LIBERTIES RULE OF LAW REPORT 2022

ROMANIA

APADOR-CH
THE HELSINKI COMMITTEE

CIVIL LIBERTIES UNION FOR EUROPE

Foreword

This country report is part of the Liberties Rule of Law Report 2022, which is the third annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties). Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU, and it is built on a network of national civil liberties NGOs from across the EU. Currently, we have member and partner organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

Liberties, together with its members and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it, and to gather public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2022 Report was drafted by Liberties and its member and partner organisations and covers the situation in 2021. It is a 'shadow report' to the European Commission's annual rule of law audit. As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to feed its own rule of law reports and to provide an independent analysis of the state of the rule of law in the EU in its own right.

Liberties' report represents the most in-depth reporting exercise carried out to date by an NGO network to map developments in a wide range of areas connected to the rule of law in the EU. The 2022 Report includes 17 country reports that follow a common structure mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. Thirty-two member and partner organisations across the EU contributed to the compilation of these country reports.

Building on the country findings, the 2022 Report offers an overview of general trends on the rule of law in the EU and compiles a series of recommendations to national and EU policy makers, which suggest concrete actions the EU institutions and national governments need to take to address identified shortcomings.

Download the full Liberties Rule of Law Report 2022 here

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About the authors

The **Association for the Defense of Human Rights in Romania – the Helsinki Committee (APADOR-CH)** is a non-governmental organization working to raise awareness on human rights issues and promote human rights standards in Romania and the region. It was established in 1990, and ever since it has been working on increasing awareness and respect towards human rights standards and the rule of law in Romania and in the region.

In reaching its goals, APADOR-CH carries out legislative advocacy, fact-finding visits to prisons and police lock-ups, research and monitoring to assess compliance with laws and policies with human rights standards and rule of law principles, strategic litigation as well as capacity building to empower other civil society groups and individuals to enforce their rights.

Key concerns

In the area of justice, no real progress has been made to address existing concerns. In January 2022, the Ministry of Justice stated that its immediate priorities for achieving the objectives of the Cooperation and Verification Mechanism (MCV) are the abolition of the Section for investigating offences within the judiciary, the promotion of justice laws and the introduction of amendments to the Criminal Code and the Code of Criminal Procedure. These reforms have been announced since 2020 but no real progress has been made to date.

Certain practices continue to frustrate the effectiveness of the framework to prevent corruption. These include obstacles to access public interest information, with authorities

using the General Data Protection Regulation (GDPR) to further limit the scope of public interest information by unjustifiably extending the protection offered by this regulation in cases where there is an explicit and legitimate public interest visibly manifested at the general level. Access to public interest information has been particularly restricted in the context of the COVID-19 pandemic, when the authorities systematically diverted requests for access to information regarding the management of the pandemic from one body to another, with each body discharging its responsibility to disclose information. Measures to ensure whistleblower protection and encourage reporting of corruption are still inadequate, as discussions on draft laws to implement the EU Directive on Whistleblowers Protection are still ongoing.

The checks and balances system is negatively affected by the tendency of authorities to disregard provisions on transparency in the decision-making process, in particular failing to take into due account comments and recommendations on draft laws by citizens and civil society organizations, which worsened in the context of the COVID-19 pandemic. In 2021, there was an attempt by the government, considered unlawful by the Constitutional Court, to remove from Office the Ombudsman, which plays an important role in advising authorities and monitoring compliance with human rights. The legal framework regulating the independence and effectiveness of independent authorities is in need for reform, both in terms of strengthening safeguards to avoid arbitrary dismissal of the Ombudsperson. In its June 2021 ruling the Constitutional Court found that the decision to dismiss the Ombudsperson was an arbitrary act, without constitutional basis, and that not even the highly lax conditions provided by the law for the dismissal had been met (the dismissal decision did not contain any accusations regarding violations of the law or the Constitution, just referred to the unsatisfactory performance of the Ombudsperson's duties). Following an express indication in the decision of the Constitutional Court, the Ombudsperson resumed their function on 6 July 2021, on the day the ruling was published in the Official Gazette, about three weeks after their revocation. In the same decision, the Constitutional Court also analyzed the quality of the regulations contained by Law 35/1997 on the cases in which the Ombudsperson can be revoked and the respective procedure, finding that the law has severe constitutional deficiencies.

State of play

- Justice system
- Anti-corruption framework
- N/A Media environment and freedom of expression and of information
- Checks and balances
- N/A Enabling framework for civil society
- N/A Systemic human rights issues

Legend (versus 2020)

Regression:
No progress:
Progress:

Justice system

Key recommendations

- The Ministry of Justice should urgently resume the process of submitting the new justice draft laws for the necessary legal approvals so that it can be sent to the Parliament for adoption.

- APADOR-CH considers necessary that, in order to ensure an adequate legal framework for the independence of judges, the elimination of the Section for investigating offences within the judiciary (SIIJ) be doubled by the provision of an alternative guarantee, at least as strong as the one embodied by the SIIJ, that offers effective protection against abusive and intimidating

criminal investigations of judges (as it was the case before the establishment of the SIIJ). This measure will also prevent the Romanian Constitutional Court from declaring the abolition of SIIJ as unconstitutional.

• APADOR-CH recommends that the decisions of the Superior Council of Magistracy (SCM) on disciplinary matters should be motivated and public, to avoid such decisions from appearing disproportionate and subjective thus casting doubts on the independence of the justice system.

On January 15 2022, the Ministry of Justice stated that its immediate priorities for achieving the objectives of the Cooperation and Verification Mechanism (MCV) are the promotion of the law on the abolition of the Section for investigating offences within the judiciary, the promotion of justice laws and promoting amendments to the Criminal Code and the Code of Criminal Procedure. These promises are pending since 2020.

The draft laws on justice were launched for public debate in September 2020 and went through a public debate for several months, concluding in the spring of 2021. Because the laws of justice were no longer promoted by the Ministry of Justice for the approval of to the SCM, for approval by the government and for adoption by Parliament in 2021, the Ministry of Justice will resume and continue this process in 2022. Following the integration of proposals and solutions received in the public debate that took place in 2021 and the amendment of the projects, taking into account the recent decisions of the Court of Justice of the European Union, the Ministry of Justice is expected submit the draft laws on justice for inter-ministerial approval on 15 February 2022 at the latest and, following the approval by the ministries, in the approval process at the SCM, no later than 1 March 2022, so that the project can be sent to the government for approval and to the Parliament for adoption, no later than by the end of March 2022.

Regarding the penal codes, the process of public debate on the laws amending the Criminal Codes ended in 2021, without the projects being promoted to the government and, subsequently, to the Parliament, for approval and adoption. The Ministry of Justice is expected to resume the necessary procedures for the promotion of the draft bills, so that they will be submitted to the government and the Parliament for, respectively, approval and adoption by the end of March 2022 at the latest.

Judicial independence

Abolishing the Section for investigating offences within the judiciary (SIIJ)

In January 2022, the Minister of Justice stated that the Section for investigating offences within the judiciary (SIIJ) would be abolished by the end of March 2022 and a similar structure would not replace this prosecution unit. He claimed that a draft law would be presented to the government in February 2022, to

be submitted to the vote of the Parliament in March, but only if it receives a positive opinion from the Superior Council of Magistracy (SCM).[1]

In this context, it is worth noting that last year another draft law to abolish the SIIJ received a **negative** opinion from the SCM (with a six-page opinion).[2] During the meeting which took place on 11 February 2021, the SCM plenary issued a negative opinion (11 votes out of 19) motivated by the fact that "*the proposed legislative solution is not accompanied by* ***guarantees designed to give effect to the principle of the independence of justice, by ensuring adequate protection of judges and prosecutors against possible pressures exerted against them***". In addition, the initiator of the draft law (Minister of Justice) excluded from the outset any discussion of these guarantees, which led to the adoption of the negative opinion.

The reasons included in the negative opinion regarding the pressures to which judges were subjected before the establishment of the SIIJ, through the process of subjecting them to criminal investigations that were harassing and intimidating, are based on the report of the Judicial Inspection No 5488/IJ/2510/DIJ/1365/DIP/2018, which was approved by the decision of the Plenary of the SCM No 225/15.10.2019.[3] Following the examination of this report, the Plenary of the SCM concluded that, from the perspective of compliance with the guarantees provided by law for magistrates involved in cases pending before the National Anticorruption Directorate (DNA), there are significant deficiencies in the conduct of criminal proceedings in several cases. These deficiencies of the criminal prosecution carried out by the DNA on judges, which were detailed in the decision of the Plenary of the SCM no. 225/2019, were considered by the Plenary of the SCM as representing forms of pressure not only on the targeted judges, but on the entire professional body of judges, with direct consequences in terms of the performance of the act of justice and, finally, *on the parties' right to a fair trial.*

Subsequently, the DNA requested in court the annulment of the decision of the Plenary of the SCM no. 225/2019 and of the report of the Judicial Inspection, which was approved by the decision of the Plenary of the SCM. However, DNA's request was rejected by the Bucharest Court of Appeal[4] and on the 7 December 2021 by the High Court of Cassation and Justice.[5]

1 https://www.g4media.ro/predoiu-sectia-speciala-va-fi-desfiintata-pana-in-martie-nu-va-fi-inlocuita-de-o-structura-asemanatoare-respectiv-siij-2-0.html

2 http://old.csm1909.ro/csm/linkuri/11_02_2021__101170_ro.pdf.

3 http://old.csm1909.ro/csm/linkuri/08_01_2020__97031_ro.pdf.

4 https://www.clujust.ro/dna-a-pierdut-astazi-la-cab-hotararea-csm-si-raportul-inspectiei-judiciare-prin-care-se-constatau-abuzurile-comise-impotriva-magistratilor-raman-in-picioare/

5 https://www.stiripesurse.ro/breaking-inalta-curte-respinge-definitiv-recursul-dna-raportul-care-dezvaluie-abuzurile-din-dosarele-cu-magistrati-ramane-definitiv_2132705.html

The SCM's request, expressed in the negative opinion mentioned above, that the abolition of the SIIJ, to be accompanied by the provision of real legal guarantees to ensure the independence and objectivity of judges, takes into consideration the decision no. 33/2018 of the Romanian Constitutional Court (CCR).[6] The SCM mentions in its opinion an example of an alternative guarantee that could be taken into consideration: a preliminary authorization, from the Plenary of SCM or from the General Prosecutor, of the criminal proceedings or/and of the criminal trial against a magistrate.

There is a very high probability that the law on the abolition of the SIIJ will be declared unconstitutional by the Romanian Constitutional Court. Given decision no. 33/2018 of the same Court, we can estimate that, if the law on the abolition of the SIIJ is limited to the mere fact of disbanding the Section, without providing a set of guarantees for the judicial independence (in terms of its individual component, which refers to the independence of the judge), the law will not pass. This is because the Romanian Constitutional Court has stated that the SIIJ constitutes a legal guarantee of the principle of judicial independence. However, the dismantling of the SIIJ will represent, at least for the Romanian Constitutional Court, the elimination of the legal guarantee referred to in decision no. 33/2018.

Transparency of decisions of the Superior Council of Magistracy and public perception on the independence of justice

One major problem that sabotages the public perception on the independence of justice are the decisions of the disciplinary section for judges of the Superior Council of Magistracy (SCM). This section can impose disciplinary actions and sanctions for magistrates whenever there is a violation of the law on the statute of judges and prosecutors.[7] **Unfortunately, the decisions of the section are not motivated, which is a very dangerous practice because it leaves room for interpretations and speculations in the public opinion.** This is even more serious when the sanctions are very severe or apparently disproportionate. The most recent case that raised many discussions is that of judge Cristi Dănileț. In December 2021 the judge was excluded from magistracy, which is the most severe sanction according to the law.[8] His exclusion was triggered by some videos he posted on social media that pictured the judge in various situations of his private life (cleaning his yard, exercising karate in the pool). The SCM considered that those videos depict a "conduct that harms the image of justice"[9] and

6 With this decision, CCR conducted the constitutionality review of the law establishing the SIIJ and confirmed that the SIIJ constitutes a guarantee for the independence of magistrates.

7 Law no. 303/2004 on the statute of judges and prosecutors.

8 https://www.digi24.ro/stiri/actualitate/justitie/cristi-danilet-a-fost-exclus-din-magistratura-din-cauza-unor-filmulete-pe-tiktok-judecatorul-va-contesta-decizia-csm-la-inalta-curte-1768973

9 Art. 99 a) of Law no. 303/2004.

excluded him from the profession. The decision was adopted by a majority. Some members of the disciplinary section formulated separate opinions, suggesting that the case should be rejected, a different sanction to be adopted or a reevaluation of the case.

The judge appealed the decision to the High Court of Cassation and Justice, affirming that the videos reflect his private life and that he made no statement regarding the justice system. He also invoked many errors of the investigation procedure. Moreover, according to the law,[10] the judge that is removed from magistracy is also suspended from this position until the High Court issues a decision on the disciplinary sanction. Mr. Dănileț appealed this decision as well.

The case generated many discussions in the public media and reactions from the judges. At the end of 2021, 500 magistrates from all over the country signed an open letter requesting the repeal of the provisions on disciplinary offenses provided by the law on the statute of magistrates,[11] for which Mr. Dănileț was expelled from the profession.[12] The magistrates argue that these provisions are at high risk of arbitrary interpretations due to the lack of details and concrete criteria for the offenses. They say that this situation makes the law very unpredictable and confusing for magistrates.

APADOR-CH agrees with the fact that some of the provisions regarding the disciplinary offenses are susceptible to subjective interpretation as they don't offer the limits of the offenses or extended explanations. For example, the article invoked in the case of Mr. Dănileț provides that "It constitutes disciplinary violation the manifestations that affect the honour or professional probity or the prestige of justice, committed in the exercise or outside the exercise of their duties."[13] There is no definition or examples of concrete manifestation that can constitute an offense to the prestige of justice. There is a very fine line of interpretation that can lead to different solutions based on the subjective interpretation of the person that applies the law.

Therefore, in the lack of explicit provisions regarding the disciplinary offenses, the motivation of the disciplinary decisions is of great importance.

Quality of justice

Follow up on the Robert Rosu case (2020)

In November 2021, a full bench of the High Court of Cassation and Justice (HCCJ), which resolved an extraordinary appeal (appeal in cassation), acquitted the lawyer Robert Roșu of two offences (setting up an organized criminal

10 Art. 62 para. 1 e) of Law no. 303/2004.

11 Art. 99 and art. 100 of Law no. 303/2004

12 https://www.g4media.ro/peste-500-de-magistrati-cer-csm-abrogarea-prevederilor-privind-abaterile-disciplinare-pentru-care-cristi-danilet-a-fost-exclus-din-magistratura-iar-curtea-de-apel-constanta-a-fost-curatata.html

13 Art. 99 a) of Law no. 303/2004

group and complicity in the offence of abuse of office) for which, in December 2020, he had been sentenced to 5 years' imprisonment by another full bench of the HCCJ.[14] The first court (Bucharest Court of Appeal) acquitted Mr. Roșu, then the appeal court (HCCJ) sentenced him to a five-year prison sentence, and finally, the cassation appeal court (also HCCJ) acquitted him.

The diametrically opposite sentences (acquittal-prison sentence-acquittal) based on the same evidence, interpreted differently according to each court panel, created a negative public perception of the judicial system, which gave the appearance of total unpredictability. This perception was accentuated by the fact that the grounds of the sentencing decision, based on which Mr. Roșu was detained for about one year (341 days[15]), were made available four months after the date of the ruling[16] (the law in force at the time allowed that the motivation of the sentence to be released within three months from the date of the verdict).

Because the drafting of the grounds for the sentencing in such a critical case of public interest was delayed, several opinions and speculations have been expressed in public that the judges no longer know how to motivate their sentencing decisions (the subsequent annulment of a sentencing decision would confirm to a certain extent this kind of allegation). Furthermore, Mr. Roșu could not appeal the prison sentence until four months after the decision date. The extraordinary appeal in cassation against this judgment (the appeal in cassation procedure can only be initiated after the judgment under appeal has been written). This delay in drafting the sentencing decision infringed Mr. Roșu's right to appeal to the courts and prevented him from exercising the remedies available to him against the decision as soon as possible.

In parallel with the development of the Roșu case, the Constitutional Court of Romania (CCR) has been dealing with an exception of unconstitutionality raised outside the context of the Roșu case, concerning the provision in the Code of Criminal Procedure which allows the grounds of the sentences to be given after sentencing.

By decision no. 233 of 7 April 2021[17], the Romanian Constitutional Court admitted the objection and declared Articles 400(1), 405(3) and 406(1) and (2) of the Code of Criminal Procedure unconstitutional. The direct effect of the decision of the Romanian

14 https://www.hotnews.ro/stiri-esential-25199992-avocatul-robert-rosu-condamnat-dosarul-ferma-baneasa-achitat-eliberat-din-penitenciar-decizie-definitiva-instantei-supreme.htm

15 https://www.clujust.ro/primele-ganduri-transmise-de-avocatul-robert-rosu-dupa-eliberare/

16 https://www.g4media.ro/exclusiv-motivarea-inaltei-curti-in-dosarul-ferma-baneasa-de-ce-a-fost-trimis-du-pa-gratii-avocatul-robert-rosu-inculpatul-rosu-nu-este-acuzat-de-fapte-care-se-circumscriu-exercitarii-cu-bu.html

17 https://www.ccr.ro/wp-content/uploads/2021/04/Decizie_233_2021.pdf

Constitutional Court is that from its publication in the Official Gazette (17 May 2021), the articles of the Code of Criminal Procedure, which have been deemed unconstitutional, no longer apply.

The Romanian Constitutional Court has established that the drafting of the judgment by which the case is decided by the first instance court, or of the ruling by which the court rules on the appeal (the reasons in fact and in law) after the decision in the case has been delivered, "no later than 30 days after the decision" or after a time frame which may exceed by a considerable margin the period mentioned, deprives the convicted person of the guarantees of due process, infringes the right of access to justice and the right to a fair trial. At the same time, the Romanian Constitutional Court found that the enforcement of a final judgment before its factual and legal reasoning being made public infringes the Constitution and the provisions of the Conventions relating to individual liberty and security of the person and those enshrining human dignity and justice as supreme values of the rule of law.

In its decision, the Romanian Constitutional Court established a transitional solution, in the sense that until the amendment and completion of the Code of Criminal Procedure, the courts shall directly apply the provisions of Article 1(3), Article 21(1)-(3), Article 23(11) and Article 124(1) of the Constitution, as well as Article 5(1)(a) and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), to comply with the Romanian Constitutional Court decision. In other words, the Romanian Constitutional Court provided in its decision that, until the adoption of a law amending and supplementing the Code of Criminal Procedure following this decision, the courts deciding the case on the merits (first instance) or an appeal must give reasons for their rulings no later than the date on which they deliver them. This means that even from the date of the judgment, the grounds for the judgment (the full judgment) must be available to the interested party.

Shortly after the adoption of the decision of the Romanian Constitutional Court (7 April 2021) and by the date of its publication in the Official Gazette (17 May 2021), the Code of Criminal Procedure was amended in accordance with this decision by *Law No 130/2021*, published in the Official Gazette on 12 May 2021 and entered into force on 15 May 2021. **Thus, the principle that a criminal sentence must be accompanied by the grounds for the ruling at the time of delivery has been enshrined in law in cases where the case's criminal and/or civil side is decided. The same law also amended Art. 391 (3) of the Criminal Code, meaning that in all cases, the deliberation, drafting and ruling cannot take place later than 120 days after the closure of the proceedings.**

These legislative provisions also solve a problem in the Rosu case (regarding the delay in the reasoning/drafting of the judgment concerning the date of sentencing) and allow for timely appeals against the verdict.

Anti-corruption framework

Key recommendations

- Authorities should ensure without delay the full transposition of EU rules on whistleblowers protection into the Romanian legal framework.

Framework to prevent corruption

Measures in place to ensure whistleblower protection and encourage reporting of corruption

In March 2021 the Ministry of Justice launched public consultations on the whistleblowers draft law that transposes the Directive (EU) 2019/1937. After a series of meetings organized during March-May 2021 with civil society and public institutions, the draft project stagnated until December. Meanwhile, due to the national political situation, the Minister of Justice was changed. As a result, the new Minister of Justice promoted a new draft law on this subject in December 2021. This new form of the draft law is less protective for the whistleblowers because it limits their freedom of choice regarding the reporting channels and it doesn't cover the protection mechanisms provided by the Directive (financial, psychological, legal assistance). At this moment, this new draft law is still at the Ministry of Justice.

Parallel to this initiative, a draft law concerning the same Directive was registered to the Chamber of Deputies. Although it is not a perfect law project, it took into consideration many of the recommendations discussed during the public debates and it is for sure a great improvement of the current legal framework of the whistleblowers' activity (Law no. 571/2004).

It is expected that the two draft laws will be jointly discussed in the Parliament starting in March. It is to be mentioned that the deadline for the Directive transposition was 17 December 2021. Unfortunately, significantly delayed transposition of Directives is very common for Romania.

Checks and balances

Key recommendations

- Law No 52/2003 should be amended to oblige the authorities to send, within a specific timeframe (e.g. 20 days after the adoption of the draft legislation), a reply to any person, natural or legal, who has sent recommendations on a draft legislation, stating which recommendations have been accepted and which have been rejected, together with the reasons for the acceptance or rejection. In addition, to ensure compliance with such a provision, a sanction for failure to answer should be introduced in the law, at least in the form of a provision that

breach of this obligation constitutes disciplinary misconduct.

• The government and Parliament should modify law 544/2001 on access to public interest information in order to provide the obligation for public entities to communicate, ex officio, the nominal composition of the various bodies (committees, commissions, groups, etc.) that are set up by/within/among/on different public authorities or institutions. This meets the requirements of transparent activities which fall within the notion of "legitimate interest of third parties" referred to in Article 6(f) of GDPR.

• The Parliament should amend the law on the organization and functioning of the Ombudsperson in accordance with the Constitutional Court decision no. 455/2021. Any rule of law complaint state has clear legal frameworks in place concerning the cases in which the Ombudsperson can be revoked and the respective procedure, especially when the law was found to have several constitutional deficiencies.

• The Romanian Institute for Human Rights, which currently does not fulfil international standards on independence and effectiveness, should be absorbed within the Ombudsperson, which has a general legal competence regarding human rights, taking into consideration the comments and recommendations made by the Legislative Council in July 2020.

Process for preparing and enacting laws

Transparency in the decision-making process

There is already a practice, reinforced during the COVID-19 pandemic, that the authorities do not observe certain provisions of Law 52/2003 on transparency in the decision-making process.

According to the regulations of this law, citizens and NGOs can send written recommendations to the authorities within a specific timeframe on draft legislation that is subject to public debate. This is a way provided by law for civil society to be directly involved in the decision-making and law-making process. To ensure that the authorities give due consideration to the recommendations proposed by citizens and NGOs, Article 12(3) of Law No 52/2003 provides that public authorities receiving such recommendations are obliged to explain in writing the reasons they have not considered the proposals made and submitted in writing by citizens and their legally constituted associations.

Unfortunately, the general practice is not to respond to the recommendations received from the civil society, although *there is a legal*

provision obliging authorities to send a response to those who have made recommendations.

The fact that the authorities do not communicate with citizens and NGOs who submit recommendations the reasons for not taking the suggestions into account is a deterrent to making further recommendations for other draft legislation, as it creates a public feeling that the authorities are ignoring the contribution that civil society wishes to drive through such proposals.

Access to public interest information

GDPR used by authorities as a shield against disclosing public interest information

The authorities have been using, also in the course of 2021, the General Data Protection Regulation (GDPR) as an opportunity to further limit the scope of public interest information by unjustifiably extending the protection offered by this regulation in cases where there is an explicit and legitimate public interest visibly manifested at the general level.

During the pandemic, the authorities set up various commissions, committees, groups, or other bodies, which were given significant attributions regarding the management of the COVID-19 pandemic by multiple pieces of legislation. These bodies decided on measures that significantly affected the life of the community. For example, the Strategic Communication Group, the Committee for Emergency Situations, the Technical-Scientific Support Group on the Management of Highly Communicable Diseases in Romania, the National Coordinating Committee for Vaccination Activities against COVID-19, etc. have been set up.

Given the importance of the decisions made by these bodies for the public, there was a general interest in getting to know the people who make up these bodies. The public wanted to ensure that the decision-makers in these bodies were people with a professional background and a reputation appropriate with the prerogatives they exercise. Unfortunately, the repeated attempts of ordinary citizens and the press to find out the names and professional training of the decision-makers in these bodies, were eluded by the authorities, who invoked the GDPR (names, professional training) of the members of these bodies.

This repeated refusal is even in contradiction with some provisions of the GDPR. The general framework for the processing (disclosure) of personal data without the consent of the data subject is set out in Article 6 of the GDPR, which states that personal data may also be disclosed when the disclosure is necessary to legitimate interests pursued by a third party. It should be noted that in ***Opinion 06/2014 of the Article 29 Working Party on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*** (the Directive that preceded the current 2016 GDPR), an opinion that is still valid today, the notion of "legitimate interest of third parties" is also defined in the sense of the purpose of an action that does not contravene the law, and **transparency** is given as an example of the

legitimate interest of third parties (page 29 of the Opinion).[18]

In other words, it is not at all contrary to, but even in line with, Article 6(c) and (f) of the GDPR, to introduce the obligation for public entities to communicate, ex officio, the nominal composition of the various bodies (committees, commissions, groups, etc.) that are set up by/within/among/on different public authorities or institutions in Law 544/2001. This meets the requirements of **transparent activities** which fall within the notion of "legitimate interest of third parties" referred to in Article 6(f) of GDPR.

This addition to Law No 544/2001 on free access to public interest information will allow information to be obtained on the names and professional training of members of similar bodies. Adopting a transparent attitude regarding the membership of these institutions can only increase the public's confidence in the authorities while maintaining the current opacity has the opposite effect.

Repeated redirection of the requests for information concerning the handling of the pandemic

During the pandemic, the authorities contributed to creating confusion and uncertainty about obtaining information of public interest regarding the management of the pandemic by using Law 544/2001 and diverting (redirecting) requests for information from one body to another, with the last body to receive the request claiming not to have the requested information.

For example, a request for information made by APADOR-CH regarding the COVID-19 vaccines was redirected from the Romanian Government Secretariat to the Ministry of Health, and the Ministry of Health redirected the request to the National Coordinating Committee for Vaccination Activities against COVID-19, the latter institution stating that they do not have the requested information and that they recommended requesting the information from the Ministry of Health (the same Ministry which suggested that the information be requested from the National Coordinating Committee for Vaccination Activities). Finally, APADOR-CH sued the National Coordinating Committee for Vaccination Activities against COVID-19 and obtained a court decision that ordered the Committee to provide the requested information.

However, it is worth noting that in a challenging period, due to the problems raised by the pandemic, ordinary citizens shouldn't

18 https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_ro.pdf
See also the section on the official website of the European Union dedicated to the definition of legitimate interest https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/grounds-processing/what-does-grounds-legitimate-interest-mean_ro

have to put their time and energy into such matters, which are rather limited, because the public authorities refuse to fulfil their legal obligations.

Journalists have reported similar situations; their requests for information were redirected from one institution to another without definitive answers.

If the Romanian authorities truly wanted to communicate the information of public interest requested by citizens on pandemic-related topics (including vaccination-related matters) accurately and completely, they would not have fragmented the recipients of the requests, thus creating the possibility of sending information requests "in circles" from one entity to another, but would have designated a single authority to receive and respond to any kind of request for information on any pandemic-related issue. This authority could have been the Government Secretariat because the management of the pandemic is primarily a government responsibility.

This would also have increased citizens' trust in the state, which would have been perceived as a partner in the difficult situation created by the pandemic, and not as an adversary using any subterfuge to avoid answering legitimate questions.

Independent authorities

Attempt to remove from office the Romanian Ombudsperson

The Romanian Ombudsperson is the only public authority that has the legal power to appeal *directly* to the Constitutional Court any normative act with legal force, any law or ordinance. During the COVID-19 pandemic, the Ombudsperson challenged several legal regulations establishing measures for preventing and controlling the pandemic before the Constitutional Court, and in many cases, these objections of unconstitutionality have been admitted.

However, the government in power at the time, supported by the Parliamentary majority, made several public statements that the Ombudsperson was acting against the measures in place meant to prevent and control the spread of the pandemic. Shortly after these statements, the procedure to remove the Ombudsperson from office was initiated and completed. As a result, by **Resolution No 36 of 16 June 2020 of the Plenary of the two Chambers of the Parliament, the Ombudsperson was removed from office.**[19]

According to Article 9(2) of Law No. 35/1997 on the organization and functioning of the Ombudsman, the Ombudsperson shall be removed from office by a joint decision of the Chamber of Deputies and the Senate, *"as a*

19 https://www.hotnews.ro/stiri-politic-24863583-parlamentul-reuneste-sedinta-comuna-revoce-renate-weber-din-functia-avocatul-poporului-cine-vor-inlocuiasca-pnl-usr-plus-udmr.htm

result of violations of the Constitution and laws". However, the reasons cited in the decision for the removal from office were none other than the public criticism repeatedly aimed at the Ombudsperson (criticism concerning their position on measures to fight the pandemic), namely: the Ombudsperson's inaction in the case of the Caracal murders (which involved the kidnapping and murder of two young women) or on the issue of missing children, the monitoring of health units treating COVID-19 patients in terms of compliance with the rules of the prevention of torture, monitoring which created a state of fear among medical staff. The Parliamentary Group of the main opposition party at the time appealed to the Constitutional Court against the Parliament's decision to remove the Ombudsperson from office (the existing law did not and still does not allow the Ombudsperson to appeal the decision to remove them from office on their behalf).

By **Ruling No 455 of 29 June 2021,**[20] **the Constitutional Court** found that the decision to dismiss the Ombudsperson was an arbitrary act, without constitutional basis, and that not even the highly lax conditions provided by the law for the dismissal had been met (the dismissal decision did not contain any accusations regarding violations of the law or the Constitution, just referred to the unsatisfactory performance of the Ombudsperson's duties). Following an express indication in the decision of the Constitutional Court, the Ombudsperson resumed their function on the day the decision was published in the Official Gazette (6 July 2021), i.e., about three weeks after their revocation.

In the same decision, the Constitutional Court also analyzed the quality of the regulations contained by Law 35/1997 on the cases in which the Ombudsperson can be revoked and the respective procedure, finding that the law has severe constitutional deficiencies, as follows:

1) the law does not cover distinctly and restrictively the cases in which the Ombudsperson may be revoked; it only covers serious misconduct committed by the Ombudsperson, but in a vague and loose manner, so that the conditions of clarity, predictability and reasonableness which laws must meet are not observed;

2) the law does not provide the Ombudsperson's right of defense through a transparent procedure that ensures a public hearing of the Ombudsperson;

3) the law does not provide for a procedure to challenge the revocation decision before the Constitutional Court by the person being revoked (according to the current regulation, the challenge can only be made by a certain number of members of the Parliament).

Since the recitals in a decision of the Constitutional Court have the same binding

20 https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_455_2021.pdf

force as the operative part of the decision, it follows that **the Parliament is obliged to amend Law No 35/1997 under the provisions of Decision 455/2021 of the Constitutional Court** on the three categories of constitutionality issues, mentioned above, which concern the cases in which the Ombudsperson may be revoked and the respective procedure. Following the amendment, Law 35/1997 must provide, in addition to the cases and procedure for the revocation of the Ombudsperson, the obligation that the Parliament's decision for the removal from office must identify and describe each act or omission imputed to the Ombudsperson and the corresponding legal power that has not been performed or has been performed improperly, including by mentioning the legal rules thus violated.

So far, **the Parliament has not amended and supplemented Law No 35/1997** under decision No 455/2021 of the Constitutional Court. This lack of action by the Parliament raises questions about obeying the rule of law, as laws that do not comply with the Constitution must be brought in line as soon as possible.

The dismantling of the Romanian Institute for Human Rights (RIHR)

The Romanian Institute for Human Rights (RIHR) is an independent public entity with a legal personality established by law (Law no. 9/1991). The state-funded institution with a budget of about 1 million lei/year, from the Parliament's budget,[21] has the promotion of human rights as its general objective.

As the only national human rights entity accredited by the UN under the Paris Principles, RIHR has been subject to regular UN assessments. Unfortunately, the UN Sub-Committee responsible for the accreditation of human rights institutions established under the Paris Principles gave it the lowest grade, namely C, criticizing, among other things, the non-transparent appointment of RIHR members and the unlimited term of their office.[22]

In July 2020, 4 USR MPs initiated a legislative proposal[23] to dismantle RIHR and integrate and merge it with the National Council for Combating Discrimination (NCCD). The legislative proposal was motivated,[24] on the one hand, that "*RIHR's main activities, as shown in the institution's reports, are small-scale, inferior even to the work of some NGOs (very short, strictly localized training courses, teaching creativity competitions initiated, in fact, by the Ministry of Education, etc.) and are not part of a national and multi-annual strategy with measurable results*" and, on the other hand, that currently "*...RIHR's purpose and activities constantly overlap with those of other public bodies...*"

21 In 2020, IRDO's annual budget was 2.3 million lei, out of which about 1.8 million Lei were salary expenses; see https://www.senat.ro/legis/PDF/2020/20L701EM.PDF

22 https://apador.org/en/ca-facem-cu-irdo-il-desfiintam-sau-ii-schimbam-seful/

23 https://www.senat.ro/legis/lista.aspx?nr_cls=L701&an_cls=2020

24 https://www.senat.ro/legis/PDF/2020/20L701EM.PDF

(as an example, the overlapping of tasks between RIHR and the following public bodies was given: NCCD, National Agency for Equal Opportunities, National Authority for Persons with Disabilities, National Authority for the Protection of Children's Rights and Adoption).

The reasons for the dissolution of the RIHR (by absorption into the NCCD) were also that, "*according to its activity reports, the RIHR has not provided, by its own initiative, at least in the last half-decade, statements, opinions or legislative summaries to the Chamber of Deputies or the Senate, in other words, it has not provided the support in Parliament's law-making activity that its subordination to the Chamber would indicate. Moreover, even in the area of legislative summaries, RIHR is in the same situation of institutional parallelism that characterizes all its work: such materials are produced and made available to Members of the Parliament by the Legislative Council and Parliament's internal legislative services.*"[25] The Legislative Council endorsed this legislative proposal with comments and recommendations,[26] and in December 2020, the Chamber of Deputies tacitly adopted it. In November 2021, the Senate (the decision-making chamber in the case of this legislative proposal) rejected the legislative proposal, a rejection which puts the attempts to dismantle the institution to a halt for the moment.[27]

As it emerges from the joint report of the Senate Legal Committee and the Senate Human Rights Committee,[28] the legislative proposal was rejected mainly because, during the Parliamentary procedure, it did not undergo the amendments and additions necessary to meet the objections raised by the Legislative Council in the opinion issued, namely:

1. The legislative proposal does not state to what extent the field of activity of the RIHR (as established by Article 3 of Law 9/1991) is to be taken over by the NCCD, i.e., to what extent the tasks of the staff taken over by the NCCD will be maintained or will consist of.

2. There is no correlation between the provisions on the dismantling of RIHR and those on the takeover of RIHR's assets and the transfer of RIHR's allocated budget, and those on the takeover of RIHR's staff (there are unjustified time differences between the date of the dismantling of RIHR and the date of entry into force of the provisions on the employment of RIHR's staff by the NCCD and the date of the transfer of RIHR's budgetary allocations to the NCCD).

In conclusion, it can be estimated that although the legislative proposal of July 2020 has been definitively rejected, the idea of absorbing the

25 https://www.senat.ro/legis/PDF/2020/20L701EM.PDF
26 https://www.senat.ro/legis/PDF/2020/20L701LG.PDF
27 https://www.senat.ro/legis/PDF/2020/20L701ARD.PDF
28 https://www.senat.ro/legis/PDF/2020/20L701CR.PDF

RIHR into another public entity with relevant activities related to human rights should not be abandoned. This is because there are still overlaps between RIHR and other public entities, and public expenditure on the operation of RIHR is far too generous for the results achieved.

Thus, based on an objection of unconstitutionality raised by the President of Romania and settled by decision no. 772 of 22 October 2020 of the Constitutional Court of Romania,[29] it is stated that the role of the RIHR becomes unclear, as it duplicates the role of the Ombudsperson, as provided in Article 1(2) of Law no. 35/1997, of promoting and protecting human rights, in compliance with the Paris Principles, adopted by Resolution A/Res/48 of the United Nations General Assembly of 20 December 1993, the relationship between the RIHR and the institution of the Ombudsman being unclear. The grounds for the President's objection also state that some of the RIHR's tasks overlap and are in conflict with the functions of lawyers (concerning the provision of legal advice in the field of human rights, something which only lawyers can provide) or with the tasks of the National Agency for Civil Servants and the National Institute of Administration (concerning human rights training programmes).[30]

Perhaps instead of the NCCD, the Ombudsperson is more appropriate to absorb the RIHR, including its areas of activity. Unlike the NCCD (which is focused on only one key area of human rights, namely the right not to be discriminated against), the Ombudsperson has a general legal competence regarding human rights (however, much broader than the competence of the NCCD).

The forthcoming legislative proposal on the absorption of the RIHR by the institution of the Ombudsperson will have to be drafted taking into consideration the comments and recommendations made by the Legislative Council about the July 2020 legislative proposal (presented above), which could greatly increase the chances that the new legislative proposal will be adopted.

29 https://www.ccr.ro/wp-content/uploads/2021/01/Decizie_772_2020.pdf

30 See paragraphs 9-12 of Decision No 772/2020 of the CCR. Paragraph 67 of the decision states that, in view of the merits of the grounds of extrinsic unconstitutionality relating to the procedure for the adoption of the contested law, it follows that it is no longer necessary to examine the other criticisms of intrinsic (substantive) unconstitutionality raised by the author of the objection of unconstitutionality. This does not mean that the substantive issues of overlap between the IRDO and other public entities no longer exist or remain relevant.

Disregard of human rights obligations and other systemic issues affecting the rule of law framework

Key recommendations

- Authorities should take steps to ensure a timely and full implementation of judgments of the European Court of Human Rights.

Implementation of decisions by supranational courts

As of January 2022, there are **101 leading judgments pending implementation** in Romania. This is the highest number of pending leading judgments of any country in the European Union. Only since the beginning of 2020, the ECtHR has delivered 30 violation judgments with respect to Romania. Of the leading judgments handed down by the European Court of Human Rights against Romania over the past 10 years, more than 56% await full implementation. Only five leading judgments have been implemented by authorities since the beginning of 2020.

The ECtHR implementation record in Romania is among the poorest in the European Union. The statistics indicate an extremely high number of leading judgments pending, as well as a high percentage of leading judgments which are waiting to be implemented. These have been pending implementation for a moderately long period of time. On average, leading cases have been pending in Romania for **more than 4 years and 5 months**, with the oldest pending implementation since 2005.

While the data shows that there is **significant room for improvement**, there are also some **positive examples** of ECtHR judgment implementation where reforms have been initiated or are underway. However, significant efforts are required further to improve ECtHR compliance and Romania's overall implementation record.

Contacts

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APADOR-CH is a non-governmental organization working to raise awareness on human rights issues and promote human rights standards and the rule of law in Romania and the region.

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The Civil Liberties Union for Europe

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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