were passed to the president of the republic which so far, whatever his name was, did not have the same interests as the party in power. This mechanism insured so far an institutional equilibrium, as the president is the politician elected by the biggest number of citizens than any other politician.

[18] The new legislation draft proposes the introduction of a ban on admission to the judiciary before the age of 30. In this case, the best graduates of the law faculties, who now come to take exams for admission in magistracy, will have to consider other legal professions. When they are 30 years old, the chances that they will drop out of their chosen careers to enter the magistracy, that is to have a 3 years of study (or more, as it is proposed in some other variants of the draft) will drastically reduce if they are successful in their professions. Therefore, the selection base for the admission to the magistracy will be composed from those who are not successful in other legal careers. It is not likely that a successful lawyer or public notary shall abandon his or her profession in order to enroll in a school program for 3 (or more) years in order to later become a magistrate.

There are difficult years yet to come, and the support of the European Commission under the Cooperation and Verification Mechanism of Romania's progress in achieving specific benchmarks in the field of judiciary reform and the fight against corruption will be essential.

undermine the independence of the judiciary system. The Chief Prosecutor of the National Anticorruption Directorate is blamed by the television channels whose owners are convicted for high-profile crime. At the same time, Camelia Bodgan, maybe the most well-known anti-money laundering judge of Romania, who dared convict several political leaders or Romanian billionaires for committing corruption offenses, was excluded from the magistracy in February 2017 for the simple fact that she would have taught courses outside the higher education institutions system but under a World Bank-funded project to fight the corruption of public officials responsible for the use of European funds.[19]

Recently, according to the Decision no.1/2017, including at the Constitutional Court of Romania[20] separate opinions of some judges are removed from publication, at the mere discretion of the president of this constitutional authority placed outside the judiciary system. It is very difficult to argue that the right of the Constitutional Court judges to form separate and competing opinions can be restricted, given that, as the Venice Commission,[21] has been stated, that separate and competing views also assert the moral independence of judges and their freedom of expression and improve the quality of decisions and their convincing character, enhancing institutional transparency.[22]

On August 23rd, 2017, by a PowerPoint document presented at a

[19] See webpage http://thelondonpost.net/romanian-judge-who-jailed-corrupt-billionaire-media-mogul-is-suspended-seeking-justice-for-herself/ [last accessed on October 17th, 2017].

[20] The Constitutional Court of Romania based on Art. 146 of the Romanian Constitution, has attributions of *a priori* control of the constitutionality of the laws. *A posteriori*, it resolves exceptions of unconstitutionality of laws and ordinances (not infra-legal normative acts), invoked before courts of law or commercial arbitration. The Constitutional Court of Romania also verifies the constitutionality of treaties or other international agreements, as well as the regulations of the Parliament, resolves the legal conflicts of a constitutional nature between the public authorities, has some electoral attributions, respectively for organizing and conducting the referendum, also decides on of objections concerning the constitutionality of a political party.

[21] See Opinion on the Draft Law on the Organization of the Constitutional Chamber of the Supreme Court of Kyrgyzstan adopted by the Venice Commission on June 17-18, 2011, available on the website http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)018-e [last accessed on October 17, 2017].

[22] See Opinion on the Draft Law on the Law of the Constitutional Court of Latvia adopted by the Venice Commission on October 9-10, 2009, available on the website http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)042-e [last accessed on October 17th, 2017]. In ordinary courts, including the High Court of Cassation and Justice (the highest court), we have the procedural rule that the concurrent or the dissident opinions are to be published, with (and within) the body of the decision. The rule of not publishing such opinions was made only for the Constitutional Court, by a decree issued by the president of the Constitutional Court, former head of the Chamber of Deputies (former Member of the Parliament from the party currently in power). That decree came as a response of some dissident opinions issued by the former president of the High Court of Cassation and Justice (currently serving as constitutional judge) in which the decisions of the majority of judges were criticised in a legal manner. It is very difficult to argue that the right of the Constitutional Court judges to state dissident and concurring opinions can be restricted, given that, as the Venice Commission has been stated, that dissident and concurring views also assert the moral independence of judges and their freedom of expression and improve the quality of decisions and their convincing character, enhancing institutional transparency.

press conference, the Minister of Justice proposed a new set of amendments to the "laws of justice" (Law no. 303/2004, Law no. 304/2004 and Law no. 317/2004), without impact studies and prior consultation on key legislative issues, to ensure decisional transparency regarding the magistrates (judges and prosecutors) and the civil society.

The draft was communicated to the Superior Council of Magistracy, and in its meeting of September 28th 2017 the Plenum issued a negative opinion on the whole project, taking into account the votes expressed in numerous general assemblies of the judges and prosecutors from the courts and prosecutor's offices, where they were rejected, in overwhelming proportion, among other things, all substantive changes to the draft law, reorganization of the Judicial Inspection as a structure with legal entity within the Ministry of Justice, the amendments of the decisions for al the nominations at the top of the judiciary system (General Prosecutor of the Public Prosecutor's Office attached to HCCJ, first deputy and assistent, the chief prosecutor of the NAD, his deputies, the chief prosecutors of the Prosecutor's Office attached to the HCCJ and the NAD, as well as the chief prosecutor of DIICOT and his deputies),[23] the proposed amendments regarding the magistrates' liability regime,[24] the changes of the recruitment system of the magistrates -

[23] All of those appointments are meant to be in the hand of the Ministry of Justice, directly or indirectly. For instance, the ministry of justice shall make the nominations for the heads of the prosecutors departments and for the head of the High Court of Cassation and Justice and the president of the republic or, in some other cases, the Superior Council of the Magistracy shall make the actual appointments. Also, there is a decision of the Constitutional Court in which it is stated, as the law does not regulate it precisely, that the one who make the appointment is able to refuse the nomination only once. According to that rule, if the ministry of justice makes an unacceptable nomination that is refused by the one that is appointing in this position, the second nomination is mandatory. It results that in an indirect manner, the minister of justice may actually appoint persons of his or her choice in such positions, even if the draft law states that he or she only nominates.

[24] In Romanian judicial system, also if a judge administers the law faultily and knowingly, this is a criminal offense. In such a case which falls within a criminal ambit, the judges' liability with their assets is possible. The draft proposes the aggravation of disciplinary liability in an unpredictable manner. Currently, magistrates are disciplinary liable for administering the law faultily and knowingly or with non-excusable negligence. In the current system, this conduct is established in a disciplinary procedure initiated by the Judicial Inspection which conducts an investigation and then proposes to the Superior Council of Magistracy to sanction the judge or prosecutor. The decision of the latter may be contested before the High Court of Cassation and Justice. Last year there were about 5000 investigations started by the Judicial Inspection (on its own motion or on the request of the parties of the case) and about 50 magistrates (judges and prosecutors) which received different sanctions with various degrees of severity. The most severe sanction is the exclusion from the judiciary which was served in two cases last year (one of them being established by a final decision in court and the other one being currently before the court). If that is the case, the judge or the prosecutor is also liable for the damages with their assets is possible. If a decision in a regular case is quashed by a higher court, such an event does not constitute ground for stating that a judge has administered the law faultily and knowingly or with non-excusable negligence, as that is to be established in the above mentioned disciplinary procedure which may be initiated by Judicial Inspection, when asked by the parties involved in the case or by its own motion. The new draft does not define who is to state that a judge administered the law in such a manner and also, does not state what the content of these two notions is (administering the law faultily and knowingly or with non-excusable negligence). That leaves open the possibility that the parties would make a case directly against the judge. If that will be the case, than the judges (and prosecutors) will spend their time defending before the courts rather than paying attention to the cases brought before them, even if the allegation of misconduct of judicial proceedings are false. Also, the Judicial Inspection is proposed to have its status changed. Now, it is under the supervision of the Superior Council of the Magistracy, as the Constitution states that it ensures the independence of the judiciary. The proposition very form putting the Judicial Inspection under the coordination of the Ministry of Justice to placing it under a mysterious body which is to be created and which does not have its main elements shown: how is it financed, how is it ruled, who shall appoint the judicial inspectors, who will they answer to, what regulations will rule their activity, who will issue such a regulation etc.

the age limit (30 years) for admission to the National Institute of Magistracy and the required seniority in another legal profession of at least 5 years, the amendments regarding the exams for promotion in executive positions, maintaining the court budget at the Ministry of Justice, as well as the establishment within the Public Prosecutor's Office attached to HCCJ of a specialized directorate with exclusive competence to carry out criminal prosecution for the offences committed by judges and prosecutors, regardless of their nature and gravity.

In October 2017, approximately 4,000 Romanian judges and prosecutors, more than half of their total, appropriated the *Memorandum to withdraw the draft amendment to the "laws of justice",*[25] addressed to the Romanian Government following the refusal of taking into account the negative opinion on the whole project issued by the Superior Council of Magistracy. The supporters of the Memorandum believe that these changes promoted by the Minister of Justice flagrantly violate the Co-operation and Verification Mechanism, its constant reports and the foundations of a natural magistracy in a democratic state. Consequently, the undeniable will of the majority of magistrates, which, according to the supporters of the Memorandum, the Romanian Government (to which the Minister of Justice belongs) cannot disregard in a Member State of the European Union, converges in the sense of removing any doubt about the diversion of this project detrimental for magistracy, requiring its immediate withdrawal, the Ministry of Justice failing to develop a effective, concrete dialogue with the magistrates, the Superior Council of Magistracy, the professional associations of judges and prosecutors, to improve the legislative framework, after carrying out the necessary impact studies and after presenting serious and credible grounds regarding the proposed changes, in order to modernize the judicial system, in accordance with the Cooperation and Verification Mechanism.

The gesture of the approximately four thousand judges and prosecutors seems to be a most unusual one. As a rule, magistrates are silent, magistrates express themselves more in their interior self and of course through the decisions or documents they issue, and less in the *agora*. It is a genuine public statement of the independence of the judiciary system, but not a change of attitude, while the rejection of the laws of justice was a continuous coordinate. Also, for the first time in the post-communist period, civil society thanked the thousands of magistrates who supported the Memorandum, joining its conclusions.[26]

3. Conclusions

When democracy and fundamental freedoms are in jeopardy, the judge's duty to be a reserved becomes subsidiary to the indignation obligation.[27] Therefore, the judges' reactions, through their

[25] See the web page http://www.forumuljudecatorilor.ro/index.php/archives/2866 [last accessed on October 17th, 2017].

[26] Approximately 100 non-governmental organizations have asked the Romanian Government to waive the bill initiated by the Ministry of Justice on the amendment of the laws of justice, for details see https://www.vedemjust.ro/index.php?p=societatea-civila-impotriva-modificarii-legilor-justiiei [last accessed on October 25th, 2017]. Also, on October 11th 2017, in front of courts in the main Romanian cities, messages were posted with the text "Thank you 3500+" to encourage the protest of Romanian magistrates. See webpage http://epochtimes-romania.com/news/multumim-3500-cetatenii-le-multumesc-magistratilor-care-au-spus-nu-politizarii-justitiei—266432 [last accessed on October 25th, 2017].

[27] See the Declaration on Judicial Ethics, adopted by the General Assembly of the European Network of Judicial Councils, held in London on June 2-4, 2010.

representatives or by the professional associations they have set up, are legitimate and expected. But, in such a context, is there courage within Romanian magistracy, especially regarding the conviction of public figures accused of corruption?

Surely, we do not only take into consideration the limits and vulnerabilities of the freedom of expression of the Romanian judges and prosecutors,[28] but precisely the proper functioning of a judiciary that is at least institutionally aligned with the modern legislative tendencies of the Member States of the European Union.

But the institutions are led by people, not by robots, and the mistrust of the communist period has not been definitively removed from the perception and behavior of Romanian public authorities. There are difficult years yet to come, and the support of the European Commission under the Cooperation and Verification Mechanism of Romania's progress in achieving specific benchmarks in the field of judiciary reform and the fight against corruption will be essential.

4. Annex:

***The Romanian Judges' Forum* regarding the main 10 amendments proposed by the Minister of Justice on the „laws of justice" in August 2017**

4.1. On the reorganization of the Judicial Inspection, as a legal personality structure within the Ministry of Justice

With reference to this amendment proposed by the Minister of Justice on the „laws of justice", there has never been during prior talks, beginning with 2016, such an issue put forward concerning any modification of the statute of the Judicial Inspection. There is no reasonable explanation to proceed to such a modification, it is unknown why the current statute should be subject to change and what where the reasons underlying such an initiative.

The report issued by the Judicial Inspection for the year 2016[29] reveals the following data:

– there have been **6823 referrals** (218 ex officio) lodged regarding the activity and the conduct of judges and prosecutors, out of which 4762 referrals regarding judges (177 ex officio) and 2061 referrals regarding prosecutors (41 ex officio);

– solved at the end of preliminary verifications: 5751 closed for lack of probable cause of having committed any disciplinary offence (4030 – Inspection Service for Judges, 1721 – Inspection Service for Prosecutors);

– closing resolutions challenged: 182 (114 - Inspection Service for Judges, 45 - Inspection Service for Prosecutors) out of which 157 rejected and 2 admitted (Inspection Service for Judges); the admission decisions have been appealed by the Judicial Inspection and are pending before the High Court of Cassation and Justice; the other challenges have not yet been solved;

– solved at the end of the disciplinary action: 119 (1,65% of all the referrals), out of which 93 regarding judges and 26 regarding prosecutors;

– 51 referrals admitted (0,71% of all the referrals), out of which 40 regarding

[28] See *D. Călin, I. Militaru*, Freedom of Speech of Magistrates. Limits and Vulnerabilities, in Judges' Forum Review no. 3/2009, pp.23-39, study available on the web page http://www.forumuljudecatorilor.ro/wp-content/uploads/Art-4-forumul-judecatorilor-nr-3-2009.pdf [last accessed on October 17th, 2017].

[29] Found on the web page http://old.csm1909.ro/csm/linkuri/09_03_2017__86944_ro.pdf [last accessed on 17th October 2017].

judges and 11 regarding prosecutors, and 68 referrals rejected;

– legal remedy against referral rejection resolutions: 3 challenges (percentage of challenges 4,41%), all rejected (annulment index 0%);

– **the Judicial Inspection proceeded to disciplinary action for: 36 judges (37 disciplinary actions) for 60 disciplinary offences and 14 prosecutors (13 disciplinary actions) for 22 disciplinary offences**; the most common disciplinary actions are those provided under letters t (21), h (14), a (11) and m (9) of art. 99 of Law no 303/2004 regarding the statute of judges and prosecutors;

– disciplinary actions solved by the Superior Council of Magistracy: 17 regarding judges for 23 offences (15 sanctioned and 8 rejected); 5 regarding prosecutors for 11 offences (5 sanctioned, 6 rejected);

– 12 disciplinary sanctions enforced to judges: **warning - 4**, **reduction of gross monthly salary – 3**, **suspension – 3** and **dismissal from magistracy – 2**;

– 4 disciplinary sanctions enforced to prosecutors: warning - 2, reduction of gross monthly salary – 2;

– **professional deontology** – 6 referrals regarding the possible infringement of the Code of deontology for judges and prosecutors (4 regarding judges, 2 regarding prosecutors) of which 2 ex officio;

– **good reputation of active judges and prosecutors** – two referrals (each regarding a judge), proposals of the Judicial Inspections have been confirmed by the Plenary of the SCM;

– **defence of the independence of the judiciary**: 26 referrals (4 regarding judges and 22 regarding prosecutors) of which 23 solved by SCM (23 admitted);

– **defence of the professional reputation, independence and impartiality of magistrates** – 36 requests (17 made by judges and 19 by prosecutors) of which 21 solved by SCM (16 admitted).

These data show that the Judicial Inspection, in its current organization, delivers efficient results. Thus, the real reason why it would be necessary to change its statute is unknown.

Moreover, as in the case of the appointments of the heads of the prosecutor's offices, no MCV reports has brought any criticisms to this institution, in view of its statute as a structure within the Superior Council of Magistracy having legal personality, acting on the basis of the operational independence principle (art. 65 of Law no. 317/2004 regarding the Superior Council of Magistracy).

The reorganization of the Judicial Inspection within the Ministry of Justice, regardless of its legal formula (autonomous, under the authority etc.) will create, at least apparently, the impression of political subordination, which leads to the infringement of the principle of the separation and balance of powers within the framework of constitutional democracy.

Considering all the above arguments, there is no legal or factual basis for modifying the statute of the Judicial Inspection.

The assertion and the guarantee of the independence of judicial inspectors means excluding any influence from political factors, including from a minister of justice, member of a political government. Any misfunction of the present organization could be easily corrected instead of proceeding to the proposed institutional transfer.

4.2. Regarding the material liability of the magistrates

Regarding the Justice Minister's proposal of the review of justice laws even though this is a very common subject, in fact, it requires an extremely technical analysis.

4.2.1. In view of the European legal framework

The Consultative Council of European Judges, through the 55th alin. of the third Notice recommends as a general principle that the judges must be exempted of any liability concerning the direct complaints against them regarding the goodwill exercise of their function. *The legal errors, related to assessing and law enforcement, or to evidence assessment, either related to the jurisdiction or to the procedure, must be corrected by way of appeal; other judicial errors which cannot be amended in that manner (including the excessive delay) must lead at the most to a claim against the State of an unhappy litigator*.

European Charter on the Statute for Judges, in the 5.2th alignment, emphasizes the need to restrain the civil liability of the judges to the state's indemnification for „gross and inexcusable negligence" using legal procedures and having the prior agreement of an independent authority based on a pertinent legal representation (such as the represented one at the 43th article of The Opinion of CCJE No 1/ 2001). Furthermore, with regard to the material liability of the judge, the Charter states that the State should provide the compensations for illegal damages incurred following a decision of the judge or due to the way of exercising his office. Therefore, the State is the constant guarantor to te victim for damage compensation.

By stating that, this State guarantee shall be applied to the damages incurred in a illegitimate way following a decision of the judge or due to the way of exercising his office, the Charter does not necessarily refer to the wrong nature of the decision or the judge's behaviour, but rather insists on the damages arising thereof or illegally incurred. This is perfectly compatible with the liability that doesn't rely to the judge's error but based on the unusual, special and serious character of the damage that arises from his decision or from his behaviour. The meaning of this emerges from a particular consideration to the fact that the judicial independence of the judge should not be vitiated by a civil liability regime.

In fact, the Charter states that, when the damage that the State has to ensure is the result of a gross and inexcusable ignorance of the rules governing the judge's activity, the Statute can provide the State the possibility to require the beneficiary judge to reimburse the compensation for the reimbursement, by a jurisdictional action, within the limits of the Statute.

The need for a gross and inexcusable error, the jurisdictional nature of the repayment action must provide significant guarantees to avoid an eventual deviation of the procedure. (The European Charter on the Statute for Judges).

Without affecting the disciplinary procedures or any right of appeal or State compensation, according to the national law, the judges should have personal immunity towards civil suits intended to obtain material damages for inappropriate acts or omissions made in the performance of their judicial function. (Basic Principles on the Independence of the Judiciary, adopted by The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan, from 26 august to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

4.2.2. European standards

Consultative Council of European Judges (CCJE) – Opinion no. 18 (2015) "The position of the Judiciary and its relationship with the other powers of state in a modern democracy"

The Judiciary, just as the other two powers of state, provides a public service. It is self-evident that it has to be held responsible to the society it serves. The judicial authority needs to be exercised in the interest of the rule of law and of those seeking justice. Accordingly, the Judiciary is confronted with the task of proving the other powers of state and society in general the utility in whose service it has dedicated its competencies, its authority and its independence. The beneficiaries of justice are increasingly demanding a more efficient Judiciary. A better access to justice is regarded as increasingly important. The efficacy and the accessibility are elements that demonstrate the "responsibility". The CCJE admitted the existence of these trends on other occasions as well. When it notes that the judiciaries in democratic systems have to produce justice of the highest quality and with adequate responsibility, the CCJE is emphasizing an aspect of the judicial "responsibility" that needs to be provided to society in general. In recent years, the public services have evolved to become more open and have accepted the fact that they need to provide the public that they serve with explanations that are more thorough. Consequently, the concept of responsibility towards the public has become increasingly important in the overall setting of the public activities. A public agency will be seen as "responsible" if it provides explanations for its actions and, equally important, if it assumes responsibility for them.

This accountability is as vital for the Judiciary as it is for the other powers of state because the Judiciary, just as the others, has public service as its main objective. Additionally, if a careful balance is maintained, the two principles, of judicial independence and of accountability, are not irreconcilably opposite. In the judicial sense, "accountable" needs to be read as being held to account for one's actions, in other words to indicate the reasons and provide explanations for the decisions and the conduct in relation to the cases the judges are called to adjudicate. "Accountable" does not mean that the Judiciary is responsible or subordinated to another power of state because this would contravene its very constitutional role of being an independent body, whose function is to adjudicate disputes in a way that is impartial and in accordance with the law. If the Judiciary were "responsible" to another power of state, as in respond or be subordinated to it, it would follow that in those situations in which the other powers of state are involved, the Judiciary would not be able to fulfil its abovementioned constitutional role.

The accountability of individual judges and the Judiciary, as a whole, is twofold. First, they are responsible to the private individuals that are engaged in the particular judicial proceedings. Second, they are responsible to the other powers of state and, through them, to society in general.

There are multiple forms of accountability. First, the judges are accountable for their rulings through the appealing procedure ("judicial accountability"). Second, the judges have the duty to act transparently. By organizing public hearings and by providing reasoning in the publicly available (save for exceptional circumstances) rulings, each judge provides the justice seekers with arguments for their actions and decisions. At the same time, the judge provides justifications for his or her actions to the other powers of state and the society in general. This type of accountability can be described as "explanatory accountability". Third, if a judge acts improperly, (s)he will be held liable in a more rigorous way, for instance by being subject to disciplinary procedures and, as the case

may be, to criminal prosecution. This is called "punitive accountability".

As far as civil, criminal and disciplinary liabilities are concerned (what was previously called "punitive accountability"), the CCJE stresses that the main remedy for the judicial errors that do not implicate bad faith has to be the appealing procedure. At the same time, in order to protect the independence of justice against improper influences, a great deal of attention has to be paid when setting up a framework for the criminal, civil and disciplinary liability of judges. The tasks of interpreting the law, weighing the evidence and finding the facts that are undertaken by a judge in ruling on the cases before him or her should not give rise to his/her civil or disciplinary liability, save for situations when his/her bad faith, malice or gross negligence have been proven. In addition, when the state is ordered to pay damages to a party due to the faulty administration of justice, it is the state, and not the party, who holds the power to determine, through judicial action, the civil liability of a judge.

European Commission for Democracy through Law (Venice Commission). Republic of Moldova *Amicus Curiae* Brief for the Constitutional Court on the right of recourse by the state against judges (Article 27 of the Law on Government Agent no. 151 of 30 July 2015) adopted by the Venice Commission at the 107th Plenary Session (Venice, 10-11 June 2016).

As far as the procedure of holding judges liable, initiated because of a decision by the Court, keeping up with the Court's jurisprudence can prove to be a difficult task. The Court has repeatedly held that the Convention is a living instrument that has to be read in light of the latest developments in society. The way in which the Court makes use of the living instrument doctrine makes it difficult for domestic courts to anticipate the rulings that are to be rendered in its pending cases. The contested legal issue may be a novel one or specific to a certain jurisdiction so that the existing jurisprudence of the Court does not provide clear guidance for interpretation by the national judge. The Court's jurisprudence can be more or less rooted or evolving, depending on the legal issue and the affected rights.

The core issue here is the way in which requests for a more extensive accountability of the Judiciary are dealt with, while safeguarding the fundamental principle of the independence of judges.

Article 66 of the Recommendation CM/Rec(2010)12 weighs up the independence of a judge and his/her accountability as follows: "The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence."

Statement of Principles of the Independence of the Judiciary by the Conference of Chief Justices of Central and Eastern Europe, Brijuni, Croatia, 14 October 2015

Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits and immunity from paying indemnification, based on allegations of improper acts or omissions in the exercise of their judicial functions. No judge should be subjected to criminal proceedings for criminal conduct without the withdrawal or waiver of the judge's immunity. However, because no judge is above the law, whenever a judge engages in criminal conduct, the waiver of his immunity should be forthcoming.

ENCJ Report 2013-2014 "European and International Standards for Independence and Accountability of the Judiciary"

The independence of the Judiciary as a whole and that of individual judges lie at the heart of the rule of law. Without it, the Judiciary cannot fulfil its functions. However, independence does not stand on its own. It must be recognized that independence is directly linked to accountability. A Judiciary that claims independence, but which refuses to be accountable to society will not enjoy the trust of society and will not achieve the independence for which it strives.

ENCJ working group Report on Liability 2007-2008

Generally, State responsibility mechanisms also exist to correct errors caused by "defective or abnormal functioning" of the justice service. Any deficiency that translates to the justice service being unable to fulfil its mission generally constitutes an error. By way of example, the main causes are unreasonable delays in handling procedures, serious negligence, denial of justice, judicial error, the duration of detention etc.

In certain countries, in such cases where civil errors can be proved against judges, those judges can be declared civilly responsible for the consequences of their decisions independently and outside of the framework of recourse actions. Civil responsibility is of the classic type. A civil error must be present in judgement or the exercise of professional functions and result in damages.

The issue of civil responsibility poses the question of insurance for judges who, although independent in exercising their functions, remain an agent of the State, and thus of its guarantee. Since 1988, Spanish and Italian judges have been insured.

Nevertheless, in no case should civil responsibility be a way of destabilising judges responsible for a case or to either directly or indirectly attach their independence. Moreover, final jurisdictional decisions must retain the authority of the issue being judged after all means of appeal have been exhausted.

Notice no.3 of the Consultative Council of European Judges (CCJE)

With regards to the criminal liability, CCJE considered that judges have to be held accountant to the ordinary laws for crimes committed outside their legal function; criminal liability does not have to be applied to judges for errors unintentionally committed while performing their duties.

Regarding the civil accountability, CCJE considered that, with respect to the principle of independence, correcting judicial errors (both related to jurisdiction, substantial or procedural) has to be done through a corresponding system of appeals (with or without the Court permission, any correction in administrating justice – including for instance the excessive delays – are addressed exclusively to the state and it is not appropriate for a judge to be exposed - regarding their job assignments – to any personal accountability, even as damages owed to the state, unless it the error is intentional.

The Decision of the Court – September 30, 2003 Gerhard Kobler vs. Austria. The claim asking for a preliminary decision: Landesgericht fur Zivilrechtssachen Wien – Austria. Equality of treatment. Cause C-224/01.

"Any possible liability of a judge towards the victim is in conflict to the principle of the independence of judges".

3. Situation in the member states of European Union[30]

a) In the following states, the judge has (personal) immunity – the state is responsible for damages: United Kingdom, Scotland (with some exceptions for local judges – judges of peace, clerks of court and prosecutors).

b) In the following states, the judge is responsible only in the case of certain crimes: Latvia, Estonia

c) In the following states, the judge is responsible for decisions taken with bad faith or extreme negligence: Sweden, Germany, Croatia, Portugal (regress action is only undertaken with the notice from the Supreme Council of Magistrates), Italy, Serbia, France (state action against a magistrate that committed a personal mistake regarding the public service is optional and has never been used), Austria (except the Supreme Court Judges that have immunity, there is a professional insurance system)

d) In the following states, there is no magistrate liability ruled: Poland, Cyprus

e) In Hungary there is a complex form of liability

4. Conclusions

a. From the analysis upon the suggestions made by the Ministry of Justice, we can conclude the intention is to state one of the harshest regimes in Europe of juridical liability for magistrates, placing Romania only alongside Hungary from this perspective.

b. From the above stated, corroborated with the situation in other countries, first of all it needs to be stated that in the hypothesis of a harsher liability (because such liability already exists currently) there is the need for **ruling a system of insurance for compulsory professional insurance**, to lower the risk of affecting the independence of the magistrate in making the actual decisions in a case.

c. Third, we need to stress that **in neither of the European states above mentioned, a recourse of the state against the magistrate is not compulsory (as the Ministry of Justice suggests) but rather is optional** and depends on a series of circumstances of the case in concreto.

Also in the states where one such mechanism already exists, it has never been set in motion for the exact reason to actually enforce the independence of the magistrate.

d. Fourth, in order for such suggested mechanism not to undermine the principle of the independence of the magistrate, **it is required to make a clear distinction and define the notions of extreme negligence or ill faith.**

For this matter, the Supreme Court in Italy, in similar circumstances, stated that:

- Punishable negligence requires a quid pluris over simple negligence, it needs to be presented as inexplicable, with no relation to the particularities of the situation that would make such negligence understandable, without giving an explanation for the error of the judge (Cass. 6950/94)

- Extreme breaking of the law determined by punishable negligence does not exclude the processual laws, it is not a reason for liability that moment of performing the judicial duties of a judge regarding the identification of the content of the judicial law and the applicability of the law to a specific situation, even of the solution is debatable or poorly explained,

[30] See the file regarding the **Romanian Judges' Forum**, via judge Georgeta Ciungan, Focsani City Court, regarding to the civil liability of the magistrates, available at the web link http://www.forumuljudecatorilor.ro/index.php/archives/2702 [last consulted October 17, 2017]

because in this way it would come to a revising of the case that is not allowed for a interpretative or evaluative judgement, while a lack of deciding over a decisive issue being a source of liability. (Cass. 17259/02)

e. Fifth, it is imperative to state the fact that patrimonial liability that already exists is in correlation to the European standards, and bringing up the issue of the number or the amount of damages given as a result of convictions the Romanian state got at ECHR does not represent a justifying cause to aggravate the material liability of the magistrate, considering the fact that most of the times the judicial error is not the result of a single action/inaction, but rather the effect of a summing up of factors and incidents that involves also the duties of other powers of the state of law, legislative and executive power.

Thus, according to statistics (see the study **Hotărârile CEDO în cauzele împotriva României. Analiză, consecințe, autorități potențial responsabile** ECHR decisions of cases against Romania. Analysis, authorities with potential liability), until December 31st 2014, the legislative power is responsible in 76,82% of cases in which a conviction decision was given (769 cases), the judicial power in 57,84% (579 cases), Public Ministry for 19,48% (195 cases), and Constitutional Court for 0,39% of convictions (4 causes).

Not least, any legislative intervention with the possibility to create a suspicion of pressure on the judicial system must be heavily based, so that it removes any external interference factor as the objective being precepted as threatened see ENCJ 2013-2014 report on Independence and liability of the judicial system – European and international standards regarding Judicial Independence and Liability.

f. Sixth, we stress out the demagogy of this legislative proposal, considering the conditions that the equality between the three powers of the state is not respected. Thus, we notice the fact that in Romania there is no specific procedure for recovering the damages caused by ministries or members of the parliament that are convicted of a penal crime for crimes of corruption, some of them getting an early release without paying in full the damage caused directly to the State.

There is no equivalent system of liability for members of the other powers, members of the parliament having no liability whatsoever for the laws that got invalidated at ECHR (with the most notable example being the law for restitution of properties), and members of the government have no form of liability for activities that cause negative consequences, including at ECHR (most notable example being the situation in the penitentiary, where members of the government know the issue for years and the only initiative to solve that was issuing a law of pardon in the form of an Urgent Government Ordinance 13/2017).

The convictions at ECHR are not determined just by the conduct of some magistrates, but have a fundamental cause, in most cases, of poor laws, sometimes considered to be constitutional by the Constitutional Court (see for example, ECHR (see, for example, ECHR judgments in *Sabou and Pîrcălab v. Romania*, 28 September 2004, *Dumitru Popescu (No 2) v. Romania*, 26 April 2007, *Marcu v. Romania,* 26 October 2010, *Bălteanu v. Romania*, 16 July 2013). In such cases where the judges' decision was based on a national legal rule not in conformity with the European human rights law, maintained in the normative fund by a decision of the Constitutional Court, we ask whether the material liability should not be exclusive (or priority, at least) parliamentarians and judges of the Constitutional Court?

It is surprising that the initiative of the Minister of Justice, a former judge of the Constitutional Court, to deviate precisely from its constant jurisprudence on matters of magistrates' liability. For example, by Decision no. 633 of November 24, 2005, it was stated that "the rule that the injured party can bring an action only against the State and not against the magistrate who has committed the judicial error offers wider possibilities for the recovery of a possible right to compensation. Thus, making the recognition of the right to compensation exclusively for the judicial error results in the alleviation of the burden of proof, in the case where, alongside the judicial error, the bad faith or serious negligence of the magistrate should be proved, constitutional requirements for the accountability of the follow. Moreover, conferring the status of debtor of the wage-exclusion obligation exclusively to the state is likely to eliminate the creditor's risk of not being able to redeem his claim, being in principle the state is always solvable."

g. Finally, it must be said that the establishment of a regime of extremely harsh liability compared to the other European states (with the exception of Hungary), where the rule of law works, without any of the previously exposed guarantees (clarification of the notions of bad faith and serious negligence; professional liability insurance, etc.) will lead to the creation of a new type of magistrate, the fearful, timorous magistrate.

If the Romanian society needs a fearful magistrate who, when rendering decisions, would always reflect on the possibility of somebody regarding his/her conduct as being susceptible of patrimonial accountability, then the proposals put forward by the Minister of Justice accomplish just that: they bring in a constraining variable in the decisional process.

The argument that the measures are necessary for avoiding abuses is not valid. To the extent that there are abuses presently committed by magistrates, there are mechanisms in place through which they can be held liable, including criminally. There are well-known cases of magistrates that are subjected to various stages of criminal prosecution, as well as magistrates that are sanctioned disciplinarily, according to the Judicial Inspection Report that includes 2016.

It has to be noted that the proposed measures are susceptible of "supervising" the reasoning of the judge/magistrate, thus creating a risk that the measure would interfere and censure the very prerogative that is central for the judge/ magistrate, namely to adjudicate, for the mere fact that one of the parties or the society is unhappy with a certain ruling (by way of example, see, *inter alia*, *S v. Makwanyane* – Constitutional Court of South Africa, in a famous decision regarding the unconstitutionality of the death penalty, rendered despite the fact that a large part of the population had voted for the penalty).

4.3. On the setting up within the SCCP of a specialized directorate with the exclusive competence to carry out criminal prosecution for the acts committed by judges and prosecutors

Regarding this proposal of the Minister of Justice to review the "laws of justice", first of all, such an idea has lacked explications about the necessity to implement such structure.

A special structure is justified only with a special problem. This measure implies that there is a problem of criminality within the magistrates, which requires special attention.

In addition, at a first glance, such a measure can be analysed from a constitutional perspective due to the fact that this type of special criminal

investigation will apply only to the magistrates.

As a support for those presented, is the no.104/2009 Decision of Constitutional Court, which even though it was issued in a unrelated area with this discussion, the Decision was issued in work conflicts domain, it has confirmed the fact that there is no justification for a different treatment and procedure for magistrates.

There is no such type of measure for parliamentarians, nor for the members of the Government, neither for officials and nor for any other professional category.

There is no justification to undergo a special treatment for the magistrates. If the justification is that of the protection of magistrates, then such type of explanation is at least unbelievable and also likely to raise the suspicion that it actually hides something else.

It is not necessary to recall the fact that the SIPA was also established for the "protection" of the magistrates.

It should also be noted that in the present, within the National Anticorruption Directorate there is the "Anti-Corruption Justice Service", established by Order no. 10 of January 31, 2014, whose competence is limited to corruption offenses.

Due to the fact that such an entity exists, no arguments have been put forward and there is no explanation to justify why it is necessary to create a separate structure for all offenses, including corruption.

4.4. On the abrogation of the legal provisions related to the taking over the budget of the other Courts by The High Court of Cassation and Justice

Related to the proposal made by the Justice Department concerning the review of the „justice laws", when the Law no. 304/2004 was adopted, the goal was the ensuring of the independence and the stability of the Judges, regardless their level of jurisdiction in which they may activate; the term of January the 1st 2008, for the taking over of the Courts' budgets by The High Court of Cassation and Justice, was established on purely technical grounds, which makes any delay unjustifiable, at least until January the 1st 2018.

Whatever are the motives discussed in the public space, regarding the delay of the implementation of the legislator's will, it can be easily considered that if it existed the will the make the change, it would have been done through a legislated shift of attributions or by signing a protocol between the legal entities evolved, by which the officials should be transferred / delegated / seconded and the logistics should be made available, so that all the activities continue without interruption.

According to the Article no. 25 form the Romanian Constitution, the Judges are designated by the President of the Republic and they cannot be removed from the magistracy; any proposal regarding the appointment, promotion, transfer and punishment of the Judges fall on the exclusive power the Supreme Counsel of Magistracy and the position of the Judges is incompatible with any other public or private position, except for teaching positions in higher education.

In the legal level below the Constitution, the magistrates' statute is regulated in the Law no. 303/2004. According to this law, the Judges are independent, they obey only the law and they must be impartial. The second Chapter from the quoted Law establishes a number of incompatibilities and interdictions applicable for Judges, Prosecutors and Assistant-Magistrates.

The Fundamental Principles regarding the independence of Magistracy, in the way that they were adopted in the 7th Congress of United

Nations on the Prevention of Crime and the Treatment of Offenders (Milan, august the 26th – September the 6th 1985) and ratified by the General Assembly of the United Nations through Resolutions no. 40/30 from November the 29th 1985 and no. 40/146 from December 13th 1985, provide in an express manner in the article 11 that « *the duration of the commission of the Judges, their independence, their safety, their remuneration, the working environment, their retirement remuneration and retirement age are adequately guaranteed by the law* »

The Minimal Standards of the Judiciary Independence, adopted by the International Bar Association in 1982, provide that « *Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.* »

The Recommendation no. R(94)12 regarding the independence, the effectiveness and the mission of the Judges, adopted in October the 13th 1994 by the Committee of Ministers of the Council of Europe, emphasizing the importance of the independence of Judges purposely to enforce The Rule of Law in democratic countries and considering the Article no. 6 from European Convention on Human Rights and also the Fundamental Principles regarding the independence of Magistracy, quoted above, established, among other important measures that have to be adopted by the States, that is the duty « *of the State to watch that the Status and remuneration of the Judges should be according to the dignity of the profession and the responsibilities they assume.* »

The Recommendation no. CM/ Rec(2010)12 a the Committee of Ministers of the State Members regarding the Judges: the independence, the effectiveness and the responsibilities (adopted by the Committee in November the 17th 2010, on the occasion of the 1098th meeting of the Ministers' delegates) provides that « *54. The remuneration of the Judges should be established according to their mission, responsibilities, in such a manner that would make them immune to any sort of pressure meant to influence their decisions. There must be safeguards in order to maintain a reasonable remuneration in case of illness, maternity leave or paternity leave, also in case of the payment of an old-age retirement, that should have a proportional amount, reasonably comparable to the remuneration of an acting Judge. There has to be a specific legislative regulation meant to protect the Judges' remunerations against a reduction in remuneration that would specifically target the Judges.* »

The Article no. 6.4 from the European Chart regarding the Status of the Judges, adopted the year 1998, provides " *It specifies in this context that judges who have reached the age of judicial retirement after the requisite time spent as judges must benefit from payment of a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.* ", and the article no. 1.8 from the same Chat refers to the necessity of consulting the Judges "*by their representatives or professional associations on any proposed change in their statute or any change proposed as to the basis on which they are remunerated, or as to their social welfare.*"

The Venice Commission (The Venice Commission of the Council of Europe through Law) in the Report on the Independence of the Judicial System, adopted within the pale of the 82nd plenary session (Venice, march the 12th-13th 2010) holds that the salary of a Judge must be compliant to the

dignity of the profession and the appropriate remuneration is necessary in order to protect Judges from external interference. Exempli gratia, the Constitution of Poland guarantees to all Judges a consistent salary relative to the dignity of their profession and to the scope of their duties. Their remuneration must be established according to the social situation in the country and **must be comparable with the level of salaries that the high officials have**, determined according to a general, objective and transparent standard. Any sort of reward, gratification, bonus including a discretionary element must be excluded.

In all these documents, principles and measures established regarding the Status and the rights of magistrates are directly related to the provisions contained within the Article no. 10 from the Universal Declaration on Human Rights and those contained within the Article no. 6 form European Convention on Human Rights, concerning to the fundamental right of any person to be judged by a competent, independent and impartial tribunal, established according to the law. Even though some of the quoted documents have only the power of recommendation, those provisions and the purpose sought in those provisions have, individually target directly legal stipulations situated in treaties to which Romania is a party and, by consequence, they enrol in the spirit the provisions found in the Articles no. 11 and no. 20 from the Romanian Constitution.

In Romania, the management of the Courts' budget it is an attribution of the Justice Department, in consideration of it's legal main right to distribute credits from the State Budget.

This legislated solution is contrary to the recommendations of the Consultative Counsel of the European Judges (CCEJ) and it raises a serious question on the independence of the justice system, as long as its own budget is controlled by the executive and legislative powers.

The state of underfinancing of the judicial system, the non-payment and the over-dues of the salaries and the rights related to salaries (as they are recognized through subsequent judicial decisions), the inequities from within the salary system, the refusal of the executive power to give up its financial strings regarding the Courts, by passing the management of their budget to the Supreme Court, the increasingly impingement of the main elements of the Status of Judges and Prosecutors constitute the bases of the general protest of Magistrates, back in 2009, that caused a 30days block of all judicial activities.

The financial resources may represent for the Justice Department, respectively for the executive power, an element of pressure against the magistrates and any abrupt modification of the remuneration system might become an injury factor to the independence of the magistrates.

4.5. Regarding the naming procedure of chief magistrates

In this regard, the Ministry of Justice proposes the revision of the laws of justice, as it follows:

- The President and the Vice-Presidents of the *High Court of Cassation and Justice will be named by Romania's President* after the *Superior Council of Magistracy – section for judges proposal, among the High Court of Cassation and Justice's judges, who ruled at this Court at least 2 years and had not been disciplinary sanctioned.*
- The General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, the First Deputy Prosecutor General and his

Deputy, the Chief Prosecutor of the National Anticorruption Directorate, his Deputies, the Heads of Sections of the Prosecutor's Office attached to the High Court of Cassation and Justice and to the National Anticorruption Directorate, also the Directorate for Investigating Organized Crime and Terrorism Chief Prosecutor and their Deputies are named by the *section for prosecutors*, at the Justice Minister's proposal.

- Due to a transparent judicial procedure, the Justice Minister presents at least 2 proposals, among the prosecutors having at least 10 years seniority in the practice of the prosecution activity.

4.5.1. Regarding the intention to modify

These proposed changes to justice laws don't have any judicial reason, but obviously, the reasons could be of a different kind.

Firstly, beyond any further arguments the naming procedure in these positions was previously established, but in order for Romania to join the European Union, agreed with the members of the Community field and accepted by the Cooperation and Verification Mechanism.

Afterwards, none of the annual reports criticized the naming procedure in these positions, nor sustained that the balance of state powers could be affected.

4.5.2. The proposed changes regarding the Heads of Prosecutor's Offices

As the proposal it's being made by the Justice Minister, the *Superior Council of Magistracy has not a full liberty of choice, the alternative of a refusal being almost excluded within the Decision No 98/7 February 2008 of the Romania Constitutional Court.*

This is an unsafe procedure, because, on one side, the SCM has only the choice of a "Yes" or a "No", regarding the Justice Minister's proposal, couldn't be able to choose between the large number of Romanian prosecutors, and on the other side the responsibility for the decision could be lost between the SCM members who might hidden at the guard of the secret vote.

In fact, the Justice Minister will be the one who consolidates a main position in the naming of the Heads of Prosecutor's Offices.

Much worse is that this mechanism which allows the Justice Minister to name the *Heads of Prosecutor's Offices (knowing that he has to choose between 2 proposals) liaised with the proposal which allows the Chief Prosecutor to infirm solutions based either on illegal reason (as it is now), or on unfounded reason (as it's proposed), generates the right conditions for a political control of the Prosecutor's Offices, which would affect the credibility of the Criminal Justice.*

Therefore, it would not exist any possibility for a democratic control of the criminal investigations, which could be finished or initialized based on the decision of some Chief Prosecutors politically named by the Justice Minister.

Among all the investment procedures or removal from the important positions of the Prosecutor's Offices (The General Prosecutor's Office, the National Anticorruption Directorate, the Directorate for Investigating Organized Crime and Terrorism) the current procedure was the only one to generate the conditions of a real criminal justice in Romania, thanks to a tripartite mechanism which offers counter-weights like: the Justice Minister (Government's representative), the President of Romania (directly elected by the citizens), SCM formed of magistrates and civil society representatives.

By maintaining the role of the Justice Minister and removing from the process

the Romanian President – the Romanian dignitary with the main democratic legitimacy, directly elected by the majority of Romanian citizens – it would generate a serious imbalance.

4.6. On modifying the recruitment system of magistrates

The Minister of Justice proposes to review the "laws of justice", in the following sense:

- Candidates must be physically and psychologically apt to serve as magistrate;

- Candidates must be at least 30 years of age;

- Candidates must have at least 5 years of effective employment in one of the legal professions regulated by law;

- The admission examination for direct entry into the magistracy, with a 5-year seniority in other legal professions is removed;

- The admission examination to the NIM (National Institute of Magistracy) will be announced at least 6 months before the date set; - it is currently announced 60 days before the date set;

- Justice trainees will benefit from the reimbursement of learning materials;

- Justice trainees will receive free accommodation in NIM's accommodation facilities;

- Legal provisions on incompatibilities and interdictions of judges and prosecutors will also apply to justice trainees;

- Justice trainees will have the right to be reimbursed for the rent up to a maximum of 50% of the amount due under this title to magistrates in case there are not enough free places for accommodation in NIM facilities;

- After the completion of the NIM courses, the justice trainees need to pass a graduation exam which verifies the acquirement of the knowledge, skills and abilities necessary to perform the function of judge or prosecutor, as well as a psychological test;

- Changes are suggested regarding the competence of cases that can be assigned to trainee judges, both in civil and criminal matters;

- The trainee judges also attend court hearings with other types of causes than those provided in paragraph (1), by rotation, to the judges' panels of the court composed of definitive judges established by the president of the court. In the cases in which he / she is assisting, the trainee judge draws up a consultative report on the case and may draft the decision at the request of the chair of the panel.

As a first observation, it must be said that this idea was not publicly debated in the previous rounds of discussions, from 2016 until today, being a newly presented idea.

Apparently, these measures can be viewed with goodwill - who does not want a mature and well-prepared magistrate? But at a closer analysis it must be noticed that they will have the effect of destroying the NIM's performance system and, in the medium term, lowering the level of training both within the institute and within the magistracy institution.

Thus, the current system allows the presentation of the best-prepared students of each generation, of the valedictorians at the entrance examination at the Institute.

This ensures both a high level of professionalism within the magistracy and an increased exigence, and justifies the existence of the Institute as an elite entity meant to prepare the magistrates.

In the proposed system, this would not be possible.

Valedictorians will naturally choose other legal professions and after reaching the age of 30, assuming they are proficient at their jobs (as lawyer, being a notary public etc.), they will have no reason to look to NMI (INM).

For this reason, the pool of candidates is expected to suffer a decrease in terms of their level of preparation as most of them would probably be jurists merely on paper (given the current state of legal affairs, this is impossible to deny), candidates who will have failed in other legal professions.

In time, after repeated admission exams will have failed to find suitable candidates for all the vacant positions, this fact will lead to the decrease in the level of difficulty of exams, which in turn will result in a pool of magistrates that are less well prepared.

Of course, there will also be exceptions as perhaps some well-prepared candidates would be found but the trend will be the one previously explained.

If the current system can be blamed for certain aspects and, generally, in public, it is said that there is a lack of maturity, this shortcoming can be remedied through other mechanisms, through the extension of the initial period of training at the Institute, through the diversification of the training activities (for instance, in the Netherlands two of the other legal professions require a mandatory 2-year period of training), through the amendment of their jurisdiction for the first years after their permanent appointment (for example, they would be precluded from adjudicating criminal cases or family law disputes where the need for social experience is discernible) etc.

Additionally, in the current system, given that candidates graduate from law school at the age of 22-23 and the NMI (INM), including the training period, lasts for 3 years, it follows that, in fact, a magistrate is effectively starting his work on cases at the age of 27, should (s)he indeed be admitted on the first attempt.

Keeping the competence of the Magistrate to judge the technical areas in his first three years of career (contravention complaints, for example) could have the same effect as that which it intends the proposals examined, without however upset the system.

A final reason for which the analyzed proposal will not operate is that the situation is different in Romania, in comparison to the Western countries, where the entry in the Magistracy is done later.

Thus, in other Member States with a consolidated democracy, the receipt of the Magistracy represents a natural course of what was called in the Roman Empire “the road of honor”, a normal step in the professional career, either to return the society a part of the benefits that have been offered, either to continue to build the career in the service of the justice. In those countries, however, the amount of work of a Judge is much smaller, compared to the amount of work of a Romanian Judge. Also, there are necessary – we are saying this as directly as possible – personal sacrifices, including those of physical nature, the resistance to stress and to public attacks on the profession. These downsides have been compensated for the moment with the abnegation of young people who have sought and found their vocation, especially because the reform presumed, among other things, attracting those who have graduated from the faculty of law after the Revolution in 1989.

The proposal of the Justice Department is not based on a study drawn up by the independent psychologists or a sociological survey, to take account of the specific context of our country, based on the statistics and partial objectives (either at the level of courts of medium level), in which to consider issues such as:

- Checking the results of the evaluations of periodic training, to see if they are weaker in the case of the magistrates under the age of 30 years to

receive in the profession, or who have not had the age of 5 years in another legal profession;

- Checking the number cassations or amendments of judgments, in order to observe if the ratio is greater in the case of the magistrates under the age of 30 years or of those who had at least 5 years of professional experience in another legal field;

- Checking the grades, obtained from the promotion exams, according to the specified criteria, to indicate if there is a deficiency caused by the lack of "experience" (the exams would check both theoretical and practical abilities);

- Checking irregularities, disciplinary action or conduct, for the same purpose, considering that they cover the relationship with the lawyers, the citizens, the court;

The Proposal of the Justice Minister is not based on a prior opinion of the Scientific Council of the National Institute of Magistracy or an impact assessment regarding human resources, which takes account of:

- The number of vacancies in the judiciary (judges and prosecutors);

- The number of additional posts, aiming to complete the *implementation of the new Codes or of the public procurement laws, for example;*

- The necessity of adding new jobs, considering the anticipated increase of the level of the activity (for example, because of the decision of The Constitutional Court of Romania relating to the threshold in Appeals);

- The number of the posts that after the normal evolution of the removal from office of the magistrates but also due to the wave of retirements this decade will be vacancies;

- The hindering of the promotion system due to the suggested changes (the increase of the effective required seniority), which will be affecting the professional mobility toward higher Courts;

- The low number of the candidates for direct admission to Magistracy even now (having 5 years of seniority in any legal profession), this would be the only allowed category for the Admission to the National Institute for Magistracy, according to the Justice Minister (with an additional condition: the age of thirty years old);

- The weight of the recruitment by examination (NIM or direct admission), related to the subject difficulties over the last years, preserving an exacting standard;

- The possibility of making an opinion poll on the occasion of the admission examination for NMI (INM) and Direct admission in magistracy from 3rd of September 2017, that sets out the extent that the proportion of those who meet the conditions, and also the proportion of those who indicated their intention to participate to an admission system such as the Ministry did propose.

To the extent that the problem of lack of experience would be correctly identified through studies and polls, then its causes and solving methods are not the same, not the simplistic ones which, in addition to the fact that they are shattering the dreams of generations of Law Graduates, well prepared, will also lead to a decrease of prestige of NMI, influence and relevance, but also to a mitigation in the long term, of the level of training for both, justice trainees and magistrates – afterwards.

4.7. On the changes attempted to be made to the conditions of promoting within magistracy

Regarding this proposal made by the Minister of Justice to amend "the justice laws", **the CVM reports welcoming the evolution of the magistracy indicated in a certain manner that a merit-based**

promotion ensures the foundation of an independent judiciary body, free of any influences, both from its inside and from the outside. **The return to a manner of promotion on subjective criteria, that lack any form of objective control made by the magistrates, with no possibility to challenge and no predictability, will deprive the judiciary of this foundation.**

The establishing of an evidence, for the promotion, evaluating the documents drawn up by the magistrates could lead to situations, for example, in which a seconded magistrate who drew up only administrative documents (administrative proposals approved by the minister / president of SCM / director of the National Institute of Magistracy etc.) receive a maximum rating, as the administrative notes were perfectly drafted, while a sitting judge, with hundreds of decisions annually ruled, have the bad luck and his/her decisions ruled in repetitive cases be analysed in a succinct manner, the decisions being criticisable for „the lack of imagination" in reasoning at least. The latter will not promote, while the seconded judge will be able, without problems, to claim a position to the superior court. The text presumes an effective promotion procedure that is deeply subjective allowing for a lax selection, based on an extreme subjective non-transparent criteria, of those who will have access to the hierarchical superior levels of the courts and prosecutor's offices. That is to say, an extreme non-transparent procedure for the selection of judges / prosecutors is established, the solution blocking, for extremely unclear reasons, the career path of the magistrates who are not among those favoured by the evaluators. This manner of promotion seriously impairs the independence of the justice system from the perspective of the selection procedure of the magistrates for the superior courts, on the basis of other criteria than the strict professional and merit-based ones. The possibility to regulate the promotion procedure in question by secondary legislation is not only extremely criticisable in terms of opportunity, but also questionable in terms of constitutionality, as long as the provisions of art. 125 par. (2) of the Constitution impose the rule that the promotion of the judges fall within the powers of the Superior Council of Magistracy, under the conditions established by the organic law.

As a consequence, the promotion to the hierarchical superior level of the magistracy is to be made through an extreme no-transparent, subjective procedure (the evaluation of some documents drawn up by the magistrate representing, in fact, the opinion of the evaluators about those documents, the individual opinion being, by definition, of no objective nature) **and also volatile** (being possible to be regulated at will and directed depending on the interests at moment – under the circumstances in which the procedure is to be established by the SCM Regulation), a circumstance exclusively resulting in the quality of the magistracy being impaired, by increasing the level of dissatisfaction and mistrust, within the system in the first place, at the reliability and objectivity of the promotion procedure. The questionable character of the promotion procedure within the system cannot be kept only intra-professionally, its export to the media and society will lead inclusively to a decrease in trust in the act of justice (the citizen / journalist will have no reason to trust a magistrate promoted to the superior courts following a selection process that is questionable within the judicial profession).

The return to a manner of promotion on subjective criteria, that lack any form of objective control

made by the magistrates, with no possibility to challenge and no predictability, will deprive the judiciary of this foundation. We draw the attention that the desired amendments related to the promotion were rejected by the General Assembly of Judges and Prosecutors with over 600 ballots against in September 2015.

In the context in which the promotion of the magistrates in non-managerial positions, according to the current regulation, caused over the years dissatisfactions among the candidates related to the quality of the subjects, the manner of dealing with the complaints challenging the evaluations, to inequalities in the tie-breaking of the candidates with various specialities, remained unsolved till the present day, the introduction in the pass mark of more subjective variables is inexplicable, total non-transparent variables, as: hundreds of various evaluation commissions at the national level, subjective and unpredictable criteria, the inexistence of a transitional rule, making use of a mark obtained following the evaluation of the documents drawn up within a speciality when promoting in another position with another speciality, the impossibility to establish a common base for the evaluation of the magistrates who effectively carry out their activity in courts/ prosecuting units and of the magistrates seconded to the Superior Council of Magistracy, the National Institute of Magistracy, the Ministry of Justice etc., although they have the possibility to candidate for the same position (the last years' experience showing that the tie-breaking mark is at the level of hundredths), and the list of problems remains open.

According to *the Fundamental Principles on the Independence of the Judiciary*, adopted by the Seventh United States Congress, approved by the resolutions of the General Assembly of the United Nations Organisation no. 40/ 32 of November 29th,1985 and 40/146 of December 13th, 1985, „Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives" (point. 10). Moreover, point 13 provides that „ Promotion of judges, wherever such a system exists, **should be based on objective factors, in particular ability, integrity and experience**." The Committee of Ministers of the Council of Europe recommended to the governments of the Member States to adopt or strengthen the all measures needed in the promotion of the role of the judges, in an individual manner, but also of the magistracy, as a whole, with the view to promoting their independency applying, in particular, the following principles: (...) I.2.c. „**any decision referring to the professional career of the judges has to be based on objective criteria**, the selection and promotion of the judges has to be based on their merits and **in accordance with their professional training**, integrity, competence and efficiency".

Any „objective criteria" seeking to guarantee the merit-based selection and career of the judges, by taking into account the professional training, integrity, ability and efficiency" can be defined only in general terms. Firstly, a content is sought to be offered to the general aspirations for „merit-based appointment" and „objectivism", aligning the theory with the reality.

The objective standards are deemed necessary not only to exclude the political influences, but also **in order to prevent the risk of favouritism, conservatism and of „nepotism**", existing to the extent in which the appointments are made in

an unstructured manner. Although the appropriate professional experience is an important condition for the promotion, the seniority in office, in the modern world, is no longer generally accepted as a dominant principle applied for determining the promotion. The public shows an increased interest not only for the independency, but also for the quality of the judiciary and especially in times when great changes occur. A possible sacrifice in terms of the dynamism may occur when the promotions are exclusively based on the seniority, which cannot be justified by a real gain in terms of independency.

4.8. Regarding the reinstatement to magistracy, without examination, of judges or prosecutors with at least 10 years of relevant experience

Regarding this proposal of the Minister of Justice to review the "laws of justice", **the reinstatement to magistracy, without further examination, of former judges or prosecutors with at least 10 years of experience in these professions is another controversial element found in the MCV Reports**.

The profession of being a magistrate is and must remain a career profession that requires vocation. A magistrate who elects another system, for financial (lawyering), political or any other reasons, must assume the consequences of his or her decision. This proposal leaves an open door to the magistracy system, and also delivers the possibility of juggling with entries into and exits from the system, based on considerations other than the professional ones and considering interests other than those of the justice.

The justification given to this change makes it look like the magistrate is almost constrained, due to the incompatibility regime, to leave the system. But if the magistrate resigns once, it means that he does not accept the system's constraints of which he was thoroughly informed at the beginning of his career, thus being fully aware of what is expected of him. There is no guarantee that the magistrate, after another five years for example, will not resign again from the system, because the incompatibilities and deontological constraints will certainly continue to be regulated in the future, too. Such psycho-professional instability is simply unacceptable, particularly when provided as an explanation emanating from the highest level of magistracy.

Another issue is raised by the concepts of independence and impartiality. A magistrate unsatisfied with the regime of the judiciary may choose to resign and become a lawyer, where he/she has the possibility of being in contact with the criminal environment if he/she works at the criminal court, as he/she was previously a judge/prosecutor. Subsequently, if he/she re-joins the system, and has to adopt a position that is required to be independent and impartial, it will be extremely difficult to achieve, especially because he/she will not appear to be impartial and independent for an external, objective and informed viewpoint. Likewise, a former magistrate may choose to act as a politician, a representative of a political party, or simply in a profession that is outside the legal field. All of these hypotheses have nothing in common with an existing vocation, with the calling of the profession. Through this legislative gap, we cannot help but wonder about the external appearance of the magistrates that have vocation and remain in the system despite not only the massive workload and the low salaries that do not correspond to the level of responsibilities and workload, but also the incompatibilities.

A magistrate might take a step back from these incompatibilities to substantially increase his or her

income by joining the Bar or through other methods that do not implicate any constraints, or simply to gain glory and extend his/her political network, after which the SCM allows his/her return to the magistracy, where he/she will share an office with a colleague who all this time remained in the system, by way of example, due to being, should we say, less inspired.

4.9. Romanian Judges' Forum regarding the salary rights of magistrates according to their current positions, regardless of their professional status

Regarding this proposal of the Minister of Justice to review the "laws of justice", first of all, such an idea has never been debated, this being the first time such an amendment has been made, without any previous consultation with the body of magistrates.

Secondly, such a measure is likely to affect the status of the magistrate in one of its essential components-independence, diminishing its authority.

Such a solution raises several problems:

a) it is a discriminatory solution, being thus unconstitutional:

- throughout the **budgetary system** consists of certain rules based on promotion in stages, given by degrees, that affect salaries; in all these cases, the acquisition of a higher position does not compel the person in question to change the workplace and does not make the payment of the degree of such a change conditional; (see annexes to Law No 153/ 2017 on the remuneration of staff paid out of public funds);

- in the case of the **military system**, the acquisition of a higher rank does not imply that the military judge/prosecutor will perform other tasks or that he will occupy another role, but only that it contributes to strengthening the vocation to ascend in the military hierarchy;

- in the case of the "**diplomatic**" occupational family (diplomatic degree is paid regardless of function);

- in the case of assimilated staff from the Justice Ministry, where a large number of the personnel already have a rank equivalent to the one given for the Courts of Appeal, the situation will be aberrant, and the consequences would be preposterous. But this has already been confirmed on several plans, for instance salary and promotion, the assimilated personnel not being limited by the number of vacant places, unlike magistrates. The consequence would be that such assimilated staff would actually be given more rights than the ones whose jobs they bear resemblance to.

- in the case of teachers, doctors (but also in other categories), in the case of school inspectors, management functions for auxiliary teaching functions, patrimony administrator, etc., hospital managers, general managers, research directors, economic directors etc., in the case of the "culture" occupational family; in the case of staff from public authorities and institutions fully financed from their own revenues, subordinated to, under the authority of, in the coordination of the Government, ministries and other specialized bodies of the central and local public administration, under the coordination of the Prime Minister, and of those under the control of Parliament; in the case of the "administrative" occupational family.

b) it represents an intrusion into the status of the magistrate, being thus unconstitutional;

- given that the magistrate's income is included in the notion of his status, designed to guarantee his independence, the diminishing of income in such a way means the impairment of the status, which impinges on independence, so that the measure is, from this point of view, unlawful;

- no justification for such a measure has been provided, so it can not be known whether its purpose is legitimate or arbitrary;

- Even if a justification (purpose) has been found, the measure does not maintain a level of constitutional proportionality, since it represents the most drastic intrusion into the status of the magistrate, without taking into account other alternative methods of fulfilling it.

c) it raises even more problems of inequity:

- **assimilated staff** will continue to benefit from the professional grades, although they do not perform judicial activities specific to the profession of magistrate;

- unlike magistrates, **the assimilated staff will advance in rank and receive all the rights corresponding to the positions**, although they will work in the same office, on the same computer, doing the same work;

- it will **diminish the professional development of the magistrate**, which will no longer be attracted by the perspective of presenting to sterile thorough examinations, which will not bring any benefit; the magistrate cannot be accused of having regard to the financial aspect of his status as long as the constraints of the position are well known.

4.10. Regarding the strict delimitation between the judges' careers and the prosecutors' careers

Regarding this proposal made by the Minister of Justice to amend "the justice laws", one has to take into account the fact that the contentious constitutional court has already mentioned by ***its Decision no.331 of April 3rd, 2007*** *referring to the exception of unconstitutionality of the provisions of art.29 par.(7), art.35 related to art.27 par.(3) and art.35 letter.(f) of the Law no.317/2004 on the Superior Council of Magistracy and art.52 par.(1) of the Law no.303/2004 on the statute of judges and prosecutors*, that „according to art.133 par.(1) of the Constitution, the Superior Council of Magistracy is responsible for guaranteeing the independence of the justice system. This being the case, the circumstance that the promotion of the judges to the High Court of Cassation and Justice is made by the Superior Council of Magistracy, in its Plenum, consisting also of prosecutors and representatives of the civil society, through the selection procedure provided by art.52 par. (1) of the Law no.303/2004 and not through contest is not of the nature to impair the impartiality of the judges of the supreme court.

Thus, the provisions of art.52 par. (1) of the Law no.303/2004 are not of the nature to infringe neither the provisions of art.21 par. (3) and art.124 par. (2) of the Fundamental Law nor the provisions of art.6 paragraph 1 of the Convention on Human Rights and Fundamental Freedoms, the author of the exception enjoying all the guarantees of a fair trial performed in front of an impartial court.

Moreover, the provisions of art.52 par. (1) of the Law no.303/2004 are not of the nature to infringe the provisions of art.124 par. (3) of the Fundamental Law too, these having been adopted in accordance with the constitutional provisions of art.133 referring to the structure of the Superior Council of Magistracy.

The Constitutional Court notes also that the dispositions of art.35 related to the dispositions of art.27 par. (3) of the Law no.317/2004 express the powers of the Superior Council of Magistracy, as they were regulated by art.134 of the Fundamental Law. Therefore, these cannot be construed as infringing the provisions of art.124 par. (3) of the Constitution".

Moreover, the manner in which the constitutional legislator regulated the

formation of the Superior Council of Magistracy cannot make the object of a constitutionality control.

Finally, the provisions of art.35 letter (f) of the Law no.317/2004 are in accordance with the provisions of art.134 par. (4) of the Fundamental Law, according to which the Superior Council of Magistracy performs other functions too, set by its organic law, being responsible for guaranteeing the independence of the justice system. Thus, no violation is brought to the provisions of art.61 par. (1) of the Constitution, according to which the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the state, as the regulatory function by organic law falls within its exclusive competence, and the regulation referred to in the criticised text of law is adopted in accordance with the law.

As a consequence, the Constitutional Court appears to assert that under the circumstances in which the decisions of the Superior Council of Magistracy (SCM) are made, according to art. 133 par. 5 of the Constitution, by secret ballot in order for the members of SCM not to be exposed to external pressures, under the circumstances of a lack of an imperative mandate, the fact that the prosecutors are part of SCM with their retained members and take the decisions in the Plenum together with the judges members and the members of the civil society, the respective decisions are not of the nature to impair the independence of the judges.

The circumstance that distinct sections exist in respect of the judges or the prosecutors does not involve the fact that the decisions made by these sections are final or that the complaints challenging these decisions are solved by the very section that ruled the challenged decision.

The constitutional architecture of the Superior Council of Magistracy, a collegiate body, involves the challenging in the Plenum of the decisions ordered by each section (except for the decisions ruled by the disciplinary sections, also as an effect of a constitutional text).

The only manner in which a strict delimitation between the judges' careers and the prosecutors' careers can be made is by a constitutional amendment.

In France or Belgium, the traditional constitutional models for Romania too, the presidents of the supreme courts have recently ruled in favour of the unity of the judiciary within the same council.[31]

[31] For details see the interview with the President of the Court of Cassation from Belgium, Mr. Jean de Codt, published in the Judges' Forum Rewiev no.1/2017, pg.15-16, available on the webpage http://www.forumuljudecatorilor.ro/index.php/archives/2706 [last consulted on October 17th, 2017], as well as the stand taken by the President of the Court of Cassation from France, Mr. Bertrand Louvel, the webpage https://www.courdecassation.fr/venements_23/derniers_evenements_6101/magistrature_bertrand_37040.html [last consulted on October 17th,2017].