LIBERTIES RULE OF LAW REPORT 2023

ROMANIA

#ROLREPORT2023

FOREWORD

This country report is part of the Liberties Rule of Law Report 2023, which is the fourth 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 gathers public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2023 Report was drafted by Liberties and its member and partner organisations, it and covers the situation during 2022. 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 2023 Report includes 18 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. Forty-five member and partner organisations across the EU contributed to the compilation of these country reports.

Download the full Liberties Rule of Law Report 2023 here

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ROMANIA

About the authors

The **Association for the Defense of Human Rights in Romania - the Helsinki Committee (APADOR-CH)** is a non-governmental organization. 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 advocacy, fact-finding visits to prisons and police lock-ups, research and monitoring to assess compliance of 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

The much contested "justice laws" (the Law on the Superior Council of Magistracy, the Law on the Judicial Organization, and the Law on the Status of Judges and Prosecutors) finally entered into force in December 2022. Some of their more controversial provisions have been challenged before the Constitutional Court by political parties as well as the Ombudsman. The challenged provisions have been declared constitutional by the Court.[1]

The Ministry of Justice's draft law amending the Code of Criminal Procedure (CCP), sent to the Senate in December 2022, aimed primarily to bring the provisions of the CCP in line with several decisions of the Romanian Constitutional Court. In this respect, amendments have been proposed that reflect the solutions adopted in 38 decisions of the Court issued in the period from 2015 to 2022. The constitutional corrections that will be introduced into the CPP will lead to increased quality of the criminal code, as the Constitutional Court decisions have resolved controversial issues that have arisen in practice.

Three justice laws entered into force in December 2022. It will take further developments in practice to determine whether the changes they introduced have benefited the judiciary. For example, one of the EC recommendations refers to the disciplinary regime of magistrates. Currently, failure to comply with the decisions of the Constitutional Court

1 Constitutional Court Press Release, 9 November 2022, https://www.ccr.ro/comunicat-de-presa-9-noiembrie-2022/

(CCR) or the decisions of the High Court of Cassation and Justice (ICCJ) in the resolution of appeals in the interest of the law no longer constitutes a disciplinary offence, according to the new law no. 303/2022 on the status of judges and prosecutors. How the absolute abolition of this disciplinary offence has benefited the judiciary remains to be seen.

There has been some progress in the legislative process. Compared to last year, a series of important laws have finally been adopted or are underway, and have generally been appreciated (including by the Venice Commission). However, the recommendations coming from civil society (see below) have not been taken into consideration by the Ministry of Justice and the Parliament and no explanation was provided in relation to them, as the law requires.

In the field of anti-corruption, the whistle-blower legislation was adopted at the end of 2022 (a year after the transposition date). While the transposition law contains the minimum standards required by the EU Whistleblower Directive, some of its provisions are unclear (particularly as they apply to the private sector).

Regarding checks and balances, the Romanian state has failed to ensure effective public consultations before the adoption of draft legislation. The 2022 experience of APADOR-CH during the legislative processes of three major draft laws (the law on the statute of judges and prosecutors, the cybersecurity law and the law on the protection of whistle-blowers) can attest to the fact that consultation of civil society organizations is a mere formality, when it even occurs. In 2022, there were no efforts to establish a National Human Rights Institution taking into account the UN Paris Principles (no new legislative proposal was initiated in this sense).

No major developments regarding the regulatory framework for civil society organizations have produced effects in 2022. In November 2022, a group of parliamentarians from the majority coalition initiated a legislative proposal aimed at amending Government Ordinance 26/2000 concerning the functioning of associations and foundations. The draft law introduces several conditions for the initiation by an NGO of a legal action with the object of legality control over an administrative act and it mainly targets environmental organizations. Its main targets being environmental organizations. Should this draft law be adopted in this form, it will most likely be challenged before the Constitutional Court as it severely limits the right of free access to justice.

State of play

- (Progress) Justice system
- N/A Anti-corruption framework
- N/A Media environment and freedom of expression and of information
- (No progress) Checks and balances
- (No progress) Enabling framework for civil society
- N/A Systemic human rights issues

Legend (versus 2022)

- (↓) *Regression*
- (–) *No progress*
- (↑) *Progress*

Justice system

Key recommendations

- The Constitutional Court must be protected and its role as guarantor of the supremacy of the Constitution cemented. Measures should be taken to improve the predictability of its decisions. The law on the organization and functioning of the Constitutional Court should be changed in order to specifically include the categories of decisions that the Court can pronounce. There is also a need for more precise criteria when electing the members of the Court, i.e. less political and more oriented towards promoting competence.

- The law on the statute of judges and prosecutors should be amended to correct important omissions regarding the financial liability of judges and prosecutors.

Judicial independence

Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal liability of judges

In the past few years, problems have arisen with the contradictions between the decisions of the Constitutional Court and the decisions of the Court of Justice of the European Union (CJEU). Judges were faced with the choice between respecting the CCR's decisions or the CJEU's decisions. Some judges have chosen to comply with the latter to the detriment of the Constitutional Court decisions, thus risking being disciplined for not complying with the CCR decision, based on the text of the former Law on the Status of Judges and Prosecutors.

Failure to comply with the decisions of the Constitutional Court (CCR), or the decisions of the High Court of Cassation and Justice (ICCJ), in the resolution of appeals in the interest of the law[2] no longer constitutes a disciplinary offence according to the new law no. 303/2022 on the status of judges and prosecutors (entered into force in December 2022).

The legislature opted for the radical solution consisting of the total elimination of the offence, although a middle-way solution could have been chosen, in the sense of keeping the disciplinary offence but redefining it. Thus, the text could have been amended in order to establish an order of preference regarding the respect of decisions/judgments of the relevant domestic and international courts, which would have allowed the courts, in case of conflict between the CCR decisions and the

2 An appeal in the interest of the law (RIL) is a procedure by which, in the event that two courts pronounce different solutions regarding the same legal issue, the highest court in the country (High Court of Cassation and Justice) intervenes, and determines which solution is correct. The decision of the High Court is binding for all courts in the country. The RIL ensures the uniform interpretation and application of the law by all courts.

CJEU decisions, to give priority to the CJEU decisions.

The practical consequence of totally abolishing this disciplinary offence is that it creates conditions for eroding national jurisprudence's consistency. Removing the sanction for non-compliance with CCR decisions may result in a situation in which a law/provision of law declared unconstitutional by a CCR decision is also considered constitutional by a court of law that holds a different opinion than the CCR. As a result, conflicting scenarios may occur in which a legislation/provision of a law is both constitutional and unconstitutional, depending on the court that rules, which may or may not agree with the Constitutional Court.

In connection with these problems, the Romanian Ombudsman referred the matter to the Constitutional Court. Included among the reasons for the unconstitutionality of the new law on the status of judges and prosecutors is the elimination of the disciplinary offence of failure to comply with CCR decisions.

The CCR judgement no. 520 of 9 November 2022 rejected the Ombudsman's complaint. In essence, CCR ruled that the elimination of this disciplinary misconduct is constitutional, because failure to comply with CCR decisions may subject the judge or prosecutor to disciplinary liability to the extent that it is demonstrated that he or she exercised his or her office in bad faith or with gross negligence.

In other words, with the implementation of Law 303/2022, it is no longer possible to argue that every failure to comply with CCR judgments will be sanctioned as a disciplinary offence, but only failure to comply with CCR decisions done in bad faith or with gross negligence. Thus, the sanction cannot be applied when the judge presents a reasoning that contradicts the reasoning of the CCR decision and claims that this is his decision. It will not be bad faith or gross negligence, but rather the legal conviction and reasoning of the judge who does not respect the CCR decision and is presumed to be in good faith.

However, the constitutionality or unconstitutionality of a legal text should not be a matter that differs according to each judge's conviction, regardless of the arguments. Otherwise, it can lead to legal instability/chaos, which will manifest itself in the fact that, in parallel cases of the same type, some judges will consider a text of the law to be constitutional, and other judges will consider precisely the exact text of the law to be unconstitutional.

It remains to be seen whether or not the absolute abolition of this disciplinary offence has benefited the judiciary. APADOR-CH considers that, despite the current, justified criticism in relation to the nominal makeup of the Constitutional Court, as well as some particularly contentious rulings at the institutional level, it is necessary to protect the role of the Constitutional Court as a guarantor of the supremacy of the Constitution. This role can be exercised only if the CCR decisions are respected effectively, not declaratively.

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

Two decisions of the Romanian Constitutional Court (CCR) concerning the interruption of the statute of limitations of criminal liability, the latest issued in 2022, have destabilized criminal investigations and the trials of criminal cases (some concerning well-known politicians).

The first CCR decision (no. 297 of 26 April 2018) established that the text of the Criminal Code (Art 155) which stipulated that the statute of limitations is interrupted by the performance of "any procedural act in question" (i.e. also of a procedural act which is not communicated to the suspect/defendant) is unconstitutional. This is because the suspect/defendant cannot know the moment the statute of limitation of his criminal liability was interrupted, thus marking the beginning of a new statute of limitation, as long as the statute of limitations can be interrupted by procedural acts initiated by judicial bodies which must not be communicated to the suspect/defendant. In its motivation, the Constitutional Court mentioned that in order for the interruption of the statute of limitations to be constitutional, the judicial body has to carry out a procedural act which is communicated to the suspect/defendant.

Surprisingly, in 2022, when several criminal cases involving politicians and well-known public figures were at an advanced stage of completion, the Court issued a new decision on the matter of interrupting the statute of limitations, assessing the conduct of the judiciary after the 2018 decision.

In its decision No. 358 of 26 May 2022, adopted by a majority of 7 to 2, the Court established that after the publication of the 2018 decision, the statute of limitations period could not be interrupted at all, i.e. not even by carrying out a procedural act that is communicated to the suspect/defendant (despite the 2018 decision stating that the limitation period could be interrupted by carrying out a procedural act that is communicated to the suspect/defendant).

The Constitutional Court argued that the 2018 decision was not an interpretative one, which would have allowed for the partial application of the criminal procedure code. Rather, the Court argued, its decision was one which stated that the article allowing for the interruption of the limitation period was utterly ineffective (practically "eliminated"). Moreover, the Court added that after the 2018 decision, the only possibility to interrupt the statute of limitations was to amend the article of the criminal code with an express provision allowing for the statute of limitations to be interrupted exclusively by a procedural act communicated to the suspect/defendant.

In the past, the Constitutional Court has issued numerous decisions open to interpretation that did not result in the suspension or elimination of a legal text. They only corrected specific unconstitutional formulations (in such decisions, the RCC mentions that the text in question is constitutional only to the extent that it refers to or does not refer to specific aspects).

Alongside other controversial decisions, the 2022 Constitutional Court decision further decreased the public confidence in its authority because it led to the closure of some cases under investigation (even in the trial phase). Since 2018 there were criminal investigations carried out, and judges ruled on the basis of the interpretative character of the CCR decision. In 2022, the same Court ruled that that decision was not interpretative but ordinary.

APADOR-CH recommends that all legislative measure that could contribute to improved predictability of the Constitutional Court decisions and an improvement of the general trust in this institution should be taken. Criteria for electing Constitutional Court members should be preciser, less political and more oriented towards promoting competence. In addition, there is a need for more straightforward regulations concerning the law on the organization and functioning of the Court concerning the categories of decisions that it can pronounce. This would avoid the situations where it is not clear when the Constitutional Court adopts an interpretative decision, an ordinary decision or a decision of another nature.

Fairness and efficiency of the justice system

Respect for fair trial standards, including in the context of pre-trial detention

The Ministry of Justice's draft law amending the Code of Criminal Procedure, sent to the Senate in December 2022, aimed primarily to bring the provisions of the CCP in line with several decisions of the Romanian Constitutional Court. In this respect, amendments have been proposed that reflect the solutions adopted in 38 decisions of the Court issued in the period 2015-2022 (8 years). The constitutional corrections that will be introduced into the content of the CPP will lead to increased quality of the provisions of the criminal code, as the Constitutional Court decisions have resolved controversial issues that have already arisen in practice.

Among the positive developments when it comes to pre-trial detention, the Constitutional Court decision 136/2021 concerns the situation of a person who has been lawfully arrested but whose case has been closed/the person has been acquitted. In such a situation, the Code of Criminal Procedure did not provide for the possibility of compensation for the person placed in pre-trial detention and subsequently acquitted. Only the person who had been unlawfully detained could be compensated, i.e. only the person against whom the measure of pre-trial detention was not justified at the time of detention (it had no legal basis).

The Constitutional Court stated that it did not matter whether the measure of arrest was justified at the time of the arrest, but what mattered was how the case was closed. If the case was closed/person was acquitted, this means that the basis for the arrest never existed, because a person cannot be arrested for an act that is not an offence and for which he cannot be convicted.

Other

The current regulation on the financial liability of judges and prosecutors has at least two deficient aspects which negatively impact the good functioning of the justice system. APADOR-CH's concrete recommendations made in relation to the law on the statute of judges and prosecutors, made at the various stages of the draft's evolution in 2022, were ignored without any explanation.

Under Article 268 of Law 303/2022, the state is liable for damages caused by judicial errors committed by judges and prosecutors. This fact does not remove the liability of judges and prosecutors who, even if they are no longer in office, exercised their functions in bad faith or with gross negligence. Under Article 269 of the same law, the injured party may bring an action for damages only against the state, represented by the Ministry of Finance. In other words, the injured party can only sue the state, not the judge/prosecutor who committed the miscarriage of justice. If the injured party is granted damages in court, the state will pay the compensation within a maximum of 6 months from the date of communication of the final judgment to the Ministry of Finance.

After the Ministry of Finance has received the final court decision by which the state is obliged to pay compensation for judicial errors, a verification procedure of the file in which the judicial error was committed is automatically triggered. If the verifications show that the judge or prosecutor acted with bad faith or gross negligence, the material liability of the judge or prosecutor will be engaged. In other words, in such a situation, the state will sue (through a recourse action) the judge or prosecutor who made the miscarriage of justice in bad faith or gross negligence, and will ask the court to oblige the judge/prosecutor to pay the state the amount that the state paid to the victim of the miscarriage of justice.

It should be emphasized that the judge/prosecutor is liable for the payment of compensations (the liability for payment of compensation is only towards the state, through the obligation to return to the state the money that the state has paid to the victim of the judicial error) only if he/she committed the judicial error with bad faith or gross negligence. If the judge/prosecutor has committed a miscarriage of justice, but through simple negligence (not gross negligence) or acting in good faith (good faith is presumed), there is no question of the judge/prosecutor being liable to pay compensation. As a result, in these cases, the state will pay compensation to the victim of the miscarriage of justice but will not recover from the judge/prosecutor the amount paid to the victim (the state will no longer bring a recourse action).

The referral to the Superior Council of Magistracy by the Ministry of Finance triggers the verification procedure regarding the material liability of the judge/prosecutor. After several verifications, which also involve an evaluation by the Judicial Inspection, and the hearing of the judge/prosecutor (which is mandatory), the SCM (appropriate section) will adopt a decision finding that the judicial error was committed or not committed with bad faith or gross negligence. If it finds bad faith or gross negligence, the SCM will send

its decision to the Ministry of Finance, which must bring a recourse action against the judge/prosecutor.

The new law (art. 269 para. 3 of Law 303/2022) no longer provides for a deadline within which the Ministry of Finance is obliged to refer the matter to the SCM by sending the final court decision obliging the state to pay compensation for the judicial error. The old law of 2004 stated that a deadline of 2 months from the receipt of the final decision to order compensation should be observed, by which the Ministry of Finance had to refer the matter to the Judicial Inspection so that it could verify whether there was bad faith or gross negligence.

The omission of such a time limit in the new law may compromise the liability of the judge/prosecutor since it is possible that, in the absence of a time limit that must be respected, the Ministry of Finance may refer the matter to the SCM very late, at the limit of the expiry of the limitation period of material liability thus making useless, on the grounds of lateness, the whole verification procedure described in the law.

The new law also fails to provide for a procedure whereby the SJC would have to carry out checks on the existence or non-existence of bad faith or serious negligence on the part of the magistrate in the event of the state being obliged to pay compensation by a judgment of the European Court of Human Rights (ECHR) or by an amicable settlement agreement in a civil case. The existing procedure in Law 303/2022 (art.269) does not cover domestic civil cases brought before the ECHR in which Romania is obliged to pay damages. Therefore, the procedure in article 269 should be extended to domestic civil cases subject to an ECHR judgment by which the state has been ordered to pay damages.

Anti-corruption framework N/A

Framework to prevent corruption

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

The legislative saga of the adoption of the whistle-blower protection legislation ended in December 2022, one year after the transposition deadline. Law 361/2022 which transposes the EU Directive 2019/1937 entered into force on 23 December 2022 after being adopted by the Parliament in July 2022, challenged before the Constitutional Court, and sent for re-examination in Parliament by the President on 29 July 2022.

Civil society organizations managed to push back against many of the detrimental provisions of the various draft laws on whistle-blower protection (initiated both by the Ministry of Justice and the Parliament). However, CSO experience during the legislative process can attest to the fact that the political class is not yet committed to real protection of whistle-blowers, showing an institutional resistance to regulations and procedures which have the potential to unveil illegalities and corruption.

Monitoring how the law is applied in practice remains crucial for its effective implementation. In this sense, the National Integrity Agency (ANI) has to be equipped with all necessary resources (financial and technical) in order to fulfil its crucial and complex role of promoting and monitoring the implementation of the law. Equally important remains the education of judges, who remain generally unaware of the existence of whistle-blower protection legislation.

As an overall assessment, it can be stated that the domestic law has transposed the EU Directive provisions. However, there are certain aspects that must be clarified, completed and reformulated for the transposition of the Directive to be complete. Currently, some private companies who already have internal procedures in place do not think this legislation applies to them, since they already have regulations and procedures in place as part of their compliance polices. Their interpretation is supported by the ambiguous/incomplete wording of the transposition law. Art 1 para 3 does not clearly state whether special regulations that do not contain the minimum standards of whistle-blower protection provided for in the Directive have to be amended in order to contain, if not higher standards, at least the minimum protection standards provided in the Directive.

Media environment and freedom of expression and of information N/A

Online media

Financing framework (including allocation of advertising revenues, copyright rules)

During recent years, political parties in Romania have developed a system of bribing the press with public funds. In return for the millions of euros it receives, the press no longer fulfils its role as a watchdog of democracy, but has become a propaganda tool for the parties that pay - the parties in power.

In 2018, an amendment to the law on the financing of political parties dramatically increased the subsidies granted to parliamentary parties from the state budget. According to data published by the Permanent Electoral Authority (AEP), in the last 6 years the parliamentary parties have received a budget totally 200 million euros. They are allowed to spend unlimited amounts of this money on press and propaganda, which can't be controlled by state institutions such as the Court of Auditors.

Parties spent €22.3 million on media appearances in 2019-2020, the years in which elections, including four election campaigns, took place. But spending has continued and increased after the election campaigns (2021-2022), through a mechanism that circumvents the Broadcasting Act and through confidential contracts, even though public money is

involved. In 2021 alone, political parties paid €12.6 million to various media outlets.

Through FOIA requests, several NGOs and independent media have tried to find out how much the parties pay to the press and to which media outlets, but have only received answers from some opposition parties. The main parties in power, which also receive the largest sums from the budget (according to the percentages they obtained in the elections) have refused to disclose the amounts paid and the media outlets with which they have contracts, citing commercial secrecy. They have been taken to court to comply with the FOIA laws, but the trial takes years.

Several media investigations in 2021 and 2022 had some success unravelling the system, however it remains in place. The leaders of Romania's two largest parties, who have effectively rebuilt the single party through the left-right coalition in government, have also become private media investors to control national news.

The Broadcasting Law prohibits the financing of TV stations by parties outside election campaigns, but TV stations use front companies that own the websites of the TV stations to circumvent the law. Through subscription payments, the parties constantly transfer money to certain advertising agencies, which in turn transfer it to the TV stations' front companies. In this way, party leaders gain the obedience of the media through TV programs and articles that are not reported as politically paid advertising. Viewers and readers are unaware that the information they receive is carefully filtered and disseminated only with political approval. More than 50% of the country's population gets its news from the TV.

The few independent media outlets, struggling to operate under complicated financial conditions, manage to deliver important articles and investigations that expose corruption and dysfunctional state institutions. However, because most of the press is politically financed, these articles and investigations of real public importance rarely make it onto the public agenda. As a result, the authorities rarely feel compelled to take an official stance or respond in any way to independent media investigations.

At the end of 2022, the PEA proposed an amendment to the Law on Political Parties, which would limit party spending on the media to a maximum of 30% of the budget allocations received. However, the draft law does not include mechanisms to make party spending on the media transparent.

Safety and protection of journalists and other media activists

Smear campaigns

In January 2022, journalist Emilia Șercan published an investigation claiming that Romania's Prime Minister had plagiarized

his doctoral thesis.[3] Shortly after this revelation, on 16 February 2022, Șercan received a Facebook message from a stranger containing personal photos of her, which the sender said he had found on an adult website. The images were taken in a private setting decades ago, and the journalist believes they were taken from a personal device.

On 17 February 2022, Șercan filed a criminal complaint with the Criminal Investigation Service of the Bucharest General Police Directorate. Only a day later, on 18 February 2022, she realized that the images and screenshots she had only sent to the police had been published on the website realitateadinmoldova.md.

The journalist reported the information leak to the Minister of Interior, who promised an internal investigation and facilitated a discussion with the head of the Romanian Police. The latter assured her that he would investigate the case and directed the journalist to file a criminal complaint with the Internal Affairs Directorate of the Romanian General Police Directorate for information leakage and violation of privacy.

On 21 February, Emilia Șercan was informed by the police chief that the internal investigation revealed that the prime source of the information that appeared in the press was not the police, but another website, which had released the photos and screenshots before the journalist had taken them to the police. Hence, the police chief suggested that the journalist's phone had been hacked.

However, three independent international institutions specialized in computer security breaches examined the journalist's phone and concluded that it was not compromised. The same organizations have also demonstrated that the websites that published the photos backdated the posts. Personal investigations revealed that behind these websites are Romanian media owners and a former Romanian MP who fled to the Republic of Moldova to avoid prosecution. Following the journalist's criminal complaints, more criminal investigation files were opened against these individuals, but prosecutors refused to merge them, even though they pertained to the same offence.

Throughout 2022, the journalist filed several criminal complaints, including for abuse of office, failure to report (against the police and the Minister of Interior), violation of privacy, harassment, threats, blackmail, concealment, obstruction of justice, and false testimony (against the persons running the websites in the Republic of Moldova). The journalist claims that her case is currently the subject of seven criminal cases at various stages in several institutions, including the Public Prosecutor's Office of the Bucharest Court, the Public Prosecutor's Office of the Bucharest District 1 Court, the Public Prosecutor's Office of the

3 https://pressone.ro/premierul-nicolae-ciuca-a-plagiat-in-teza-de-doctorat-printre-sursele-copiate-se-numara-alte-doua-teze-de-doctorat

Bucharest Court of Appeal, and the Public Prosecutor's Office of the High Court of Cassation and Justice (January 2023).

"*Splitting a case into as many components as possible is one of the tactics prosecutors employ to bury a case so that no one is charged. The fragmentation of the case complicates the investigation since other prosecutors would have to conduct the same thing, examine the same facts, question the same persons, and request the same evidence*," Emilia Șercan adds.

Although the initial posts containing the photographs were removed, they were taken up and reproduced on dozens of other sites throughout 2022. The discrediting of the journalist, with the motivation of terrorising her, has been the topic of various media and civic protests urging the authorities to conduct a prompt investigation and prosecute the perpetrators. Unfortunately, little has changed a year later.

Other

In January 2022, following the press disclosure regarding the fact that Prime Minister Nicolae Ciucă had plagiarized his doctoral thesis, several referrals to verify this suspicion were filed in court.[4] The case was tried in April before the Bucharest Court of Appeal, but information appeared in the press that there had been interventions in the random distribution of the case in order for it to reach a judge accused of older connections with the party to which the prime minister belongs (the National Liberal Party). The file was resolved by the respective judge, who dismissed the three plagiarism accusations on grounds that the journalist who formulated them made abstract general assessments.[5] A few days after this ruling, the judge applied for retirement and his request was approved.

In another file, the Prime Minister himself requested in court the suspension of the effects of the registration of the plagiarism complaint. Another panel of the Bucharest Court of Appeal admitted the Prime Ministers' request on grounds that Romania needs stability and that the plagiarism scandal could become a weapon for his political opponents.

The suspicions of manipulation of the file distribution system in the case of the Romanian Prime Minister are the subject of an April 2022 unfinished investigation by the General Prosecutor's Office (April 2022). The public information available in this case, as well as the reasoning given by the two judges in the decisions concerning the plagiarism complaints, have negatively impacted the public trust in the justice system and the perception of its proper functioning.

4 https://www.g4media.ro/breaking-surse-sectia-de-urmarire-penala-si-criminalistica-din-parchetul-general-investigheaza-procedura-de-repartizare-aleatorie-a-dosarului-in-care-premierul-nicolae-ciuca-a-obtinut-anularea-sesizar.html

5 https://www.g4media.ro/motivarea-judecatorului-care-a-anulat-sesizarile-de-plagiat-din-doctoratul-premierului-ciuca-analiza-emiliei-sercan-este-o-simpla-apreciere-generala-in-abstract-partiala-iesita-din-contex.html

Freedom of expression and of information

Abuse of criminalization of speech

On 22 December, the Romanian Senate voted on the new cybersecurity law. The law contains many problematic provisions which are highly contested by civil society organizations. One of the most dangerous articles amends law 51/1991 on national security. According to the law, any opinion expressed online contrary to that of the state will become an offence. For example, anti-vaccination opinions, a subject which has polarized Romanian society.

The qualification as threats to national security of public positions contrary to the official state policy will make those with critical positions become authors of an offence against state security, an offence provided for in Art 404 of the Criminal Code as "communicating or spreading, by any means, false news, data or information or falsified documents, knowing their falsity, if this endangers national security, is punishable by imprisonment from one to 5 years."

Until now, because these critical positions directed against the state position were not qualified by Law 51/1991 as threats to national security, this criticism of power could not be included in the offence provided for in Art 404 of the Criminal Code. Now, after the inclusion of these critics in the category of threats to national security, it will be relatively simple to initiate criminal files against critics of the political power. This represents a gross violation of freedom of expression. On 27 December, the Ombudsman challenged the law before the Constitutional Court.

Checks and balances

Process for preparing and enacting laws

Framework, policy and use of impact assessments, stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), and transparency and quality of the legislative process

Overall, the transparency and quality of the legislative process have not improved. Important legislation, including the one regulating the transparency of the decision-making process of the public administration, continues to be adopted through emergency procedures.

For example, In March 2022 law 52/2003 on the transparency of public administration in the decision-making process was amended, triggering criticism from civil society organizations. According to the amendment "in the event of the regulation of an urgent situation or one which, due to its exceptional circumstances, requires the adoption of immediate solutions, to avoid serious harm to the public interest, draft legislative acts shall also be subject to adoption before the expiry of the deadline [of 30 days for public debate]". Government Emergency Ordinance 16/2022 amended the content of Article 7 para 13 of law 53/2003.

Prior to the amendment in 2022, Law no. 52/2003 on transparency in decision-making in public administration contained, in article 7, paragraph 13, an ambiguous provision, which would have established a more accelerated derogation procedure for the debate of draft legislation if these drafts concerned special situations needing urgent and immediate regulation. Before the 2022 amendment, the ambiguous provision mentioned above was interpreted by the vast majority of courts in case law to mean that in exceptional situations, which require immediate regulation, the draft regulatory act covering such a situation does not need to be submitted for public debate and can be adopted immediately.

Criticisms have been made in the public space about the content of the amending legal text, in the sense that the reference to "urgent situations" and "exceptional circumstances" is too broad and therefore ambiguous, leading to abuses in practice stemming from the issuer of the legal act deeming any situation, even ordinary, normal, as urgent, or exceptional. Also, that the text would allow a draft legislative act to be adopted in urgent/exceptional situations without being subject to public debate, even for a very short period (e.g. one day, 3 days, etc.).

The Ombudsman referred the matter to the Constitutional Court in March 2022 regarding the ambiguities of this amendment. In essence, the criticisms of the Ombudsman relate to:

-GEO 16/2022 was issued unconstitutionally because its adoption does not aim to regulate an urgent, exceptional situation. In other words, the amendment of Article 7, paragraph 13 of Law 52/2003 should have been made through law, not through an emergency ordinance;

-GEO 16/1992 was issued without the prior opinion of the Economic and Social Council (ESC);

- the reference in the legal text to emergency situations and exceptional circumstances is unclear and unpredictable as it is impossible to determine the legal basis, no objective criteria are provided, and there is no competent body to determine whether a situation is an emergency or an exceptional situation. Thus, public authorities are given the opportunity to arbitrarily and erroneously interpret the urgency or exceptional nature of a situation, thus committing an abuse of power by avoiding the legal regulations on decision-making.

The Romanian Constitutional Court has not yet adopted a decision. The case was registered on 24 March 2022, and the report is being drafted (by the judge-rapporteur appointed by the President of the RCC) with no date yet set for the proceedings.

Regime for constitutional review of laws

In 2022, the flawed nature of the process for preparing and enacting laws was once more emphasized by the Constitutional Court and further deepened citizens' distrust in the legality and seriousness of the measures taken by the authorities. For example, in February 2022, the Constitutional Court declared unconstitutional the government Ordinance

192/2020 (popularly known as the law imposing the mandatory requirement to wear a mask in public spaces during the pandemic). The government Ordinance produced effects during November 2020 and March 2022, and it was declared unconstitutional for failing to comply with the Governmental Rules and procedures for adopting normative acts, namely, for not having the opinion of the Legislative Council when it was adopted. Considering that the general population had mixed beliefs about the restrictions imposed by the government to prevent the spread of Covid-19, the decision of the Constitutional Court would have created a state of chaos if this decision had taken during the pandemic restrictions. Despite civil society requests, no public servant has been held accountable for not fulfilling their responsibilities and breaching laws and regulations when adopting normative acts.

Enabling framework for civil society

Regulatory framework

Access to justice, including rules on legal standing, capacity to represent collective interest at court, and access to legal aid

In November 2022, a group of parliamentarians from the majority coalition initiated a legislative proposal aimed at amending Government Ordinance 26/2000 concerning the functioning of associations and foundations.

According to the draft law, the legislative proposal aims to eliminate blockages caused by litigations initiated by some NGOs which delay major infrastructure works (highways, hydropower plants). Environmental NGOs are targeted and being accused of committing "*serious damage to the public interest by depriving a modern and developed society of essential services*". The initiating senators argue that an administrative act on the basis of which a major infrastructure work is carried out, worth billions of euros, or a real estate project, can be challenged in court with the payment of a very small fee (appr. 4 euros for the action of suspension and appr. 10 euros for the cancellation action). And the administrative act can be suspended, causing great damages, even if in the end it is annulled but declared legal.

The motivation also invokes the provisions of article 11 of EC Regulation no. 1367/2006 of the European Parliament and the Council of 6 September 2006. Namely, that in order for an NGO to initiate litigation on environmental issues with a community institution/body, it must have declared as it's the main objective to the goal to promote environmental protection within the framework of environmental law. Also, the NGO must be established for more than 2 years and actively pursue the stated main objective.

The draft law introduces several conditions for the initiation by an NGO of a legal action with the object of legality control over an administrative act, for example:

- the introduction of a guarantee to the amount of 1% of the value of the

investment - not exceeding 50,000 RON when filing such an action in court (the percentage of 1% is calculated in relation to the value of the investment)

- the challenged administrative act must be related to the object of activity and the mission of the association in accordance with the constitutive act and its statute
- the challenged administrative act must be issued after the establishment of the association, etc.

There are other criteria stipulated by the draft law which also include a transitory provision, in the sense that these new conditions are to be applied for the pending litigations, and NGOs must prove the fulfilment of these new conditions in each case before the court within 45 days from the entry into force of the law.

The Legislative Council favourably approved the legislative proposal, but formulated several observations, some of them regarding the constitutionality of the proposal. The Council appreciates that the introduction into the law of these additional conditions for NGOs in order to challenge administrative acts violates the right of free access to justice, provided for in the Constitution and in the ECHR. The Council also mentions that the decision 8/2020 of the High Court of Cassation and Justice is also infringed (according to it, an NGO can challenge an administrative act even if the NGO does not have a legitimate private interest, but nonetheless there is a direct link between the challenged administrative act and the direct objectives of the NGO).

Despite being criticized by many civil society organizations, there was no reaction from the MPs and almost no press coverage of this subject. It is to be expected that if the draft law will be adopted by the Parliament and becomes law, it will be challenged before the Constitutional Court (most likely by the Ombudsman).

Online civic space

Law enforcement capacity to investigate online threats and attacks

The capabilities of the Romanian police to investigate cybercrime are low. This information comes from a 2022 media investigation,[6] but also from statements obtained by APADOR-CH in various informal discussions with representatives of the system.

According to the cited investigation, the General Inspectorate of the Romanian Police (IGPR), which has been entrusted with this task since 2019, has a small number of police officers (63 officers nationwide) who have to deal with a disproportionately high number of cybercrime cases. The situation has worsened in the past three years, when the number of complaints has exploded, as shown by police

6 https://www.g4media.ro/motivarea-judecatorului-care-a-anulat-sesizarile-de-plagiat-din-doctoratul-premierului-ciuca-analiza-emiliei-sercan-este-o-simpla-apreciere-generala-in-abstract-partiala-iesita-din-contex.html

statistics: out of a total of over 34,000 complaints nationwide, 11,817 have been resolved, most of which have been closed or prosecutions dropped for lack of evidence. In only 412 cases did the police complete the prosecution and refer the case to the public prosecutor's office.

The number of unresolved cases increased from 5,057 to 21,245 between March 2020 and March 2022, marking a 320% increase. The police officers interviewed by the author of the investigation claim that they are neither adequately trained for this responsibility, nor do they have the necessary equipment, as they are forced to conduct investigations either from their personal mobile phones or from a work laptop that is not equipped with the appropriate software.

In 2022, under the pressure of internal reports, the management of the IGPR set up cybercrime units at district level, but only on a formal basis, without increasing the number of staff and without equipping them with the necessary technology.

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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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