The Romanian Judges' Forum Association - Observations regarding the projects of Emergency Government Ordinances concerning the collective pardon and the amendments of the Criminal Code and the Procedural Criminal Code. Measures with high risk of reducing the institutional capability to fight against corruption and general criminality in Romania

PRESS RELEASE

Recently, the Romanian Ministry of Justice issued for public consultation (only 5 days term), some drafts of Emergency Government Ordinances, acts that the Executive may issue in certain situations defined by the Constitution, bypassing the constitutional attribute of the Parliament, as primary legislative authority of the Republic. These drafts refer, on one hand, to collective pardon, and on the other hand, to amendments of the Criminal Code and the Procedural Criminal Code.

The Romanian Judges' Forum Association (FJR) released, to whom it may be concerned, its observations on prison overcrowding in Romania and the collective pardon, for accurately informing the public about this topic, but also to delimit from the recent statements of the Romanian Minister of Justice, that such measures would be accepted by professional associations of magistrates.

Also, FJR expressed its highest concerns about the drafts issued by the Romanian Ministry of Justice that aims to make amendments to the Criminal Code and the Procedural Criminal Code, by means of Emergency Government Ordinances, acts with the same legal force as bills of the Parliament, only that these are issued by the Executive Power.

By disrespecting the constitutional principle that underlines that "No person is above the law", the

Government initiative raises the question whether or not these measures are in reality intended for the benefit of a few persons, ex-public servants who are currently serving imprisonment sentences, and who, by their criminal deeds, affected on a large scale the public budget, without repairing the consequences.

The Romanian Judges' Forum Association is pointing out that in a society torn by corruption, it is absolutely necessary to increase the institutional capability to fight against corruption, including the recovery of damages, which has the effect of discouraging the phenomenon, and not to adopt measures such as collective pardon, (partially) decriminalization of certain crimes or reduction of sentences.

On Constitutional Principles regarding the possibility of issuing emergency ordinances

In Romania, the possibility of the Executive to govern by emergency ordinance must be justified by exceptional circumstances requiring the adoption of an emergency regulation, art. 61 para. (1) of the Constitution expressly ordering that the Parliament is the sole legislative authority of the republic.

Even if, from a constitutional perspective, an exceptional procedure in which the Government substitutes the Parliament in adopting primary normative acts (including organic laws) may be accepted, this possibility cannot be equivalent to a discretionary right of the Government and cannot justify the abuse in issuing emergency ordinances under article 115 par. (4) of the Constitution (see Decision no. 15 of January 25, 2000 issued by the Constitutional Court of Romania).

Otherwise, we are in the presence of a disallowed interference in the legislative competence of Parliament, in violation of the principle of separation of powers, as ordinances can not be adopted in the field of constitutional laws, can not affect the status of fundamental constitutional institutions, rights, freedoms and duties under the Constitution (cannot be suppressed, can not be prejudiced, cannot be harmed, injured, etc.), electoral rights, namely measures of forcible transfer of assets to public property [see article 115 par. (6) of the Constitution]. Therefore, the domain where the Government can substitute the Parliament in adopting primary legislation is limited by the Constitution, including by the imperative of the existence of an urgent situation, which requires regulation.

The case law of the European Court of Human Rights regarding the conditions of detention. The current situation in Romania

The serious situation of the prison system in Romania is neither new nor unusual. There have been many other European countries that have experienced the same phenomenon, and a solution for Romania must be drawn from the experience of the best remedies of these other countries.

In ECHR case-law there are several pilot judgments that found systemic failures on the prison regime as a result of structural recurring problems: ***Ananyev and Others v. Russia*** (10 January 2012), ***Torreggiani and Others v. Italy*** (January 8th 2013), ***Eshkol and others v. Bulgaria*** (January 27th 2015), ***Varga and others v. Hungary*** (March 10th 2015), ***WD v. Belgium*** (6 September 2016).

The fact that the problem of the necessity to make the conditions of detention compatible with the Convention has not been resolved by the political decision-makers after a period of 5 years from the first ECHR convictions (problem

addressed by FJR in its study "ECHR rulings in cases against Romania. Analysis, consequences, potentially responsible authorities"), coupled with the lack of progressive efficient remedies, creates to an objective observer the impression that this phenomenon is used, at its peak, by the same political decision-makers, as a pretext to promote draft legislation to frustrate the fight against corruption and crime in general.

The legislative and executive powers are responsible for convictions relating to prison conditions, since they did not take, at a proper time, the appropriate legal and administrative measures to prevent and stop overcrowding.

In the case ***Maiorano v. Italy*** (15 December 2009), the Court of Strasbourg has ruled that the state is responsible for the crimes committed by prisoners released on parole, finding the violation of article 2 of the Convention (right to life) when a person was killed by a prisoner who benefited of a semi-freedom regime. Such a risk exists in the event of collective pardons, where there is no control from the judge, who is not allowed to form an opinion whether or not that person gave solid evidence of improvement or if she or he was able to reinsert in society.

Among the general measures being envisaged by the Court of Strasbourg in order to be implemented by Member States for resolving the overcrowding of prisons, were NOT to be found collective pardon or amnesty. It is for the Member States, together with the Committee of Ministers of the Council of Europe, to establish preventive and compensatory measures.

Such preventive and compensatory measures may include:

• Implementation of structural reforms of the prison system, to reduce the number of detainees;

• Increasing prison capacity and modernization of their facilities;

• Transfer of prisoners to other prisons - where applicants may receive individual space and adequate conditions of detention;

• A regulation in the national law and effective remedies available to detainees, enabling them to complain to a judicial authority on the material conditions of detention and possibly of obtaining compensation;

• Adoption of punishments systems alternative to deprivation of liberty (restorative justice and mediation programs) and encourage their implementation, depending on the circumstances of each case;

• Granting parole to inmates who gave solid evidence of improvement, followed by supervision;

• Monitoring by electronic means;

• The introduction of community support programs for social reinsertion; and so on.

In order to implement any general measures, even in the case of a pilot judgment against Romania, the ECHR practice is to allow a period of at least 6 months (Belgium, 2 years), for establishing a predictable timetable to implement such measures. That makes it absolutely clear that there is **NO urgency in adopting a law of collective pardon before exhausting all other remedies**, in order to eliminate the causes for the future (on medium and long term), and not just the effects.

Specialized international analysis[427] have concluded that amnesty and

[427] Hans-Jörg Albrecht, *Prison Overcrowding - Finding Effective Solutions. Strategies and Best Practices Against Overcrowding in Correctional Facilities*, Max-Planck-Institute for Foreign and International Criminal Law, Germany, page 106-107, available online at http://www.unafei.or.jp/english/pdf/Congress_2010/13Hans-Jorg_Albrecht.pdf [last viewed at 23.01.2017].

collective pardon are problematic in terms of principles such as sustainability, respect for the rule of law and separation of powers. Such measures have the effect of decreasing confidence in the judiciary and increasing the sense of social insecurity without actually leading to the eradication of overcrowding, as the effect may be only short-lived.

The European Commission issued a first alarm about the situation in Romania by country report MCV in 2015, where it was stated that "The rejection of the amnesty law by the Parliament in November 2014 gave a positive signal in terms of opposing a law which would effectively result in exonerating individuals sentenced for corruption crimes. Nonetheless, the fact that only a week after this vote, the idea of a new draft law on collective amnesty was again floated in Parliament suggests that the debate has not been closed."

As for the corruption offenses, in many countries with democratic standards presumably lower than those adopted by Romania (Venezuela or Pakistan), amnesty and /or collective pardon processes were rejected by the constitutional courts or supreme courts.

The Romanian Judges' Forum Association is pointing out that in a society torn by corruption, it is absolutely necessary to increase institutional capability to fight against corruption, including the recovery of damages, which has the effect of discouraging the phenomenon, and not to adopt measures such as collective amnesty of crimes, pardon or reduction of sentences.

Criticism on the draft of EGO regarding pardon

– There is no exemption from pardon in cases of punishments for certain categories of crimes that previously were constantly exempted by the legislature for the benefit of the act of clemency, such as embezzlement, tax evasion, failure to comply with regulations on ammunition; there is no explanation for changing the view, especially since the first two categories of crimes above mentioned frequently are causing important material damages;

In a society torn by corruption, it is absolutely necessary to increase institutional capability to fight against corruption, and not to adopt measures such as collective amnesty of crimes, pardon or reduction of sentences.

– There is no exemption from pardon in cases of punishments for certain categories of offenses that have a high degree of social danger, such as manslaughter, whatever the number of victims, access without right to a computer system (there are convictions to deprivation of freedom including illegal access to computer systems of an authority of a foreign state), receiving undue benefits by public servants;

– In cases of partial pardon, the penalties imposed on persons who have reached 60 years of age, pregnant women or people who have in care minors up to 5 years of age, will be reduced by half, regardless of the offense (including offenses against state security, murder, offenses regarding sexual life, corruption offenses etc.); there is no objective justification in this appearance, the age, the medical condition or the family situation not being a relevant criterion;

– In regard of recovery of damages, although pardon is conditioned by the payment - within one year after the release - of the compensation to which the convicted person was bound by the final judgment, this delay is too long and

creates the risk of impossibility to recover the damage in cases when the pardoned person succeeds in hiding its possessions;

– For people who have reached 60 years of age, pregnant women or people who have in care minors up to 5 years of age, it was not stated the same condition to pay the compensation determined by final judgment within 1 year from release; the age, the medical condition or the family situation is not a relevant criterion;

– It was not stated the sanction of revoking the pardon benefit when the obligation to pay compensation determined by final judgment was not fulfilled;

Criticism on the draft of EGO regarding the amendment of the Criminal Code and the Criminal Procedure Code

– Amendments to the offense of abuse of office are not likely to reconcile with the jurisprudence of the Constitutional Court. The latter looked very deeply to the offense of abuse of office and concluded that it is unconstitutional to the extent that it is found that the public servant violated primary legislation, not secondary or tertiary legislation. This distinction of the Constitutional Court would be sufficient to ensure the predictability of law;

– Another amendment is conditioning the existence of the offense of abuse of office by a certain amount of pecuniary damage produced during the crime; that would be a first in the landscape of criminal law in Romania, conditioning criminal liability by an arbitrarily established criterion;

– In respect of amending the limits of punishment by reducing them, such a policy is not justified, given the existence of a large number of cases of abuse of office for which there were already issued final judgments of conviction; the increasing numbers of this type of crime cannot justify in any way, the reduction of the limits of punishment;

– The decrease of the maximum limit of punishment makes inapplicable the Code of Criminal Procedure concerning the arrest, where such action is necessary to eliminate a state of danger to public order, because the law states that such a measure may be enforced only for crimes punished by imprisonment of five years or more;

– Introduction of preliminary complaint for crimes such as abuse of office constitutes an important barrier in addressing such cases, especially if the offender is the Head of the institution in which the damage occurs. Such crimes should be prosecuted *ex officio*, since there is a clear public interest in doing so;

– In case of conflict of interests, the limitation on the scope of the benefit obtained by the offender, only to undue benefits, would leave outside the criminal law some of these behaviors (eg, a person who would hire, in her / his office, his / her spouse or relative or in-laws up to second degree, would not face criminal consequences since the remuneration of the employee cannot be labeled as unduly, which would frustrate efforts made in recent years to combat the phenomenon of "nepotism", which has negative consequences for the optimal functioning of public services);

– Excluding the effect of the denunciation of being cleared from criminal liability if it was lodged after 6 months from the date of the offense is likely to make it more difficult the discovery and punishment of serious offences if the denouncer is deprived of any legal benefit.

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The Romanian Judges' Forum Association is an independent, non-profit, non-governmental and apolitical association of Romanian judges, having legal personality under Romanian law, having as main goals the following: 1. the progress of society through actions aimed to create an independent, impartial and efficient justice; 2. the assertion and the defense of the independence of justice in relation to the other powers of the state; 3. the initiation, organization, support, coordination and implementation of projects concerning the improvement, the modernization and the reform of the administration of justice. The principle of separation of powers in a democratic state does not exclude the judiciary's possibility to express concerns and / or technical and non-binding opinions on the rule of law. According to their status, Romanian judges and prosecutors are obliged to respect and protect the Constitution and the laws of Romania.