EU 2020: DEMANDING ON DEMOCRACY

Country & Trend Reports on Democratic Records by Civil Liberties Organisations Across the European Union

ROMANIA

Association for the Defense of Human Rights in Romania
– the Helsinki Committee (APADOR-CH) – March 2021

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Key concerns

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- Concerns persist over the inadequacy of the legal aid system
- Government lags behind on the implementation of judgments of the European Court of Human Rights
- COVID-19 exacerbates existing issues as regards the quality and transparency of law-making, access to information and justice
- Measures of online censorship taken to allegedly fight disinformation during the COVID-19 pandemic

Justice system

Judicial independence

Starting with 30 September 2020, the Ministry of Justice put up for public debate, until 31 March 2021, 3 draft laws that can be grouped under the title of "justice laws", respectively: the draft Law on the statute of judges and prosecutors in Romania; the draft Law on judicial organization; the draft Law on the Superior Council of Magistracy. It should be mentioned that the proposed new laws replace (they do not modify) the current "justice laws", which are to be repealed: Law no. 303/2004, Law no. 304/2004 and Law no. 317/2004.

As a general assessment, the draft laws return, in many respects, to the regulations prior to those introduced in 2018 and transpose decisions of the Constitutional Court, judgments of the European Court of Human Rights (ECtHR) and recommendations of several international bodies. They contain positive developments such as:

-redefining the principle of impartiality, by including the obligation for judges and prosecutors to ensure, in addition to impartiality,

the appearance of impartiality (art. 4 para. 3 of the draft law on the status of magistrates);

- the removal from the draft Law on the statute of judges and prosecutors of the obligation provided for magistrates in the current regulation (art. 9 para. 3 of Law 303/2004), according to which one must refrain from defamation against other state authorities, by any means it can be expressed. This obligation can restrict the freedom of expression of magistrates and can be a source of pressure on them. The removal of this provision corresponds to a recommendation in the 2018 MCV Report.

-Article 91 of the draft Law on the Superior Council of Magistracy establishes the principle of non-permanent activity of SCM members, who, between SCM sessions, will carry out their current professional activity in courts and prosecutor's offices, except for the SCM president and vice president, who have permanent activity within the SCM.

Accountability of judges and prosecutors

A draft law on the statute of judges and prosecutors (no. 303/2004) is part of the "justice laws" opened for consultation at the end of September 2020 by the Ministry of Justice. The public consultation will last until 31 March 2021.

The new regime regulating the patrimonial liability of magistrates (art. 270 of the draft law) poses some concerns.

On a positive note, the draft law establishes that the plenum of the Superior Council of Magistracy (SCM) will be the decision-making body regarding the recourse action against magistrates. In other words, a professional body, SCM, will decide on the quality of the magistrates' activity. It will no longer be the Ministry of Finance, part of the executive branch with no special abilities in evaluating complex legal issues.

However, the draft law also has certain deficiencies which can make the mechanism inefficient.

1.The draft law does not provide for a deadline for the Ministry of Finance to notify the SCM plenum in case the state is obliged to pay compensation for a judicial error. By contrast, the current legislation does provide for a 2 months' term. The absence of a deadline can lead to a very long delay in initiating the verification procedure that precedes the formulation of the recourse action and there is a risk that the recourse action will be formulated late.

2. The draft law does not provide for the possibility of initiating recourse action against magistrates who, in civil cases, acted in bad faith or gross negligence leading to ECHR judgments obliging the state to pay compensation. For criminal cases such a regulation exists and it is provided in the Code of Criminal Procedure.

3. The draft law provides for a 6-month period (from the payment of compensations) for the state to exercise the recourse action against the magistrate who acted in bad faith or gross negligence. This period is too short and should be increased to at least 1 year from the payment of compensation.

The solution offered in the draft law- that of indirect increase of the term of 6 months by another 6 months through the possibility given to the state to postpone by 6 months the payment of due compensation- is not reasonable. A victim of a judicial error must receive compensation as soon as possible, a delay of 6 months from the moment when the state is able to pay is not justified. Moreover, even the Civil Code stipulates that the derogations made by parties from the general limitation period (which is 3 years) cannot lead to the establishment of limitation periods of less than 1 year, precisely in order for the holder of the action to have a reasonable time to act. So, the reasonable term estimated by the Civil Code for exercising an action is at least 1 year (not 6 months) from the date of birth of the right to act.

In addition, Article 156 of the draft law on judicial organization (also part of the package of laws subject to public debate until 31 March 2021) provides for the abolition of the Special Section for the investigation of offences committed by magistrates (SIIJ) within the Prosecutor's Office attached to the High Court of Cassation and Justice.

Some of the arguments brought by the Ministry of Justice for the abolition of the SIIJ are: unanimous criticisms made in international reports; lack of correlation between the law on the organization of the Special Section, as a structure without legal personality within the Prosecutor's Office attached to the High Court of Cassation and Justice, and the concrete attributions of the head of the Special Section which seem rather similar to the specialized prosecutorial structures with legal personality (DNA, DIICOT); violation of the principle of career separation (Article 1 (2) of Law no. 303/2004 on the statute of judges and prosecutors); the existence of de facto immunity from criminal jurisdiction of SIIJ prosecutors, in some cases; the regulation and functioning of SIIJ -having in view the definition of the notion of a hierarchically superior prosecutor- trigger discussions from the perspective of the constitutional principle of hierarchical control but also from that of efficient judicial control; the material and territorial competence assigned to this section, from a functional point of view, create difficulties and does not ensure the use of specialized prosecutors in situations where it would be necessary (fight against corruption, organized crime and terrorism), etc.

In addition to this draft law amending Law no. 304/2004, which contains in articles 156-158 provisions regarding the abolition of SIIJ, there is also a draft law aimed exclusively at the abolition of the SIIJ, which was initiated by the Ministry of Justice in February 2020. The amended form of this draft law was sent back to the Superior Council of Magistracy (SCM) for an opinion. In essence, the December 2020 version of the draft law contains provisions similar to those in articles 156-158 of the draft law for amending law no. 304/2004.

During the meeting of 11 February 2021, the SCM plenum gave a negative opinion (11 votes out of 19) on the draft law on the abolition of the Section (the December 2020 version). The negative opinion was justified by the fact that „*the proposed normative solution is*

not accompanied by guarantees meant to give efficiency to the principle of independence of the judiciary, by ensuring adequate protection of judges and prosecutors against possible pressures on them."

After receiving the negative opinion from the SCM (an advisory opinion only), the Minister of Justice stated publicly that he will nonetheless send the draft law to the Parliament, for adoption.

APADOR-CH considers that a greater importance should be given to the SCM's opinion as an institution representing the constitutional guarantor of the independence of justice. The fact that the negative opinion was adopted with a narrow majority vote indicates that this matter is subject to debate among magistrates and any solution adopted should try to reconcile the requirements of the SCM opinion with the initiative of abolishing the SIIJ.

Independence and autonomy of the prosecution service

A draft law on judicial organization (no. 304/2004)[1] is part of the "justice laws" opened for consultation at the end of September 2020 by the Ministry of Justice. The public consultation will last until 31 March 2021.

Article 68 (3) of the draft law on judicial organization provides for the possibility of the hierarchically superior prosecutor to overturn a prosecutors' decision only for reasons of illegality: "the decisions adopted by the prosecutor may be refuted, with a motivation, by the hierarchically superior prosecutor, when they are considered illegal." This change in the draft law followed a recommendation from the GRECO Report of July 9, 2019 and returned to the regulation prior to 2018, eliminating the possibility of overturning the prosecutors' solutions for reasons that they are unfounded. Currently, until the adoption of the new law on judicial organization, the current law on judicial organization provides in article 64 (3) the possibility of refuting the prosecutors' solutions on grounds that they are unfounded.

Public perception of the independence of the judiciary

The Robert Rosu case polarized the Romanian justice society and stirred unparalleled controversy, as well as protests expressed by attorneys. A Romanian attorney, Robert Rosu is partner at one of the most renowned law firms in Romania, Tuca, Zbarcea&Associates ("TZA").

In 2005, TZA through Mr. Rosu represented a buyer of litigation rights before Romanian authorities for the completion of the procedures for the restitution of several land plots. In 2015, the prosecutors of the Romanian National Anticorruption Directorate (DNA) began an investigation and accused him of

1 Full text available at: http://www.just.ro/in-temeiul-dispozitiilor-art-7-din-legea-nr-52-2003-privind-transparenta-decizionala-in-administratia-publica-republicata-ministerul-justitiei-supune-dezbaterii-publice-urmatoarele-proiecte-de-leg/

organizing a crime group with the beneficiaries of the restitution, based on his activities as an attorney.

The first court acquitted Robert Rosu, motivating that his activities were professional ones, specific to an attorney. This decision was appealed by the DNA. On 18.12.2020, the High Court of Cassation and Justice condemned him to 5 years of prison.

The legal issues deriving from this final decision are related to the huge discrepancy between the initial acquittal solution and the condemnation of the second court, for the same activities qualified by the first court as activities specific to the lawyer's profession. Several voices raised awareness on the fact that during the NAD's investigation, judges were heard and retracted within their testimony the decisions made through their final civil ruling, under pressure.

The case led to a wave of protests from attorneys within all Romanian bars arguing for the need to defend the lawyer's profession independence from undue associations between the lawyer's defence and the activities of the client. Other actors also reacted: the Superior Council of Magistracy publicly condemned the protests and the Prosecutors' association supported the DNA's point of view.

The fact that the Supreme Court solution was diametrically opposed to the first instance court one (went from acquittal to prison sentence) has created in a part of the public opinion a perception which may affect the appearance of impartiality of justice. The ruling against Mr. Rosu is perceived as an example of a prison sentence being imposed as an act of intimidation against a lawyer. This perception has been also fed by the fact that although the common 30-day motivation term lapsed, the Court did not yet deliver its motivation. According to the law, where good reasons exist, this term can be extended by 30 days, for a maximum of two times. Currently, Mr. Rosu is executing his sentence in prison and cannot file any extraordinary means of recourse. This case has led to public discussions regarding the necessity for the motivation to be delivered in the same time as the court ruling.

It is worth emphasizing that the appearance of impartiality is of similar importance to impartiality itself. Not only is this particular case but in all cases, the motivation of the solution should be very clear and convincing, based on arguments beyond any doubt and, if it cannot be communicated together with the solution itself, it must be drafted as soon as possible, shortly after pronouncing the solution.

Quality of justice

Legal aid system

The issue regarding the low value of legal aid fees for legal aid lawyers remains an unsolved one and continues to affect the quality of legal assistance and subsequently, the accessibility to effective legal representation by the lawyer.

A Protocol between the Ministry of Justice, the Public Ministry and the National Association of the Romanian Bar establishing the legal

aid fees has been adopted in February 2019. Although the adoption of this instrument was a welcome step, in practice the matter of the low value of the fees is yet to be resolved, since in some cases, the courts do not even take into consideration the fees mentioned in the Protocol, lowering them even further. Procedural laws allow judges to modify these fees, without having to observe the minimal thresholds set out through the Protocol, since such Protocol is not binding and opposable to magistrates as a law would be. In addition, in practice, it is also common for prosecutors to challenges the amount of the legal fee requested by the legal aid lawyers.

Another matter related to the legal aid fees is the fact that they are usually paid with a certain delay which can also lead to disruptions in the quality of the legal representation. One solution would be to enforce mandatory legal provisions establishing minimum legal aid fees which are paid within 30 days from the date when the legal services were performed.

Resources of the judiciary

Considering the concerns of judges and prosecutors with respect to the potential abrogation of their service pensions[2], a large number of magistrates filed requests for early retirement. In the near future, this circumstance will lead to a reduced number of magistrates per court, while the number of cases will remain the same, thus leading to an overload of cases per magistrate.

In December 2019, the Romanian Parliament voted for the anticipated retirement to be postponed until January 2022, in order to prevent the judicial system being overwhelmed due to the lack of magistrates. This measure alone, however, will not suffice. Competitions to fill in positions as judges and prosecutors should be organised urgently so that human resources at the courts' level are ensured once the magistrates are allowed to enter early retirement. Moreover, 2020 was the first year in which the Superior Council of Magistracy did not organize any type of competitions for the positions of judges or prosecutors, which increases the need for new resources to fill open positions within the judicial system and share magistrates' caseload.

Digitalisation of the justice system

In September 2020, the Ministry of Justice announced a draft law regarding remote justice during the pandemic that will provide for the possibility to hold video-conference hearings.[3] The draft law provides the possibility for

2 See the country submission on Romania in last year's report from Liberties, A response to the European Commission Consultation on Rule of Law in the EU, cited.

3 See http://www.just.ro/proiect-de-lege-privind-unele-masuri-in-domeniul-justitiei-in-contextul-pandemiei-de-covid-19

persons deprived of liberty (pre-trial detention, serving a custodial sentence or an educational measure of deprivation of liberty) to be heard by videoconference at the place of detention without their consent if the court considers that this means is without prejudice to the proper conduct of the proceedings or to the rights and interests of the parties. The draft law is currently still in the legislative process.

The draft law also provides for the possibility for persons, other than those deprived of their liberty, to be heard by videoconference, but only with their consent, which will be brought to their attention either at the first hearing or by a notice communicated by telephone, e-mail or other such means, the person concerned being asked whether he agrees.

Although the majority of courts were provided with video systems for hearings, their usage is extremely limited during the state of alert, since judges prefer to organize in person sessions, while implementing other social distancing methods such as scheduling case files at different hours, allowing only a limited number of people in the court room, providing limited access to physical files and others similar.

Fairness and efficiency of the justice system

Length of proceedings

Through the adoption of the New Romanian Civil Procedure Code in February 2013 and through the adoption of the New Romanian Criminal Procedural Code in February 2014, the length of proceedings has been substantially reduced and should be, at least in theory, somewhat predictable. However, in practice, the length of proceedings in certain types of trials remains more than excessive. For example, in April 2020 the High Court of Cassation and Justice established a first hearing in a recourse against a public administrations' decision in March 2022, approximately 2 years after the date of submission of the recourse. The extensive length of these proceedings is explained by magistrates as being caused by insufficient personal, a high burden of cases per magistrate and scarce court resources, such as rooms for trials and for hearings. Therefore, a solution for limiting the situations when the length of proceedings is excessive is to increase the number of judges and to allocate proper locative resource to courts, including ICT equipment for long distance hearings.

Due to the measures implemented for the prevention of Covid-19, the length of the trial proceedings has suffered an increase. As of May 15th, 2020 courts are scheduling hearings per hour, as opposed to previous times, when all hearings were scheduled at the same time (e.g. if the court hearing commenced at 09.00 am, all participants to the trials were summoned at 09.00 am). This circumstance, coupled with the absence of sufficient court spaces where the hearings may take place, is leading to an increase of the time between the hearings, which in turn, leads to a significant increase in the entire trial duration. This situation also stems from the fact that starting from May 15th 2020 when the State of alert

was adopted, courts turned bak the possibility to hold remote hearings almost unanimously.

Execution of judgments

The extensive time for motivating courts' decisions is a problem which affect a great number of cases in practice. The delay in motivating and communicating the ruling impacts the enforcement of judgements, since a ruling can only be enforced once its motivation is drafted and duly communicated to the trial parties.

A solution would be increasing the number of judges and/or reducing the load of cases for each judge. However, in practice, this solution is difficult to implement. An alternative solution would be to introduce elements for the standardization of the judgements form. This would help to have more concise motivations that would lead to shorter times and diminished efforts. The standardization could be achieved by introducing a standard form for the motivation, depending on the specifics of certain categories of cases, starting with those in civil or criminal matters that raise the most frequent problems regarding motivation time. The forms could be prepared by the Superior Council of Magistracy and could also contain limitations on the number of pages.

One of the models that could be considered is the current complaint form used by the European Court of Human Rights (ECtHR), which, through the mandatory fields and limitations, obliges the parties to be concise, to describe exactly and objectively the situation, its classification and the arguments on which the violation of rights relies on.

Other issues related to checks and balances

Fostering a rule of law culture

Considering the limited possibilities of organizing physical discussions with stakeholders related to the rule of law, the necessity of ensuring the proper implementation of the frequently-changing COVID-19 legal framework in 2020 took the limelight. Therefore, apart from isolated initiatives of NGOs, no high-level initiatives related to fostering the rule of law were carried out.

Enabling framework for civil society

Freedom of association

In 2020, government ordinance 26/2000 2020 was amended by Law no. 276/2020 and entered into force on 5 December 2020. The law includes a series of beneficial measures, all meant to facilitate the right of association and to make the life of NGOs less bureaucratic. These changes are also a consequence of civil society pressure and advocacy. Some of the changes worth mentioning are:

-the registration request of an association in the Register of Associations and Foundations will be accompanied by fewer documents; the associations' by-law will no longer need to be authenticated (which implies the notary), it will

have to be submitted in a single copy certified for conformity with the original by the person empowered by the associates to carry out the procedure of acquiring legal personality;

-when applying for registration in the Register of Associations and Foundations, in the case of associations/ foundations set up/run only by natural persons, it is no longer mandatory to submit an affidavit when the only real beneficiaries are natural persons whose identification data are included in the file's documents, in which case the completion of the central register will be done based on them and according to the rules provided in art. 4 of Law no. 129/2019 for preventing and combating money laundering and terrorist financing;

- the General Assembly and Board member meetings may also take place remotely by electronic means and its decisions can be signed by the members with an extended electronic signature also;

-for the registration of the by-law changes in the Register of Associations and Foundations, the decisions of the General Assembly or those of the Board are submitted in a certified copy, for conformity with the original, by the person/ persons empowered by decision of the GA or the Board. Therefore, it is no longer necessary for them to be authenticated by a notary or attested by a lawyer.

-the declaration regarding the real beneficiary may be a document under private signature or in an electronic form and may be communicated without any other formality, by electronic means, by electronic signature or by postal and shipping services; therefore, the authenticated form of this declaration is no longer required.

-the obligation to submit a declaration regarding the real beneficiaries of the association/ foundation to the Ministry of Justice (by 15th of January each year) was eliminated and has been replaced with the obligation to announce any change regarding the real beneficiaries within 30 days of change.

Other systemic issues affecting rule of law and human rights protection

Implementation of judgments of the European Court of Human Rights

Of the "leading" ECtHR judgments handed down against EU states over the last 10 years – i.e. those that identify serious or structural problems - 38% remain pending implementation. For a number of EU states, this figure is almost 50%. This has also been the case of Romania for the last 10 years.[4] In 2020, there were 346 pending cases (out of which 85 leading cases) under the supervision of the Department for the execution of judgments of the Committee of Ministers, while only

4 See https://www.einnetwork.org/romania-echr

10 cases (out of which no leading case) were closed by final resolution.[5]

While the ECtHR is not an EU body, countries have to accept the ECtHR's jurisdiction in order to become members of the European Union. However, countries can refuse to implement ECtHR judgments, and face no negative consequences at the EU level – the issue being not even mentioned, for example, in the European Commission's report on rule of law in the EU. Against this background, it would be important for the EU's rule of law review mechanisms to take into consideration widespread non-implementation of ECtHR judgments and the reasons for non-implementation. This would strengthen both the EU's rule of law mechanisms and the Council of Europe's process for implementing judgments of the ECtHR.

Impact of COVID-19

Emergency regime

Law-making during the emergency regime

In 2020, there was a certain inconsistency of the authorities in some matters of principle regarding the rule of law. For example, the government chose at least twice to violate the national Referendum on Justice, validated in 2019, which it had intensely promoted in the previous year. The referendum established that no emergency ordinance can be adopted "in the field of crime, punishment and judicial organization". A regulation adopted in violation of a referendum can be declared unconstitutional. However, the government decided, at various intervals during 2020, to issue emergency ordinances in relation to areas on which the national referendum had established that they could not be regulated by emergency ordinances:

1. Emergency Ordinance no. 28/2020 for amending and supplementing the Criminal Code, which introduced new crimes in the Criminal Code, in connection with the measures for combating the COVID-19 epidemic (adopted in March 2020);

2. Emergency Ordinance no. 215/2020 on the adoption of measures regarding the composition of the judicial panels in appeal (adopted in December 2020);

The opportunity to introduce such regulations was reasonably motivated by the government, but the adoption procedure contradicted the prohibitions established by the 2019 Referendum, which has to be respected in a state governed by the rule of law.

Another example of legislative inconsistency in the context of the pandemic is the legislation regarding the contraventions during the state of emergency, which created confusion and inequity among people. More precisely,

5 See https://rm.coe.int/168070975f

following the Ombudsman's notification, the Constitutional Court decided in May 2020 that the provisions related to fines during the state of emergency were unconstitutional due to the lack of predictability and clarity of the law and therefore all the fines imposed during the state of emergency had no constitutional basis. However, people still had to challenge the fines in court in order to cancel them and to take their money back. This situation created a great inequity between the persons that were fined. Some of them could challenge the fine, others maybe didn't have the possibility and they had to pay a fine that was imposed on the basis of an unconstitutional provision. For this reason and in order to avoid the burdening of courts with almost 300.000 files, whose result was predictable, APADOR-CH asked the government to immediately adopt fiscal amnesty. Unfortunately, it was not the case, the situation wasn't improved.

Lack of transparency and consultation

One of the most problematic aspects of the state of emergency period has been the expedited manner in which laws have been adopted. This had impact on their quality, creating a legislative chaos. Later, many of them have been declared unconstitutional by the Constitutional Court.

Art. I, point 5 of the Government Ordinance no. 34/2020 contains a modification, meaning that during a state of siege or emergency, the provisions concerning the decisional transparency and the social dialogue don't apply to draft normative acts which establish the measures taken during a state of siege or during a state of emergency or which are a consequence thereof. Broadly put, for any passed legal acts "the transparency of the decision making process" means that any draft legislation is subjected to public debates 30 days before it is passed (according to Law no. 52/2003). And "social dialogue" means that draft legislation is submitted for consultation and approval to the Economic and Social Council (tripartite organism, composed of the representatives of the civil society, the trades unions and employer's organizations), within ten days before it is passed, according to Law no. 248/2013.

The justification of this exception to the rules concerning transparency and dialogue is that during a state of siege or the state of emergency, immediate measures are needed, which must be implemented without any delay; otherwise, the desired effects may be cancelled, negative or even generate the opposite consequences. With a few notable exceptions, during the state of emergency civil society impact on law and policy has been limited.

These exceptions applied only during the state of emergency. For the state of alert, the law doesn't establish any other derogations from the transparency of the decision-making process or from the social dialogue.

During the state of emergency, all 13 military ordinances issued by the Ministry of Internal Affairs were passed without public consultation (they were later published in the Official Gazette). The state of alert was also instituted and prolonged though 8 normative acts which were also adopted without public consultation (government decisions).

Restrictions to civil liberties and role of the ombudsman

Given the 2020 context, the Ombudsman has been very active in monitoring rights and freedoms restrictions in relation to the pandemic measures taken by the authorities. Its initiatives have generated controversy in the public space and among politicians who have requested its revocation. This reaction can be considered as an attempt to put pressure on the Ombudsman in connection with the exercise of its legal attributions since this happened especially due to the notifications addressed to the Constitutional Court regarding the pandemic measures. As detailed below, the notifications were admitted, which means that the Ombudsman acted accordingly to the law.

In 2020, the Ombudsman notified the Constitutional Court with 18 exceptions and objections of unconstitutionality, 26 legal opinions and conducted 76 visits regarding the torture prevention mechanism. One of the most important initiatives was challenging the legislation adopted during the state of emergency and during the following states of alert.

During the lockdown, the Ombudsman challenged the Emergency Ordinance on the establishment of the state of emergency that restricted many fundamental rights and freedoms. Although the Constitutional Court decided that the state of emergency was established in accordance with the Constitution, it also noted that the concrete measures taken exceeded the limit provided by law in which the president could act. Parliament could have sanctioned the president's overstepping of legal powers, but it did not. At the same time, the provisions related to fines during the state of emergency were declared unconstitutional due to the lack of predictability and clarity of the law and therefore all the fines imposed during the state of emergency had no constitutional basis.

Moreover, the Ombudsman challenged the legislation on quarantine and forced hospitalization of infected persons which was also declared unconstitutional and the Parliament was forced to adopt a law that guarantees human rights. As part of its watchdog role, APADOR-CH issued recommendations regarding the law on quarantine and isolation and participated in the public consultation organized by the Chamber of Deputies. Most of the recommendations were taken into consideration but the adopted law still lacked many of the criteria imposed by the Constitutional Court Decision. As a result, on 7 August 2020 the Ombudsman challenged again the law for constitutional reasons, without any success this time.

Beside these initiatives, considering the legislative inconsistency that affected human rights in the healthcare field, the Ombudsman issued many recommendations and requests for legislative clarifications during the year. For example, there has been a great dissatisfaction coming from patients with serious chronic diseases that didn't have access to health services due to the pandemic measures. The situation gradually improved after the state of emergency has been lifted.

Freedom of assembly

Article 3 of the military ordinance no. 2/21.03.2020 banned the movement of groups larger than 3 outside the residence - thus participation to any public assembly, which obviously means more than three people, was essentially no longer possible. Starting with the 15th of May 2020, Romanian authorities declared subsequent states of alert. The restrictions regarding the freedom of assembly were gradually relaxed. Starting with September 2020, up to 100 people are allowed to participate in demonstrations, whilst wearing masks and respecting social-distancing.

The restrictions on the number of people who may assembly were justified by the fact that the disease spreads when the physical distance between two persons is less than 2 meters, and thus any public assembly where the participants couldn't keep a minimum distance of two meters between one another was essentially impossible to hold. This medical argument had no convincing counterarguments.

Similar to other actors, civil society organisations have been negatively affected by the total prohibition on the right to freedom of assembly and association. At the same time, the few protests which took place during the state of emergency and state of alert took place in peaceful conditions and the participants were not disproportionately sanctioned.

Freedom of expression and censorship

Legislation adopted during the state of emergency expressly set out the measure of taking down websites which shared fake news. The measure was implemented by the National Authority for Management and Regulation in Communications (ANCOM). Since the provision didn't state any means of appeal, the decision regarding this could be appealed at the administrative court, according to the procedures of the ordinary law, which are very slow, and which might take 1-2 years. Another problem was that the notion of "fake news" was not clearly defined, thus the classification of a piece of news as fake was quite arbitrary.

During March 15th-May 15th, ANCOM blocked 15 news websites and the access to these websites were restored after the nationwide state of emergency was lifted. Meanwhile, most of these websites were still accessible, since all the content was moved to other domains, according to information provided by the media. There are some accusations that some blocked websites didn't show any fake content and that the blocking thereof was used as a method to censor those with a critical view. Some civil society and media voices accused that the blocking of websites was decided and implemented by a group whose members were not known (the Group for Strategic Communication) and that these decisions can't be appealed effectively. During the first half of the year, ANCOM received 360 complaints regarding fake news.

Unofficially, many journalists complained about the obstruction of the right to information, with authorities employing different mechanisms or covert threats. But officially, no journalist has filed a complaint, and there is no information that any coercive measures have been taken against a journalist. Examples of harassment have included the removal by the Focsani County Hospital of the publication Ziarul de Vrancea from their media communications WhatsApp Group, after the paper published articles which criticized the hospital spokesperson who is also the spouse of the hospital director. The coordinator of all publications belonging to the Ringier Group was threatened with a criminal investigation after publishing in the newspaper Libertatea a working document concerning the declaration of the state of emergency prepared by the National Committee for Emergency Situations.

There have also been some cases of limitations of freedom of expression but they were a consequence of poor implementation of the law (not the law itself). Such was the case of a student who was fined by the local police for having criticized in a civilized manner the town mayor, who failed to adopt the necessary measures during the crisis.[6] The fine was totally disproportionate and unfounded and the student had to challenge it in court. The court annulled the fine. During the same period, there was also a case of a whistleblower police officer who was disproportionately sanctioned for speaking to the press about abuses in the police.[7] The sanctions were withdrawn.

Access to information

According to art. 56 of Annex I to Decree 165/2020, during the state of emergency, the legal deadlines established for answering FOIA requests were doubled (to a maximum of 60 days). This doubling of the term, although justified by the pandemic context, was problematic from the point of view of transparency and access to timely relevant data about the states' ability to manage the pandemic. Some institutions have gone as far as interpreting this change in the law in the sense that it was totally suspended and refused to answer questions coming from journalists. After the 15th of May, during the current state of alert, the "normal" provisions and legal deadlines of the law on access to information of public interest (in force prior to the state of emergency) are applicable.

The Strategic Communication Group is one of the entities responsible with the pandemic management. According to the Government, it is formed of communication specialists from all ministries and public services with responsibilities in combating the pandemic.

6 For more information, see https://www.apador.org/cerem-ministrului-de-interne-o-ancheta-in-cazul-amenzii-pentru-o-postare-critica-facebook/

7 See https://www.apador.org/ce-se-intampla-cand-un-politist-spune-ca-politia-greseste/

However, almost one year since its establishment and despite demands from civil society and journalists, neither the exact component of this group nor its concrete attributions are known to the public. In November 2020, a Romanian MP requested the nominal list of its members from the Ministry of Internal Affairs (MAI) and received it on the basis of the Governments' constitutional obligation to answer the questions of the Parliament. However, the document remains a secret, MAI invoking protection of personal data reasons. As a consequence, APADOR-CH drafted and sent a concrete proposal to amend Law 544/2001 on access to public information in order to oblige the institutions to publish such information. The law that protects personal data cannot limit the right of citizens to access information of public interest under the pretext of the "right to anonymity" of some people, especially when those people hold public positions and they take decisions that influence the citizens lives. Unfortunately, the problem currently persists, one year after the pandemic started.

Impact on the justice system

Romania was under a State of Emergency between 16 March – 14 May 2020. Starting with 15 May, the country is under a State of alert regime.

During the State of Emergency, only urgent cases were judged. The list of such cases was determined by the Leadership Collective of each Court, as per the guidelines set out by the Supreme Magistracy Council. For extreme emergency case, the courts set shorter deadlines. Most courts used videoconference and communicated the procedural documents through telefax, electronic mail or other means, which excluded the transfer of written documents. The statute of limitation and other time limits were suspended throughout the period of the state of emergency. New time limits of similar duration started to run as of May 15th.

Among the barriers encountered by criminal justice lawyers during this period we can mention the lack of confidentiality of remote hearings, logistic matters, violation of the right of defence due to the impossibility to physically study the file and the delays incurred due to the manner in which hearings were scheduled, corroborated with the absence of enough court spaces.

Considering the significant reduction of the lawyers' activity during the State of emergency, The National Union of the Bar Association ("NUBA") and county Bars awarded postponements of the payment of the lawyers' monthly taxes, as a support measure.

The activity of the courts was resumed starting with 15 May and is currently characterized by transition measures, which involve the return of the in person court hearings, as well as a reassessment of the concept of scheduling the hearings.

In May 2020, the Superior Council of Magistracy (SCM) established a series of guidelines and general recommendations, applicable to all courts in the country. Some

of the measures taken by the courts are related to access in the buildings, conducting court hearings, transmission of documents to courts, the working schedule etc. For example, all the participants must wear protection equipment, each person that enters the building should present a statement regarding their health status, the presence of persons in the courtrooms will be restricted in order to ensure the social distancing, the hearings will be under very strict schedule and others similar.

In relation to these measures, the National Union of the Bar Associations manifested its dissatisfaction with the fact that SCM established the administrative measures that involve lawyers without a proper and prior consultation with the Union.

Due to the reorganisation of court schedules as part of Covid-19 protective measures, many delays are registered as regards the terms for publishing the motivation of court rulings.