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Meeting: 1406th meeting (June 2021) (DH)

Communication from an NGO (Romanian Judges' Forum Association) (28/04/2021) in the case of Kovesi v. Romania (Application No. 3594/19).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1406^e réunion (juin 2021) (DH)

Communication d'une ONG (Romanian Judges' Forum Association) (28/04/2021) dans l'affaire Kovesi c. Roumanie (requête n° 3594/19) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



DGI

28 AVR. 2021

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Subject: *Submission by the Romanian Judges' Forum Association under Rule 9.2 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments on implementation of the general measures in the case of Kovesi v. Romania (application no. 3594/19, Judgment, 5 may 2020)*

I. Introduction

The present Rule 9.2 communication is submitted for the 1406th meeting of the Committee of Ministers in June 2021; it concerns the general measures required for the implementation of the Kovesi v. Romania judgment.

Romanian Judges' Forum Association is a non-governmental, apolitical association of judges established in 2007 that aims at achieving an independent, impartial and efficient justice system and defending the independence of the judiciary from the other state powers, as well as at the reform and modernization of the Romanian justice system.

In its approximately 14 years of activity, the Association has distinguished itself through dozens of scientific projects and numerous positions concerning the rule of law in Romania, the reform of Romanian legislation and the independence of judges and their status. The Association issued press releases and public positions¹, addressed letters/petitions to national and European institutions, submitted amicus curiae briefs before the Constitutional Court²,

¹ <http://www.forumuljudecatorilor.ro/index.php/asociatia-fjr>
<https://www.agerpres.ro/comunicate/2021/01/15/comunicat-de-presa-asociatia-forumul-judecatorilor-din-romania-si-asociatia-initiativa-pentru-justitie--643719>
<http://juri.ro/asociatiile-forumul-judecatorilor-si-initiativa-pentru-justitie-cer-10-reforme-iata-lista>

² Case no. 945AI/2018 <http://www.forumuljudecatorilor.ro/wp-content/uploads/FJR-Amicus-curiae-pentru-CCR-obiectii-neconstitutionalitate-CPP.pdf>

Rules of the Committee of Ministers with regard to the execution of the judgment of the European Court of Human Rights (ECHR) in the Kövesi v. Romania case.

The two associations **proposed general measures necessary** for the enforcement of the ECHR ruling in Kövesi v. Romania case.

In March 2021 the Ministry of Justice made public the draft justice laws (the first concerning the statute of magistrates, the second concerning judicial organisation and the third concerning the Superior Council of Magistracy)⁵. These projects regarding new justice laws bring important changes in the judiciary, covering the main proposals included in the RJFA and AIJ 2020 statements and memoranda. These projects were put on public debate. Our association has participated in this debate, forwarded some proposals (in fact, any association representing magistrates could do the same thing).

The proposed changes consist in:

1. The provisions of Article 9 paragraph 3 Law No 303/2004, introduced by Law No 242/2018 ("Judges and prosecutors are obliged, in the exercise of their duties, to refrain from any defamatory manifestation or expression, in any way, against the other powers of the state - legislative and executive.") have been removed from the draft law on the statute of magistrates.

However, there is still the possibility to suspend and remove from office a prosecutor or judge for critical opinions on public policy issues of interest to the judiciary. This is possible because, under provision of article 99, letter a), Law no. 303/2004, "any manifestation affecting professional honour or probity or prestige of justice" is a disciplinary misconduct. According to article 52 paragraph 1 Law no. 317/2004 (provision which was introduced by Law no. 234/2018), „during disciplinary proceedings, the appropriate section of the Superior Council of Magistracy may, either *ex officio* or on a proposal coming from the judicial Inspector, order the magistrate to be suspended from office until disciplinary action has been definitively settled, if further exercising of duties could affect the impartiality of the disciplinary procedure or if disciplinary proceedings are likely to seriously undermine the prestige of justice”.

These two provisions combined could be used as weapon against the magistrates who had a critical voice on legislative changes that affect the rule of law or who had warned over possible acts of corruption. That is why it is necessary to be clarified in the new draft law that expressing a point of view on rule of law or on the status of judicial system and its functioning does not constitute a disciplinary breach in magistrates' duties.

2. The principle of prosecutors' independence has been reintroduced.

Article 3 paragraph 1 of draft law on the statute of magistrates reintroduces the provisions of Article 3 paragraph 1, Law No 303/2004, in force until the changes introduced by Law no 242/2018, stating that „Prosecutors (...) are independent, in accordance with the law.”⁶.

However, the constitutional term establishing the work of prosecutors "under the authority of the Minister of Justice" has not been explained. This is necessary in order to underline that a Minister of Justice could not intervene in the prosecutors' activity or interfere in ongoing legal cases. The Ministry of Justice should have as main role creating and development criminal policies based on real social needs and establishing the legal framework to implement those policies.

⁵ <http://www.just.ro/ministrul-justitiei-am-semnat-astazi-proiectele-celor-trei-legi-ale-justitiei-rezultate-in-urma-consultarii-publice-si-le-am-trimis-in-procedura-de-avizare-interministeriala-si-de-catre-cs/>

⁶ The current form of Article 3 paragraph (1¹), Law No 303/2004 provides, concerning the independence of prosecutors, that „the prosecutors are independent in case handling (...)”

3. The system for appointing/removing high-ranking prosecutors in management positions has been modified.

The draft law on the statute of magistrates enhances the role of the Superior Council of Magistracy, whose negative opinion on a proposal for chief prosecutor stops the appointment procedure⁷. It also establishes the procedure for the removal from office of Chief prosecutors and provides the right to challenge the decree of the President of Romania on the removal from office before administrative courts, which shall examine both its legality and merits⁸.

The procedures mentioned above provide for both a transparent appointment of high-ranking prosecutors, and a removal from office with guarantees against excessive political influence, subject to the jurisdiction of administrative courts.

Another important aspect concerning the general measures proposed by the Ministry of Justice is that the Parliamentary procedure is expected to be a very long one as there is no secure parliamentary majority willing to vote on these draft laws in the version proposed by the Ministry of Justice. As so far, the draft projects are not in parliamentary debate, as various endorsements from different bodies are still being expected. It is also highly likely that objections of unconstitutionality will be raised and submitted to the Constitutional Court for an *a priori* constitutional control. Having all these in mind, it is possible that the draft justice laws could not be adopted and enter into force for a very long period of time.

IV. General measures

While the proposed legislative changes described above are welcome, there have not yet entered into force, and there is no timeline to indicate when they will be effectively implemented. Furthermore, additional general measures for the implementation of this judgment are still necessary.

A. *Further legislative changes required*

In particular, there have been no draft laws or proposals to modify the Constitution concerning the following matters laid out in the previous communication from RJFA and AIJ:

- a. the appointment/removal from office of high-ranking prosecutors

Rethinking the system for appointing/removing high-ranking prosecutors in management positions, including by reviewing the relevant provisions of the Constitution, in order to ensure the conditions for a neutral and objective appointment/removal process, by maintaining the role of authorities such as the President and the Superior Council of Magistrates (CSM), able to counterbalance the influence of the Minister of Justice (for example, compliance with negative opinion of the CSM). As long as a chief prosecutor can be revoked at the discretionary assessment of a politician, even a Minister of Justice, there cannot be no question of independence, being created an excessive political influence. According to Annex IX to the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union, Romania has committed to ensure the effective independence of the National Anti-Corruption Directorate, which is denied by the dismissal of the chief prosecutors of this prosecutor's office at the discretionary power of the Minister of Justice.

⁷ Articles 148 and 149 paragraph 1 of draft law on the statute of magistrates.

⁸ Article 173 of draft law on the statute of magistrates.

b. the functioning of the Constitutional Court, namely by ensuring that the procedure of legal conflict of a constitutional nature and the working procedures do not generate a risk of interfering with the jurisdictions of ordinary administrative courts;

In Romania, the procedure of the legal conflict of a constitutional nature is not intended to call into question civil rights or civil rights specific to a particular person, nor to allow third-party intervention in the trial, with the peculiarity that individual appeal before the constitutional court is not provided for by law. It is therefore necessary to lay down a prohibition so that the procedure of legal conflict of a constitutional nature not to be transformed into a common law procedure, interfering with the jurisdiction of an ordinary administrative court.

c. regulating the possibility of reviewing a decision of the Constitutional Court in cases when:

- the ECtHR finds a violation of fundamental rights or freedoms due to that decision and the serious consequences of such a violation continue to occur;
- Such a decision is in violation of the principle of priority of European Union law, regulated by art. 148 paragraph (2) of the Romanian Constitution, republished, if the serious consequences of this violation continue to occur.

The possibility of reviewing a decision of the Constitutional Court should also be regulated if the European Court of Human Rights finds a violation of fundamental rights or freedoms due to that decision, and the serious consequences of such a violation continue to occur and as a result of violation of the principle of priority of European Union law, if the serious consequences of this violation continue to occur.

This will make the Constitutional Court more vigilant and more careful with the ECHR or CJEU case law. Secondly, the injured party will have an effective remedy.

d. the appointment of judges of the Constitutional Court. For the present, only the President of Romania and both Chambers of Parliament have the right to elect the members of the Constitutional Court. The judiciary has no role in this.

It would be beneficial to appoint a part of the judges of the Constitutional Court by the judiciary, but also to regulate some conditions regarding the candidates for selection in order to appoint judges in the Constitutional Court, who should be law professors with a prodigious career or career magistrates with a high level of professional training.

The number of judges of the Constitutional Court can be increased from 9 to 15 in order to allow the representation of the judiciary, a situation in which certain types of cases could be resolved in panels of 7 judges, which would speed up the trial, given that there are remarkable delays determined by the overload of the Constitutional Court. The Plenum of the Constitutional Court would decide the streamlining the case-law of the 7 judges' panels, but also in cases such as legal conflict of a constitutional nature. At the same time, a ban is imposed on former judges of the Constitutional Court to hold political offices, for at least 3 years after the termination of their mandate.

It is also important to regulate the prohibition for members of political parties to be appointed as judges, if in the last 5 years they were active members.

B. Disbanding the Special Section to Investigate Offences in the Judiciary

The disbanding of the Special Section to Investigate Offences in the Judiciary (SSIOJ) is the object of another important draft law⁹.

The Special Section to Investigate Offences in the Judiciary (SSIOJ) was created by Law no. 207/2018 and was awarded exclusive jurisdiction for all crimes committed by magistrates and, when other persons are investigated together with magistrates, as well as for these persons¹⁰. The SSIOJ has only 15 prosecutor positions¹¹.

Until the creation of SSIOJ, the offences committed by magistrates were investigated by the prosecutor's office that had jurisdiction according to the rank of the magistrate and the type of offence.

One of the declared aims of the creation of SSIOJ was to remove pressures exerted on judges and prosecutors and to ensure procedural safeguards for investigated judges and prosecutors.

However, the majority of magistrates opposed the SSIOJ¹², mainly on the grounds that there are no reasons for its existence, that it would affect the independence of judges and prosecutors and the public confidence in the criminal justice system.

Laura Codruța Kövesi, at the time Chief Prosecutor of the National Anti-Corruption Directorate, was also critical of the creation of a special department for crimes committed by magistrates¹³. In December 2018 and March 2019, SSIOJ opened two investigation concerning alleged crimes of prosecutor Laura Codruța Kövesi. One of the measures imposed to Laura Codruța Kövesi by the prosecutor in charge of the investigation was the interdiction to speak to the press¹⁴.

The handling of this case was criticised in the 2019 European Commission Report on Progress in Romania under the Cooperation and Verification Mechanism issued on 22.10.2019: „A key example concerned a criminal case against the former Chief Prosecutor of the National Anti-Corruption Directorate while she was a candidate to be European Public Prosecutor. The timing of the opening of the criminal case and the calendar of summons seemed specifically designed to frustrate this candidacy, and a decision by the High Court of Cassation and Justice on the preventative measures applied qualified the case as unlawful. The fact that another case was registered involving the Prosecutor-General seemed to confirm the pattern of steps taken against senior magistrates critical of the Section.”¹⁵

In the same report, the European Commission observed that “There are various examples where the Special Section exercised its powers to change the course of criminal investigations in a manner which raises serious doubts about its objectivity 21. These examples include cases where the Special Section launched investigations against judges and prosecutors who had opposed the current changes to the judicial system, as well as abrupt changes in the approach

⁹ Draft law project no. PL-x nr. 108/2021 (the Chamber of Deputies), no. 76/2021 (the Senate) http://cdep.ro/pls/proiecte/docs/2021/cd108_21.pdf

¹⁰ Article 88^1 paragraphs 1 and 2 Law no. 304/2004 on judicial organisation.

¹¹ Article 88^3 paragraph 23 Law no. 304/2004 on judicial organisation.

¹² <https://www.g4media.ro/88-66-dintre-magistrati-s-au-pronuntat-pentru-desfiintarea-sectiei-speciale-centralizare-partiala-a-voturilor-din-adunatile-generale.html>

¹³ AGERPRES Interview of Laura Codruța Kövesi 6.09.2017 https://www.economica.net/interviu-kovesi-nu-exista-doar-presiuni-prin-declaratii-ci-si-aceste-incercari-de-modificare-a-legislatiei-e-o-campanie-de-fake-news_143105.html

¹⁴ <https://www.dw.com/ro/laura-k%C3%B6vesi-spune-ca-adina-florea-i-a-interzis-sa-vorbeasca-cu-presa-este-o-masura-de-a-mi-inchide-gura/a-48106453>

¹⁵ page 5 footnote 21 https://ec.europa.eu/info/sites/default/files/progress-report-romania-2019-com-2019-499_en.pdf

followed in pending cases, such as the withdrawal of appeals previously lodged by the DNA in high-level corruption cases 22”.

Similar concerns were raised by the Venice Commission¹⁶, GRECO¹⁷ and Constitutional and Human Rights law experts¹⁸.

The activity of the SSIOJ has already raised many problems of public perception. A large international reverberation was caused by the unexpected inquiry to which Ms Laura Codruta Kovesi was subject, immediatly after being confirmed as first candidate in the election for the position of Chief prosecutor of EPPO. At the begining of 2019, Ms Laura Codruta Kovesi was placed under judicial control by SSIOJ. The High Court of Cassation and Justice has ordered revoked the judicial control imposed on Laurei Codruta Kovesi, establishing that the charges that were brought (bribery, abuse of service and false testimony) are not precise, clear and leack probative support, judicial control being illegal. The judge retained the failure to meet the conditions necessary to start prosecution in personam, the lack of reasons for the prosecutor' decision who also imposed obligations other than those expressly and restrictively regulated by law. (see web page, Exclusiv Motivare devastatoare a Inaltei Curti in cazul Kovesi: Acuzatii neprobate si neclare, masuri nelegale, SS a adaugat la lege (Document) (ziare.com)

According to the Romanian press, "on 21 December 2018, 17 January and 31 January 2019, SSIOJ has subsequently formulated three requests to DNA prosecutors, asking for the submission of „Tel drum” file, in which it was investigated the president of the Social Democratic Party (PSD), Mr. Liviu Dragnea (President of the the Deputies Chamber at that time).

All requests were rejected by DNA prosecutors. The press noted that SSIOJ tried to take over the investigation (for details, web page <http://www.ziare.com/liviu-dragnea/tel-drum/sectia-de-investigare-a-magistratilor-a-incercat-de-treiori-sa-preia-ancheta-tel-drum-liviu-dragnea-de-la-dna-1550416>).

SSIOJ have been brought into the attention of the public by untimely withdrawal without public motivation of some appeals declared by DNA against decisions of the High Court of Cassation and Justice concerning current or former top members of the Social Democratic Party or former magistrates prosecuted for corruption offenses (e.g. Ghiita Sebastian Aurelian, Tudose Liviu Mihail, Adam John, Bularca Anca Roxana, Ordog Lorand Andras, Sturdza Paltin Gheorghe, Hrebenciuc Viorel, Chiuariu Tudor Alexandru) or for other crimes (judge Dolache Damian). SSIOJ also failed to lodge appeals in the case of a judge prosecuted for the offense of forgery in statements (see web pages web <https://www.g4media.ro/sectia-speciala-de-anchetare-a-magistratilor-nu-a-facut-apel-in-dosarul-judecatorului-ovidiu-galea-acuzat-de-fals>

¹⁶ Opinion no. 924/2018 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e) paragraph 90: „90. In these circumstance, while the choice of the means for fighting against offenses belongs to the national legislator, existing fears that the new structure would serve as an (additional) instrument to intimidate and put pressure on judges and prosecutors - especially if coupled with other new measures envisaged in their respect, such as the new provisions on magistrates’ material liability - may be seen as legitimate and should not be ignored.”

¹⁷ GRECO AdHocRep(2019)1 <https://rm.coe.int/follow-up-report-to-the-ad-hoc-report-on-romania-rule-34-adopted-by-gr/1680965687>

¹⁸ Bianca Selejan- Guțan - New Challenges against the Judiciary in Romania, 22.02.2019 <https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/>

[in-declaratii-pentru-ca-nu-a-spus-ca-este-mason-magistratul-a-fost-sef-de-cabineta.html](http://portal.just.ro/59/SitePages/Dosar.aspx?id_dosar=3500000000016020&id_inst=59) and http://portal.just.ro/59/SitePages/Dosar.aspx?id_dosar=3500000000016020&id_inst=59).

In this context, for the public opinion was clear that SSIOJ could be used as weapon against uncomfortable judges or as a shield for corruption networks.

In May 2020, the Superior Council of Magistracy (CSM), the country's judicial governance body that is responsible for protecting judicial independence, voted against the disbanding of the SSIOJ.

In February 2021, CSM issued a negative opinion on the draft law concerning the abolition of the SSIOJ arguing that this measure was not accompanied by “guarantees to ensure the independence of justice through an adequate protection of magistrates against potential pressures” similar to the ones a previous draft law.

On March 2021, the Chamber of Deputies adopted the draft law project with an important amendment which states that the binding opinion of the Superior Council of Magistracy is required when a criminal case concerning a magistrate accused of specific offences, namely offences against the administration of justice, corruption and service or offences assimilated to corruption) is to be referred to a court¹⁹. The draft law has yet to be discussed in the other Parliamentary chamber, the Senate.

The provision concerning the binding opinion of the Superior Council of Magistracy offers this institution the power to stop a criminal case against magistrates, infringing the principle of equality as it offers a *de facto* immunity to magistrates when investigated for the offences mentioned above. Moreover, it allows that the members of the Superior Council of Magistracy decide on and even terminate criminal cases.

C. Changes in judicial and administrative practice

In RJFA and AIJ's Rule 9.2 Memorandum of August 2020, it was mentioned that the enforcement of the ECHR ruling is to be carried out also through **changes in judicial and/or administrative practice**.

In the last years, the administrative practice of the Judicial Inspection and the Section for Judges within the Superior Council of Magistracy have raised concerns regarding the respect of magistrates' freedom of expression²⁰.

It has been noticed that the Judicial Inspection decided to investigate and further demand the disciplinary sanctioning for the misdemeanour of “manifestations that prejudice the professional honour or probity or the prestige of justice, committed in the exercise or outside the exercise of official duties” (Article 99 letter a) Law no 303/2004) various judges and prosecutors that publicly opposed the changes of the justice laws in 2017 and 2018²¹. At the

¹⁹ Article 4 of draft law project no. PL-x nr. 108/2021, no. 76/2021 http://cdep.ro/pls/proiecte/docs/2021/cd108_21.pdf

²⁰ EUROPEAN COMMISSION Report on Progress in Romania under the Cooperation and Verification Mechanism 13.11.2018, pages 5,6 https://ec.europa.eu/info/sites/default/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf

EUROPEAN COMMISSION Report on Progress in Romania under the Cooperation and Verification Mechanism 22.10.2019, page 7 paragraph 2 https://ec.europa.eu/info/sites/default/files/progress-report-romania-2019-com-2019-499_en.pdf

²¹ See the web page <http://themis-sedziowie.eu/materials-in-english/disciplinary-procedures-against-uncomfortable-members-of-the-judiciary-in-romania/>. Judge Ciprian Coadă was sanctioned on the basis of Article 99 letter a) Law no 303/2004 for criticising the latest caselaw of the Constitutional Court in a legal article on the website www.juridice.ro <https://www.csm1909.ro/299/5406/Comunicat-de-pres%C4%83-privind->

same time, the disciplinary investigations for political comments of other judges, that supported the changes, especially the SSIOJ, were dismissed²².

In this matter, it is relevant that the Section for Prosecutors within the Superior Council of Magistracy dismissed the above-mentioned accusations and these rulings were upheld by the Supreme Court of Romania. As an example, on 14 December 2020, the Supreme Court of Romania rejected the Judicial Inspection's request to sanction 6 prosecutors: Antonia Diaconu, Cosmin Adrian Iordache, Carmen Alexandra Lancranjan, Cristian Popescu, Claudiu Sandu, Alexandru Onica²³. These prosecutors had been investigated for the issue of press releases by one of the prosecutors' association and for having criticised publicly the legal changes of the justice system in the period 2017-2018.

The Section for Judges within the Superior Council of Magistracy had a different approach and sanctioned various judges for manifesting their opinions concerning the justice system.

On 15 July 2020, the Section for Judges found that Crina Muntean, judge in the criminal section of Bihor Tribunal, was guilty of professional misconduct for giving an interview that included her concerns that local "networks of interests" – judiciary and business representatives – joined forces to have "inconvenient" judges like herself removed²⁴. The sanction applied for the misconduct provided for by Article 99 a) Law no 304/2004, was the suspension from her functions for a period of 6 months. At the moment, the appeal submitted by judge Crina Muntean against the sanction has yet to be decided upon by the Supreme Court²⁵.

Another disciplinary investigation of the Judicial Inspection concerns leaked private Facebook conversations involving judges and prosecutors, including members of RJFA. On 29 March 2021, the Section for Judges notified the Judicial Inspection, evoking possible non-respect of compliance with standards of conduct concerning the content of the conversations. Eight judges are being investigated for the alleged misdemeanours: Dragoş-Alin Călin, Laurenţiu Marius Grecu,

sanc%C5%A3ionarea-disciplinar%C4%83-a-unor-judec%C4%83tori-(16.03.2018). The Supreme Court admitted only partly the judge's appeal and applied a more lenient sanction.

Judge Cristi Danilet was sanctioned for a post on a social network in which he criticised the attacks on various institutions of the state such as the police, the army, the Supreme Court, the Prosecutor's Office attached to the Supreme Court etc. on the basis of Article 99 letter a) Law no 303/2004. <https://www.csm1909.ro/ViewFile.ashx?guid=572b2da3-07c1-4f5b-88cf-40cc33e8142b|InfoCSM>, <http://www.scj.ro/1093/Detaliijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=171010>

Judge Ioan Fundătureanu was sanctioned for the same offence for having expressed himself quite explicitly, with no room for interpretations, on Facebook, concerning the Minister of Justice. The Supreme Court dismissed the disciplinary action on the grounds that the defendant did not intend, directly or indirectly, to have their opinion reach the public by being quoted by a local newspaper.

<http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=145088>

²² <https://amasp.ro/2020/07/17/comunicat-amasp-privind-vaditul-dublu-standard-al-ij-si-csm-in-raport-cu-limitele-libertatii-de-exprimare-in-cazul-magistratilor/>.

Also, by Decision no. 15J of May 4, 2017, delivered by the Section for judge within CSM -related disciplinary issues, the disciplinary action against judge Florica Roman for committing the disciplinary offence provided by Article 99 letter a) in Law no. 303/2004 was dismissed. The judge had been investigated for publishing on her personal blog the article "Complaint filed with NAD against the American ambassador, Hans Klemm, and Valeriu Zgonea for influence peddling. Their remand custody is demanded".

"900 days of uninterrupted siege upon the Romanian magistracy. A survival guide", Editura C.H. Beck Bucureşti 2020, page 182;

²³ Case no. 2332/1/2020 <https://www.scj.ro>

²⁴ U.S. Department of State 2020 Country Reports on Human Rights Practices: Romania, page 8, last paragraph <https://www.state.gov/wp-content/uploads/2021/03/ROMANIA-2020-HUMAN-RIGHTS-REPORT.pdf>

²⁵ Case no 696/1/2021 <https://www.scj.ro>

Alina Mihaela Gioroceanu, Cristi Danileț, Anca Codreanu, Georgeta Ciungan, Alexandru Bălășanu, Ioan Fundătureanu.²⁶

On 19 April 2021, the Judicial Investigation requested the Section for Judges to suspend judges Dragoș-Alin Călin, Laurențiu Marius Grecu and Alina Mihaela Gioroceanu from their functions until the disciplinary investigation is complete.²⁷ This request became public on 20 April 2021 on the website www.luju.ro, known for the positions against the Anti-Corruption National Direction, the defence of the controversial changes in justice laws from 2017-2018 and for the critics of some the magistrates mentioned above. The three judges found out about this request from the online press. The Section for Judges will decide on this matter on 12 May 2021²⁸.

It is noteworthy that it is for the first time when Judicial Inspection demanded that magistrates be suspended from their office during disciplinary investigation for supposed opinions expressed in private capacity. A group of non-governmental organisations publicly criticised the Judicial Inspection for its handling of this case and asked for the repeal of the Article 99 a) Law no 304/2004²⁹.

Considering the aspects presented above, the disciplinary investigation appears to be used in a subjective manner, both infringing freedom of expression and exerting a chilling effect on freedom of speech.

The removal from office of a Chief Prosecutor and the disciplinary sanctioning of judges and prosecutors, all persons who criticised changes in the justice laws, send the message that retaliatory measures towards a judge or a prosecutor will be taken if he dares to speak out.

The volume “900 days of uninterrupted siege upon the Romanian magistracy. A survival guide”³⁰, that “outlines the context of the rule of law and the independence of Magistracy situation during the 2017-2019 interval, analysing the conduct of public authorities and the various reactions displayed by judges and prosecutors”, includes testimonies of Romanian judges concerning freedom of speech and the “chilling effect” felt by Romanian judges:

Judges that protested on the steps of Bucharest Court of Appeal against the changes in the criminal codes and the justice laws were lynched by a press institution and CSM, through Plenum Decision no. 44 of March 5, 2020 dismissed the motion to defend the judicial system’s independence³¹.

Moreover, given the exclusive jurisdiction of the SSICJ for crimes committed by magistrates and the low number of prosecutors working in this section, part of the judiciary, including magistrates from the Judicial Inspection, may act with impunity.

²⁶ <https://www.g4media.ro/seful-inspectiei-judiciare-cere-suspendarea-din-functii-a-judecatorilor-care-l-au-reclamat-la-cjue-magistratii-dragos-calin-laurentiu-grecu-si-alina-gioroceanu-acuzati-ca-au-facut-politica-pe-face.html>; <https://romania.europalibera.org/a/netejoru-%C8%99eful-inspec%C8%9Biei-judiciare-cere-suspendarea-din-func%C8%9Bii-a-judec%C4%83torilor-care-l-au-reclamat-la-cjue/31213287.html>.

²⁷ See the *Letter* signed by Professor Laurent Pech, Professor Alberto Alemanno, Professor Vlad Perju and Dr Joelle Grogan, acting on behalf of The Good Lobby Profs - <https://twitter.com/GoodLobbyProfs/status/1385538867244191745>.

²⁸ <https://www.csm1909.ro/ViewFile.ashx?guid=b94953eb-11c1-48f3-acd7-76819b30c63e-InfoCSM>

²⁹ <https://vedemjust.ro/inspectiejudiciara/vedemjust.ro/inspectiejudiciara/>

³⁰ Editura C.H. Beck București 2020, ISBN 978-606-18-1035-2. https://www.kas.de/documents/280457/0/900_days_EN_20201202.pdf/2d07e665-a8e3-b003-55c8-a0bae8b4ff6c?version=1.0&t=1609841294482

³¹ “900 days of uninterrupted siege upon the Romanian magistracy. A survival guide”, page 155;

*Individual testimonies*³²

Augustin Lazăr (ex General Prosecutor): "A particular part of the *media* has played a major role in preparing the counter-reform, fuelling distrust by spreading the idea that a significant portion of the judiciary might be corrupted, also by way of outreach among political figures. According to the literature, many of these media debates were initiated by *press organisations belonging to individuals involved in court proceedings* concerning corruption or other serious offences (money laundering, tax evasion, blackmail, etc.). Among the critical factors that have influenced public trust in the judicial system are: the independence and impartiality of judges and of the judicial system as a whole, the long duration of proceedings, the enforcement of judicial orders, political pressures via media channels and a show of resilience towards them. Other internal challenges for the public image of judicial institutions, nonetheless manifested periodically, are appointments of high-ranking prosecutors and SCM elections. In the context of a deteriorated sense of civic responsibility shown by officials involved in court proceedings, we see that the Romanian judicial self-governing system turned out not sufficiently prepared and resilient to effectively defend the system's independence against systematic attacks from the political fronts. As such, a *media campaign* was launched, followed by legislative actions aimed at adjusting the Romanian judicial Euro-model, on the grounds that "the total independence of the judicial system from the remaining Romanian state architecture, also from the citizens – which it supposedly serves – raises serious doubts and fuels ever more the deep fragmentation of social cohesion in Romania". The claims filed by the civil society, the HCCJ president, the PÎCCJ Prosecutor General, SCM and the magistrates' associations forced the authors to abandon or postpone some of the changes harmful to the justice system independence, such as subordinating the Judicial Inspection to the Ministry of Justice or magistrates' early retirement. The adopted laws, despite the serious concerns expressed by the European Commission, still kept new provisions on extending substantive liability, setting up the department specialised in investigating magistrates, appointing high-ranking magistrates, etc., all of which threaten the justice system independence, particularly the effectiveness of the fight against corruption."

Alinel Bodnar (judge): "The experience of these years has taught us the utmost importance of magistrates expressing their viewpoint on any proposal to change the legislation. We are a segment of society, people first and foremost, and our knowledge may contribute to the development of society on sound principles. During our practical work, we encounter on a daily basis various situation in which we enforce the law and are able to foresee possible consequences of legislative proposals. This experience forces us to also issue a public warning when necessary. Our experience and knowledge may ultimately contribute to the adoption of a balanced solution for the entire society. Magistrates have direct contact with contexts where laws are enforced and can ascertain whether something has to be changed, as well as understand the practical consequences of a law coming into effect. By expressing an opinion, the door is opened to argument-based debates beneficial to society as a whole."

Alina Gioroceanu (judge): "The specialised prosecutor's office directorate did not docket the referral, indicating the fact that it has not even been read so as to outline the issue in fact. They sent it to the local prosecutor's office. After a considerable period of time, the referral returned to the specialised directorate, qualified to settle it. It was too late. There are persons who will never get their justice. In the meantime, I filed a new referral, the two case files being merged as they concerned the same deeds. As for their fate before a local structure, it remains to be seen. When the pandemic ends. Somehow, things will get settled. Ultimately, the state institutions, once they've become undermined and inert, will only convey a message of distrust

³² See the volume "900 days of uninterrupted siege upon the Romanian magistracy. A survival guide", https://www.kas.de/documents/280457/0/900_days_EN_20201202.pdf/2d07e665-a8e3-b003-55c8-a0bae8b4ff6c?version=1.0&t=1609841294482

and deterrence to all who might ever intend to do their duty and notify them. Given that information from the case file concerning the communication of information of public interest, requested by *The Romanian Judges' Forum Association*, pending settlement, by myself, at Olt County Court, were leaked to the media, I referred the matter to the prosecutor's office, as per the provisions of art. 304 in the Criminal Code *on the disclosure of secret occupational or non-public information*, during the same days when the matter was referred to the Court of Justice of the European Union. The Court is in the process of ruling, however, to date, I have not been summoned for statements by the prosecutor's office of competent jurisdiction. I do not know whether the case file has been *somehow* settled."

Ciprian Coadă (judge): "In a context where Romanian magistrates shall be, in the current period, subject to unprecedented challenges, as far as the enforcement of the law and of Constitutional Court decisions is concerned, it is critically important that, in the process of asserting law, one does not neglect the principle of the supremacy of the Constitution, written at art. 1 par. 5 in the Romanian Constitution, or the principle of the supremacy of the law, written in the same fundamental document. To that end, beyond complying with the statute specific to the office held, law court judges, as well as constitutional judges must display thoughtfulness and maturity, utmost moral and professional integrity in carrying out assigned missions, demonstrate forethought and the ability to see and understand the big picture, all of which would allow them to better face future actions, circumstances or events and better deal with a real need for social progress, in conjunction with the importance of their decisions which, added to other regulatory imperatives, are binding throughout society."

Bogdan Pîrlog (military prosecutor): "In early 2017, after the elections held by the Superior Council of Magistracy, a majority in the Department for Judges drew closer to decision makers within the executive and the legislative, contributing, next to a few other judges and prosecutors, to the emergence of "*reflection hubs*". Out of the collaboration, set up against the order of things and the provisions in the Constitution, among decision-making elements within the executive and legislative powers and the Constitutional Court, on the one hand, and magistrates, on the other hand, some of the latter holding key offices within the judiciary or the Ministry of Justice, came out an ever more coherent and more integrated strategy to destroy and subordinate justice to various more or less perceptible power hubs."

V. Conclusions and recommendations

The proceedings presented above as mere examples demonstrate that, following the ECHR judgment in the *Kövesi v. Romania* case, the practice of the Judicial Inspection has not become more respectful towards the magistrates' freedom of speech, but less so. Therefore, it is imperative that this practice be addressed.

Accordingly, noting that general measures are still required in law and judicial and administrative practice, the RJFA requests the CM to carry out a continued examination under the enhanced procedure of the enforcement of the ECHR judgment in the *Kövesi v. Romania* case.

RJFA kindly asks the Committee of Ministers to request the Romanian authorities to continue to provide information regarding:

- the provision of a complete and effective right to review, by an ordinary tribunal or other body exercising judicial powers, of any measure leading to the removal or dismissal of a magistrate,
- the measures taken or envisaged to guarantee that there will be no further premature removals of magistrates on similar grounds, including the establishment of effective and adequate safeguards against abuse in this regard,

•the measures taken or envisaged to lift and countervail the “chilling effect” of the violations in the instant case.

Finally, we kindly ask the Committee of Ministers to request the Romanian authorities to:

- Ensure that the proposed legislative changes described under points III. 1, 2, and 3 enter into force as soon as possible and are implemented effectively;
- Clarify in the new draft law on statute of magistrates that expressing a point of view on rule of law or on the status of judicial system and its functioning does not constitute a disciplinary misdemeanour;
- Take necessary measures to change the administrative and judicial practice of disciplinary proceedings against judges for exercising freedom of expression;
- Disband the Special Section to Investigate Offences in the Judiciary;
- Introduce the possibility of reviewing a decision of the Constitutional Court in cases mentioned in point IV.c;
- Review the appointment system of judges of the Constitutional Court;

Sincerely yours,

The Romanian Judges’ Forum Association

judge Dragoş Călin, co-president

judge Lucia Zaharia, co-president

