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THE JUSTICE SYSTEM IN ROMANIA
- INDEPENDENT REPORT -

September 2006

Konrad Adenauer Stiftung
50 years of competence worldwide
Rule of Law Programme for South East Europe

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Cap I. JUSTIFICATION

Core ideas:
SoJust is an organisation of a unique character in Romania.
It is releasing the first domestic report on the justice system.
SoJust proposes justice reform principles.

1. The justice system

The latest debate on the *justice reform* seems to be restricted to the *reform of the magistracy*. The reality, however, is that *justice*[1] should be looked at globally, as a system, with consideration given to all the involved agencies (Ministry of Justice, Public Ministry, Superior Council of Magistracy, National Bar Council of Romania, Constitutional Court, Ombudsman, so on and so forth) and to all the legal professions involved in the legal system (law professors, judges, prosecutors, solicitors/barristers, members of Parliament serving on the legal committees of the Parliament, legal advisors, intellectual property advisors, auxiliary and related staff working in courts and prosecutor's offices, judicial police service, notaries public, court executors, judicial liquidators, mediators, probation officers, technical experts, accountants and forensic professionals, coroners).

On the one hand, the members of all these professions are expected to contribute to the reform of their respective organisations. They each must act in full awareness of the immense responsibility they have in rendering justice and accept the fact that the current state of play needs improving in order to serve the overriding best interest of the public – to keep and restore social order.

[1] In this context, also to be resumed in this Report, by *justice* SoJust understands the *justice system* (and not the *judiciary* that only concerns the magistracy).

On the other hand, each and every member of a legal profession is supposed to realise that they do not act within a cast meant to preserve its monopoly, but that they are part of a multi-structural body where every component is expected to act at full capacity in making the entire system work.

The „Society for Justice" (SoJust) emerged out of the intention to create a binder among all these professions, as well as a linkage between them and the society,

2. Some things about SoJust

History: *The Society for Justice* was established at the end of several months of intensive communication on the Internet (*http://groups.yahoo.com/group/reformaj/*), among individuals who share a broad interest in the reform of the Romanian justice system that is now in progress – judges, prosecutors, SCM members, the minister of justice, solicitors/barristers, legal advisors, journalists, students, political scientists. There, in a virtual environment, draft laws, draft regulations, cases, political and legal events were debated upon.

Establishment: From August 5 to 7 2005, the most active of the *reformaj* members convened at Lăpuşna, the County of Mureş, for an informal conference, for the purpose of discussing the state of play in the Romanian justice system. The principal conclusion stemming from the debate was that the system was experiencing a profound crisis caused by impermissible delays in achieving a genuine reform. Such delays have led to the consolidation of a conservative legal oligarchy that was not socially committed, but often governed by privileges and cast spirit. By their reluctance to have a critical thinking about the real issues and by ignoring minimum ethical standards, those groups created a disastrous image of the legal professions they represent. That is why the general feeling of the public is that the Romanian justice system is being hampered by clan-like policies and undermined by nepotism, competing interests and poor performance.

A group of participants in that debate decided to establish the *Society for Justice*. The ‚Society for Justice' association was registered at number 53/13.09.2005 to the register of associations and foundations deposited with the Targu Mures Court House, according to the closure 95/30.08.2005 of the Targu Mures Court House, and is based in Targu Mures, 34 Infratirii Street, ap. 11.

Aim: *SoJust* is an organisation seeking to turn the changing of the state of play of the Romanian justice system into a priority and responsibility for the directly interested parties.

Romanian lawyers, alongside the civil society, would like to work in a better justice system, irrespective of their legal profession. The numerous public debates on the reform of the justice system have suggested major crisis and rung many alarm bells in that respect. Such signals ought to be heard and acted upon by the representatives of the legal occupations and turned into legal public policy initiatives.

The primordial purpose of our organisation is to contribute the fulfilment of an authentic and comprehensive reform, not only of the magistracy, but of other legal professions as well and of the legal education system, for the purpose of improving the quality of justice rendering in general. For that aim, *The Society for Justice* intends to use the legal expertise of its members to encourage the act of justice in the interest of the public. The association also intends to facilitate the public debate and uphold an active civic attitude on the Romanian justice system.

Membership: The organisation currently brings together 18 members, 12 of whom are founding members. They represent the various legal professions as well as the civil society.

The SoJust criteria for recruiting new members are mainly a prompt response, real time communication and specialist expertise the candidate can demonstrate.

Objectives: Through the *Society for Justice*, all the stakeholders interested in the quality of the system where they work can cave a tool of civic and professional action to be able to brig about and even impose substantive changes by:

- providing professional mobility in the justice system based on merit and performance;
- improving the quality of the higher legal education in Romania;
- complying with ethical standards that would remove possible conflicts of interests;
- promoting an active attitude among the judges and prosecutors in what regards the interests of the citizen;
- ensuring a justice system that would be independent from political and group interests;
- rendering the system of justice responsible to justice seekers and society alike.

Action: Our action is described at www.sojust.ro. In the course of the year that ahs lapsed since our establishment, we have looked into conflicts of interests, we have solicited and indicated clear criteria for the appointment of justices to the High Court of Justice and Cassation, we have taken a standing on certain actions of the members of the Superior Council of Magistracy (SCM), we have contributed with observations to the 2005 EC Report

on the progress towards accession – the Justice chapter, have closely monitored the work of SCM and of the Ministry of Justice, have prepared the press review on justice matters on a temporary basis, have encouraged the expression of critical views on the various changes in progress.

3. Independent report on the Romanian justice system

Having monitored the operation of the legal institutions and developments in the justice reform process for a year, SoJust is releasing the first independent report written in our country on the justice system in Romania. The outcome of the voluntary contribution of the members of the association and of collaborating experts, this report has the merit of cross-sectioning almost all the aspects of justice affairs, ranging from the management of the court houses to the personal relations among judges and prosecutors, from the quality of the paperwork prepared by lawyers to options in evading the law, unveiling bluntly unveiling the irregularities that poison the optimal operation of the state's agencies.

It was not the interior of SoJust to dwell on the positive aspects in their activity, considering that they would be naturally found in the work reports such agencies are supposed to prepare annually, under the law.

4. Principles in reforming the justice system

Justice presents special importance. It is the backbone of any democratic society. The safety of the individual, the rule of law and economic development depend on an effective functioning of the justice system. For the time being, in Romania justice is being rendered only through the state institutions, while alternative ways of settling litigations are not yet developed.

The reforming of those institutions began immediately after 1990; however, they were only revised in substance in the recent years. The reform exercises every government ahs made us get used to prompt us to believe that there is no clear and unanimously embraced vision on the directions to pursue. Not yet uttered, SoJust proposes principles based on which any reform ought to be (re)designed:

- principle of priority: the importance of the justice system in a society makes it a necessity that is should be recognised as a priority to all the authorities of the state;

- principle of continuity: the reform has a permanent nature and it does not end with the accession to the European Union. The accession of Romania to the European Community

is just an immediate aim, the merit being that a short-term strategy has been created that had to be followed under the pressure of EU monitoring; after the date of accession, that, in our view, will only mark the beginning of an actual reform, it will need to be continued and taken from the institutional level down to an individual level.

- principle of global approach: the justice system needs a global approach, since the reform is not restricted to the magistracy, but it needs to include the other professions, too, as well as each and every institutional component of the system;

- principle of integrated reform: the justice system can only be reformed in the context of the entire Romanian society, which comes to strengthen even further the need for education to be reconsidered, for a mainstream legal education and improvement of the image of justice;

- principle of simultaneity: legislative amendments, improvement of working conditions, modernisation of services must be started in the entire legal system;

- principle of effort pooling: justice is rendered for the society, and the public must support the reform by undertaking the related costs and by crediting the system with confidence; the Ministry of Justice and the Superior Council of Magistracy should mainly co-operate in such endeavour.

- principle of bidirectional approach: the reform does not only happen from top to bottom, but also from bottom to top. The reform is not 'confiscated' by the administrative or political authorities that happen to be managing the system at some stage, but each and every member of the system ought to make a contribution to it, from ideas on how to improve the system to changing one's own mentality and attitudes;

- principle of transparency: reform is conducted by consultation. The consultation is crucial, both of the components of the system and of the public. Only in that way can the fact that justice has a social character be revealed to all the stakeholders and to the general public;

- principle of structural changes: the reform is conducted in institutions (by rules) and at a mentality level (by people);

- principle of public policies: the reform entails the existence of policies; however, without a vision, strategies and targets in place, no structural and institutional changes of substance can be commenced. For them to be sketched out, their status in the system and their expected impact on the public need to be carefully assessed. This is the reason why SoJust is of the opinion that an *Institute for the Reform of the Justice System* needs to be created, to take care of the evaluation of existing public agencies and laws in the system and of the social impact of any changes that may be considered.

- principle of co-ordination: to ensure a unitary approach, the reform needs to be managed by a body that could brig together representatives of all concerned agencies and occupations. For that aim, SoJust proposes the establishment of a *Council of the Justice System.*

- principle pf authentication: a genuine reform can only be authentic. It entails the recognition of the negative aspects in the system, the taking of responsibilities and complete consistency between what is proposed and what is achieved.

It is the opinion of SoJust that the aims of any reform of the judiciary can be attained by observing the aforementioned principles, namely the establishment of a fast, friendly and trusty system of justice.

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Chapter 2. THE SUPERIOR COUNCIL OF THE MAGISTRACY

- BETWEEN ASPIRATION AND CAPABILITY, BETWEEN EFFECTIVENESS AND INEFFECTIVENESS

Core Ideas:
The SCM members should work permanently.
The SCM fulfils non constitutional duties or issues decisions that do not observe the law.
The magistrates do not feel protected against pressures.
People do not feel protected against the magistrates' possible abuses.

1. The SCM – Power or Aspiration?

The Superior Council of the Magistracy(SCM) changed radically once the Constitution from 2003 was revised. Together with the Courts of Justice and the Public Ministry, the SCM represents the *judicial authority,* as stipulated in the Constitution of Romania, Chapter VI, Title III.

The practice of half measures, of confusions on the definition of what a real judicial power is (which is specific to all decisional executive or legislative bodies that have been acting on the Romanian political stage from 1990) characterises the current constitutional design of the SCM.

First of all, the lack of logic in the SCM structure stands in its composition, since it is made both of judges and prosecutors.

The main function of the SCM is to guarantee justice independence, defined by the Constitution of Romania, article 126, paragraph 1, ("The High Court of Cassation and Justice and other courts set by law are empowered to apply the law".) As you can see, the Public Ministry is not mentioned in the herein paragraph. The conclusions are more than obvious:

On the one hand, the SCM would guarantee but the independence of the High Court of Cassation and Justice (ICCJ) and of the courts of justice, not having constitutionally the power to guarantee independence or stability of prosecutors (other confusing concepts that the Constitution uses in an ambiguous manner), cannot exert prerogatives with respect to the latter.

On the other hand, following the same line, the fact that the SCM is made up both of judges and prosecutors, makes it, in a complete formula (judges and prosecutors) to take

challengeable decisions with respect to the judges' career (proposing to the President of Romania to appoint and dismiss judges to/from their positions, as well as to promote them[2]) their evaluation, training and examination (organises and validates the competitions for executive prosecutor positions, disposes prosecutors to organise the competitions, appoints the commissions to evaluate the prosecutors' activity[3]) as well as the organisation and functioning of the courts of justice (summons the prosecutors' General Assemblies, approves the measures for reducing or increasing the number of positions for the courts of justice[4]).

We consider the SCM involvement in judicial matters – by virtue of its prerogatives - completely unacceptable, since the Public Minister Representatives make major decisions with respect to the judicial power.

As stated before, this is an original sin, an "Adamic" one. Once the Constitution of Romania is revised, all ambiguities will disappear; therefore it is essential to set clear terms such as "power set up within the state" that is the judicial power cannot include elements the function and organisation of which are similar to another ones (we are referring in this case to the Public Ministry, of course).

First of all, following the same reasoning, the SCM cannot be part of the judicial power, simply because it does not apply the law. It just guarantees its independent functioning.

Apparently the second confusion is deliberately supported by the SCM itself. In practice, the SCM confiscates the independence of courts and of prosecutors by its organisation and functioning, as well as by the prerogatives it was conferred or it awarded itself. For example, the SCM centralised the decisions on the organisation and functioning of the courts of justice, although it was the latter's prerogative; the SCM can take up this prerogative when the court of justice does not succeed in solving punctual issues, as guaranteeing authority. But the clear severe centralisation of decisions concerning the organisation and functioning of the courts of justice sets a comprehensible *subordination report between the courts of justice and the SCM*, the former being obliged to make use of means that do not correspond to a real independence in order to get favourable decisions from the SCM. This becomes even more confusing, since following the same principle of obedience, the courts of justice representatives have to make appeal to prosecutors, i.e. to representatives of an institution which is not part of the judicial power.

[2] See article 35, Law no. 317/2004 regarding the SCM, republished in the Official Journal no. 827 of September 13, 2005.

[3] See article. 36, paragraph, Law no. 317/2004, republished.

[4] See articles 36. 37, Law no. 317/2004 republished.

Second, the SCM members induce the same confusion on purpose. The allegations of the SCM former President, the attacks directed towards him were considered attacks on justice, within a barely credible strange image puzzle[5]. It is clear that the SCM could not set itself up for being the representative of the judicial power, since the SCM is also made up of the Minister of Justice, prosecutors and representatives of the civil society.

Beyond all the constitutional and legal constraints that lead to ambiguities, the SCM comprehensive structure denotes that it should act in practice not only on behalf of judges and people: it should be an interface among three poles: the citizens, the magistrates and the public power: to protect the first against the judges' abuse, and the second against public and social power pressures. The studies carried out by SoJust reveal that unfortunately the SCM still does not fulfil its constitutional role as justice independence warrantor. Below you will find some findings regarding the SCM activity.

2. The SCM Structure

2.1. The Election of the SCM Members' and President

The SCM elections at the end of 2004 did not have an ample election campaign. The fact that most of the candidates were judges from top positions (119 judges and 80 prosecutors registered, 59 and 25 respectively from top positions), put a lot of pressure on those who dared to be themselves candidates, bearing in mind the fact that superiors from the court of justice or the prosecuting magistracy have quite an influence on the staff. The media revealed cases where contestants experienced direct pressure.

Without reason[6], neither the old SCM nor the new one did consider these issues worth being considered[7]. It would have been essential for the present SCM to analyse them on the occasion of their first meetings, to show its transparency not only towards the public opinion, but also towards the judges – independence warrantors – and to start a new journey free from any doubt.

2.2. The SCM Members

Beyond the information made public by the media concerning the SCM members, we tried to find data on each member directly from the website. This is in fact the recommendation that the Council made with respect to transparency: "Browsing the SCM

[5] http://www.gandul.info/articol_4369/presedintele_SCM__dan_lupascu__lanseaza_un_atac_furibund_impotriva_ministrului_macovei.html or http://www.antena3.ro/Lupaşcu,_în_apărarea_SCM_act_6968.html

[6] A possible explanation: most of SCM members or their fellows put pressure on the staff.

[7] There were complaints regarding the SCM election campaign, pointed out by the Association of Magistrates of Romania (AMR), with respect to the items deleted from the official reports – an issue still unsolved – : high rank judges and prosecutors putting direct pressure and threats on some fellows/candidates, as well as pre-accession councilors lobbying powerfully for some candidates.

webpage (www.SCM1909.ro) you will have access to what you call the 'professional biography' of the SCM members, the community and the work groups they are part of, as well as their activities."[8]

As we have noticed, a year later, only 8 of the 19 appointed members had public CVs (January 2006), then 13 (June 2006); by the time the present report was launched, there were still 4 SCM members (among which two were elected) who didn't made their CV public[9].

The SCM members continue to consider themselves as representatives of the institution they belong to, preserving their position. They do not perceive themselves as representatives of all[10], having less contact with the districts that do not have SCM. What is strange though is that the SCM prosecutors pay more visits in the territory than their fellow judges.

Although the SCM s an institution that appoints judges and prosecutors to top positions, neither of its members sat an exam to this end, having no management or HR training, even though 10 of them have top positions in the judicial system.

There are two representatives of the civil society, SCM members that the Senate of Romania elected from various candidate organisations. Unfortunately, we do not know their exchange of information with the interested NGOs, or with the public opinion, in general. However, they made no public conferences since their appointing. It would be interesting to know whether they are in charge of making the magistrates liability towards the public or of improving the judicial culture to the Romanian people. For the time being, we cannot say whether they represent the civil society opinion within the SCM. The non-magistrates should be allowed to involve more in the SCM– beyond the limits imposed by the Constitution of Romania: besides other European countries where they represent almost half of the Council members, the public opinion on the justice – including the recruitment and the penalty policy levied on magistrates - cannot be put aside. All in all, *justice is done for the society*, the latter having the mission to set the rules.

2.3. Conflicts of Interest

Usually, the SCM members make their personal interests visible. The perfect illustration in this respect that SoJust pointed out then[11] was the "*Huza*" case, where there

[8] http://www.sojust.ro/forum/viewtopic.php?t=39.

[9] http://www.SCM1909.ro/SCM/index.php?cmd=920302.

[10] Provided the SCM members represent the elected magistrates, there are only 13 institutions represented - among the 240 courts of justice and prosecuting magistracies.

[11] Please consult: http://www.sojust.ro/forum/viewtopic.php?t=25&sid=1d82642f2bbc002b11fe9d14bb4a9b12 and http://www.sojust.ro/forum/viewtopic.php?t=31&sid=1d82642f2bbc002b11fe9d14bb4a9b12.

were set proceedings. The SCM member who failed to observe the law took advantage of his position and he launched a threat to the prosecutor and the judges, within the SCM Plenum. As the prosecutors' career is entirely controlled by the SCM, there are reasons to believe the respective prosecutor is likely to have had difficulties in being promoted or dispatched.

What is even more serious: by virtue of his position a SCM member caused serious trouble to the justice independence, through his declarations, because he made public a possible solution to that issue.

Then, neither the SCM members nor the SCM itself did officially state their position with respect to this member's public declarations (elected in the SCM Plenum). We believe that the SCM should have immediately reacted to any breach of the justice independence.

There are SCM active members who did not submit declarations of interest on the SCM website[12] or to courts of justice or prosecuting magistracies, or did not update them. The display of such declarations would have been a proof of transparency for this constitutional authority, which we believe, does not represent a priority for the SCM. However, Law no. 161/2003 stipulates the compulsoriness of making declaration public. *Any infringement* is considered disciplinary departure, stipulated under article 99, letter a, Law no. 303/2004, republished.

2.4. The New Management

The New SCM Management was appointed on January 11, 2006. Let us remind you briefly the facts:

The AMR[13], SoJust and the media representatives did not have access to the Plenum room. The monitor in the lobby – that normally displays the meeting – was shut down.

While the public was waiting in the lobby, as it was found out later, what the media partially revealed[14], there was much debate regarding the secret or public character of the meeting. The members accepted that the meeting was not open to the public, without expressing their opinion with respect to the secret character of the session. The fact that there were no candidates was a proof that the SCM lacked a sense of responsibility. Consequently, we had to resort to proposals. There was quite a debate saying that the SCM needed without delay a managing judge. These proposals fuelled the latent conflict between judges and prosecutors. However, none of the proposed candidates presented a management plan,

[12] http://www.SCM1909.ro/SCM/index.php?cmd=920304
[13] The Magistrates' Association of Romania.
[14] http://www.cotidianul.ro/index.php?id=3593&art=8028&cHash=eb3435dc36

although the Minister of Justice asked them to dot that a week before. The public was allowed to enter the room only at the end of the session, when the vote results were made public[15].

The entire procedure was not professional, with serious legal defaults, which is unbelievable if we think that we speak of senior judges and prosecutors. According to SoJust, the procedure was not correct, since there was no decision to declare the meeting secret. According to article 24, paragraph 2, "The President and the Vice-President of the SCM are elected in Plenum, in the presence of at least 15 of the Council members, with a majority of votes"; article 29, paragraph 1 stipulates the following: "The works of the Plenum and of the SCM panels are usually public. *The members of the Plenum and of the sections decide, with majority of votes, when the sessions are not public*"; paragraph 4 stipulates that: "The SCM decisions, in Plenum, as well as in sections can be taken by direct and secret vote provided they are accounted for".

But, the information posted on the SCM website[16] shows things differently:

- according to Decision no. 9 A, dated January 11, 2006, the SCM decided that the new management would be decided within a secret session;
- Decisions no. 10 and 11, dated January 11, 2006 made public the names of the elected candidates.

According to SoJust, this is an illegal practice that makes us doubt whether the SCM is able to be and to act like a transparent judicial authority; in fact, there was no vote on *the secret or public procedure to be followed.* Even it there were, **the entire debate on the procedure should have been carried out according to the general rule that is *in public***. The public would not have been allowed in the room provided it was a secret session for the election of the President and Vice-President.

The numbering of the three decisions and the publication date are a proof for what we have just said:

- Usually, decisions are numbered consecutively (9, 10, 11, and so on). In practice (though there is no regulation with respect to this issue) we use also capital letters, "A" for example, to remind of a specific decision, placing the letter between 9 and 10. According to SoJust it was impossible to "forget" any of the decisions on the

[15] Mr. Galca - 14 in favour, 2 opposed, 1 abstained, 2 null; dl. Deliorga - 13 in favour, 2 opposed, 4 null.
[16] http://www.SCM1909.ro/SCM/index.php?cmd=0301&pg=33

January 11, 2006 agenda – the activity yearly report of the SCM- 2005 and the new management election.

- Decisions no. 10 and 11 were posted on the SCM website the following day, i.e. January 12, 2006[17], while Decision no. 9 A, more than a month later[18]; a minute analysis can be excluded given these circumstances, as the Decision has only one page. In fact, the delay was caused by the rumours that were spread among the magistrates who contested the elected candidates, because of the illegal procedures.
- To conclude, we may say that Decisions no. 10 and 11 do not make reference to the secrecy of the session of management election as it should have had; it is a regular practice for judicial decisions (since 10 of the 19 SCM members are judges!)

3. The SCM Activity

3.1. The Permanent Activity of the SCM Members

SoJust estimates that the SCM could carry out its activity in optimal conditions provided its members have permanent activity. This is what the European Commission Reports - dated October 2005 and 2006 - pointed out, and what the President of Romania - at the SCM session that took place on December 14, 2005 – and the magistrates' association and the SoJust requested. The work volume doubled because of the problems the judicial system encounters requires round-the-clock activity. Legally speaking, after September 2005, all SCM active members are required to have permanent activity.

At present, only 6 of the 19 members have permanent activity, beside another member who has recently made public his intention to carry out permanent activity from January 1, 2007. If the three legitimate members and the two representatives of the civil society have no obligations with respect to this aspect, a possible explanation to this might be the power the 8 SCM members have at the local level and the benefits that have provided they do not have permanent activity.

What becomes more interesting is the fact that though the SCM members admit that the following mandate would be permanent (Law no. 317/2004 republished), they do not consider moral or normal for them to adopt such status. Apparently, it is moral and perfectly

[17] http://www.SCM1909.ro/SCM/linkuri/12_01_2006__2676_ro.pdf and http://www.SCM1909.ro/SCM/linkuri/12_01_2006__2677_ro.pdf
[18] http://www.SCM1909.ro/SCM/linkuri/21_02_2006__3077_ro.pdf

normal for them to have compensations from two different jobs, within **the same working hours!** Due to the fact that such delicate issues have generated numerous tensions in the system, SoJust proposed to the SCM members to request every magistrate's opinion with regard to this aspect, which it a proof of concrete representation.

The lack of permanent activity prevents the SCM members from acknowledging in due time the file content for every session or to properly manage the activity of the working groups they coordinate, as well as to skilfully carry out their activity besides the courts of justice and the prosecuting magistracy, where some of their obligations should be reduced. Let us take an example: after having checked the Official Registers of the Court of Appeal of Bucharest from the first half of 2006, the President of the Court – a SCM member, did not participate in any judgement session.

Following the same reasoning, the SCM as criticised in the EC Report on the progress towards accession dated May 2005 due to the possible conflicts of interest, but also because of it was not very efficient, bearing in mind the fact that SCM elected members chose not to permanently carry out their activity. The argument[19] the SCM President invoked on a national tune, according to which "the SCM technical staff is well prepared" violates the provisions of Law no. 317/2004, as the technical stuff is not in charge of taking decisions; it is the SCM members' responsibility. In fact, the argument that the SCM members use, tends to hide the true (and sad) state of affairs: that the SCM is the real holder of the judicial power; that is why Presidents of the highest Courts of Appeal of Romania, SCM members, have an overwhelming influence, to the prejudice of courts of justice and to the judges themselves, who are quietly forced to obey the judicial power magnates.

3.2. Internal Functioning and Organisation

The SCM is made of sections similar to those of the Ministry of Justice (MJ). This is not surprising, if we consider the fact that most of the SCM members have previously worked in the MJ. However, the SCM is made of unproductive working groups.

Having monitored several SCM sessions, SoJust found out there is strong evidence to question whether the magistrates' career is seriously treated; for instance there were situations where a SCM member's answer to the phone was considered an approval of the point on the

[19] http://www.bbc.co.uk/romanian/news/story/2006/05/060518_judecatori_SCM.shtml. *„The Council of the Magistracy carries out its activity in plenary session and on panels. That does not involve daily sessions, as we dispose of an excellent technical tool that has started to function accurately. This technical tool may provide us with everything we need so that the activities of the Plenums and of the Courts of Justice are properly carried out ".*

agenda; there were cases when the absent were informed that they had "abstained" from voting, or others who found out they had been appointed to conduct a working group.

As regards the quorum, there are often difficulties to meet it. This happens also because the General Prosecutor and the Ministry of Justice do not participate in the sessions, which is a bit strange since the latter always criticizes the SCM. As the General Prosecutor, the President of the High Court of Cassation and Justice and the Ministry of Justice are SCM members in their capacity as institution representatives, SoJust proposes the legislation to be changed, in order to replace them during the SCM sessions.

The SCM sessions last far too long[20], sometimes about 12 hours. The members receive the files 12 hours prior to the meeting, most of the members consulting them during the meetings. Supplementing the points on the agenda is a breach on the law as the agenda has to be made public 3 days prior to the session.

In order to avoid such shortcuts, it would be advisable to have live transmissions from the sessions, and large rooms with public, the magistrates being invited to join the debates.

The SCM works require a complex technical system. Nevertheless, the SCM members were caught in the trap of bureaucracy. They have to debate all kinds of requests which should normally be handled by the head of the administrative institution. SoJust formulated a request on February 1, 2006 on behalf of the dispatched magistrates, mentioning the beneficiary and the period of transfer. The Secretary General/Head of the SCM d not dispose the HR Office to send a reply, but to put the request on the agenda of the Plenum on February 16, once the Legislative (159/L) and the HR Section (1283/DRUO) drafted a note. After having been illegally approved in the Plenum, the request was forwarded to those in charge, receiving thus an answer.

We believe that the Plenum and the SCM panels should deal with the magistrates' career, not with administrative issues. This applies also to other staff categories from the judicial system.

3.3. The SCM– Unconstitutional Prerogatives

The SCM was founded as an institution whose mission was to manage the magistrates' careers – judges and prosecutors. Founded on the background of the incongruities between magistrates and former ministers of justice, the SCM was conferred legal prerogatives that do not comply with the objective described by the fundamental law: some of its prerogatives deal

[20] One of the longest sessions of the SCM Plenary Sessions, dated July 13, 2006, had 62 points on the agenda, except for 13 other points of the sections.

with justice administration (i.e. judicial statistics, evaluations of the judicial system, rationalization of the courts of justice) which should be the MJ responsibility; others deal with professional categories that are under no circumstances the SCM responsibility.

That's why the SCM was legally conferred prerogatives as regards the auxiliary staff of courts of justice and prosecuting magistracies, the National School of Clerks of the Court, as well clerk recruiting. The SCM weekly agenda includes positions that are to be changed: *clerks of courts* with university degree[21], *civil servants*[22], *drivers*[23] and *guards*[24].

As far as we know, the institution is called the Council of the Magistracy not the Council of the Judicial System. The auxiliary staff has to ensure the administrative functioning of the justice, without applying the law itself[25]. The status of the clerks of courts depends functionally speaking on the Ministry of Justice, administratively by the Head of the court of justice/prosecuting magistracy whereas their career depends on the SCM that internally sets their profession.

3.4. The SCM Becomes… the MJ.

The SCM is a constitutional judicial authority. As it should have worked strictly for the justice, we would have expected an institution entirely different from the administrative ones; unfortunately, it follows the same organisation as the Ministry of Justice. Its prerogatives, sometimes similar to those of the MJ, make us believe that the Romanian judicial system has a bi-cephalous management: the MJ and the SCM. On January 24-2, 2005, over 60 people were dispatched to the SCM after a selection of files (?!). Once the procedures were final, the hiring regulations were set (Decision 30, on February 2, 2005[26]).

And, just like any other administrative institution, the SCM becomes more and more bureaucratic: communicating less with the people and not assuming the responsibility for the internal mistakes. In return, the SCM would rather send representatives from the technical staff. This makes us believe that the SCM management's intention is to appoint reliable people. The SCM President himself delegates the representatives, on the grounds of a mandate given by the Plenum[27], with no legal basis, violating article 63, Law no. 317/2004

[21] http://www.SCM1909.ro/SCM/linkuri/05_06_2006__4555_ro.doc (point 8).
[22] http://www.SCM1909.ro/SCM/linkuri/05_06_2006__4555_ro.doc (point 6).
[23] http://www.SCM1909.ro/SCM/linkuri/13_06_2006__4713_ro.doc (point 14).
[24] http://www.SCM1909.ro/SCM/linkuri/12_09_2006__5827_ro.doc (point 7).
[25] According to the present prerogatives, the SCM should be called `The Superior Council of the Magistracy and of the Auxiliary Staff` or `The Superior Council of the Judicial System`.
[26] http://www.SCM1909.ro/SCM/linkuri/22_09_2005__511_ro.pdf and http://www.SCM1909.ro/SCM/linkuri/22_09_2005__514_ro.pdf
[27] http://www.SCM1909.ro/SCM/linkuri/03_11_2005__1626_ro.pdf.

republished that stipulates that executive positions can be conferred only to those appointed in the Plenum. But these are norms of public order; the Plenum cannot departure from the organic rules (this is an infringement on the organization of the judicial norms: the decision of the SCM Plenum that is to be put into practice exceeds the legal framework – Law no. 317/2004).

At present, delegates have already filled 10 of the 15 executive positions for several months (8 magistrates). Since the positions were not open for competition, we think that the SCM made positions available only when having the right person for them, or made it public provided there were no candidates to apply. This might be a good reason for the disparity between decisions taken at the SCM sessions and those mentioned in the official reports.

For instance, the session of the judges' section dated June 21, 2006, point 9 on the agenda[28], presented a voted list of open positions; in the end, the respective point was not included in the Official Report of the session[29] but in the daily agenda of the Plenum, the last but one point, no. 24[30], the decision being drafted as if it were taken by the Plenum[31]. It was probably considered a minor topic. This typical procedure denotes the fact that the post-decisional system does not work properly.

Consequently, the SCM becomes the administrator of the justice independence (instead of guarantor), taking up privileges that do not match the profile of the institution. The 'SCM Collection of the Case Law of the Courts of Appeals' has been recently finished. The High Court of Cassation and Justice, the real tenant of the judicial power should have drafted it, not the SCM. The latter should have been in charge only of the "Collection of Disciplinary Subjects", as part of its duties. The one who reads the yearly Report on the SCM activity – 2005 – may find out that the SCM 'conducts surveys on legal issues every three months that are given various interpretations; it centralises the number and the legal subjects where the courts of justice had formulated requests for appeal, on behalf of law'. This is a perfect illustration of the Minister of Justice and the Prosecuting Magistracy - besides the Supreme Court of Justice - which take up prerogatives from other judicial bodies.

But the list of privileges does not end here, since the SCM controls the auxiliary staff too. The SCM addressed a request to manage the courts' budget (the request did not come from the Ministry of Justice or the High Court of Cassation and Justice, as stipulated under

[28] http://www.SCM1909.ro/SCM/linkuri/16_06_2006__4819_ro.doc
[29] http://www.SCM1909.ro/SCM/linkuri/23_06_2006__4857_ro.doc
[30] http://www.SCM1909.ro/SCM/linkuri/23_06_2006__4855_ro.doc
[31] http://www.SCM1909.ro/SCM/linkuri/07_07_2006__5298_ro.pdf

Law no. 304/2004, republished, from January 1, 2008). Starting with the aforementioned date, the SCM will turn into an institution similar to the Ministry of Justice.

All these parallel activities are a waste of energy for the SCM, as they do not have a specific purpose. That is why the SCM fails to fulfil its role: to warrant the justice independence.

4. The SCM Apparatus

4.1. The SCM Technical Staff

Once they become SCM members, the magistrates' representatives seem to forget their electors. Though the media and some magistrates strongly opposed the two controversial magistrates elected on January 17, 2005 as Secretary General and Deputy Secretary General (Mr. Popa – judge, and Mr. Picioruş - prosecutor). The first was dismissed only four months later, on May 26, 2006, because he lacked managerial skills[32]; due to the general chaos, the following appointed person resigned only two months later. The third, appointed on November 23, 2005, resigned in January 2006. As the SCM members preferred not to extend the latter's dispatch, the Secretary General had to immediately resign, on the occasion of the meeting that took place on June 21, 2006[33]. Therefore, at present the SCM has neither a Secretary General nor appointed Deputies.

Moreover, this structure was completed by judges and dispatched prosecutors. There are currently about 50 persons. We are not against using professionals in the judicial institutions, but this should apply only to fields that need their expertise. We do not think magistrates are needed in other fields except the legislative ones. Who would to do the administrative jobs, if the judicial institutions had only magistrates? Although Article 63, paragraph 3 of Law no. 317/2004 stipulates that magistrates can be dispatched only to judicial positions, there are magistrates in the SCM who perform mostly administrative duties. But a magistrate is not a luxury product, as he/she needs a lot of time for training. We should then wonder whether the administrative subordination of magistrates does not represent a failure to observe the principle of independence, as well as the constitutional ban stipulated under article 125, paragraph 3 of the Constitution of Romania that mentions that the judge position does not match any position, either public or private. A similar text specifies the same provisions that apply to prosecutors (article 132, paragraph 2.)

First of all, we would like to underline the fact that this is not a common practice for the SCM; there are *magistrates dispatched* to other public authorities: the Ministry of Justice,

[32] These skills should be checked prior to appointment!
[33] http://www.SCM1909.ro/SCM/linkuri/28_06_2006__4896_ro.pdf

the Secretariat General of the Government, the Prime Minister Office, and the Ministry of Foreign Affairs. If we speak of a serious lack of staff in courts of justice and prosecuting magistracies, it is the judges and prosecutors to be blamed, as they did not have "the chance" to be dispatched elsewhere.

Second, due to these transfers, there is *a lack of balance in wages*. To be more specific, that means that income increases once the employees of the courts of justice or the prosecuting magistracy get promoted. However, promotion is not made according to the results of an exam; that means a judge from the Courts of Justice, with 6 years seniority in judicial work, receives the wages of a judge of the Court of Appeal (6 years is the length of service required for passing to the next stage)!

Last but not least, it is important to point out that dispatched magistrates have a lot of bonuses: daily allowances, travel expenses and others that double their income.

With respect to organisation, we would like to point out another negative aspect: the SCM has a Media and PR Office, but it does not have an office where *people may address to the magistrates*. The SCM seems more likely to be interested in having contact with the media, than with the magistrates.

4.2. The Judicial Inspection

There is no mention regarding important inspectors in the SCM documents. According to the information, it seems that there are 25 inspectors from courts of justice or prosecuting magistracies from Bucharest whereas there are only 7 outside the system. There are no regulations prohibiting inspectors from doing their job within the courts of justice or prosecuting magistracies they work for.

According to the legal text, such positions are filled by open competition. But, at present, none of the inspectors observed this regulation. There is another possibility, i.e. by transfer, although there is no mention in this respect. However, the SCM interviews the candidates; apparently, they had set common criteria of evaluation at the last competition – June 2006. Except for this case, most of the candidates were recommended by SCM members.

The role of the Inspection is to check aspects revealed by the media. If the central press is carefully monitored, the TV and Radio channels are left aside, although the latter reveal a lot more about the magistrates.

The Judicial Inspectors use the transfer as a promotion launcher, giving birth to various conflicts of interest; for example: two members of the Judicial Inspection, including the manager, apply for a position of judge at the High Court of Cassation and Justice.

However, the outcome is strange, since the Inspection manager is illegally appointed to the position. This is what we are going to present below.

5. Decisions of the SCM (the Superior Council of the Magistracy)

It is very difficult to search for the SCM decisions. It is actually impossible to find a decision regarding a specific aspect or related to a certain person, as there is no system of electronic search, nor a register of them. SoJust provides on its site, for all those interested, such a register of the decisions pronounced in the Plenum until present[34] (what should have been done by the people paid for this, has been done *pro bono* by the SoJust members).

As a general observation, in the case of decisions that were not made unanimously, the number of the people who voted in favour of it, against it, and who abstained should be specified; those with a different opinion from that of the majority should motivate their separate opinions. It is interesting that only the President or the Vice-president signs the decisions, both those of the Plenum and those of the sections, although any decision should be signed by those who adopt it. There is a regulation – art. 7 paragraph 4, letter e in The Regulation of the organization and functioning of the SCM, which states that the President signs the acts issued by the Plenum, but we do not believe this regulation can refer to decisions, but only to handouts, addresses, etc.

Analyzing the SCM decisions, most of them posted on the SCM website[35], we have noticed several problems, unacceptable for the SCM members, the majority of whom are magistrates and who should therefore be used to the way of applying the law, of drawing and publishing decisions. In this respect, we have noticed:

a) Illegal Decisions

There are decisions adopted by SCM that are either against the laws, or against regulations.

For example, The Regulation for transferring or delegating the magistrates adds to the law; article 9 mentions: "The **dispatch** of the judge or of the prosecutor can cease prior to the duration for which it was required, by the decision of the corresponding department of the Superior Council of the Magistracy, at the request of the person who demanded the dispatch, or of the dispatched judge or prosecutor. *The dispatch can also cease upon the request of the President of the proceedings or of the Court where the respective judge or prosecutor*

[34] **…….SOJUST**

[35] Not published in `The Official Bulletin of SCM`, as the law states starting with 2004!

works".[36] Practically, the authorization of the leader for dispatches was subtly reintroduced, although it had been specifically given up in Law 275 of 2005. And interruptions of the delegations have already taken place under these conditions[37].

Dispatches can be disposed for a minimum of 6 months, for a smaller period they are only delegations. Nevertheless, the SCM has dispatched a person, through Decision no. 157 of June 2006[38] for a period of 2 and half months. Please note that the respective person has been dispatched to the SCM.

Another type of illegal decisions is represented by retroactive decisions. In this respect, on June 1st the judge department decides, through decision no.182 of.2006, to dispatch a Court judge to a top position, starting with the very same date[39]. In the meeting of June 28 this decision is discussed again, it is re-analyzed. The decision was to do the dispatch on …May 1st[40]. Certainly, it is absolutely impossible to correct a simple material mistake.

In the meeting of September 5, 2006 the Judge department of the SCM has passed the largest number of retroactive decisions: 5 judges have been dispatched as presidents and for other 5 the dispatch was extended a month or even 2 months before the decision was passed[41].

Some decisions regard the same thing, but include different solutions: for example, prosecutor M. puts forward a request for a transfer from the Court of the MN. On June 1st, SCM approves his request and disposes his transfer from MN to locality TC, starting with June 15[42]. But after a month, on July 13, the same prosecutor is dispatched again from MN to another court[43]. And this last decision also mentions that prosecutors have been appointed to top positions, but the reason for naming judges was invoked (article 48 instead of 49 of the Law). We rightfully wonder what court prosecutor M. will go to in order to perform his activity.

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[36] Decision no. 193 of March 9, 2006, of the SCM Plenum, for approving the Regulation regarding transferring and dispatching judges and prosecutors, appointing judges and prosecutors in other executive positions, as well as appointing judges as prosecutors, and prosecutors as judges, published in The Official Journal no. 329 of April 12, 2006.

[37] The judge section of the Superior Council of the Magistracy, with the majority of the votes of those present, decided to stop the dispatch of Judge AT to the Court of the 2nd Sector, Bucharest, and call her back to the Court of Târgu Mureş. http://www.SCM1909.ro/SCM/linkuri/28_07_2006__5438_ro.doc (paragraph 11).

[38] http://www.SCM1909.ro/SCM/linkuri/04_07_2006__5172_ro.pdf

[39] http://www.SCM1909.ro/SCM/linkuri/15_06_2006__4780_ro.pdf

[40] http://www.SCM1909.ro/SCM/linkuri/30_06_2006__5004_ro.doc (paragraph 6).

[41] http://www.SCM1909.ro/SCM/linkuri/06_09_2006__5778_ro.doc

[42] http://www.SCM1909.ro/SCM/linkuri/04_07_2006__5194_ro.pdf

[43] http://www.SCM1909.ro/SCM/linkuri/21_07_2006__5419_ro.pdf

From another decision, we find out that a transfer is approved because the parents of the requesting prosecutor are *old and sick*. We wonder if such a mention is included in the category of personal data and should not be revealed[44].

Anyway, there is the need of a way to revise the SCM decisions, planned as an internal attack. They cannot have the authority of a judged thing, therefore there must be a procedure of re-examination /revising, but the conditions must be clearly stated in the law.

b) Arbitrary Decisions

SoJust has identified situations in which the activity of SCM has been arbitrary.

Therefore, although SoJust has drawn the attention of SCM[45] about the fact that the latter does not have criteria for differentiating the candidates for promoting to the High Court of Justice the judges that meet all the legal requirements, for instance during the competition from August 2005, the SCM rejected 28 persons, without stating the points in their career that did not meet the requirements. Because of this, some candidates rejected in October could be admitted to the next session, in November 2005.

As the vote was secret, these criteria do not even matter eventually. For a complete transparency and real responsibility, SoJust suggests to the SCM members to give up the constitutional protection regarding the secrecy of their vote.

c) Inconsistent Decisions

The lack of SCM consistency can be observed in the decisions they take and subsequently revise.

Therefore, decision no. 306 of August 17, 2005[46] approves the Regulation regarding the final exam of intern judges and prosecutors. According to article 43, it was appropriately applied to specialized judicial staff assimilated to the magistrates in the system of the Superior Council of the Magistracy, of the Ministry of Public Affairs, of the National Institute of Magistracy and of the National School of Court Clarks. Later, through SCM Decision no. 446 of October 12, 2005[47] the regulation was applied for the staff of the National Institute of

[44] http://www.SCM1909.ro/SCM/linkuri/21_07_2006__5417_ro.pdf. Observing law 677 of 2001 concerning personal data protection is not applied by the SCMeither regarding the competitions organized through NIM, as the name and the grades of the judge or prosecutor are revealed.

[45] http://www.sojust.ro/content/comment.php?comment.news.11.

[46] http://www.SCM1909.ro/SCM/linkuri/26_09_2005__805_ro.pdf

[47] http://www.SCM1909.ro/SCM/linkuri/03_11_2005__1663_ro.pdf

Criminology. But after a month, this last decision was repealed by SCM Decision no. 55 of November 23, 2005[48]. And all these took place during the final competition!!!

There are inconstancies between INM and SCM. Therefore, for the magistrates recruited according to article 33 of Law 303 (5 years seniority in judicial work), it is necessary to perform a training stage in the first 6 months. INM claims that the SCM agreed on November 30, 2005 that during this period the interns would not participate in meetings/drawing proceeding acts. As a result, INM transmitted this decision of SCM. But according to Decision no. 13 of January 18, 2006 the SCM Plenum decided that these persons could participate in the meetings before the end of the 6-month training. On February 16 this possible contradiction was discussed. Therefore, the same problem has been debated 3 times.

We have noticed decisions made obviously in the spirit of a conflict with the Ministry. Although initially, on June 14, the Minister's request of dispatching a judge to this institution was rejected, the reason being "the necessity of ensuring a good functioning of the court instances"[49], after a week, the same person, based on the same documents, is dispatched to … the SCM[50]. On June 1st the dispatch of a judge from a court to the Ministry is rejected for the same reasons of the great volume of court activity[51]; after a month, the dispatch is however allowed, at the same institution[52].

d) "Strange" decisions

Decision no. 71 of August 3, 2005 of the judge department, mentions that Court S. has a vacant executive position, so the transfer of judge ACV from Court B. is approved starting with September 1st 2005. The decision is published on August 11, 2005 that is 3 months after being adopted and 2 months after it should have taken effect[53]. But it is not applied, so the judge stays at B., where he presides without having the right to do so. And he even enrols for the competition for president of Court B., and his file is accepted without any problems[54]! Still, the judge gives up the competition and does not show up for the first test[55]. In order to cover the inconstancy, two solutions were possible: a revision of decision 71, stating that the transfer request was approved by mistake, or: at the beginning of 2006, the judge files the dispatch request, obviously fictitious, from S. to B., which is approved by four judicial

[48] http://www.SCM1909.ro/SCM/linkuri/15_12_2005__2497_ro.pdf
[49] http://www.SCM1909.ro/SCM/linkuri/04_07_2006__5151_ro.pdf (point1)
[50] http://www.SCM1909.ro/SCM/linkuri/30_06_2006__4970_ro.pdf (point 2)
[51] http://www.SCM1909.ro/SCM/linkuri/12_06_2006__4703_ro.pdf (point 1)
[52] http://www.SCM1909.ro/SCM/linkuri/13_07_2006__5338_ro.pdf (point 2)
[53] http://www.SCM1909.ro/SCM/linkuri/08_11_2005__1780_ro.pdf
[54] http://www.inm-lex.ro/file.php?FileID=968
[55] http://www.inm-lex.ro/file.php?FileID=979

bodies!!!: the leading college of Court B., of Court M., of Court C. and finally, it is approved by the SCM by Decision no. 66 of March 16, 2006, but (please pay attention!) **applied retroactively from September 1st, 2005.**

Please let us remind you of another case, when a procedure is started but another one is finished. Therefore, the position of Judicial Inspection Executive became vacant in February 2006. Instead of organizing a competition that would allow several candidates to compete, a faster procedure was preferred, delegation, which could only be temporary. The "only" candidate expresses in writing his agreement for *delegation* (!), the SCM Plenum votes the *delegation* on February 23, 2006 as stated in the proceedings of the meeting[56], but decision no. 131 of 2006 states *naming* instead of *delegating* in that position[57], which could only take place after a contest (several candidates, management plan, etc.). This means that the position was occupied definitively, but through an illegal procedure – applied by the very Chief of Judicial Inspection of the SCM.

e) Unmotivated Decisions

Also, although the law forces the SCM to motivate their decisions, SoJust has identified a series of decisions not motivated from the judicial point of view. There are situations when the decision itself does not mention the reasons of the SCM members when deciding for certain aspects[58]. The most serious case is when this happens in the procedure of promoting the judges of the High Court of Justice, not knowing what exactly differentiated a rejected candidate from the accepted one[59].

The procedure of receiving a magistracy candidate is particularly important. Any of the SCM decisions must be motivated, especially those by which a candidate is taken out of the competition for a position in the magistracy. Therefore, Ms. MCA has passed well the theoretical tests, the medical test, but has been then rejected by the prosecutor department of the SCM according to decision no. 99 of April 13, 2006 because of a lack of good reputation[60]. But there is no mention about what a good reputation is, how it is evaluated and what facts committed by MCA to make her unworthy of the position of magistrate.

[56] http://www.SCM1909.ro/SCM/linkuri/27_02_2006__3120_ro.doc (point 3).
[57] http://www.SCM1909.ro/SCM/linkuri/08_03_2006__3383_ro.pdf.
[58] http://www.SCM1909.ro/SCM/linkuri/25_10_2005__1518_ro.pdf
[59] http://www.SCM1909.ro/SCM/linkuri/01_11_2005__1594_ro.pdf
[60] http://www.SCM1909.ro/SCM/linkuri/19_04_2006__4050_ro.pdf.

There are decisions, maybe simpler, taken by the SCM members, without any prior debate in a meeting. We cannot explain what the reasons are for preserving such decisions in these situations.

f) Decisions motivated with big delays, or unpublished decisions

The largest number of deficiencies regarding this aspect was recorded in 2005. For example, decision no. 100 A of March 16, 2005 regarding granting an approval for transforming positions was published after 11 months, on February 15, 2006[61]. Decision no. 108 of March 23, 2005 concerning the competition for permanent positions is published sooner in the Official Journal, on December 4, 2005, than 4-6 months after they have been adopted. But there are currently decisions still to be published, a year after they were adopted – for example, decisions of the SCM Plenum no. 82, 89, 105 and 106 of March 2005, no. 181, 182, 228 and 239 of May 2005, no. 375 and 389 of September 2005, etc. We have also found decisions only partially published: for example, the Decision of the President of SCM o. 36 of 08.11.2005, of which only the second page is posted[62].

This major deficiency improved largely in 2006, when the decisions were generally published after a month. We have noticed though, that even here there are unpublished decisions, although over 6 months have passed since they were adopted – for example, the decisions of the SCM Plenum no. 90, 91, 141, 142 of February 2006, no. 180 of March 2006, no. 281, 304, 329 of April 2006, etc.[63], or the decision of the judge department no. 81 of April 6, 2006. As regards the decisions of the SCM Secretary General, a single decision is published for 2006, no. 119[64]. Finally, no disciplinary decision is available[65], the mention "the information will be soon introduced" has been displayed for over a year[66].

At present, about 100 SCM decisions are contested in court, by magistrates or the civil society. We do not state that all are illegal, but many of them are not convincing.

g) Ineffective Decisions

Decision no. 71 of March 9, 2005[67] of the Superior Council of the Magistracy set the general rules applicable to the programs of arbitrary distribution of cases, meant to solve the

[61] http://www.SCM1909.ro/SCM/linkuri/15_02_2006__2984_ro.pdf
[62] http://www.SCM1909.ro/SCM/linkuri/18_11_2005__2125_ro.pdf
[63] 50 decisions of the SCM Plenum from 2005 and 2006 were not published on August 15, 2006.
[64] http://www.SCM1909.ro/SCM/index.php?cmd=0304
[65] http://www.SCM1909.ro/SCM/index.php?cmd=030202
[66] http://www.SCM1909.ro/SCM/index.php?cmd=030204
[67] http://www.SCM1909.ro/SCM/linkuri/23_09_2005__560_ro.pdf

situations that might appear while solving the cases and that could affect the essential elements of the arbitrary distribution of the files. Solving incidental situations during trials has also been regulated, such as classifying the files in the case of impeaching, restraining, temporary absence of the judge, etc. The rule was an electronic division of the cases, as well as an auxiliary manual division, according to a cyclical system. In order to grand court autonomy and to increase the judge's power to preside his own session, *it is necessary that through the arbitrary system of dividing the files only the structure of the court to be determined, not the deadline*. Therefore, once the judge is appointed, he will take over the file and according to the degree of emergency of solving the case, to the time necessary to study the case, and to his own file load, he will set the trail date.

A special situation is related to defending the professional reputation of the magistrates, where the SCM reaction to the attacks against judges and prosecutors must be immediate. Therefore, in the case of a judge who candidates for a leading position and is accused by a local MP of having political connections, his request for defending the reputation, formulated in March, is solved only 3 months later[68]. But, except for a statement posted to the SCM web-site, nothing else happened.

Or, upon a media observation of the possible abuses of a magistrate, the SCM reaches the conclusion that, as the case is being solved, the Superior Council of the Magistracy cannot express points of view, as they are forbidden to get involved in the activity of the judges who decide in compliance to the law[69]. And this after not less than 7 pages that present the situation, which are completely useless.

There are recent attacks to justice to which SCM has not answered at all – that of the two elderly people sent to prison because they did not pay some penal tickets after being definitively condemned for the crime of altering the possession in an aggravated form and who have been given a delay of a year for the ticket, although the law states only 3 months[70], or that of the pregnant woman imprisoned for not having paid the alimony after repeating the deed, after she had been condemned for family abandon. These persons have been presented in the mass media as victims of unprofessional magistrates, while in fact the latter only applied the law exactly, without discrimination, as they are forced by the Constitution. We do not know why the media finds these specific cases emblematic, while there are also underage

[68] http://www.SCM1909.ro/SCM/linkuri/13_06_2006__4713_ro.doc
[69] http://www.SCM1909.ro/SCM/linkuri/04_07_2006__5141_ro.doc
[70] http://www.business.ro/stiri/2006/07/justitia_romana_a_azvarlit_in_temnita_doua_batrane.htm

children in jails, as well as intellectuals, workers, young, old, sick and disabled people, pregnant women, mothers with young children at home, thieves and murderers. This way, the system got to be blamed even when it worked. We wonder what would be the public reaction if mass amnesties would be applied again – certainly it would be said that the state allows criminals to walk freely among honest people, when in fact this could be a useful policy from an economical point of view or from that of social reintegration for those ready for it.

6. The Justice Day

Without any reason, the 1st July – Justice Day was taken by the SCM. Instead of representing all the judicial systems sectors, it organized an assembly reuniting heads of courts of justice and prosecuting magistracies that took part in the press award ceremony.

Just like the precedent year, the judges and prosecutors who had excellent results were not conferred any awards.

7. The Magistrates' Career

The bad SCM management has also effects on the magistrates' careers. We have identified several aspects in this respect:

a) Recruitment

The law schools graduates' entry to the National Institute of Magistracy (NIM) is a real problem. For several years, there have been only 120 candidates (from 3,000) passing the exam, although there have been 180 seats. There are two possible explanations to this: either the candidates are not well prepared, or the recruitment system has a shortcut.

The exam for 5 years seniority judges has the same problem. The SCM controls did not reveal the cases when policemen who did not have judicial councillor prerogatives enrolled for the competition, being proposed to be appointed as magistrates to the President of Romania. Only 10-year seniority prosecutors can enter directly the magistracy, passing a simple interview. As prosecutors do not enrol for any competition, and in Romania they do not have to pass an interview, it is easy to fill such positions. We think the system needs qualified persons, especially when things can no longer be changed due to security of tenure.

The number of magistrates had never been scientifically determined. The research carried out in the past two years is not complete. The SCM has recently started a pilot programme by which judges from five pilot courts of justice monitor the time reserved for any type of activity. Pointing out that such monitoring took place for the first time in 2003 within

the AMR – the Cluj subsidiary – we would like to draw your attention to the fact that the procedure was not correct, as the judges had monitored their own activity.

b) Promotion

The way in which competitions for executive positions were organised is a proof of irresponsibility and non-professionalism. It is really strange not to find the responsible, though the candidates and the media[71] invoked many irregularities within the competitions organised so far.

Before 2005 executives were appointed on political and not on managerial criteria. Once the system changed, major difficulties appeared. At present, there is a certain parallelism: some courts have executives who have passed complex tests - management, HR and communication – others with executives whose abilities have not been checked. We cannot speak of a radical change in the judicial system management. This will probably happen about 2009, when the ones appointed according to the old regulations will end their mandate.

c) Transfer

There are regulations on transfers that do not include objective criteria for applying the procedure. That is why there are some debatable issues.

- many prosecutors submitted requests of transfer from courts of law to prosecuting magistracies; putting aside the reduced number of prosecutors, we do not see any reasons for not admitting these requests, as some have been submitted two years ago;
- 5 year seniority lawyers who became judges within a year, are not allowed to transfer to the court house they originally opted for, for the argument that, when they enrolled for the competition, they knew exactly that in such cases position sin less favourite courthouses are normally made vacancies for a competition; thus we see mothers with babies who have to commute from the locality of domicile to another locality where the courthouse is based because the SCM does not approve the transfer.

[71] For instance: http://www.gandul.info/2006-03-29/actual/judecatorii_denunta.

- former judges are sent to courts that do not need extra staff: at Sighişoara for instance there are 5 judges, while in Reghin there is only one, though the activity is double.
- there were cases when judges have not been dispatched – even on disciplinary grounds – we consider this completely unacceptable, since disciplinary penalties can be equivalent to limited transfers.

d) Retirement

Magistrates state they do not know when they have to retire; some, though they have received the order to retirement from the House of Pensions, did not complete the procedure of dismissal from position. Consequently, there were cases when magistrates have two sources of income: the salary and the pension.

e) Deontology

The Deontological Code of Judges was elaborated in 2001, being selectively distributed: only to some magistrates. It was not made public. A new code was elaborated in 2004, with further modifications operated the following year. According to the SCM Yearly Work Report, less than a quarter of the total number of magistrates was informed in 2005 about the Deontological Code during the campaign run within the Phare Twinning 2002 Programme. SoJust considers that debates prior to the code are more important. The code should be the outcome of the debates. Although in Romania there are experts with deontological training abroad, they had not been consulted in the adoption process.

At present, judges and prosecutors share the same deontological code. This aspect is totally unacceptable, as the two categories fill different positions. However, such code should be drafted by the magistrates, by the professional associations, not by an official body. Nevertheless, we think the legal vocational framework – Constitution, laws, regulations, deontological code – is sufficient. But there are still some drawbacks in the system.

f) Disciplinary misdemeanour

We have identified at least 4 malfunctions:

f1. Incompatibilities and interdictions

In order to make sure magistrates are objective, the law stipulates they cannot be members of any political party, carry out trade activities, or fill a public position, except for

the legal curricula. To prevent conflicts of interest, the magistrates are compelled to be NGO members and to declare any of their close relatives working in the judicial system. It was obvious, once the law was published that, in order to ensure all the abovementioned aspects, such declarations had to be made public, though there were no precise regulations in this respect. However, the SCM forgot about the principle according to which law has to be observed, whatever the form.

Given these circumstances, SoJust requested the declarations to be published. The SCM agreed on making the magistrates' activity more transparent: "The SCM Plenum has decided[72] on May 4, 2006, that the declarations 'of interest' signed by the magistrates, attesting their positions within different associations, foundations or non-governmental organisations or political parties, or paid activities that are not part of their mandate or position - as associates or shareholders of a company - including banks or other institutions of credit, insurance or financial companies, to be posted on the website of the court of appeal from the they work. The magistrates yearly submit such declarations, according to article 111 of Law no. 161/2003 concerning the measures for setting transparency in positions in public offices or in the business environment, in order to prevent and punish corruption. There was a decision according to which all written statements of judges, prosecutors and assistant magistrates to be posted on the Superior Council of the Magistracy website, including the spouse, or close relatives – 4th rank included – who fill various positions or carry out judicial activities, or conduct inquiries or criminal investigations. It is compulsory for the magistrates to early submit such declarations, according to article 5, paragraph 3 of Law no. 303/2004 concerning the status of judges and prosecutors, enclosed to the professional file."

But nobody has checked whether this decision was applied or not. Moreover, nobody has checked whether there are magistrates who fail to observe the law. SoJust discovered there are magistrates who increase their income by their illegal membership of various commissions, councils and committees; this applies both to dispatched magistrates and judicial councillors considered magistrates. The only thing the SCM did – including the respective institutions - was to check the wealth statements that were made public.

The law stipulates that magistrates must make their yearly wealth statements public. Though magistrates comply with this regulation, the SCM Inspection did not check their content, although it was its duty. SoJust draws the public attention with respect to the fact that

[72] 2006 http://www.SCM1909.ro/SCM/index.php?cmd=0501&com=173

some magistrates are also shareholders, although the law forbids it. This is precisely what the SCM confirmed by a recent decision.

f2. Good Reputation

According to the law, magistrates need a good reputation in order to enter the National Institute of Magistracy. Once in the system, it is clear that magistrates have to meet the requirements as long as he fills the position. We have noticed that the SCM has no criteria to describe what good reputation is, and no ability to check it.

In 2004 the SCM penalised magistrates with administrative fines, according to article 18^1 of the Penal Code! According to this practice, any magistrate receiving speed tickets would be liable of loosing his/her good reputation, being therefore excluded from the magistracy!

This was supported also by law concerning the status of magistrates as it considered any breach of the deontological code a disciplinary departure. This regulation was abrogated in 2005. In return, we reached the other extreme: 20 magistrates who have been found to have seriously departed from an acceptable public behaviour could not be penalised by the SCM, due to the absence of legal provisions in this respect. SoJust considers that it was normal for the respective decision to be cancelled; the public opprobrium sets penalties to violations of the deontological code. These cases could have been solved on the grounds of article 12 of Law 303- that stipulated the requirements that have to be met prior to admission. It goes without saying that the provisions have to apply subsequent to admission.

A perfect illustration in this respect: a candidate who passed the exam – autumn 2005 – was *not* proposed by the SCM to be appointed by the President of Romania because of his bad reputation. Besides the fact that the SCM decision was illegal and unfounded, we have analysed the reasons. These are the findings: the candidate in question was accused of forgery for which the prosecutor levied an administrative fine. In 2005, once started the investment procedure, the candidate informed his superior prosecutor about the incident and requested him to cancel it ex officio. The latter came with a solution more than favourable to the former, basing his decision on the lack of the personal characteristic in committing the respective crime. The final decision was not contested. However, the SCM did not admit the candidate, saying *the final decision was not good*! If we compare this to the SCM usual way of operating, we may say that the decision was astonishing, since the SCM affords to evaluate the magistrates' decisions, to contest them and not to apply them. As you will see later, things will change. Moreover, if the SCM argued the solution, we think that the superior prosecutor

should have started an investigation. In return, *it is strange that a candidate who received a decision from a judicial body in favour receives another one against.*

But let us recall the previous idea: if the SCM agreed that a good reputation was a prerequisite that needs to be considered, we do not understand the reason why guilty magistrates were not punished. What is even more interesting is the fact that judges with bad behaviour are still filling their positions[73]. That the standard of good reputation is likely to be very flexible…

f3. Wilful Misconduct or Gross Negligence

SoJust underlines the fact that the SCM had erroneously interpreted some legal provisions, which can promote arbitrariness among the magistrates when applying the law.

Both the judicial authorities and the Ministry of Justice requested the SCM to investigate some magistrates for misfeasance, abuses or incompetence. Without stating precisely terms such as "independence", "justice" or "interference", the SCM considers that investigations are a question of interfering with the activity of the judicial authorities, while they perform their duties.[74] Once the case is closed, it is clear that the SCM could no longer intervene. What SoJust pointed out was the fact that *these requests of investigation were wrongly interpreted by the SCM as attempts of interference*. The SCM tried to state its position saying that it could not analyse the decision a magistrate made, without affecting the independence of the former. However, SoJust cannot accept this solution.

The justice independence is a matter of state of affairs, but that does not mean it is the magistrates' privilege but the *citizens' benefit*¸ as the latter have to be protected against any abuse or form of arbitrariness. To avoid turning independence into a shield for magistrates who act inappropriately, it should go hand in hand with responsibility. According to the SCM, only the superior judicial authority is allowed to decide whether a magistrate's decision is good not. According to SoJust, a different principle should be applied: only the superior judicial authority may contest a solution; the way in which law is applied can and may be analysed according to penal[75], disciplinary[76] or specialised principles. It is wrong to believe

[73] The "Voodoo Judge case" - http://www.ziua.net/display.php?id=195506&data=2006-03-11,

[74] http://www.SCM1909.ro/SCM/linkuri/24_02_2006__3093_ro.doc (point 11), or http://www.SCM1909.ro/SCM/linkuri/24_02_2006__3092_ro.doc (points 67 and 70).

[75] The Criminal Code indicates criminal offences that magistrates might commit when dealing with cases. The unjust reprisal (article 268) means "prosecuting, arresting, referring to court or convicting someone who is not guilty, being fully in full awareness of such reality." Given such circumstance, it is clear that a superior judicial authority other than the one that is next in the regular hierarchy to hear appeals against such decision, will be called to decide whether the judge or the prosecutor made mistakes when dealing with such a case. The final decision that will ascertain such offence w\shall trigger the reviewing of the illegal or ungrounded decision,

that a magistrate's decision cannot be contested; sometimes incongruities are necessary, to prevent further similar mistakes or to impose legislative changes. In exchange, the authority of a final decision must be observed.

Another reason to support this idea is that the magistrates' disciplinary liability can be trained also with respect to other departures – activities or decisions taken while filling a position – repeatedly breaking the principle of secrecy of jury deliberations or of confidentiality of works, of legal provisions concerning solutions, unreasonable rejections of requests, conclusions, memorandums or documents submitted by the parties in a case, delayed work executions – for imputable reasons (article 99, letter d, f, e and i of Law no. 303/204.)

Article 97 of Law no. 303 stipulates that "Any person can address the SCM, either directly or by the executives of courts of law or prosecuting magistracies, with respect to the *activity*, or *wilful misconduct* of judges or prosecutors, *gross negligence* towards judicial authorities or disciplinary departures." Articles 43 and 44, letter c of the SCM Organisation and Functioning Rules, approved by the SCM Decision no. 326 from August 24, 2005 stipulates that Judicial Inspection is charge of checking the notices addressed to the Council as regards the *activity* or the *wilful misconduct* of judges and assistant magistrates by the High Court of Cassation and Justice, prosecutors respectively and *wilful misconduct* or *gross negligence* towards judicial authorities.

We agree to the fact that checking the magistrates' activity does not mean questioning their solutions – which may be changed by appeal into court, as stipulated under article 97, paragraph 2 of Law no. 303/2004. However, we cannot wonder how it is possible to evaluate a magistrate's activity unless checking his documents and decisions… No case of professional incompetence has been recorded so far, though there were dismissals from positions because of this.

We do not believe that magistrates should be reluctant to such controls; either it is material or disciplinary or criminal liability, the guilty will be judged only by their colleagues. There are two possible explanations: either they lack competency - since they are aware that

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which is stipulated in the Codes of Procedure. A similar procedure applies to other offences such as illegal arresting and abusive investigation (article 266 of the Criminal Code), legal forms of abuse of office (articles 246-248[1]), professional negligence (art. 249), abusive conduct (article 250), forgery in connection with written documents (articles 288, 289, 291). All the aforementioned offences can be committed by judges and prosecutors in their work; when such offences become part of their decisions, bodied other than those superior to them are called upon to ascertain and punish them.

[76] When wilful misconduct or gross negligence is not considered criminal offence, it might impose disciplinary penalties. Since a judge or prosecutor's mission is to deal with cases and follow the procedures as well, it is clear that such irregularity will need to be heard by an administrative body – SCM in this case.

they can be held liable for any error, they avoid taking up responsibility - or their colleagues, who are under a disability, do not risk being judged by the latter. Whatever the choice, the system lacks professionalism.

f4. Redress from Disciplinary Penalties

In conclusion, we notice there is a new concept the SCM members developed: although legally speaking any citizen has the right to appeal against an authority's decision, the SCM considers that once the disciplinary action was rejected, the disciplinary commission may also appeal against that, as party to the disciplinary procedure. Apart from the fact that a new quality in court proceedings would be thus created while not been granted by the law, we cannot understand how the disciplinary commission (made of one SCM member and two Inspectors) could take legal action against the judges/prosecutors' department working for the same institution.

Given the present context, the subject regarding the Judicial Inspection members appointed as SCM members is still open to discussion. The Commission of Discipline includes both categories and can dispute decisions taken by the disciplinary section. The inspectors' objectivity and that of the SCM members – members of the Disciplinary Commission that are supposed to investigate and judge magistrates - is highly questionable.

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Cap. III MINISTRY OF JUSTICE AND REFORM OF THE JUDICIARY

Core ideas:
The Ministry presents shortcomings in the area of public policies.
Major inconsistencies have been identified among the various normative acts developed by the Ministry
The Ministry's authority over the Public Ministry is not fully used
The war between the minister and the SCM is not for the benefit of the system

A reputed member of the civil society and fundamental human rights and freedom militant being appointed to the public dignity office of minister of justice brought along a major hope in the reform of the judiciary not only to the civil society, but also to the overwhelming majority of judges and prosecutors, the latter having been through the experience of years of systemic humiliation (2001-2004 – the saddest post-Communism years for the magistracy, years when they suffered an evident restriction of their independence and impartiality of their work, under the autocratic leadership of former minister of justice Rodica Stanoiu).

The Ruling Programme[77] in the area of justice as well as the one in the area of combating corruption reflected the aforesaid hopes, which represented the expectations and hopes of the civil society and of the majority of judges and prosecutors.

In what concerns justice, the Government set three overriding objectives (Chapter 26 of the Programme), namely:

- to guarantee an effective independence of the judiciary;
- to guarantee access to justice to the citizens by improving the operation of the judicial system as a public service and
- to develop the necessary institutional framework.

For the fulfilment of those objectives, the Government, therefore the Ministry of Justice implicitly, sought to take a number of measures also set forth in the Ruling Programme. We are hereby mentioning the most important of them:

[77] Decision of the Romanian Parliament number. 24/28.12.2004, published in the Official Journal of Romania, Part I, number 1265/29.12.2004, through which the Romanian Government entrusts the Romanian Government as per Annex 1 with carrying out the Ruling Programme set out in Annex 2.

- to consolidate the role of the Superior Council of Magistracy (SCM) as guarantor of the judiciary, to regulate the SCM as a body with a permanent activity, to introduce the obligation that the SCM members be suspended from all leading positions held in court houses or prosecutor's offices for the duration of their term in office, to have SCM report annually on the state of play in the justice system, to clarify the statute of the prosecutor and the role of the Public Ministry, the legal content of the stability of prosecutors and of their hierarchical subordination (principles that will be found at the foundation of a special law on the statute of the prosecutor and of the Public Ministry), to remove the right to vote of the minister of justice within SCM, to ban the SCM members from being re-elected for same position, to suspend them from the office of judge and also from the possible leading positions they may have, during their term in office – all for the purpose of guaranteeing an effective independence of the judiciary.

- to conduct a unitary reform of the procedure codes and of the other relevant normative acts towards simplifying judicial procedures and administrative procedures preceding those for a celerity in ruling on litigations, to abrogate Government Act no. 22 (2002) on the payment obligations of public institutions (an unconstitutional act from the point of view of the authors of the Programme), to generalise and adequate system for an impartial allocation of cases to the various courts or to prosecutors, to adjust the structure of courts to the specificities of the cases pending before them and to establish specialised departments, to reconsider and resize the number of courts, prosecutor's offices and judges to match the actual caseload of the judicial system, to improve competencies in the organisation and operation of the system for the execution of custodial and non-custodial sentences, to digitise the justice system – all this for the purpose of guaranteeing access to justice;
- to gradually restrict the competence of the Ministry of Justice while increasing the SCM competence, to prepare, jointly with SCM and with representatives of the professional organisations, including the barristers and solicitors, the legislation in the judicial area and monitor its implementation, complete and adopt the necessary legislation for the implementation of the acquits communitarian, the Civil Code, the Civil Procedure Code and the Criminal Procedure Code, clarify the statute of the National Corruption Prosecutor's Office towards ensuring its effective independence, terminate military courts and prosecutor's offices, integrate the Judicial Police under the strict and complete subordination of the Public Ministry and under the authority of the minister of justice, while providing its commensurate statute and budget, support

reform and modernisation of the rules governing the organisation and work of the courts and prosecutor's offices, encourage the establishment and operation of the professional organisations of the magistrates and of the auxiliary staff and ensure co-operation among the SCM, the Ministry of Justice and those organisation, regulate the statute of the intelligence service of the Ministry of Justice by law and effectively put it under the oversight of the Parliament, delegate the activities of the Trade Register and of the Land Register to liberal professional systems that would function autonomously under the authority of the Ministry of Justice, take over from the Foreign Ministry the competence to represent the state before the European Court of Human Rights and prepare the exercise of representation competence before the European Court of Justice in Luxembourg – all for the purpose of developing the institutional framework.

In what regards the anti-corruption measures devised by the Government in the same Programme (Chapter 10), regarding the judiciary, they are two:

- change the legislation to permit the appointment of the Attorney General of the National Corruption Prosecutor's Office by the president of Romania at the proposal of the Superior Council of Magistracy and
- introduce the mandatory suspension of the SCM members for the duration of their term in office from the possible leading positions they may be holding in court houses or prosecutor's offices.

SoJust finds that, in the first part of 2005, the Ministry of Justice, through the minister of justice, was totally open, was attentive to the main issues of the justice system, and effectively consulted the major stakeholders in the system. During that period, the essential element was the consultation of the magistrates[78] and of the civil society[79], but also the adoption, as a result of a genuine consultation of the SCM, directly of the judges and prosecutors' professional associations, of the strategies for the reform of the judiciary and for the national anti-corruption strategy, of related action plans[80], as well as the amendment and completion of the

[78] Please refer to http://www.just.ro/comunicate.php?idc=31, the delegation of the Ministry of Justice meets, March 11, 2005, in Bacau, representatives of judges and prosecutors in Moldavia. They have similar talks with representatives of judges and prosecutors in Cluj and Timisoara, at about the same time.

[79] Please refer to consultations in the summer of 2005 in connection with the draft law on the regime of public grants: http://www.just.ro/comunicate.php?idc=98 .

[80] Approved by Government Decision number 232/30.03.2005, published in the Official Journal of Romania, Part I, number 273/01.04.2005.

justice laws, the latter also with the Government's taking responsibility before the Parliament[81].

On July 6, 2005, by means of the Decision no. 375[82], the Constitutional Court finds in an *a priori* constitutionality control, that several stipulations (all of them concerning the legal field) in the legislative pack on the reform of property and justice, as well as a number of adjacent measures are unconstitutional, curtailing the legal reform project and thus delaying the actual reformation of the system[83].

This political and legal episode marks a breach in the attitude of the Ministry of Justice and of the minister of justice towards the other actors of the legal system. Moreover, we notice the obvious politicising of the actions and statements of the minister of justice, to the prejudice of a constructive reform of justice (the minister's punctual statements and declarations, which may be historically viewed on the web at www.just.ro, have suffered an involution from the first statements, in which she pleaded with magistrates to reform the system, to the latest statements, where her sole concern seems to be to accuse some of the members of the political parties for not supporting the illusive legal reform.

1. Public policies in the area of justice at the Ministry of Justice. Initiative and adoption of normative acts

The secrecy in which some normative acts have been prepared, without producing public policy processes including the participation of the active stakeholders of the justice system, as well as the input of those interested in certain areas where the Ministry of Justice has been involved, after July 6, 2005, has been obvious, especially for the main possible beneficiaries, respectively for judges, prosecutors and for the professional associations founded by them.

The simple publication on the Ministry's website, after July 6, 2005, of the draft normative acts initiated by the ministry, and the creation of a discussion forum for these drafts on the Ministry's website[84] have not compensated for the lack of these public policies. The

[81] Law number 247/19.07.2005 on the reform in the area of property and justice, as well as other related measures, published in the Official Journal, Part I, number 653/22.07.2005.

[82] Published in the Official Journal, Part I, number 591/08.07.2005.

[83] Please see the media coverage of this decision: http://www.cotidianul.ro/index.php?id=1159&art=855&cHash=1a9127e7f3, http://www.gandul.info/articol_46/guvernul_anunta_ca_vrea_sa_faca_un_tarc_curtii_constitutionale.html .

[84] Please refer to the „Forum" section on www.just.ro.

Ministry has shown an obvious opacity towards possible suggestions, observations or even issues of public policy in the field of legal reform.

The lack of communication on the part of the Ministry of Justice and, especially, of the minister of justice with the exterior, particularly with those active elements of the civil society and of the legal system that wished and had the necessary expertise to suggest public policy issues and to participate constructively in public policy processes, has lead to a lack of a concerted efforts of continuing the reform of the justice system.

We must point out that since the approval of the 4 programmatic documents, namely the two reform strategies of the legal system and of the national anticorruption effort, as well as the two action plans, the justice reform has been blocked and limited to accomplishing the "tasks" specified by these programmatic documents. In this sense, the lack of public policies, from January 2005 until the present time, becomes obvious by simply visiting the Ministry of Justice website, where, in the „Consulting the civil society" section, we only find four public policy issues in which the civil society was consulted (the draft law modifying Law no. 656/2002 for the prevention and punishment of money laundering, the consultation of the public on the future of the Internal Market of the European Union, the draft laws modifying the organization of the judiciary and the on the declaration of assets, conflicts of interest and incompatibilities)[85].

According to the answer communicated to SoJust (Letter no. 80131/II/08.09.2006 written by the Ministry of Justice – Cabinet of the Minister), at our request, the public policy unit[86] in the Ministry was founded on January 24, 2006 (Order no. 394/C/2006).

Although, up to this date, the Ministry of Justice has been concerned with preparing several draft normative acts, only in two cases, as confirmed by the above-mentioned correspondence, has it proceeded to initiating and conducting public policy processes: the draft law concerning the declaration and control of assets and conflicts of interest, as well as incompatibility regulations for people who hold public offices and dignities, and the draft law amending Company Law 31/1990.

The situation is the more serious as we find, in fact, that the Ministry of Justice has not completely observed the public policy procedure, as stipulated by the art. 8 par. 2 of the Regulations concerning the procedures of preparation, monitoring and assessment of public policies at a central level („*The activity of identifying variants is conducted with the*

[85] Please refer to http://www.just.ro/rtrv_MC.php?param=consult_soc_civila .

[86] As stipulated by the Government Decision no. 775/2005, published in the Official Journal of Romania, Part I, no. 685/29.07.2005, approving Regulation concerning the procedures of drafting, monitoring and assessment of public policies at a central level.

participation of non-governmental organisations, social partners, professional associations and representatives of the private sector that are involved, influenced or interested in the way this particular problem is being solved") in at least one of two cases in which the process of public policies was applied. The people "*influenced or interested*" in this public policy issue, and we include here judges, prosecutors, and the professional associations founded by them, were not invited by the initiator to participate in this process, although they were entitled to that according to the contents of the above-mentioned normative act – since the provisions in this draft law (known also as „the NAI project", after the name of the National Agency for Integrity) directly concern the judges and prosecutors: art. 14 point 25 (declaration of assets), art. 31 par. 2 (conflicts of interest and art. 58 and 59 (incompatibilities). By simply referring to the minutes drawn up on the occasion of debating this public policy issue, we may note that only the representatives of the civil society were invited at the debate eventually set for the date of April 6, 2006, and not the judges and prosecutors, the professional associations or even SCM[87], although consulting the people mentioned in the art. 8 par. 2 of the above-mentioned Regulation might have brought necessary clarifications to the text, which suffers from major constitutional shortages through the way in which the National Agency for Integrity is regulated.

On the other hand, the participants in this public policy process, all members of the civil society, have accused the Ministry of Justice of ignoring the discussions conducted during the debates, the opinions and suggestions[88] expressed. Thus, in fact, this public policy process was stimulated because the project did not take these observations and suggestions into consideration.

Otherwise, the impossibility to predict the initiation and, eventually, the approval of normative acts by the Ministry and the Government obviously undermines the stability of legal interactions. Judges and prosecutors, who are after all the ones enforcing the law, lack security and certitude in applying normative acts precisely due to the extremely rapid changes in normative acts.

Thus, on September 6, 2006, the consistent changes and additions brought to the Code of Criminal Procedure[89] have taken effect (the Code of Criminal Procedure is an important

[87] Please refer to: http://www.just.ro/files/organizare_judiciara/Minuta.doc .

[88] Please refer to: http://www.transparency.org.ro/text.php?LNG=ro&MOD=2&SEC=94&ART=26, statement signed by three non-governmental associations: the Open Society Foundation, Transparency International Romania, and the Centre for Legal Resources.

[89] The Law no. 356/21.07.2006 for the changing and completion of the of the Code of Criminal Procedure, as well as for the changing of other laws, published in the Official Journal of Romania, Part I, no. 677/07 August 2006.

normative act that establishes the rules to be followed in a lawsuit, the stability and provision of which are necessary not only for the parties to court proceedings, but also for the members of the judiciary, the ones who apply them). However, it seems that the draft Code of Criminal Procedure finalised by means of the Law no. 356/2006 for the changing and completion of the Code of Criminal Procedure, as well as for the changing of other laws, itself devised in lack of an adequate public policy, was not conceived in the smallest details since, on the day when the Law no. 356/2006 should have taken effect, the Emergency Act no. 60/06.09.2006[90] was approved as bearing the same title: for changing and completion of the Code of Criminal Procedure, as well as for the changing of other laws.

The conclusions of such a poor development are either that there are several work groups functioning in the Ministry of Justice that do not work together, or that the phrase "public policies" is unknown to this central public authority, or both. At any rate, legal instability undoubtedly harms the independence of the judge by subjecting them to an unjustified pressure from the executive and legislative bodies (in this case, the blame belongs entirely to the Ministry of Justice). The more so as, at the time the official site that hosts the Official Gazette, Section I, was consulted (September 10, 2006), the text of the normative act did not appear as registered. Therefore, we do not know according to which normative act the judges delivered their findings and how the prosecutors managed cases during the period between September 7, 2006 and September 11, 2006. It is useless to mention that, with respect to the Emergency Act no. 60/2006, through its rapid adoption, the Ministry of Justice has not initiated any process of public policies, although it was obligated to do so by the Government Decision no. 775/2005.

Last but not least, at the level of the Ministry of Justice there are commissions created for the preparation of various draft laws, in which judges and prosecutors are often involved. Nevertheless, the method of appointment and formation of these commissions is not transparent. For lack of a transparent selection based on the expertise of future members, we may assume that the appointment of these members is arbitrary, with direct consequences on the quality of draft laws written by these commissions. This fact may be another source for the lack of consistency of many projects, which leads to overnight changing of normative acts once they have been approved.

SoJust believes that the Ministry of Justice has disregarded, through the above-mentioned facts, one of the objectives established in the Government Programme, namely

[90] Published in the Official Journal of Romania, Part I, no. 764/07 September 7, 2006.

guaranteeing the citizen access to justice. Thus, although the Ministry has decided to take the measure of performing *„a unitary reform of the procedure codes and other relevant normative acts in order to simplify the legal and administrative procedures for ensuring the celerity of adjudication"*, for achieving such an objective by a cascading approval of normative acts that we have mentioned, the "unitary reform" of these normative acts is impossible.

2. How the Ministry of Justice relates to the Public Ministry, prosecutors and prosecutor's offices

From a formal point of view, prosecutors and implicitly the Public Ministry are functioning under the authority of the Ministry of Justice.

Unfortunately, the constitutional text that describes the subordination of prosecutors to a representative of executive power, respectively art. 132 par. 1 of the Constitution of Romania (*„Prosecutors function according to the principles of legality, impartiality and hierarchical control, under the authority of the Ministry of Justice")* is ambiguous due to its topography.

Thus, the Public Ministry is mentioned in the chapter concerning legal authorities, leaving the impression that it possesses the independence attribute held by other authorities, respectively ÎCCJ, courthouses and SCM, art. 132 par. 1 of the Constitution, mentioned above. Yet, the denomination of Public Ministry given to this public authority (in fact, the ambiguity produced by this denomination accentuates the bewilderment and confusion of the constitutional determination of this public authority. It is worth noting that this is the only ministry without portfolio, that is without a direct representative in the Government), as well as its institutional subordination to the minister of justice obviously denies the independence statute of prosecutors, since they are under the authority of the executive power, namely that of the Ministry of Justice.

SoJust cautions that, 16 years after the events of December 1989, a public authority of the Romanian state, and we refer here to the Public Ministry, does not have a clear and distinctly defined statute, or even a constitutional statute, and that there have been no public debates on its role and use (although the activity of this authority is essential for the creation and future maintaining of a state of law).

One of the objectives established by the current Government before the Parliament was that of ensuring actual independence for the legal authorities, and an important measure mentioned in the Programme, for achieving this objective, was *„clarifying the statute of*

prosecutors and the role of the Public Ministry, of the legal content of the prosecutors' stability and of their hierarchical subordination (principles that will form the basis of a special law concerning the statute of prosecutors and of the Public Ministry)". It is assumed that the confidence vote of the Parliament, received by the Government on the occasion of its investiture should have licensed the executive as well as the Parliament to strictly abide by the proposed Programme. In fact, the Decision no. 24/2004 of the Parliament of Romania (quoted above) legally has an obligatory force for the Government and its elements, precisely because the role of the executive authority is to execute the normative acts approved by the Parliament. This is the role of a state of law.

The first person entitled to initiate a real debate on this matter, namely the minister of justice, has instead limited herself, in her relationship with the prosecutors, to issuing statements regarding various leading structures of the Public Ministry (in order to change them, of course) and to sketching a report of the activity of the Public Ministry for the year 2005, based on the analysis of other reports[91]. It is unacceptable in the opinion of SoJust that the Ministry of Justice not be capable, after almost two years after taking over the office, to fulfil one of its constitutional prerogatives, namely the „authority over prosecutors", although an entire ministerial direction is in place to ensure the functionality of this "authority" („the Direction for Relations with the Public Ministry and Prevention of Criminality and Corruption").

The fact that, during these two years, the Ministry has presented a single report suggestively entitled „Conclusions over the activity report of the Office of the Prosecutor with the High Court of Cassation and Justice"[92], which does not use its own data, obtained by enforcing the "authority" in question, but that borrows data from various reports, giving more than questionable interpretations (oriented more towards throwing the "anathema" on the former leaders of the Public Ministry than towards an institutional growth and consolidation implied by the exercising of the "authority" function) leads to the conclusion that the Ministry of Justice has not achieved one of the objectives in its Government Programme.

Unfortunately, in comparison with the Public Ministry, the prosecutors and their offices, the Ministry of Justice has limited itself to simple statements and declarations, in lack of well-supported analyses and studies and of obvious communication with the Public Ministry and its elements.

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[91] Please refer to: http://www.just.ro/comunicate.php?idc=247 .
[92] http://www.just.ro/files/diverse/MP%20Evaluare%20activitate.doc .

In this context, in order to support our position, we will reveal the fact that when the former Prosecutor General, Mr. Ilie Botoş, forwarded his resignation, the Minister of Justice stated[93] flatly and disconcertingly at the same time that: *„The Minister of Justice, Monica Macovei, has acknowledged the resignation of the Prosecutor General of Romania, Ilie Botoş. The Minister of Justice has repeatedly expressed her opinion about the Prosecutor General's managerial competences. The Minister of Justice will shortly initiate the proposal procedure for a Prosecutor General of PICCJ."* Yet, in lack of a thorough analysis and of an effective control of the management of the Public Ministry and its elements, although the minister of justice had such an obligation as a "task", such statements seem ridiculous.

Returning to the measure stipulated in the Government Programme, SoJust appreciates that the Minister of Justice, at least until the present time, has failed to accomplish this measure, although a real, public and supported debate on the relationship between the Minister of Justice and the legal authority represented by the prosecutors would have been necessary.

The more so as, as mentioned above, constitutionally, the prosecutors are subordinated to the minister of justice, and yet the Public Ministry is independent administratively and financially from the Ministry of Justice (art. 70 paragraph 4 of the Law no. 304/2004 for legal organization). This is because the Prosecutor General of the Prosecutor's Office with the High Court of Cassation and Justice is main paying authority. Meanwhile, as a strange fact, although the courthouses should be independent, including financially, the courthouse presidents are only secondary or tertiary paying authorities, while the main paying authority is the minister of justice (it is true that starting from January 1, 2008 the courthouse budgets will be administered by the HCCJ).

It is worth noting, though, that the particular department in the Ministry of Justice that deals with administering budget and extra-budget funds has managed a far more efficient administration than in former regimes, achieving, for example, the massive digitisation of courthouses (with a few dysfunctions, it is true, but these can be explained considering the vastness of the project), the inauguration of the imposing building of the Palace of Justice in Bucharest, the closer monitoring of rehabilitation projects for some courthouses around the country, etc. But the debate on the essence of the problem remains.

However, we must say that the Ministry of Justice has concentrated its attention on the functionality of the National Anticorruption Department (DNA), which is the new

[93] http://www.just.ro/comunicate.php?idc=264 .

denomination of the interior structure of the Public Ministry that is specialized in fighting corruption. Yet, even if real achievements can be confirmed for the year that has passed since the appointment of the new chief prosecutor of this Direction, these achievements are due to the individual competence of the person running this department rather than to the minister of justice.

Besides, the normative design of this department suffers from real constitutional shortages, which we have mentioned on other occasions[94], shortages that come especially from not consulting specialists in the constitutional field at the time when the project of the normative act for the reorganization of this department was conceived.

Here, again related to the lack of predictability of normative act approval, we wish to point out that the Emergency Act no. 134/2005[95] approved by means of the Law no. 54/2006[96] overlaps, concerning the National Anticorruption Department, with the dispositions of the art. 80 and the sequels of the Law no. 304/2004 for legal organization, the latter as modified by means of the Law no. 247/2005 for which the Government has assumed responsibility before the Parliament in the month of July 2005.

In other words, there are two normative acts issued at an interval of two months one from the other, which give dissimilar regulations for the same structure of the legal authority. The first normative act, namely the Law no. 247/2005, expresses the political will of supporting the DNA Yet, it is difficult to explain how the Ministry of Justice, at the time of the creation of the law project by means of which the Government has assumed responsibility (undoubtedly, a political act of significant dimensions, which once again forces the Government to respect the promises it made before the Parliament, promises which it imposed on itself).

For example, in the Law no. 54/2006 DNA. is a secondary chief accountant of credits – art. 4 par. 4, while in the Law no. 304/2004 DNA appears as being the main chief accountant of credits – art. 82 paragraph 3.

A more serious inadvertence in the two overlapping acts is that between the DNA. report and the Prosecutor's Office with the High Court of Cassation and Justice, which concerns the hierarchical control principle that constitutionally characterizes the activity of prosecutors. In

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[94] http://www.sojust.ro/forum/viewtopic.php?t=110&sid=81d429934d89403813f73835b812a379 and http://www.sojust.ro/forum/viewtopic.php?t=117&sid=81d429934d89403813f73835b812a379 .

[95] The Government Emergency Act no. 134/29 September2005 for the changing and completion of the Emergency Act no. 43/2002 concerning the National Anticorruption Office, published in the Official Journal of Romania, Part I, no. 899/7 October 2005.

[96] The Law no. 54/9 March 2006 for the approval of the GEA no. 134/2005, published in the Official Journal of Romania, Part I, nr. 226/13 March 13, 2006.

this sense, the article 3 index 1 of the Law no. 54/2006 stipulates that the Attorney General of the High Court of Cassation and Justice rules the DNA. by means of the Attorney General of this institution, while the art. 80 par. 2 of the Law no. 304/2004 stipulates that the DNA is coordinated by Attorney General of the High Court of Cassation and Justice. Or, the legal consequence of this inadvertence is not to be neglected because it can have unwanted repercussions on the proper functioning of this institution. Thus, "coordination" does not necessarily imply that the Attorney General of the High Court of Cassation and Justice assume responsibility for the actions of the DNA., especially since this coordination is limited to general matters, while leading such a legal authority obviously implies the entire responsibility of the one who runs the DNA.

Another surprise is the position of the minister of justice[97] with respect to the initiative concerning the change of the procedures of appointing and withdrawal of the prosecutors in leading positions, especially of Prosecutor General of the High Court of Cassation and Justice and of the Attorney General of the DNA. Even if these initiatives are questionable, a public debate is more than necessary now, considering that it was implied by the Government Programme, as mentioned above, but especially because the same Programme includes among the objectives of fighting corruption (Chapter 10) the measure of *„changing the legislation in order to allow the appointment of the Prosecutor General of the* National *Anticorruption Department by the President of Romania at the suggestion of the Superior Council of Magistracy"*. Yet, the opposition of the Minister of Justice, without a public discussion of the necessity of modifying the priorities set out in the Government Programme is not recommended.

3. How the Minister of Justice relates to the Superior Council of Magistracy

The relationship of the Minister of Justice with the SCM is not only functional and formally institutionalised, but also favouring participation.

Thus, art. 28 of the Law no. 317/2004 regarding SCM establishes that the Minister of Justice participates in all plenary session, as well as in both selections of the judges and prosecutors, having the right to vote, excepting the cases where the departments fulfil the role of a courthouse in disciplinary responsibility.

[97] Please refer to the statement of September 5, 2006: http://www.just.ro/comunicate.php?idc=281 .

Practically, the participating role of the Minister of Justice in SCM sessions is a very important prerogative along that of authority for the Public Ministry, prosecutors and their offices as well as that related to the legislative initiative in the legal field.

Considering the vastly wide variety of prerogatives of SCM we are referring both to the Plenum (art. 35 – 39 of the Law no. 317/2004 rep.) and to the departments (art. 41 – 43 of the same law), and taking into advantage the major importance of the activity of this legal authority on the eve of Romania's integration in the European Union, we would have expected an extremely active and constructive attitude on the part of the Minister of Justice during SCM sessions, precisely in order to invigorate this legal authority.

At the request of SoJust, addressed to SCM, according to the Law no. 544/2001 concerning the access to public information, SCM, by way of the letter no. 243/BIPRM/07.09.2006, through which we asked at how many sessions the Minister of Justice participated as a rightful member, SCM offered the following reply:

- *„during the period September – December 2005 the minister of justice participated in 3 sessions (partial presence) of the Superior Council of Magistracy of the total of 16 sessions;*
- *during the period January – September 5, 2006 the minister of justice participated in 10 sessions (partial presence) of the Superior Council of Magistracy of the total of 27 sessions.*

According to the art. 38 paragraph (4) corroborated with art. 32 of the Law no. 317/2004 regarding the Superior Council of Magistracy, re-published, the minister of justice has legislative initiatives that need to be approved by the Superior Council of Magistracy, which is the reason why such initiatives were forwarded.

We wish to specify that, as a rightful member of the Superior Council of Magistracy, the minister has had the following interventions during the sessions she participated in:

- *perpetuating the activity of the members in the Superior Council of Magistracy;*
- *the exclusion the Superior Council of Magistracy of Mrs. Maria Huza;*
- *performing preliminary research on Mrs. Lidia Bărbulescu, vice-president of the High Court of Cassation and Justice;*
- *expressing discontent over the rejection of the requests of seconding judges/prosecutors to the Ministry of Justice;*
- *cancelling the decision of the Plenum of the Superior Council of Magistracy by which the president of the Council has the possibility to delegate people,*

in exceptional cases, for leading positions in the apparatus of the Superior Council of Magistracy;

- *demanding the releasing from office of the president of the Court of Appeals and of the Dolj Courthouse President."*

The number of sessions in which the Minister of Justice has effectively participated is extremely small, although her presence would have been necessary considering the long debated reform of the justice system. We wish to remind that the Minister of Justice has the right to vote, which, according to the administrative interpretation laws, and in lack of deliberate derogations, may not be delegated. In other words, the presence of other people from the Ministry of Justice replacing the minister is not acceptable as an excuse, as only the Minister has a voting right.

We can state that, practically, SCM was deprived of the input of a major actor in the legal field, and particularly of the legal reform. We mean, of course, the Minister of Justice, who, in 2005, between September and December, of the total of 16 sessions participated only in 3, while between January and September 5, 2005 she participated in 10 sessions out of 27.

Perhaps the greatest problem is not the absence from sessions, as much as the minister's statements in these sessions, which amount to 6 (please see above the contents of the SCM statement). Except a single intervention that can be qualified as constructively related to the activity of courthouses, judges and the system in general (we do not know whether the intervention was well-grounded[98], as the SCM Plenum is still expected to express an opinion. We mean here the request for the withdrawal of the President of the Craiova Court of Appeals and of the Dolj Courthouse President with regard to the alleged inadequate managerial performance), and another of expressing discontent over the rejection of the secondment of judges and prosecutors to the Ministry of Justice (an issue that was rather an internal problem of the Ministry of Justice with no connection to the appropriate activity of the justice system). The other 4 interventions are strictly related to the SCM members or to their activity.

From this point of view, it seems more like the Minister of Justice is fighting a personal war against the SCM members. At least this is the impression according to the information received and exposed above.

4. Internal management of the Ministry of Justice

[98]Please refer to: http://www.just.ro/comunicate.php?idc=279 .

The National Criminology Institute (here INC) was founded at the end of the year 2002 with the avowed purpose of „scientifically ensuring the prevention and control of criminality".

Initially, a personnel scheme was devised, in which there were stipulated 38 positions, including the positions of manager and assistant manager.

At present, the specialty personnel consist of 21 people. The great majority of them were assimilated to the magistrates, which means that they enjoy the same rights, including salary, and obligations as the magistrates.

As we don't have an internal perception of INC, the information that comes from this public institution is very scarce and inconsistent.

Thus, the activity of INC is reduced, according to its official website, to a few seminars, all conducted between 2003 and 2004. For the years 2005 and 2006 there is no indication of activities held by the INC.

The website does not contain any study, strategy or programme, although according to the Regulation concerning the organization and functioning of the INC, the activities that this institution should conduct are clearly and concretely described (art. 3 of the Regulation).

However, the most serious aspect is that the INC has not been included in the plans of the legal reform strategy and in the anticorruption plan, meaning that it has no attributions or responsibilities stipulated in these documents that are extremely important for the reform of the legal system.

Yet, it is unacceptable that an institution created for the scientific assessment of criminality and for offering solutions for its control, with a special regard to the prevention and fighting of corruption, having 21 specialists in criminology, not be "trained" in this process of legal reform.

From the outside of the Ministry of Justice we can say that the INC has no visibility, that it distinguishes itself more through scandals (last year attempts of influencing the tenure exam, this year the alleged blackmail on the part of the Ministry of Justice towards an employer who asked for transfer from this institution, etc.). As compared to the generous salaries that the specialty personnel of INC receives (equal to those of a judge or a prosecutor), the actual activity of this institution leads to the idea that the existence of INC is not justified and that it should be profoundly reformed, considering that the Romanian society benefits too little from the work conducted by this institute.

The most difficult management problem, which is hard to explain considering that a lot of the competence of the Ministry of Justice was taken over by SCM, is related to the fact that the personnel working at the Ministry of Justice has not been sized down. On the contrary, the official data shows that at present the Ministry of Justice has 412 positions in 2006, although in 2005 there were 324.

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Chapter IV THE LAWYER PROFESSION

Core ideas:
Lawyers must be involved in the Justice reform.
But first, the identity crisis of this profession must be solved.
There are financial issues which need addressing.

The solicitor/barrister profession has witnessed spectacular and surprising changes over the past 16 years. Profession leaders' claim to recover and carry on the pre-war tradition was challenged by post-1989 developments and regulations, which have turned the Romanian legal practice into a hybrid product, marked by all older and newer limitations of the Romanian society.

The present report is a brief (yet relevant) and subjective (yet honest) account of the circumstances which generated the contradictions and inequities that we are facing at present.

1. Some recent history

Like most institutions in post-1989 Romania, the solicitor/barrister practice too had its "wild years" between 1990 and1995, when whoever could took full advantage of the inadequacy of relevant regulations.

Decree Law No. 90 of 28/02/1990 on measures to organize and practice the solicitor/barrister profession in Romania[99] removed the solicitor/barrister profession from the Ministry of Justice tutelage, to regulate it in an oversimplifying manner, as operating *under the profession autonomy principle*. The profession forums were announced on the same occasion: the *Romanian Solicitor/barrister Congress, Council of the Romanian Solicitor/barrister Union, Standing Commission of the union, President of the union, Bar General Assembly, Bar Council* and *Bar Dean*, with the mention that the *Romanian Solicitor/barrister Union* (UAR) and *bars* are *legal entities*.

[99] Published in the Official Journal, Part 1 no. 32 of 01/03/1990

UAR (renamed Romanian Bar Union – UNBR in 2004) and the bars therefore seem to have gained their legal person status even before they were established *de jure*. Because in a (fourth and) last article, Decree Law No. 90/1990 emphatically stipulated the requirement that *within 15 days since endorsement of the present decree-law, the forums of the Romanian Solicitor/barrister Union will be established* (!?) Even today we have difficulties identifying the agent of the aforesaid provision – who was actually to establish the respective structures?

This congenital flaw, partly owing to the candid fertility of the Provisional National Union Council, and partly to the inadequacy of the legislation on persons[100] ensured that to this day the immaculate conception of the solicitor/barrister profession's modern bodies is seen as a fact as undeniable as it is miraculous.

Although tardy[101], Organic law no. 51/1995 *for the organization and practice of the solicitor/barrister profession* instates a systematic, but inconsistent framework for the practicing of the profession. The wild years are however seen out with regrets, and the law is rather accommodating the nostalgic, with transitional stipulations instructing that "*Current law firms, as stipulated under Decree-law no. 90/1990 on measures to organize and practice the solicitor/barrister profession in Romania, may carry on their activity, under the same circumstances, for three years after the present law comes into force."*

Also baffling is the provision included at the time in the initial text of Art. 77, according to which "*Expenses made for investments, equipment and other utilities, necessary for solicitor/barrister firms and other forms of practicing the profession, established under Art. 5 of the present law,* ***are deducted*** *from taxable revenues for three years after the present law takes effect."* Few of the mostly young solicitor/barristers at present are aware that, for two years and a half, more precisely until Art. 77 of Law no. 51/1995 was expressly abrogated as of January 1, 1998, through the effect of GEO no. 85/1997 *on taxation of incomes made by private person*, the sacrosanct[102] and outrageously atypical principle of **full deductibility** of investment expenses of solicitor/barrister firms was the very key of the initial success of the large law firms.

[100] Law No. 24/1921 on legal persons was abrogated only under GO no. 26/2000 on associations and foundations.

[101] Law No. 51/1995 of 07/06/1995 for the organization and practice of the attorney profession–Initially published in the Official Journal, Part 1 no. 116 of 09/06/1995

[102] In the sense that it was enshrined via an organic law, that tax authorities did not dare to challenge.

The lucky lawyers of those times thus acquired houses, cars, land, real estate and securities, which were fully deducted (rather than subject to amortization) from gross revenues of those years, to the effect that the taxation basis was drastically reduced.

This unprecedented facility was unique and only lasted for as long as necessary. The oversized classes of young enthusiastic jurists knocking at the profession's doors starting 1998, when they graduated from *mass law schools*[103] in the host of public[104] and private universities, no longer benefited from such facilities.

2. Young solicitor/barristers

With the number of would-be solicitor/barristers rising exponentially, the profession, controlled by an "old guard," started to protect itself by introducing various barriers, in the form of interviews at first, and exams later on, but more importantly in the form of the traineeship imposed to trainee solicitor/barristers during the traineeship, and eventually the bar examination and admission.

Prior to the 1995-1997 milestone, there had been few and insignificant professional filters in the legal profession, so that *only those didn't become lawyers, who didn't want to.* The first to enter the lawyer ranks were the communist era former judges, former prosecutors, former policemen, and not least, former political police staff. They brought into the profession the entire ballast of the Ceausescu era, all bad habits and all known manipulation and blackmail techniques. So far, their privileged position in the profession has been shyly (if at all) challenged by young lawyers, so that the old guard still controls the legal profession from key positions, making sure that additional barriers are introduced to further *consolidate* their position.

Today, marginalization of young solicitor/barristers has grown chronic, with Bars doing nothing substantial to facilitate their professional access, or even to protect their dignity and prevent their moral surrender. On the contrary, successive Bar leadership regulations introduced additional barriers, especially of a financial nature (huge charges, not justified by

[103] An original, allusive phrase, echoing the phrase *mass sports.*

[104] The class the author of the present text was in (1994-1998) was the first to count over 500 students in regular first-year courses. However, Law School amphitheatres at the Bucharest University could not accommodate more than 350 students, even grouped in 3 series. As for the teaching staff, most of them close to retirement age at the time (many of them already deceased, or having immigrated or changed profession), speak no evil …

actual services[105]) with respect to the profession access, firm establishment, secondary office establishment, etc.

Moreover, the profession status included express provisions requiring uninterrupted **8-year** minimum length-in-service for a solicitor/barrister to qualify for representative positions in Bar councils or UNBR Council, while the minimum length-in-service for eligibility in disciplinary commissions is **10 years**!

A basic calculation indicates that in the elections for the UNBR Council and Bar councils due in 2007, lawyers are eligible who were already active in this profession in the spring of 1999 at the latest. In other words, participation of younger generations in professional structures is virtually prohibited for another mandate, i.e. until 2010! Solicitor/barrister Ştefan Baranga, a septuagenarian with a young conscience and one who always ran against the mainstream, noted ironically in the loud General Assembly of the Bucharest Bar held at the Palace Hall on March 11, 2006 that "*some young solicitor/barristers' claim to one or two seats in the Bar Council* [made up of 15 elected members, m.n.] *in the upcoming elections is entirely absurd: since youth under 35 account for over 80% of the 7190 lawyers in the Bucharest Bar, it is they, the young who should hold MOST councillor positions, while pensioners should hope for one representative!*".

However, one cannot claim that the young legal generation is ready to take the lead of profession forums, as the only instruction they benefited from is the corrupt, humiliating and hypocritical school of the official traineeship with a trainee supervisor. Young solicitor/barristers, whether trainees or admitted to the bar, loathe (when they can be honest) their supervisors and the beginning of their career. The paradigm they had to follow is well-known: more often then not they had to grease their way into a trainee supervisor's firm or had to work without being paid during the traineeship; they even issued invoices for fictitious payments by their corrupt supervisors, always in search for tax-deductible expenditure.

One can easily see how the considerable economic and moral dependence during the traineeship left a deep impression on the conscience of many newer-generation solicitor/barristers, shaping an embarrassing commonality for the profession, somewhere in the area of intellectual mediocrity but also, for better or worse, of relative financial wellbeing.

There are also lawyers engaged in a muffled battle for subsistence in the murky area of "appointment" distribution and payments (in criminal suits where appointed legal assistance is

[105] See Decision no. 76/17, June 2005 of the UNBR Council http://www.unbr.ro/MATERIALE/D_76_17062005_CONS_UNBR.pdf

compulsory) via the Bars. There is an unending series of scandals in this marsh, regarding the favoritism proven by those Bar Council members directly in charge with the distribution of appointed cases.

3. Amorality in legal practice

Forced to constant compromise, young lawyers grow into accurate replicas of those who instructed them, and even take pride, hypocritically, in some professional pseudo-performances.

They learned from their supervisors how to get rich through brash misuse of authority practiced with unprincipled magistrates, irresponsible Court clerks or ineffectual civil servants. They know how to avoid income taxation, by threatening the client that release of accounting documents entails an increase in fees by the amounts owed to the State Budget and the Solicitor/barrister's Insurance Agency, so that clients no longer request an invoice and receipt for the amounts they pay.

According to optimistic estimates, at least 20% ("only" about 2000) active lawyers, members of the Bucharest Bar and contributors to the Bucharest Branch of the Solicitor/barristers' Insurance Agency (CAA), are not honest taxpayers as well. We have signals that they are not even registered in National Tax Agency (ANAF) records, and no one had the curiosity or disinterested authority to compare, on the basis of personal identification codes, the data on CAA contributing lawyers and self-employed taxpayers in the ANAF Bucharest records. Surprises may be above expectations. But there is no will to help the profession regain its dignity and get rid of its undecided members, because this vulnerability allows for an efficient control on a valuable mass during elections and other decisions that must be taken in regular and special general assemblies of the profession.

With the respective lawyers aware that others too know about or practice such schemes, they are vulnerable to fellow solicitor/barristers, professional institutions or tax authorities, which presumably have all legal levers to hold them liable, but systematically choose not to. Such lawyers choose to not get involved in the profession life, keep silence on what they know about themselves and others, and all they want is to be left alone. Which they are, but their guilty indifference is a drawback which does not allow for a dignifying performance of the profession as a whole.

4. The identity crisis

The Romanian solicitor/barrister profession is also subject to a disquieting identity crisis and is still far from the European principles and values. The EU accession moment finds us in a particularly difficult position, in both moral and institutional terms.

A serious challenge has come so far from the ***alternative bars,*** parallel, original and atypical forms of organization of the legal profession, standing outside and against traditional structures for several years now.

Initiator of the challenge is self-styled "*bombshell solicitor/barrister*" Pompiliu Bota[106], who has been adeptly and casually manipulating both the media and the judicial system for several years now. Bota obtained the legal recognition of parallel professional organization called Bars and Union, of certain professional logos, such as the Justice logo (with the Patent Office as well), of certain Bar names, and even of the term "*robe*". All to the helpless frustration of the "*offshoot*" Bars (a phrase coined by the same Pompiliu Bota), which claim to be the direct product of Law no. 51/1995, having absolutely no incorporation and official association documents endorsed as such by Court authorizations.

Pompiliu Bota and his organization even reached the enviable performance of having obtained, as be boasts[107], as many as 93 non-prosecution resolutions on criminal complaints filed by traditional bars against him and his followers, with over 36 of these resolutions subsequently confirmed by Courts. His defence strategy is quite simple: he does not recognize the legal establishment of traditional Bars and insists that they produce their incorporation documents. Since documents are not produced, because they do not exist, Bota leaves police precincts in triumph[108].

Alternative bars have presented the traditional ones with an ontological mirror that the latter have not dared to look at, so far. But the emergence of alternative bars was only possible because of the insufficiency, narrow-mindedness and hypocrisy of traditional structures, and their very existence points to a number of professional organization flaws that are yet to be corrected.

Thus, the older (Constitutional Bar) or newer (county bars with the same names as traditional ones, the Romanian Free Jurist Union) parallel structures established by Pompiliu Bota currently count approx. 2000 alternative lawyers, law school graduates all of them, but

[106] http://www.bota.ro/
[107] http://www.bota.ro/rezolutii-nup/
[108] http://www.bota.ro/politia-recunoaste/

less lucky to find a seat in traditional bars. Bota boasts the low access and operation costs in his bars (membership fees are excluded in his associative structures, but an absurd "donation" system is at work, so that funds can be collected nonetheless.)

5. Hysterical reactions

Modifications operated on Law no. 51/1995, under Law no. 255/2004[109] introduce a number of barriers to the proliferation of alternative structures in the legal profession. Art. 1, paragraph 3 of the law was modified to the effect that "*The establishment and operation of bars outside U.N.B.R. is prohibited. Their incorporation and registration documents are null and void.*"[110] Rather frustratingly, once again an express absolute nullity provision was unable to operate retroactively, so that the parallel lawyer structures already set up by Pompiliu Bota and not recognized by UNBR didn't care much that they had just been banned. […]

But the line of reasoning introduced in the law seems for follow a reversed logic, sort of putting the cart before the horse. Apparently no one has noticed that UNBR cannot be the source of bar legitimacy, simply because it is the bars which form the Union, and not the other way round. Along the same lines, mention should be made that no one bothered to unequivocally define the legal regime applicable to bars (according to Law no. 51 art. 48.2 – *organizations with a legal entity status, own assets and budget*).

Since all that Bota claims is that his own bars and unions are established and operate under Law no. 51/1995, (ironically enough, modified by Law 255/2004, as their incorporation documents read[111]) all that traditional bar lawyers could think of was to alter the Law regulating the profession up to a point where it borders unconstitutionality, by making the lawfulness of free association in establishing Bars[112], conditional on their joining and admission in UNBR.

A similar failure was reported for the (rhetorical) reference to and enforcement (naturally, at the expense of alternative bars) of the drastic restrictions introduced by the same

[109] Published in O.J. no. 559/23, June 2004.

[110] See the regulation in Art. 1 paragraph 3 to the effect that: *"The establishment and operation of bars outside U.N.B.R. is prohibited. Their establishment and registration documents are null and void.*"

[111] http://www.bota.ro/statutul-baroului-bucuresti/

[112] According to a theoretical ambiguity still waiting for political clarification, attorney bars are private associations operating under GR 26/2000, according to some, and associations/institutions of their own kind under Law 51/1995, according to others.

Law no. 255/2004 through modification of Art. 82 of Law no. 51/1995, further to intensive parliamentary lobby[113].

Bota claims his solicitor/barristers owe no "levy" to any lawyer security agency, not because the system he created is any more generous, but simply because his organization does not institute an autonomous Insurance system, organized in the profession. Bota only applies what suits him in the Solicitor/barrister Act no. 51/1995 republished, and completely ignores any other inconvenient provisions.

He thus makes his life and revolutionary mission easier, with the extensive support of his gullible followers. But he also invites reflection on the current operation and future credibility of the lawyers' Insurance system, as laid down in Law no. 51/1995 and operating within traditional structures of the lawyer profession.

It is to this "threat" Bota continues to pose, that the UNBR Standing Commission decided, as we will indicate later, to dedicate a last lawyers' Congress in the summer of 2006, disregarding any other topics that may be of interest to Romanian solicitor/barristers.

However, it is our firm belief, shared by a large circle of acquaintances, that Bota is far from being a real, measurable and imminent menace. He is not perceived as such by most solicitor/barristers in traditional structures, but rather he is artfully used for diversion purposes by the alienated leaders of traditional bars, as a scarecrow coming in handy in any circumstances, and preferable to a responsible approach of the actual, substantial problems that we are facing.

6. Alienation and diversion

Reflecting such concerns and failures, the **July 29, 2006 Lawyers' Congress in Mamaia** passed, for the third running year, a new RESOLUTION ON THE PROTEST OF THE SOLICITOR/BARRISTER PROFESSION AS TO RELEVANT AUTHORITIES'

[113] Art. 82. of Law no. 51/1995, as modified by Art. 1, 68 of law no. 255/2004 - (1) On the date when the present Law takes effect, individuals or legal entities authorized under other normative acts or permitted under Court rulings to provide legal council, representation or assistance, in any field, shall rightfully end operations. Continuation of such activities is a crime liable to penalty under the criminal law.

(2) Also, on the date the present law takes effect*) the effects of any other normative, administrative or jurisdictional act recognizing or approving legal council, representation and assistance activities contrary to the provisions of the present law, shall be rightfully ended.

(3) Provisions in paragraphs (1) and (2) are not applicable to the legal adviser profession, which shall be practiced in conformity with provisions on Law no. 514/2003 on the organization and practicing of the legal adviser profession.

(4) Bar councils and deans are bound and authorized to oversee the implementation of provisions in paragraphs (1) and (2) and to take legal steps in this respect.

DECLINING TO REINSTATE RIGHTFUL ORDER IN THE PRACTICE OF THE SOLICITOR/BARRISTER PROFESSION AND TO PREVENT THE ILLEGAL PRACTICE OF THE SOLICITOR/BARRISTER PROFESSION IN ROMANIA.

Its text[114], posted both on the UNBR home page (www.unbr.ro) and on the Bucharest Bar web site (www.baroul-bucureşti.ro), vigorously announces that a decision was made *to use, in protest against the attitude of public authorities which consent to and do not punish the flagrant violation of Law no. 51/199 on the organization and practice of the solicitor/barrister profession, the suspension of legal assistance in criminal and civil lawsuits where defence is compulsory, starting September 11, 2006.* In short: STRIKE!

This is an endeavour as absurd, ungrounded and ineffective as it is impossible to take seriously. Few lawyers even heard of the nonsense decided at the latest Congress, and virtually no one planned to go on strike for the aforesaid reason and by the said means. At present the strike is suspended, to avoid a predictable and embarrassing outcome. The appeal to strike may be resumed. Or not. For the time being: SUSPENSE!

The actual goal is to divert the attention and competences of these professional bodies with decision-making power (assemblies, congresses) from the regular order of business (presentation and analysis of annual financial reports, budget approval, transfer of attributions). Cleverly manipulated, debates in such forums pointlessly overemphasize the alleged proliferation of alternative bars.

Dean of the Bucharest Bar Cristian Iordănescu voices utmost concern with the alternative bar issue, and when he does not demand Pompiliu Bota's arrest, we see him propose, with a determination worthy of a better cause, *unification of all professions in the legal system* into one *legal profession*[115]. The idea as such is rather fuzzy and makes little sense; so far I know of no supporters apart from its author himself.

On the other hand, the moves, at a different level, for the revival of the former (interwar) Romanian Association of Magistrates and Solicitor/barristers, as *an intrinsic part of the judicial reform in Romania*[116], very likely with a view to indirectly re-legitimize the Bar and UNBR institutions, naturally with the exclusion and ultimate defeat of the parallel structures set up by Pompiliu Bota.

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[114] http://www.unbr.ro/rezoluti.htm

[115] Thoroughly review the preliminary draft Law on the legal profession, as proposed by the Bucharest Bar and whose principles are posted at http://www.unbr.ro/profesii_legale.htm

[116] Quote from a letter to the Romanian Magistrate Association, dated August 2, 2006, that he addressed to Mrs. Viorica Costiniu, made public somewhat accidentally http://tinyurl.com/kxu8d

7. Core issues

Leaderships of traditional bars, of the Romanian Bar Union and the Solicitor/barristers' Insurance Agency attempted, one year after another, to turn bombshell solicitor/barrister Pompiliu Bota into Public Enemy no. 1, in lawyers' general assemblies and congresses, thus avoiding debates on current, less exciting and definitely more boring issues concerning the suitable organization of the profession, including: analysis of annual management reports, approval of revenue and expenditure budgets, harmonization and modernization of article provisions etc.

Indeed, the 2005 report[117] of the Solicitor/barristers' Insurance Agency (CAA) presented briefly in the Mamaia Congress, only after Bota and his threat gave rise to heated debates that took several hours, reads among others that *29.87% of the CAA members pay minimum contributions, which account for approx. 10% of the revenues; 5.43% pay maximum contributions which account for approx. 20% of the system revenues, and 59% pay percentage-based contributions which account for approx. 70% of the system revenues*. It is such topics that reveal true concerns with the good functioning of the social insurance system, providing some indication on the inefficiency and inequity of contribution collection from active lawyers.

Worth mentioning is the refreshing, but also disquieting fact that, given the small number of current beneficiaries (retired lawyers, beneficiaries of other rights), in spite of the flawed contribution collection the system logically registers outstanding annual surpluses—genuine cash fortunes which are highly perishable and subject to investment risks, but about which we know little.

As we managed to find out in debates held with difficulty and only *in extremis* at the March 11, 2006[118] Bucharest Bar Assembly (when Dean Cristian Iordănescu pushed enemy Bota to the forefront of assembly "concerns"), the highest surplus is reported by the CAA Bucharest branch, with 39,130,774.35 lei (i.e. 10.99 million Euros). We may assume that the total surplus at hand in the National Agency is even higher, but we may also suspect certain deficits, given that we are talking about the management of huge amounts that the National Agency leadership "forgets" to communicate to contributing members.

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[117] http://www.unbr.ro/MATERIALE/RAPORT_CONSILIUL_CAA_CONGRES_2006.pdf

[118] See POLICY PAGE - on the outraging manner in which the Bucharest Bar General Assembly on March 11, 2006 was organized and maneuvered. http://www.geocities.com/idobrinescu/Adunarea_BB.html

As expected, things will be quite different in the next 5-10 years, and we ought to start questioning the system today. We notice that total multi-annual budgets reach impressive levels, but they are nowhere presented in detail by either the report author, CAA president solicitor/barrister Viorel Pascu, or by the auditing commission. In spite of requests made repeatedly by lawyers attending this year's Bucharest Bar General Assembly, the Bar leadership and the CAA Bucharest branch obstinately refuse to act transparently and to allow for a professional auditing of annual budget execution and accrued surplus.

Therefore we are ignorant of both the actual volume and the portfolio structure of investments made by the Solicitor/barristers' Insurance Agency, a very rich institution, which seems to be accountable to no one, while demanding from all lawyers a contribution accounting for 10% of gross monthly receipts. Which fully entitles us to ask where the money goes.

While less detailed accounting records may be required in corporate and association law, they are nonetheless subject to transparency norms, involving **biannual reports** and specialized **annual auditing**. CAA auditors (*two active and one retired lawyers*, as the law requires!), are not even economists by trade[119], and cannot be credible when they perfunctorily report in writing, once a year, the impeccable execution of the budgets *of an autonomous institution with a public legal entity status*[120].

The CAA reports presented in the latest Congress is surprising and unsettling insofar as it announced that "*in the 26.10.2005 CAA Council meeting, the option was analyzed of making real estate investments through allocation of 25% of existing resources available in the centralized system fund (!?) and of existing resources managed by the Bucharest branch, for the construction of an office building*." The proposed investment is put at a "reasonable" 6-7 M EUR and is not based on any feasibility studies!

The investment target and scope are baffling, since it would substantially and irremediably affect the Insurance Agency budget in the medium and long run, according to a classical recipe in which presumed cash is embezzled into real estate dealings with uncertain returns. In contrast, the construction and finishing of a shipping mall, an undeniably lucrative business, costs approx. 18-20 M EUR and is amortized in 15-20 years, while a *Carrefour*-type hypermarket costs substantially less!

[119] The CAA articles do not require that in-house auditors be economists by trade (see Art. 132-133).

[120] Art. 12 paragraph 4 of GEO 221/24.11.2000 published in O.J. 610/28.11.2000 on attorney's pension and other social insurance rights, endorsed with modifications by Law no. 452/2001.

On the same occasion, the honorable CAA Council proposed the Congress—although not through constructive debates, but in the printed material distributed in folders—"*the sale of tracts of land owned by CAA in Poiana Braşov resort (!?) and the town of Predeal (Bucharest branch) (!?), localities where land prices are quite high, but construction works cost a lot, with the proceeds from alienation of such real estate assets to be used in localities such as Breaza (!), or Cornu (!!), or Comarnic (!!!), or Poiana Câmpina (!!!!), etc, where we may build a hotel with multiple services for retired and active solicitor/barristers, for healthcare and relaxation purposes, and for young lawyers an international-standard golf course...*" We are told nothing of the description, exact location, accounting or market value of the respective fixed assets, while an inventory of the Solicitor/barristers Insurance Agency, established in 2001, is still a dream.

Investors in the CAA leadership, past their retirement age, also estimate that "*financial resources for the operation of the complex may be ensured through rental, with a discount granted to active solicitor/barristers and certain pensioner categories—low-income pensioners will be accommodated free of charge, with a full price charged on other tourists.*" Confident that they will live to see it, they hope that "*such a complex would be operational in 2009*." Considering that such endeavours are not only far from being implemented, but also altogether impractical, we once again[121] express our concern with the lack of professionalism of such claims.

8. Ambiguities of the lawyer profession

Figures presented in work reports by profession forums and subject to formal approval in annual general meetings of Bars and solicitor/barrister Congresses since 2000 to date have never been included in a comparative analysis, while data concerning the previous year have systematically been left out in every presentation. Similarly, there have been no charts and diagrams, so that no one was able to analyze trends or make responsible forecasts on the future operation of the system.

Even more disturbing is that individuals elected to represent lawyers' interests in leading structures have grown accustomed to trying to obscure topics of interest, as over the past few years they have systematically failed to make public in due time the materials that

[121] REPORT BY A DELEGATE in the Attorneys' Congress - MAMAIA 29 June 2006. http://www.geocities.com/idobrinescu/RAPORT_CONGRES.htm

were to be discussed in such meetings, so as to prevent members from taking part in debates with "their homework done".

To ensure accurate information and critical analysis, materials should be communicated to lawyers, especially in a virtual format, on the Internet, at least concurrently with the invitation and the order of business. Also, as far as the CAA fund management is concerned, we believe it necessary for public debate to be initiated, in view of adopting prudential investment rules of the multi-annual surplus reported in CAA budgets, with the exclusion of any real estate hazards. Within this context, mention must be made that neither the establishment law, nor the CAA in-house regulation provide ANY INDICATION WHATSOEVER with respect to the acceptable destinations of funds collected from member contributions, or to the regular inspection of asset integrity. Such an omission is simply amazing.

The same holds true for the financial exercise of the UNBR and Bars, bodies which do not even have articles of incorporation or in-house regulations, as mentioned above, because they see themselves as the direct *offshoot*® of the Solicitor/barrister Act and the Solicitor/barrister profession status.[122]

In fact, Bars in Romania operate in an absolutely non-transparent manner; bars do not have representative and convincing web sites, and do not make public debates and decisions made in Bar Council meetings in Bucharest and the country. Such documents cannot be freely accessed even by members of Bar libraries.

Under such circumstances, we are custodians of no (valuable) tradition, and we cannot see ourselves as being in any way superior to Bota's alternative bars. Worth mentioning, even briefly, is that the Bucharest Bar (seen as the leading Bar, with close to half of the total number of lawyers in Romania), has enough financial resources to launch a national-scale transparency endeavor in the virtual environment, on behalf of all bars. But it lacks the initiative and, more importantly, the authority to set an example. The only (bad) example, which gains the Bucharest Bar the reputation of a bunch of irresponsible individuals, is the completely non-moderated and absolutely anonymous FORUM[123] operating on the institution's home page. An even occasional look at the foul talk hosted by the virtual forum of the Bucharest Bar, in which the particularly frustrated and highly divided staff of the head

[122] We were thus seduced by the phrase coined by Bota for the immaculate conception of these institutions.
[123] You may access, at your own risk, http://www.baroul-bucuresti.ro/Forum/Forum.asp.

office at no. 3, Dr. Râureanu St. also takes active part, might be a hair-raising experience, if it wasn't equally embarrassing and a waste of time for any reasonable person.

To return to core issues, we believe the Law and Status need modifications in the sense of a clearer regulation of hierarchic subordination relations between Bars and CAA branches (at least in terms of the subordination relation between UNBR and CAA) as well as the imperative dissociation of individual membership of bar councils (and UNBR Council) from councils of CAA branches (and National Agency Council). Within the same context, it is recommended to free the UNBR Council from the de facto coordination of the Bucharest Bar, because the presence of the same individuals in structures which counterbalance each other will predictably prevent the operation of control mechanisms.

It is with embarrassment, but also with honesty that we would like to emphasize that the Status of the lawyer profession includes nonsensical provisions (genuine loopholes specially introduced to allow the law to be circumvented). We refer to the regulation included in Art. 308, paragraph 4, of the latest published version[124] (dated January 2005) of the Status of the Solicitor/barrister Profession, a modification endorsed and introduced in line with a disgraceful resolution of the 2004 Solicitor/barristers Congress. The text is apparently benign, but it has significant importance in terms of the institutional defrauding of the Insurance Agency funds by most interested lawyers. The text in question stipulates that "***The solicitor/barrister who pays the maximum contribution quota is under no obligation to declare the value of incomes above the contribution he pays.***" Specifically, the Solicitor/barristers' Insurance Agency declines the prerogative of requesting complete records on total gross incomes cashed by lawyers, and implicitly gives up the chance to contrast receipts declared by contributors to the Agency with the gross incomes declared to the Tax Agency in tax returns.

In fact, the annual offset for payment of contributions owed to CAA (10% of gross incomes) has remained a rather rare and atypical occurrence, apart from the regular settling of accounts between structure leaders and profession dissidents. We notice in fact that the Agency in-house regulation fails to imperatively require regular offset of contribution payments against annual income and tax return forms.

The aforesaid regulation has paradoxical effects not only on the collection of contributions to the Agency, but also on the collection of taxes owed by lawyers to tax

[124] Status of the attorney profession, of 25/09/2004 published in the Official Journal, Part 1 no. 45 of 13/01/2005 (The Act took effect on January 13, 2005)

authorities: many will feel free to declare lower revenues to tax authorities as well, taking advantage of the impossibility of cross-checking annual income tax forms against the monthly gross receipt statements filed to CAA.

Mention should also be made that the monthly (rather than biannual or annual) ceiling on contributions owed to the insurance fund is itself a door wide open for frauds on CAA revenues. Specifically, for monthly receipts in excess of 7,200 RON, not only are lawyers no longer bound to declare their gross incomes (as stated above), but also they only owe contributions to the Agency up to the 720 RON ceiling.

MINIMUM AND MAXIMUM QUOTAS FOR PAYMENT OF INSURANCE CONTRIBUTIONS 2006, BY MONTHLY INCOME ACCORDING TO CAA REPORTS

Admitted att.

Month	Gross monthly income from practice	Contribution quota
Jan-April	0 - 850 RON	85 RON
	850.01 - 7200	10% of income
	over 7200 RON	720 RON

Trainee att.

Month	Gross monthly income from profession	Contribution quota
Jan-April	0 - 260 RON	26 RON
	260.01 - 7200	10% of income
	over 7200 RON	720 RON

This state of affairs may be (and it actually is) taken advantage of, without any risks, as follows: whenever possible, for several months, the respective lawyer declares for tax purposes minimum gross incomes (under 850 RON), and pays the minimum contribution quota, calculated as shown above. All he/she needs to do is to declare in one calendar month incomes much above the 7,200 RON ceiling (amounts he does not even have to declare to the Agency!) and pay a maximum contribution quota of 720 RON. For the whole fiscal year, some may thus make substantial savings, which should nonetheless count as frauds as far as the Solicitor/barristers Insurance Agency and even tax authorities are concerned.

Obviously, no one in interested in changing this ridiculous regulation, so as to make the declaration and collection of contributions more flexible, more stable throughout the fiscal year and, why not, more efficient. Consequently, contribution quotas may even be reduced,

because enough money would thus be raised, instead of dreading, as we do today, an imminent increase of the contribution percentage.

The practice of declaring all annual receipts in one calendar month is a widely treasured and extensively used method in repaying fees to trainee solicitor/barristers and other economically dependent workers.

We will not shy from saying that in the medium and long run, the Solicitor/barrister Insurance Agency is a bankruptcy-prone institution, in spite of the substantial (but diminishing) surplus reported at present, particularly since prudential investment rules, and the professional auditing and management of amounts in safe and easy to cash investments are absent altogether.

We may also add that the profession lacks clear and standardized norms for the practice of the solicitor/barrister profession and attributions at a national scale, particularly with respect to document certification, contract and power of solicitor/barrister customization, to document archiving and cancellation. Bars are hardly interested in the consistent regulation and the dignified practice of the profession, and demonstrate a penchant for the organization of bar admission exams for newcomers. Bar admission exams are a highly profitable business, insofar as they involve collection from lawyers of various fees, all of them exaggerated as compared to the costs of any services or administrative expenses the receiving institutions may incur.

Also standing to gain are the Bar councillors who are fully and systematically involved in the organization (not without scandals) of the sessions–twice a year–of bar admission exams and bar finals. For their examination activity, they are handsomely rewarded, as they can make anything between 9,000 and 15,000 euro in one year alone! Adding to such occasional sources are also the incomes from stipends, per-diems, facilities, expense refunding and benefits, as well as the regular blessing of participation in international seminars and conferences that few know of and even fewer find out about in due time.

9. Conclusion

While laws and organization and operation regulations abound in conduct norms and principles applicable to profession members, unfortunately there are no genuine moral benchmarks and noteworthy personal example of dignifying legal profession practice.

An honest and critical analysis from within the profession will reveal that persisting among lawyers is the compromise game, economic dependence, tax evasion, but also the uncontrolled (though not entirely ungrounded) fear of the abusive suppression of dissident opinions by some leaders alienated from those they presumably represent.

More often than not, they do not make many of our fellow solicitor/barristers insensitive to the precariousness of the profession organization, human vanity and professional self-importance most certainly prevent them from identifying and solve the core and form issues that we are facing.

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CHAPTER V: HUMAN RIGHTS IN ROMANIA

Core ideas:
There are no strategies in the field of human rights.
We are the second country at ECHR according to the number of complaints.
The authorities do not know and do not apply the European Convention sufficiently.

1. The absence of a strategy in the field of human rights

National authorities have often affirmed that Romania did not pose any problems in the field of human right compliance and promotion. Yet, practical life has proved the opposite. The misunderstanding of the concept of human fundamental rights has led to confusions both among civil society representatives and particularly among national administration. The lack of interest for this field shown by authorities has cost Romania[125] around EUR 5 M until the time being, and these are indemnities due on the basis of ECHR decisions in relation to the violation by the Romanian State of the provisions of *European Convention for Protecting Human Rights and Fundamental Liberties.*[126]

Although Romania has undertaken, at international level, the responsibility to implement an efficient human right education system, the lack of cooperation among State institutions has not allowed the accomplishment of the obligations undertaken.[127] A special importance has to be attached, in this respect, to the EC Recommendation (2004) of the Committee of Ministers of Council of Europe, which imposes several obligations both for Member States and particularly for Ministry of Education and Ministry of Justice, in relation to the mandatory and proper preparation of legal experts in the field of European Convention and jurisprudence of European Court of Human Rights.[128] Moreover, in Warsaw, one year ago, Romania undertook the responsibility that "*at national level it would attach care so that…an adequate*

[125] Breakdown by amounts to be paid at June 1, 2006: 4,382,569.6 EURO; 153,655 USD; 424,100.82 French francs
[126] Report by Ministry of Public Finances, July 2006.
[127] Knowing human rights has been the object of activities at UN level (in 1993, the "Action Plan from Vienna" was drawn up, followed by UN Decade addressing education in the field of human rights over 1995 – 2004 and by the World Programme addressing education in the field of human rights since 2005) and within Council of Europe (ratification of the European Convention Defending Human Rights and Fundamental Liberties in 1993, numerous recommendations and action plans, etc.).
[128] Recommendation (2004) 4 E from 2004 is available at the following Internet address: https://wcd.coe.int/ViewDoc.jsp?id=743277&BackColorInternet=9999CC&BackColorInternet=FFBB55&BackColorLogged=FFAC75

training in relation to the Convention norms would be perfectly integrated into the University and professional education systems. Consequently, we decide (Council of Europe Committee of Ministers) to launch an European programme addressing education in the field of human rights targeting those having legal professions and we launch an appeal to Member States to contribute to having it implemented".[129]

Yet, ***we do not have any information regarding the education strategies on the basis of the international instruments designed at national level in Romania.*** One should have hoped that they would be implemented by the national authorities, the more that Romania held the presidency of the Committee of Ministers over November 2005 – May 2006. The sector programmes, developed with syncope and having funding at random, are, in the absence of a national global and integrating vision, ineffective, which is reflected into the low degree of specialist legal education and particularly current practice among judges, prosecutors, police officers, lawyers or civil servants.

2. Petitions lodged with the Strasbourg Court

Currently, ***Romania ranks 2nd from the viewpoint of the complaints put before ECHR[130],*** which has been an alarm signal for the Romanian authorities. With a population smaller than Russia's, which outperforms us in the above mentioned standings, Romania is actually the state with the largest number ECHR complaints per inhabitant in Europe. This is evidence to the low interest of the Romanian State in relation to human right promotion, the existence of national provisions contrary to the provisions of the Convention, the lack of clarity and coherence of the normative acts in force, as well as the poor background of magistrates[131] in relation to the observance of these rights by applying international norms[132], mainly those provided by the European Convention and ECHR jurisprudence.

Based on ECHR statistics, around 9500 complaints against Romania are pending before the Court, out of which 6000 cases have already been assigned to benches. It has been noted that over the past 3 years the number of cases adjudicated by ECHR is following an upward trend: 53 in 2003, 70 in 2004, 137 in 2005 and 162 until July 2006.[133] This is evidence either to the

[129] May 2005 – Action Plan from Warsaw of the Committee of Ministers of Council of Europe
[130] Professor Ph.D. Corneliu Birsan, Romania's appointed judge at ECHR, quoted by the 'Curierul National', July 2006, cited in http://www.curierulnational.ro/?page=articol&editie=1221&art=79285.
[131] One should not forget that "*the first judge of the Court is the national judge*".
[132] Norms, which following ratification, become integral part to the national legislation
[133] Statistics of Governmental Agent.

violation of rights guaranteed by the Constitution, legislative incompatibility or improper enforcement of existing laws.

All the European States have difficulties in terms of compliance of certain human rights, but ***something specific to Romania is that there are complaints on breaches of most of the articles provided by the Convention.*** Core aspects identified by ECHR come both from the poor legislation and in terms of rulings by the Romanian authorities with legal competences:[134]

a. **Annulment by means of extraordinary appeals of definitive and irrevocable court decisions.** The highest number of decisions passed by ECHR against Romania are related to the violation of the right to a fair trial (art. 6), as well as the right to property ownership (art. 1 paragraph 1) following the admission of appeals for annulment promoted by the general prosecutor against irrevocable legal decisions in civil law matters (ex. The "Brumarescu" case **which has, unfortunately, become a text-book case because several other similar cases have been lost by the Romanian authorities before ECHR).** It is surprising that although the institution of appeals for annulment was repealed following the modifications to the Criminal Procedure Code in 2003, ECHR communicated to the Government Agent more than 20 such appeals lodged and accepted by the Supreme Court in 2003 – 2004. Moreover, the interpretation provided by the Supreme Court that the appeals for annulment may be judged even after having the appeal for annulment repealed if the decision challenged was passed under the law providing for appeals possibilities, is rather surprising: if these appeals are admitted subsequently to the repeal of the institution, *Romania risks several convictions on the basis of the existing ECHR case law.*

b. **The absence of any chances among the former owners whose properties nationalised without a deed were sold to tenants on the basis of Law 112/1995 to qualify for the restitution in kind of such property or another reparation.** Over 150 complaints have been lodged so far in relation to the enforcement of Law 112/1995 addressing the violation of the ownership right by declining the absolute null and void nature of the purchasing contracts among the State and former tenants. The latter bought from the State the houses took on lease which, either prior to concluding

[134] The report addressing the presence of files related to Romania brought to ECHR attention and to the Committee of Ministers of Council of Europe, drawn up by the Cabinet of Romania's PM on May 7, 2006. A translated version of the decisions passed by ECHR in relation to Romania is available at http://www.SCM1909.ro/SCM/index.php?cmd=9503

the contracts or subsequently to that, were given back by the courts to the former owners (ex. "Paduraru" case).

c. **The violation of the right to having access to a court.** The Romanian state has been found in violation of art. 6, paragraph 1 from Convention in cases like "Brumarescu", "Canciovici" and "Mosneanu": the Court admitted the complaint filed by the 'Greek-Catholic Parish in Sambata Bihor' also as a result to the violation of the same article in the Convention.

d. **The excessive time duration of the legal procedures:** violation of art. 6, paragraph 1 regarding the failure to pass a court decision within a reasonable time was noted in both criminal matters ("Pantea", "Tudorache", "Stoianova" and "Nedelcu") and in civil ones ("Moldovan", "Strain"). Over 20 cases which approach the duration of the procedures have been recently notified to the Government, either in criminal law, or in civil law, long periods of inactivity being noted in the investigation and prosecution phase, as well as the absence of adequate measure from the courts with the purpose of shortening the civil proceedings.[135]

e. **The application of inhuman and degrading treatments by representatives of public institutions and the absence of an efficient investigation related to that.** The violation of art. 3 and art. 2 of the Convention mainly refers to the bad treatments applied by police officers and gendarmes as well as to the failure in conducting efficient investigations related to such cases. The number of sentences in relation to the breach of art. 3 is rather low ("Pantea", "Anghelescu", "Bursuc", "Moldovan") but the number of communications (over 20) for similar cases is growing. ***SoJust expresses its concern in relation to the fact that the Court jurisprudence in the field is not part of the curriculum of the Romanian Police Academy.***

f. **Violence against the Roma minority.** It was only in 2005 that ECHR passed sentences in four cases in relation to the violation of art. 14 pursuant to art. 6 and art.

[135] The report addressing files from Romania at ECHR and Committee of Ministers of Council of Europe, designed by Romania's PM Cabinet on May 7, 2006.

8, within which it admitted three cases ("Gergely", "Kalanyos", "Tanase") for which the Governmental Agent has already initiated the negotiation procedures for an out of court settlement.[136] New cases were notified by ECHR to the Government throughout 2006 as admissible ("Baciu", "Nita", "Stoica"). In fact, ***SoJust finds out that sexual, religious and ethnic minorities in Romania have difficulties,*** not only because of old mentalities of the people, but also because of ineffective strategies in the field, as well as the absence of proper training among the authorities.

g. Conviction of journalists in violation of the freedom of speech. ECHR condemned Romania in relation to the breach of the freedom of speech guaranteed by art. 10 of the Convention ("Dalban", "Cumpana and Mazare", "Sabou and Parcalab"). Other 8 cases addressing the violation of this right were notified to the Government. The new amendments brought this year to the Criminal Code repeal insult and slander, but SoJust is extremely reticent as to the repeal of slander, as it is a crime in most of the states. But the press offence, not being addressed by legislation in a distinctive manner, will be the object of civil trials and the possibility of having sentences where journalists are ordered to pay damages could be also condemned in light of the Strasbourg Court jurisprudence. Thus, judges need to carefully analyse such cases. At any rate, ***SoJust notes an exacerbation of the right to freedom of speech by journalists who do not realise that the Convention itself limits this right to the cases provided in art. 10 paragraph 2, while noting a state of fear among the magistrates to pass sentences in cases involving journalists.***

h. Bad enforcement of the 1980 Hague Convention addressing civil law matters in cases of international children abduction. ECHR has noted in the *Monory* case a violation of art. 8 following the misapplication by the Romanian court of the provisions of the Hague Convention. 2 more such cases were notified to the Government. SoJust is not aware of the practice of the Romanian courts in such matters or in respect of the interaction between Hague Convention and the EU applicable legislation.

[136] Idem.

i. **Insufficient argumentation of court decisions** was identified by ECHR in the *"Albina"* case as a violation of art. 6 paragraph 1; two such cases were notified to the Government as being heard by the Court. In fact, ***in general in Romania, court decisions are not explained:*** a narrative description of the complaints and of the aspects found out by the court, with a plain reproduction of the legal text applicable, in the absence of a sufficient analysis of the circumstances and mechanisms applicable, as well as without providing explanations to the elements that have made the judge pass a certain decision based on facts, are far from a sufficient substantiation of the court decisions.

j. **Rejecting a registration application of a political party** was a violation of the right to free association – art. 11, motivated by the Court in the decision addressing "*Party of non – PCR Communists"*.

k. **Failure to hear defendants before control courts.** In the "*Constantinescu"* case, the Court found that the failure to have the defendant heard by the appeal court, which had the competence to analyse the actual facts, and the legal aspects and to study the whole aspect of the defendant guiltiness, is a violation of the provisions of art. 6, paragraph 1. Currently, five similar cases are in process at ECHR. Following an analysis of the jurisprudence of national courts, it resulted that ***the failure to hear the defendants by legal control courts is an old practice, which may result in a significant raise of such cases in the future as well.*** The new amendments to the Criminal Procedure Code made by Law 356/2006 cancel this practice, but not the convictions for of the Romanian state so far in connection with such procedures.

3. Violation of human rights in specific cases

SoJust has started analysing situations of human right violation in Romania, with the purpose of drawing the attention of the competent institutions and authorities to the approach to such cases and to their outcomes.

I. Presumption of innocence

SoJust strongly draws the attention to the current practices of the state authorities likely to be in breach of the presumption of innocence, a fundamental right to be found in art. 6, paragraph 2 of the European Convention on Human Rights, according to which *any person charged with the commission of a criminal offence is presumed innocent until found guilty by a court.'*

In Romania there is a tendency, both theoretical, and especially practical, to transfer only to courts responsibilities deriving from the obligation to comply with this presumption. The judges are not allowed to start from the pre-conceived idea that the person against whom charges have been pressed had committed the said offence and their entire behaviour throughout proceedings should be compliant with this obligation.[137]

Yet, in a decisive manner, ECHR decided, in cases which should be models of best practice for the Romanian authorities, that the violation of the presumption of innocence may come both from the judge and from any other public authority. ***The person accused of a criminal offence must be presumed innocent not only in the court of law but also in the society in general.*** Hence, the state must lay down formal measures in order to have the presumption efficiently guaranteed mainly by regulating the conduct of public authorities against the suspect of a crime and by establishing self-control on how they provide information in relation to the alleged crime and their alleged perpetrators. Any information for the public in relation to the criminal investigations in process must be discreet and with the necessary reservations required by the compliance with the presumption of innocence.[138]

The obligations to act with reservation are incumbent both on police officers and on the Attorney General Office or on the other special investigative bodies, but also for authorities in general, including Ministries, Parliament or local public authorities. Press conferences, press releases and information provided by the investigation bodies in Romania are abundant with clear hints to people's guiltiness. Such statements suggesting that the person is indeed, made without any nuance by authorities, incite the public, harm the appreciation of facts by the judge, may end up by being an inadmissible pressure on the courts, but they mostly represent equally possible cases where the state is taken to court on grounds of failing to observe this fundamental human right.

II. HADARENI CASE

[137] See Barbera, Messegue and Jabardo vs. Spain case of December 6, 1988
[138] See Allenet de Ribemont vs. France case, February 10, 1995

A. Facts

On the night of September 20, 1993, inter-ethnic incidents took place at Hadareni. Following the murdering of Craciun Chetan by Rupa Lacatus (Roma), three Roma were lynched – Rupa Lacatus, Aurelian Pardalian Lacatus and Mircea Zoltan, 14 houses belonging to the Roma community were arsoned, four were partially destroyed, and 175 Roma were banished from the village. According to the official information, Pardalian Lacatus died because of the 89 injuries inflicted on his body, Rupa Lacatus died because of the shock caused by injuries covering „almost 70 per cent of the body", and Mircea Zoltan died in the fire, in his own house which he did not dare to leave, fearing the agitated crowd outside.

Eye witnesses declared that the police officers urged the furious crowd to put the Roma houses on fire and they promised the villagers involved that they would help hush up the whole incident. Following the death of the three Roma, the police officers did not take any measures to prevent the locals from destroying the houses and assets of the Roma.

The days that followed the incidents were marked by bans on the Roma from returning to the village, put by the communities of Romanians and Hungarians, with the agreement of the authorities. It was only following international pressures that most of the Roma families were able to return to their village.

B. The situation of domestic courts and ECHR decisions in the Hadareni case

The case was investigated by the Prosecutor's Office of the Targu Mures Court of Appeals until November 1994, when it was referred to the Military Prosecutor's Office after which it was returned to the initial prosecutors for the continuation of investigations; afterwards, the Mures Territorial Military Prosecutor's Office issued, in September 1995, a resolution to stop investigations against the police workers from the local police precinct explaining that their inability to withstand the crowd was not a type of participation in itself.[139]

Regarding the criminal aspects, after the separation of the criminal and the civil parts of the case, the court of first instance – the Mures Court House (Decision of July 17, 1998) five locals for especially grievous murder and 12 locals, including the first 5, were convicted for other offences as well, the sentences ranging from 1 to 7 years in prison.

[139] See ECHR Decision no. 1/2005, published in Official Journal, Part I, no. 796/01.09.2005. It can be read at http://www.SCM1909.ro/SCM/linkuri/14_10_2005_1290_ro.doc

Following the appeal lodged by the Prosecutor's Office, the Court of Appeals convicted a sixth local for especially grievous murder and extended the sentence for one of the defendants while shortening the sentences of the other convicts. In November 1999, the Supreme Court of Justice sustained the convictions for destruction but changed the offence classification from especially grievous murder to aggravated murder for 3 of the defendants.

In 2002, 2 of the locals convicted were pardoned.

Shortly after the attack on the Roma assets, the Romanian Government disbursed ROL 25,000,000 for the reconstruction of the damaged or destroyed houses. Only 4 houses were rebuilt using these funds. In November 1994, the Government allotted another ROL 30,000,000, other 4 houses being reconstructed.[140]

In terms of civil matters (Decision of May 12, 2003 of the Mures Court House) the substantive court admitted the plaintiffs claim for material damages for the destruction of the houses, establishing that 18 houses belonging to the Roma population from Hadareni were totally or partially destroyed and 3 Roma persons were murdered during the events of September 20, 1993. Based on an expert report, the court awarded economic reparations for those houses that had not been rebuilt in the meantime, as well as alimonies to the children of the Roma killed in this incident. Based on an expert report, the court awarded reparations for the total or partial destruction of the houses of the fifth, ninth, 15th, 16th, 18th and 19th plaintiff. The claims related to the loss of personal belongings and moral damages were rejected as unsubstantiated.[141]

On February 24, 2004, Targu Mures Appeal Court awarded moral damages to the plaintiff. Based on Decision no. 1420/2005 of the High Court of Cassation and Justice[142] (case 1425/2004 of the Supreme Court) both the appeals of the defendants and those of the civil parties were rejected, so that the decisions addressing the civil aspects remained definitive and they were stating the obligation of the defendants to pay material and moral damages, mainly underlining the fact that, according to the previous decisions passed for the criminal aspects of the affair, the defendants were found guilty and convicted for several crimes.

The High Court of Cassation and Justice uses *expresis verbis* in relation to the indemnities paid by the Romanian State and those to be paid by the defendants found guilty and convicted, stating:

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[140] Ibidem.
[141] Ibidem.
[142] See details at http://www.scj.ro/cautare_decizii.asp

„i) when establishing the level of the material damages paid, the court did not consider that, by care of the Romanian Government the victims had their houses reconstructed, at a value exceeding that of the destroyed houses; in other words, the appeal court rightfully retained that the help provided to the victims by the Romanian State should not diminish the defendants' material and moral liability, who are held liable for the integral payment of the damages produced".[143]

On July 5, 2005, ECHR passed the partial decision (above mentioned) where it confirmed the partial settlement between the 18 civil parties and the Romanian State, so that ECHR decided to remove the file from its caseload, considering that the commitments undertaken by the parties represented a fair settlement of this case, in keeping with the ECHR standards. Thus, the Government committed to pay to the 18 plaintiffs amounts ranging from EUE 11,000 to 23,000 in material and moral damages, as well as to initiate and to pursue the application of measures meant to prevent the occurrence of similar situations in the future, provided for in the Government strategy addressing the improvement of the Roma situation of 2001.

Among them, there are improvements to the educational programmes meant to prevent and fight against Roma discrimination, stimulation of the participation of the Roma in the economic, social, cultural and political affairs, respectively identifying, preventing and settlement of conflicts that may generate violence within the family, in the community or with other ethnicities. In their turn, the plaintiffs committed to renounce any claims against the Romanian State arising from that case...

In the summer of 2005, the civil parties who had been paid material and moral damages on the basis of national court decisions, started the execution procedures; the Court executor prepared 11 reports freezing the assets of the defendants indicated in the opening of the Decision no. 1420/2005 of the High Court of Cassation and Justice.

The defendants and their families challenged the execution orders, and the first court date for that was set for September 2005.

The hearing of the appeals against the execution order were postponed 10 times by the relevant court – the Court House of Ludus. The reasons were quite diverse, mainly that the ECHR decision had not been sent to the court by the Romanian Ministry of Foreign Affairs,

[143] Ibidem

or that the decision had not been translated in Romanian and published in the Official Journal of Romania.[144]

Finally, on April 27, 2006, more than 8 months after the submission of the appeals, the Ludus Court admitted them and annulled the Court executor's execution papers.[145]

At the time this document is being written, the appeal is being heard by the Mures Court House.

An extremely important element with serious consequences on an independent and impartial act of justice is the communiqué of the Ministry of Foreign Affairs, published on the 18th of August 2005, and addressed to the Romanian authorities[146].

The communiqué mainly shows that, in what regards the 18 plaintiffs (civil parties and parties to the court case regarding the appeals against the execution orders), the ECHR, in the Moldovan and Rostas vs. Romania case, had noted the out of court settlement between the Romanian state and the 18 plaintiffs, that the Romanian state, the Government in that case, had committed itself to paying amounts ranging from EUR 11,000 to 23,000 in material and moral damages (EUR 260,000 in total), and that the plaintiffs had also dropped any future claims, stating: 'this is to settle the cases definitively, including our national civil court actions'.

In the same communiqué it is highlighted that the ECHR had indicated, at paragraph 152 in its decision, that: 'those amounts were for the complete and definitive settlement of the cases, including those paid in the country'. The Foreign Ministry continues by saying that 'therefore, the amounts paid in damages based on the decisions of the ECHR include damages awarded by national courts as well, as the loss suffered by the plaintiffs could not be repaired twice. The Romanian Government Agent for ECHR, on the 16th of August 2005 notified the ECHR decisions to the local authorities, the court executor and the plaintiffs'.

On the 12th of July 205, the ECHR passed a ruling in connection with the other seven plaintiffs who had refused an amiable settlement. They were awarded material and moral damages between EUR 11,000 and 95,000, in the total value of EUR 238,000.[147]

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[144] Local mass media provided extensive coverage of the topic. See: http://www.romanialibera.ro/editie/index.php?url=articol&tabel=z08022006&idx=147, http://www.zi-de-zi.ro/fullnews1.php?ID=10047IDQ=hadareni, http://www.zi-de.zi.ro/fullnews1.php?ID=12168&IDQ=hadareni.

[145] See http://www.romanialibera.ro/editie/index.php?url=articol&tabel=z28042006&idx=138.

[146] For the full version please see: http://www.mae.ro/index.php?unde=doc&id=26856&idlink=&cat=

[147] See ECHR Decision no. 2/2005: http://www.scj.ro/strasbourg/moldovan%20romania%20R.html

C. Rights possibly violated

1. SoJust takes into consideration that, at the time when this report was being produced, the appeals against the challenging of the enforcement of the court decisions were pending before the Mures Court House, therefore SoJust would refrain from producing an opinion on the substance of the case until a final court decision is passed.

However, SoJust cannot help noting the far too lengthy judicial proceedings in the case. The court of first instance has already ruled on that, therefore SoJust is free to state its opinions regarding thee reasons for the repeated adjournments in the case, with no less than 10 court appearances having been necessary for the case to be adjudicated.

As related by the mass-media, the reasons for the many postponements were in connection with the publication of the second ECHR decision[148] ascertaining the fact that the Romanian state had violated rights set out at articles 8, 3 and 6, paragraph 1 in the Convention regarding the length of proceedings (indent 131), as well as article 14 in the Convention conjointly with articles 6 and 8 in the Convention; another reason seems to have been the way in which the Ministry of Foreign Affairs had notified the decision.

Yet, in its Decision no. 1420/2005, the High Court of Cassation and Justice rules that the appeal court had rightfully decided that the assistance provided to the victims by the Romanian state was not to mitigate the defendants' moral and material liability, who would still be under a duty to fully indemnify the victims for the damages caused.[149]

Moreover, Decisions 1 and 2/2005 passed by ECHR mention the Romanian State and the defendants (Roma civil parties) as the parties, and the defendants who had been convicted.

In fact, they were convicted for various crimes (murder, destructions, etc.) based on which the moral and material damages had been calculated.

Yet, for instance, the Romanian State undertakes liability, within Decision no. 1/2005 of ECHR not for the crimes themselves, for which 12 individuals were convicted, and whose properties were frozen, but for the context that had led to the events in 1993 at Hadareni, and also for the too lengthy judicial proceedings, in connection which it commits itself to remedying the situation by (we cite *in extenso* for clarification:

- *improving the educational programmes for the prevention and fighting of discrimination against the Roma in the school curricula within the community of Hadareni, Mures county;*

[148] Ibidem.

[149] Decision of the Supreme Court of Justice and Cassation cited above: http://www.scj.ro/cautare_decizii.asp

- *designing public information programmes to remove stereotypes, prejudices and practices that affect the Roma community by the public institutions in Mures, relevant for the Hadareni community;*
- *starting of legal education programmes in cooperation with the members of the Roma communities*
- *supporting positive changes among public opinion in cooperation with the members of Roma community;*
- *stimulating the participation of the Roma to the economic, social, educational, cultural and political affairs of the local community in Mures county by promoting mutual assistance and community development programmes*
- *implementing home and environment improving programmes in the community*
- *identifying, preventing and actively resolving conflicts which may lead to violence being perpetrated in the family, community or among the various ethnic groups).*

From this viewpoint, it is more than obvious that we face two different situations: one related to the two ECHR decisions, the damages awarded being related to the human rights violations by the authorities, and a second one regarding Decision no. 1420.2005 of the High Court of Justice and Cassation awarding material and moral damages commensurate with the degree of guilt of the defendants assigned by the Romanian national courts. And the execution procedures refer only to the national court decisions, related to the liability of individual persons, and not to the Romanian authorities.

There are therefore reasons to consider that the successive postponement of proceedings had not taken into account exactly the actual state of affairs described above, meaning that, whatever the outcome of the appeals against the enforcement orders, there will still be a doubt left that those people did not have their cases heard within a reasonable time frame.

2. Another issue arising from the hearing of the appeals against the enforcement orders is concerned with the unjustified interference of another power in the state, the Executive in this case, that, via the cited communiqué of the Ministry of Foreign Affairs, intervened without having a right to do so, undermining the independence and impartiality of the court of justice that had been called to solve the appeals against the enforcement orders.

A very clear fact stemming from the communiqué of the Foreign Ministry is that the institution forecast, guided or influenced the court in passing a certain ruling (the communiqué had been released on the 18th of August 2005, after, on the 10 of August same

year, the assets of the convicted people had been frozen; they subsequently lodged appeals against the enforcement of that decision, knowing the fact also recognised by ECHR on several occasion, that the distraint phase itself is part of a civil action procedure, and that the court judging such an appeal is supposed to be independent and impartial under art. 6 paragraph 1 in the Convention).

In other words, SoJust finds there are strong reasons to believe that the Romanian state infringed on the independence and impartiality of the court set forth at art. 6, paragraph 1 of the Convention.

III. THE M.I.S.A. CASE

A. Facts

One of the cases that raised public doubts in relation to a fair judicial procedure and consistency with the fundamental rights is the one of the Movement for Spiritual Integration into the Absolute (MISA).[150] MISA leader, Gregorian Bivolaru and other disciples had been pursued, arrested and beaten by the former Securitate since the 1970s. It could have been, according to the information released into mass media, that the pursuit of MISA leader continued beyond 1989 as well. Plus the public reticence in relation to the yoga techniques, particularly in the 90s, because of lack of sound education.

The most important official action directed against MISA took place in March 2004 – ***operation "CHRIST".*** On March 18, 2004, a few hundred police officers, gendarmes and prosecutors forced their way into several properties of yoga trainees, where dozens of yoga practitioners were sharing lodging, following their spiritual practice base don the model of Indian *ashrams*. The descent was broadcast by a number of TV stations and an entire country was able to watch on the television how the law enforcers where breaking into properties, how they handled the tenants found there by means of force (some of them were foreign nationals) – under the threat of fire arms, how they were urged to lay down on the floor face down and hands up; how they were not allowed to put clothes on, how the law enforcers did not ask for their consent to film them. In one of the cases it appears there was no domiciliary search warrant. Several dozens of people were lifted into the police vans and driven to the prosecutor's office for questioning. They were denied contact with their legal defendants for

[150] Established as a not-for-profit association in January 1990, the association has a social – professional, philosophic, educational nature, aimed at raising the spiritual level of people by promoting the *yoga* theories and practices.

the reason that they were being heard as witnesses and the Romanian legislation only guarantees defence for directly interested parties and not for witnesses, too.[151]

According to the content of the search warrants, searches were supposed to address *'IT data, users' data and traffic of data*. The people who were served nevertheless stated that huge quantities of personal belongings[152] were seized, some of which were not even entered to the search reports and the majority being totally unconnected to the purposes indicated by the search warrants; two years later, the owners were only return about one third of the items that had been taken way from them on that occasion. Some of the evidence – a witness' diary (the person was a yoga practitioner) was leaked into the mass-media and therefore made public, while the authorities were reassuring everyone involved about the perfect confidentiality observed in the matter.

The prosecutor is now dealing with cases of organised crime and trafficking in human beings in connection with some of the MISA members. A disdraint measure was taken on 70 properties to cover claims. Officially, the story was that, under the covert of yoga-like training courses, the subjects of the investigation had recruited, manipulated and exploited for their personal interest the trainees – many of them minor of age, whose mental development[153] was endangered. Based on the contradictory information published by the mass-media, there were eight victims. Some of the individuals under investigation were referred to court. Something highly unusual in Romania – the full Prosecution disclosure papers were posted online and made public by the criminal investigative body[154], something that, apart from violating the right to have their case heard by a fair court and the right to privacy of the people investigated, could be looked at as yet another instance of public manipulation.

B. State of play of M.I.S.A. cases

[151] We underline the facile nature of a domiciliary search in Romania: it suffices that criminal investigation begins *in rem* and, practically any person who might not have any connection to the case whatsoever, can expect their home to be searched.

[152] The belongings confiscated were: ID papers, official documents and contracts, home and motor-vehicle property deeds, accounting paperwork, money, jewels, computers, video-, photo-cameras, clothes, watches, underwear, shoes, foodstuffs, books and magazines, audio-video tapes, phone cards, etc. Over 100 applications lodged with the prosecutors for the restitution of the personal belongings were rejected on grounds that the goods "*may be related to the case"*. It remains to be established to what extent such goods, as those above mentioned, are related to computers and to IT.

[153] http://www.mpublic.ro/presa/2004/c_03_30_2004.htm

[154] http://www.mpublic.ro/presa/2004/c_08_16_2004.htm

Despite the SCM[155] internal investigations or judicial investigations conducted further to petitions filed, the presumed irregularities in the conduct of the investigations have not been clarified. Out of the 55 criminal petitions submitted in May 2004, only nine were retained by the prosecutors fro a resolution, and for one criminal offence alone. The rest were quashed without the victims even being heard. The discharge orders have been challenged in the supreme court.

In parallel, two arrest warrants were issued in Gregorian Bivolaru's name – who left for Sweden in the meantime – one under the charge of sexual intercourse with a minor and another one for trafficking in human beings. Based on the two arrest warrants, the Romanian state made an extradition request that was sent to Sweden. Nevertheless, the Supreme Court in Stockholm decided that, because of the violation of the presumption of innocence and because of the political[156] and mass-media interference with the case (with a special mention being made that the authorities deliberately turned the public against the defendant), the Rumanian judicial system was not in a position to guarantee a fair trial for the suspect who was the subject of the extradition request, for which reason the request was declined[157]. After two more months, the Government of Sweden granted to Bivolaru political asylum.

C. Rights possibly violated

Questions were raised in relation to the conduct of domiciliary searches, hearings and investigations, with the possible breach of several domestic provisions (illegal deprivation of liberty; threat; unfair repression; breaking into; destruction; abuse of office against personal interest; abuse of office by restricting certain rights; attempt to convincing people to give untrue testimony; illegal arrest and abusive investigation; abusive conduct) and international ones (banning of torture; right to freedom; right to a fair trial; right to privacy and family life; freedom of thinking, conscience and religion; freedom of speech; freedom of meeting and association; banning discrimination; protection of the property right).

The ineffectiveness of domestic investigations of the claimed abuse becomes even more serious given the fact that Bivolaru sought and obtained asylum and then the statute of a refugee in another country. From this point of view, the competence and even good will of the Romanian authorities are being seriously questioned.

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[155] http://www.SCM1909.ro/SCM/linkuri/24_02_2006_3092_ro.doc, http://www.SCM1909.ro/SCM/linkuri/24_02_2006_3093_ro.doc

[156] See, for instance, the statement by Senator Radu Tirle in relation to a MISA meeting, in the Romanian Senate http://www.cdep.ro/pls/steno/steno.stenograma?ids=6128&idm=2,04&idl=1

[157] Decision of October 21, 2005, File no. o2913095.

IV. SRI – INTERCEPTIONS AND AUDIO OR VIDEO TAPING

A. Premise

The intercepting of communications and audio/video taping are procedures used in the collection of extremely important evidence, especially in cases of drug trafficking, trafficking in human beings, corruption, or national security. There is no question about the fact that communication interceptions and audio/video recordings do represent a violation of individual privacy the Court in Strasbourg does not exclude to the extent to which such trespassing meets the demanding principles of lawfulness, proportionality and legitimacy.

B. Legal regulations

In Romania, Law 141/1996[158], introduced for the first time audio or video recordings as evidence to the Criminal Procedure Code. That regulation has been repeatedly amended by Law 281/2003[159], and, later on, by Law 356/2006[160]. Part from the general law in the field that is to be found in the Criminal Procedure Code, there is a corps or special legislation that institutes, in specific areas, provisions regulating audio or video recording and interception, either with precise reference to the general provisions[161], or with a derogative content[162].

In the legislative area, while perfectible, acts adopted after 2003, with reference to the audio and video interception and taping, suggest a greater concern on behalf of the Romanian legislature to put internal regulations in agreement with the individual right to privacy and family life (art. 8 in the European Convention explained through a progressive case law of the European Court of Human Rights). Such measures are only to be taken in cases of alleged offences believed to be serious, strictly determined, only if necessary, and can only be ordered by a judge[163] for a limited period of time indicated in the law. In that way the positive regulation is rendered consistent with the jurisprudence of the Court of Justice in Strasbourg

[158] Published in the ‚Official Journal of Romania', Part I, no. 289/14 November 1996.
[159] Published in the ‚Official Journal of Romania', Part I, no. 468/1 July 2003.
[160] Published in the ‚Official Journal of Romania', Part I, no. 677/7 August 2006.
[161] See, for example: Law no. 143/2000 (Published in the ‚Official Journal of Romania', Part I, no. 362/3 August 2000), Law no. 78/2000 (Published in the ‚Official Journal of Romania', Part I, no. 219/18 May 2000), Law no. 656/2002 (Published in the ‚Official Journal of Romania', Part I, no. 904/12 September 2002), Law no. 39/2003 (Published in the ‚Official Journal of Romania', Part I, no. 50/29 January 2003).
[162] See Law no. 535/2004 (Published in the ‚Official Journal of Romania', Part I, no. 1161/8 December 2004).
[163] In exceptional circumstances, if there is an emergency, interceptions and recordings can be ordered by a prosecutor, under the conditions set out at art. 91^2 paragraph. 2, 3 Criminal Procedure Code, or, under Law no. 535/2004, they can be conducted by specialised state bodies that are competent in the field, in the absence of an authorisation, but in compliance with art. 22 in the Law.

that demands the institution of a jurisdictional control by independent and impartial magistrates, in view of an objective oversight of the concrete modalities of the sue of such investigative means[164]. Or, the establishment of discretionary competence for the prosecutor by the original regulation, without any possibility of control by other authorities from outside the prosecutor's offices system, would generate abuse.

SoJust is describing hereunder a situation we had in the spring of this year regarding the Interior Intelligence Agency (SRI), a situation that proves to become, as the Open Society Foundation (FSD)[165] was stressing at the time, „*a treat and a huge regress of the rule of law, an inadmissible contempt of judges and of the act of justice, with serious consequences upon the country's democratic future'*.

In a communiqué made public[166] on the 28th of February 2006, S.R.I. states a viewpoint according to which the rules in the Criminal Procedure Code in connection with the need for phone communication interception and recording to be conducted under an authorisation issued by a judge, are not applicable to SRI in situations where it acts under art. 3 and art. 13 combined in the National Security Law no. 51/1991[167]; the idea was that, in the area of intelligence, a warrant issued by the Attorney General of the Prosecutor's Office of the High Court of Cassation and Justice. There is no reference to art. 20 and 21 in Law No. 535/2004 on the prevention and deterrence of terrorism[168]. Art 46 in Law no. 535/2004 is also disregarded; according to that article, on the date when the law enters into force, all other legal provisions that are contrary to it shall be abrogated; article 13 of Law no. 51/1991 was therefore abrogated on 11 December 2004. Which means that, **two years and two months after the entry into effect of Law no. 535/2004, SRI is still guided by a legal text that was**

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[164] See, for reference, ECHR, Decision in the case Klass and others *versus* Germany of 6 September 1978, Decisions in the Kruslin and Huvin *versus* France case, of 24 April 1990, in V. Berger, ‚*Jurisprudence of the European Court of Human Rights*', 3rd edition, The Romanian Institute for Human Rights, Bucharest, 2001, page 436 onwards, the decision in the case Valenzuela Contreras *versus Spain* of 30 July 1998.

[165] See: viewpoint adopted by FSD on the interception of telephone communication by SRI, posted to: http://www.osf.ro/ro/eveniment_detaliu.php?id_eveniment=8.

[166] http://sri.ro/index.php?nav=cultura&subnav=cics&dnav=prpr&ddnav=&ddnav=detalii&sbnav=cultura_de_securitate&dbnav=detalii&id=3 and withdraw shortly afterwards!!!

[167] Published in ‚Official Journal of Romania', Part I, no. 163/7 August 1991.

[168] Under art. 20 in the Law ‚***challenges to the national security of Romania, set out at article 3 of Law no. 51/1991***….. are legal grounds for the state authorities with competence in the area of national security to propose to the prosecutor, in justified situations, to ask for an authorisation for the conduct of activities for the purpose of gathering intelligence consisting of: interception and recording of communications...", and, under art. 21 paragraph. 4, "if, within 24 hours of the receipt of the request, it is believed that the proposal is justified and all the legal conditions are met, the Attorney General of the High Court Prosecutor's Office or his/her lawful replacement, ‚***shall ask in writing the President of the High Court of Cassation and Justice to authorise the proposed activity'.*** The request is probed by **the judges**, in the council chamber, who may grant it or dismiss with arguments.

abrogated and upholds its validity with arguments that, even if seen in the light of the 1 January 2004 - 11 December 2004[169], they still contradict in a flagrant way the rule of law principles and raise natural questions, such as: '*Is the citizen protected against abuse in Romania?'* and *'Why is the Interior Intelligence Agency (SRI) afraid of the judge?'*[170].

C. Conclusions

SoJust warns about the fact that, so far, no official document has been produced to indicate the actual number of interceptions performed by SRI, the number of warrants issued for that purpose and by whom (prosecutors, judges), and the number of cases where individuals were prosecuted and referred to court over taking evidence in that way. Since SRI is the agency that is competent to conduct such interception in national security cases, it would be natural that such statistics should be in its possession, being the only way in which it could check its effectiveness and justify its work.

The interception that is not followed by referrals to court and possible by convictions of suspects raises major questions as to the formal correctness of the procedural system of authorisation issuance, as well as to the effectiveness of the SRI specific work. As a matter of principle, the interception of communications, violation of property infringe on the right to privacy of a person. The only legitimate justification of an intrusion in the privacy of an individual is the finality of such act, translated into the number of people prosecuted, referred to court, and, most of all, convicted.

A notable fact is that the Romanian legislation does not provide for redress available to a person whose privacy has been violated by SRI to take legal action and claim reparations for the prejudice caused by that, for the simple fact that the person would never find out about his/her privacy being violated. From that point of view, an individual's access to justice becomes impossible to achieve, and the possibility of redress is null.

4. RECOMMENDATIONS

Based on the facts presented in this material, as well as on the fact that the majority of cases against Romania are over decisions passed by national courts and prosecutors' conduct of investigations, **SoJust recommends the following:**

[169] The time lapse beginning on the moment of enforcement of art. 91^1-91^6 Criminal Procedure Code., according to the amendments made by Law no. 281/2003 and ending when Law no. 535/2004 entered into force.

[170] The arguments indicated are also raised in the SPECIALISED literature - see: D. Lupaşcu, *Observations regarding interceptions and audio or video recording, in* „The Law" issue 2/2005, page 169 onwards.

- Implement in the shortest time possible the provisions in Recommendation (2004) 4E of the Committee of Ministers of the Council of Europe;
- Attach special importance to human rights education and include a course in the European human rights protection to the curriculum of faculties of law, police, administrative and political studies, social sciences, etc.;
- Operate legislative changes to remove contradictions, unclear aspects and inconsistencies from normative acts in force; for that purpose, a special department should be created at the Ministry of Justice or at the Superior Council of Magistracy for to check legislation consistency;
- Acquire a better knowledge of ECHR case law by domestic courts and enforce ECHR decisions by Romanian courts directly, even prior to legislation being amended[171] as well as adopt a clear life-long training plan for magistrates towards an in-depth knowledge of the jurisprudence of the European Court of Human Rights.
- Adopt a national strategy on the responsibility of the bodies of the public administration that sell property to tenants violating court rulings returning the property to the rightful owner in kind, by establishing clear punishments;
- Adopt a national strategy seeking to render magistrates responsible for a uniform construing and enforcing of the law.
- Adopt legislation banning authorities involved in judicial processes (police, prosecutor's office, courts) as well as the other authorities of the state (government, ministries, parliament, county or local authorities) from presuming an individual guilty before being definitively found guilty by a court of justice.

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[171] SoJust embraces the proposals made in letter no. 50844/07.06.2006 written by the Ministry of Foreign Affairs and by the Ministry of Justice to the President of the Superior Council of Magistracy.

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Chapter VI. Relationships among legal professions

-Prosecutors and Judges -

Core ideas:

The analysis of the relations among the legal professions is not customary in Romania.

There is a very serious confusion between the prosecutor's position and the judge's position.

The procedural rights of the prosecutors are unfair by comparison to those of the parties.

The current internal practices and regulations which exist in the Romanian courts and prosecutors' offices are quite alarming.

In Romania, the relations among the members of the legal professions have been studied too little. In recent years, the democratization of the institutions and the advancement of the freedom of speech have unearthed frustrations and tensions gathered in time. The inter-human relations have laid their imprint on the quality of the act of justice as well. Hence, we believe that the responsible authorities must order not only studies about the way in which the system is seen from the outside, but also studies like the one undertaken by SoJust in the following pages.

SoJust is persuaded that if we examine the malfunctions and the manner of cooperation between the judges and the court managers, between the Ministry of Justice and the magistrates, between the Superior Council of Magistracy (SCM) and the Ministry of Justice, between the Council and the magistrates, between the ancillary staff and the magistrates, between the magistrates and the lawyers, between the prosecutors and the judicial police, even between the theoreticians and the practitioners, we will be able to improve the laws, statuses and regulations of such professions.

The most acute and strange relation is the one between judges and prosecutors in criminal cases. SoJust wants by the present study to draw the attention particularly to the practices perpetuated between the two institutions, which damage both their image and the quality of the acts they carry out. We would like to mention that all the situations described in the present report were encountered in their practical activity by the SoJust members in person

or by those close to them. Examples were not provided in all the situations, as our intention was not to trigger any administrative investigations, but to focus the attention on the unfair and disloyal practices and put an immediate end to them.

The study called „The perception of magistrates on the independence of the judicial system" conducted in 2005 by the Romanian Association for Transparency has officially revealed, for the first time in Romania, the existence of a ***situation of tension between judges and prosecutors***. Thus, 23% of the magistrates themselves claim that the relations between judges and prosecutors are of a nature to damage the objectivity and impartiality of court rulings[172].

The explanation provided by SoJust in this respect is that finally judges perceive themselves distinctly among the ranks of the judicial authorities, while prosecutors perceive the same distinction but fear the change of their status, which is still one of an equal footing with that of judges. This latter issue generates many confusions as to the role that the two categories of magistrates must play during the court proceedings (particularly in criminal cases), confusions of a legislative as well as of public perception nature.

The constitutional establishment of the judiciary

According to the old legislation on the organization of the judiciary, Law No. 92 from 1992, the judiciary included all the *magistrates* – in other words, both judges and prosecutors. It was the only reference to the concept of `power`. The 1991 Constitution used only the term `authority`. Short of specialists in the field of judicial organization, the few post-December 1989 authors who wrote about this topic have tried to inoculate the idea that prosecutors are magistrates exactly like judges, that they pursue the same goal and that together they belong to the same judiciary (judicial power). This reasoning did nothing else but seek to protect a professional body whose status had to be preserved, as a reminder of the totalitarian regime in which the prosecutor was the main character in a criminal case trial, standing for a repressive system whose objectives were the instatement and the preservation of the perpetual fear of the population against the institutions of the state.

Once the Constitution was reviewed in 2003, the fundamental law has established the distinct existence of the power of the judiciary, balanced against the other public powers in the state. In keeping with Art. 126 Paragraph 1 from the Fundamental Law, `justice is being

[172] See: http://www.transparency.ro/text.php?LNG=ro&MOD=2&SEC=94&ART..=20.

served by the HCCJ (High Court of Cassation and Justice) and by the courts of law defined by the law`. This means that the ***judicial power is exercised only in a court of law and that it is exerted in specific terms only by the judge himself/herself.*** From this perspective, the judge is the only one mandated by law to try a case subject to a dispute at law; the judge delivers a generally mandatory solution and hence justice is served. But the judicial power is real only if, in structural, mental and personal terms, the independence and impartiality of judges are genuine, and if the exercise of the power to judge is sovereign.

The independence and impartiality of courts according to the public perception

The two autonomous concepts – **independence and impartiality** – are attributes specific to judges. Independence[173] at least cannot belong to the prosecutor, who, in any country, on the one hand, is part of a hierarchical structure, at whose top there is usually a representative of the executive power, and, on the other hand, he does not perform the judgement function during the trial.

Independence and impartiality represent the essential components of the right to a fair trial, as they are explicitly imposed by the text of Art. 6, Paragraph 1 from the European Convention on Fundamental Rights and Freedoms. Independence, seen in the light of Art.6 Paragraph 1 from the Convention, as developed by the progressive jurisprudence of the Strasbourg Court, must be examined in relation to the executive power, without excluding subordination to other judges or magistrates, if they in their turn enjoy independence against the executive power. If, at first, the European Court has admitted that a magistrate can be considered independent even if he/she is in a certain condition of subordination to the executive but, in specific terms, through the safeguards provided by the domestic organic law, he/she acts independently, not being subject to the pressure of the executive, the Court has subsequently ruled that it is enough to run the risk that a magistrate be subject to the instructions given by the executive, even if, in specific terms, he/she is not subject to such influences, to consider that Art. 6 Paragraph 1 is infringed. ***It is obvious that the Romanian Public Ministry*** cannot be considered an independent authority, because in Romania the prosecutor exercises his/her responsibilities under the authority of the minister of justice.

Impartiality implies, in the light of the constant jurisprudence of the European Court of Human Rights, two approaches: an objective one and a subjective one. From a subjective point of view, in a specific case, the judges have the duty to abstain from the expression of

[173] Nor can impartiality, as far as the sitting prosecutor is concerned, because he is forced to uphold the prosecution.

any biased opinion and formulate a personal prejudice; in this latter case, impartiality is presumed until proven otherwise. From an objective point of view, the judge must provide sufficient safeguards to exclude any doubt that he/she could act in a biased manner in a litigation deduced from judgement. Thus, independent from the personal conduct of the judge, certain elements, verifiable de facto, are able to generate suspicion as to his/her impartiality. From this perspective, what is relevant here is the confidence that, in a democratic society, courts must instil in the subjects of the law, with specific reference to the parties in a trial, so that even appearances have relevance; hence, it is the duty of the judge to abstain whenever there is a legitimate reason to motivate the suspicion that he/she might be impartial. In general terms, the court avoids confining itself to the examination of the formal safeguards – the legislative framework – and it also queries the circumstances of each specific case, of a nature to highlight in specific terms whether the independence and impartiality of the act of justice are observed.

As such, the simple legislative establishment of the independence and impartiality of the act of justice is not enough, but ***the judge himself/herself must inoculate trust into the subjects of the law***. The independence and impartiality of justice must be genuine and acknowledged as such by the subjects of the law. Hence, the role of the public and its perception of the judicial system are essential to the examination of the objective nature of the actors involved and of the act of justice itself. In this respect, the current and real situation of the justice system cannot be described exclusively in terms of the existing legislation, but one must go down to the level of courts and prosecutor's offices, to mindsets, judicial practices, the heritage of past habits, as well as to public opinion surveys and barometers. Under the circumstances in which the law-maker attaches a confusing status to the prosecutor, and certain habits are far from being dropped, it is no wonder that the public is equally confused about the distinction made among the judicial functions.

Potential factors we have identified as a source of such confusion could be the following:

1. the location of prosecutor's offices: `within courts`

Very many prosecutor's offices in Romania have their main office in the very building of the court. Their very name is linked to that of a court: `the prosecutor's office within (court…). The fact that the prosecutor's office operates in the same building as the court and that, in many instances, the prosecutors have their offices next to the chambers of the judges represent decisive factors which shape the belief of judges that they belong to the same

professional body as the prosecutors, as well as the belief of the subjects of the law that between these two actors there is too strong a link for them to enjoy a truly fair and impartial trial.

We believe that the amendment of the law on the organization of the judiciary should be considered, to re-examine the concept of the prosecutor's offices "operation within courts of law". Thus, the substance of this concept must be limited only to the functional competence of the prosecutor's offices, meaning that they are competent to investigate the cases which fall under the trying capacity of the respective court.

2. the direct contact between prosecutors and judges

The operation of the prosecutor's offices in the same establishments as the courts, to which one must add the vicinity (proximity) between the prosecutors' offices and the judges' chambers are two factors which reveal the apparent lack of any distinction between the two categories of magistrates. In keeping with Art. 91 from the Decision of the Superior Council of Magistracy No. 387/2005[174], on the approval of the Standing Rules of the courts, the public is allowed access to: a) the court session rooms, 30 minutes prior to the beginning of the court session; and b) the court departments that perform public-related activities, according to the established timetable, as well as during the „audience" hours. T*he access of persons other than the court employees in other court offices and at different hours from the scheduled ones as well as the access to the court premises after the working hours are over* is forbidden. We do not realize yet if prosecutors can join this category or not. Anyway, many doors of court offices bear the sign which reads as follows "the access of lawyers and citizens is forbidden" – but no mention is made about the prosecutors.

Little is known about the fact that, on matters of pre-trial detention, the delegated judge is informed by telephone by the prosecutor himself who, naturally, has an interest in the admission of his proposal; or that, for the approval of a search or an audio or video tapping, the prosecutor reports directly to the judge's chambers. Such straightforward contacts between the two magistrates make it less likely for them to be able to act objectively from different procedural positions. *In other words, there is the appearance of bringing damage to the impartiality of the judge, not only in relation to the latter but also in the eyes of the subjects of the law.*

[174] Published in the "The Official Gazette of Romania", Part I, No. 958 from 28 October 2005 and amended by the Decision of the Superior Council of Magistracy No. 352/2006, published in "The Official Gazette of Romania", Part I, No. 491 from 7 June 2006.

3. the wearing of the same gown by the judge and by the prosecutor

The first contact between the subject of the law and the court of law takes place through the visual identification of the judges' and prosecutors' specific garments. The impossibility to make a distinction between the two, who have totally different roles and procedural tasks and functions can induce the onlookers the feeling that the two categories enjoy an equal footing status.

Although the current legislation stipulates that SCM must endorse the garments of the judiciary, at present the old regulation still holds, i.e. Government Decision No. 725/1993 republished[175]: on its grounds, the executive power has decided exclusively that judges and prosecutors must wear the same robe (in terms of type and colour), and the same holds true for the bib worn by the judges in trial courts which is of the same colour as the one worn by prosecutors (or, it is at the level of trial courts that the highest contact takes place, in numbers, between the population and the judiciary). The badge of both judges and prosecutors ,is the symbol of the judicial power in the rule of law'; the only difference between the two is the shape: in the case of judges the badge is round and in the case of prosecutors the badge is in the shape of a shield.

4. the physical location of prosecutors in the topography of the courts

a) for years on end, the location of prosecutors in court rooms has been **at the same level** with the location of judges, most often even at the same table as the latter. In 2000, the then management of the Brasov Court of Appeal has decided, after consulting its staff, to change the architecture of the court rooms in the related courts. The prosecutors, as of the following day, refused to attend the court sessions and the Prosecutor General of Romania contacted the president of the court by telephone and asked for an explanation. For fear of reprisals, the presidents of trial courts and tribunals from the jurisdiction of the Brasov Court of Appeal did both obey the request of the court, except for the Brasov Court itself. As a result of the differences on this particular topic between judges and prosecutors, the then SCM has decided through its Decision No.111 from 27 September 2000, and the minister of justice has issued accordingly the Order No. 2588/C/11 Oct. 2000, whereby all courts had to make changes in the structure of the court rooms, as follows: ***the prosecutor must not sit at the***

[175] Published in the "Official Gazette of Romania", Part I, No. 10 from 27 January 1997.

same level as the judge, but at the same level as the (defence) lawyer, on a stand located mid-height between the floor and the rostrum.

The Order was implemented only partially in courts: some courts complied, other court presidents deferred its application until 2005, while others do not apply it at present either. We would like to mention that there still are courts where the prosecutor sits in front of the rostrum and at the same level as the (defence) lawyer. The delay in the imposition of a fair topography in court rooms still generates especially for the subjects of the law the feeling that the equal opportunity principle does not work effectively in criminal cases and for the general public at large the impression of an interlocking directorship achieved by the prosecutor during the trial.

SCM as a defender of independence, including its appearance at the MoJ, as the administrator of justice, should pick up this rather sensitive issue and put it up for debate again.

b) in very many courts ***prosecutors go in the same door as judges.*** And they leave the court room together in the same way. It is interesting to note that the afore-mentioned order stipulates the need to have separate access doors for judges-*prosecutors*-court clerks, and for the lawyers-parties-public respectively. Even if the the judge and the prosecutor meet only when they enter/leave the court room, the subjects of the law, as well as the lawyers are under the impression that the ruling is made by the judge together with the prosecutor, which is very dangerous from the standpoint of the appearance of a strong lack of impartiality on the part of the judge.

c) SoJust draws the attention on a practice which exists in the case of many ***criminal judges who consult[176] privately with the prosecutor on the cases***, before a court session, either in their chambers or in the prosecutor's office, or in the court room; in this latter case, the consultation takes place in private and not in public. As long as they are holders of

[176] This `*cooperation*` does not exist and independently from the resolution of certain cases, respectively, through the organization of round tables and professional debates. The equal involvement of lawyers in such events seems downright overrated and inadmissible to prosecutors.

[176] Even in the cases in which the prosecutor was extracted from among the ranks of the panel of judges, he still holds a priviledged position in the court session concluding reports and in court rulings, being mentioned right after the panel members, before the common data about the object of the dispute at law, in a different bolded box, other than the one dedicated to the record of the parties present or absent from the court session.

[176] This practice, in place for many, many years, is still present in 2006.

essentially separate positions –jurisdiction and prosecution - such *private* discussions about the cases taken to court are damaging, they ruin the impartiality of the judge, they generate the presumption of a lack of transparency and they have a deep negative impact on the act of justice.

d) in the same context, we would like to highlight another practice, namely, the formal participation of the prosecutor in the civil cases. Hence, we have witnessed an on-going lack of interest on the part of the prosecutors in the resolution of certain fiscal cases, administrative cases, precious metals restitution cases and cases which involve minors. This is so because the current prosecutor is perceived as being competent only in criminal matters, unlike his peer, the French prosecutor who, due to his extended duties in a broad range of cases, can be truly called a `magistrate`. *This is true all the more so as the constitutional duties require the involvement of the prosecutor in all the cases which imply the representation of the general public interests, the defence of the legal order and of the fundamental human rights and freedoms (Art. 131 Paragraph. 1 from the Constitution of Romania).*

5. the place of the prosecutor in the court order mentions

In most court orders, the prosecutor is mentioned in the Preamble, on the same line as the members of the panel, although the law is quite clear on this issue – the panel consists only of judges[177].

There are even courts where the prosecutor signs the minute drafted by the judge, either on the day when the ruling is given or later[178]. This conduct is explained by the fact that the prosecutor's chain-of-command must see that the respective ruling was checked by the prosecutor from the viewpoint of its lawfulness and solidity of grounds. It also generates the appearance that the ruling was given by the judge together with the prosecutor. As there is no best practice guidebook in courts, this particular issue was taken up from generation to generation by the judges in those courts where it is a customary practice.

6. the privileged treatment of the prosecutor as far as the flow of files is concerned

a) the prosecutor and the lawyer should enjoy similar conditions when they examine the court files. Nevertheless, in practical terms, there are situations in which the prosecutor goes straight to the records department (archives) and takes in his office for consultation

purposes all the files which are to be heard by the judge in the next court session. In exchange, the lawyer of the parties, in a similar situation, must request the file from the records department and read it there. There is no way in which he can take the file out of the archives. Moreover, the Criminal Procedure Code, as well as the Regulation for the Organization and Operation of the courts – both the one issued by the minister of justice in the past and the one issued by SCM at present – provide the obligation of communicating the files to the prosecutor for him to examine the solutions ruled, even in the case in which the prosecutor did not take part to the trial (in the case of simple offences[179]). In other words, the courts have the obligation to send the files to the prosecutor's office in order for the appeal or judicial review reasons to be drafted; thus, they make their own rulings subject to the prosecutor's scrutiny! The curious thing is that there is no deadline for the return of the file from the prosecutor to the court.

b) ultimately, if the party wants to receive copies of certain documents from the file arrived in court, the party must pay a judicial fee for each page that is copied. There are courts where the fee is collected illegally twice: one is the duty stamp and the judicial stamp to get the copy of a page in the file, but the records department instead of making available the requested copy sends the applicant to the copying office which is located on the premises of the court or very close to the court, where the applicant pays again for the actual copying of the document in question. According to the law, the court should make available the copy of the requested document, i.e., it should provide the service which was paid on its account. In exchange, neither the duty stamp nor the judicial stamps are requested from the prosecutor.

7. privileges during the settlement of certain cases

a) in cases of a high media impact, as a rule, the ordinary sitting prosecutor is replaced by a prosecutor who has a managing position in the prosecutor's office. For years on end, the prosecutors in managing positions made use of their position in relation to the president of the court in order to channel a certain file towards a certain judge[180].

[179] This situation was valid until the recent amendments brought to the Criminal Procedure Code through Law 356 from 2006.

[180] At present, the files are distributed to the judges by computer, on a random basis. Certain malfunctions are still a source of concern to us, reported by the media, as well as the non-punishment of the guilty parties (until today, SCM has sanctioned only one Section President within the High Court of Cassation and Justice, on account of his infringement of the random case distribution rules).

b) we would like to report yet another type of an unfair treatment practice between the prosecutor and the involved parties: a remedy used by a prosecutor declared in the matter of pre-trial detention (when the judge has overruled the prosecutor's proposal for the arrest of the accused) is tried in a much shorter time than if the remedy were declared by the person charged/indicted (when the judge has ruled the admission of the prosecutor's proposal for arrest).

We feel compelled to mention in this context ***Decision No. XII from 21 November 2005 of the HCCJ*** delivered in a judicial review case in the interest of the law, which stated that the judicial review is inadmissible against the solution of rejecting the petition for the repeal, substitution or cessation of the pre-trial detention. Hence, the arrested party does not have the right to challenge this decision. So, we are in the situation in which the prosecutor can exercise a right (the right to request the arrest and to challenge the potential rejection of his petition by the judge), whereas the party involved does not have this right (the right to challenge immediately to a higher court the judge's decision to reject his petition and the right to request his release). Unfortunately, instead of removing this discrimination, the recent Law No. 356/2006 on the amendment of the Criminal Procedure Code takes into account the solution provided by the Supreme Court, legislating the inadmissibility of the judicial review in such cases.

In the same context, we would like to mention the fact that, in keeping with the legislation in force, the prosecutor can proceed to re-starting the investigation at any time, until the statutes of limitation are met (Art. 270 last paragraph from the Criminal Procedure Code), whereas the party involved can do the same only within 20 days from the service of the solution (Art. 278 Paragraph. 3 from the Criminal Procedure Code).

c) another situation frequently met in courts is the following: in the case of the panels of judges that must settle during the same court session both criminal cases and civil cases, although the law stipulates that the criminal cases are tried first, the trial does not start until the prosecutor is present in the court room. On the other hand, if the lawyer is absent from the court room at the moment when the case in which he provides legal counsel is called, he can be fined. Theoretically speaking, this happens due to the small number of prosecutors; if such is the case, nothing prevents the judge from adopting the method of calling at a certain time (hour) the cases which require the presence of the prosecutor.

d) in legislative terms, a differentiated treatment is dedicated to the parties and to the prosecutors with respect to the judicial expenses: if the party involved loses the trial, according to the distinctions made by Art. 191-193 from the Criminal Procedure Code, the party must bear both the expenses of the opposing party (other than the prosecutor) and the expenses made in advance by the state[181]. In exchange, if it is the prosecutor who „loses the case", to the effect to which the judge rules for the dismissal of the case (an acquittal ruling), or he is denied an incidental petition, or his appeal or judicial review is overturned, the legal expenses are to be covered by the state and the party unjustly charged has no legal means to be compensated for the expenses the party has made in advance.

All this places the prosecutor in a privileged position in relation to the parties and leaves the impression in the eyes of the citizens that it is the prosecutor and not the judge who has the decision-making power over the disputes settled in court.

8. the competence to rule pre-trial detention

For a very long time, prosecutors were feared not only because they could and still can launch at any time the prosecution procedure, but also because they held the monopoly over pre-trial detention. The method called "first you arrest and then you produce evidence" specific to that past period is well known. Although ever since 1994 Romania should have amended its legislation according to the European Convention on Human Rights, this process took place only in 2003, when the Romanian Constitution was also reviewed, and when the competence of the pre-trial detention ruling was transferred to the judge.

At present though something paradoxical in nature occurs: very many prosecutors have formulated transfer applications to courts, in keeping with Art. 61 from Law 303 of 2004. It seems that SCM does not have criteria for the resolution of such applications. We would like to draw the attention that a situation may be created whereby prosecutors are „transferred" to courts as judges, through a procedure which involves minimal formalities and which does not provide for them, as judges, any incompatibilities in relation to the matter of pre-trial detention[182]. Hence, a simple interview, as a rule a formal one, before the SCM, is not

[181] We would like to highlight the fact that the amount of such expenses has never been regulated; hence, they are determined according to the magistrate's simple estimation.

[182] To the effect of those mentioned above, Chapter III from the Criminal Procedure Code on "Incompatibility and change of venue", Section I "Incompatibility" should be completed. Hence, specific grounds should be given as to the incompatibility of the judge who rules the arrest, which situation does not appear explicitly in the Code. *De lege ferenda* "The judge who, as a prosecutor, has performed criminal prosecution-related acts in a particular case, has proposed the arrest according to Art. 146 or 149¹ from the Criminal Procedure Code and has ordered the custody or has ruled on the complaint against the custody is not compatible with the arrest."

enough for the "transfer". A thorough examination of the grounds for the application is imperative, maybe even some tests meant to reveal the range of grounds which underlie "the wish for transfer". Considering that at present there is a great need for both prosecutors and judges, such transfers should occur only in exceptional cases. The law must highlight the ***motivational component of the transfer*** ("solid grounds"). They must consider the circumstances which have a negative impact on the applicant's activity as a prosecutor/judge, including the ones related to his/her psychological profile. We would like to recall at this point a recent example[183], when a prosecutor was transferred to a judge's position and then, after a short while, he has made an application to be restored to his former position; this example highlights the very inexistence of a means to test the capacity to face change; the aftermath was highly significant for the court and the prosecutor's office in question, which were unable to forecast their panel of judges needs as well as the prosecutorial workload due to these movements.

Still in connection to the arrest matter, we must report a potential practice which may put pressure on the judge. At present, in the file investigated by the prosecutor, the judge is the one who rules on the arrest proposal. If he sustains it, the judge has no longer any control on the case in question: the prosecutor can give a solution for the removal or the discontinuance of the prosecution, even if the person in question is under arrest; it is obvious that the judge cannot challenge this solution. As far as the party „illegally" arrested is concerned, the solution given by the prosecutor is enough for him/her to get a large amount of money from the state, which will have to recover it later on from the judge.

Finally, still in the field of pre-trial (preventive) measures, but this time with respect to the ***remand in custody*** measure we would like to draw the attention onto the fact that the initiation of the criminal prosecution by the judicial police worker is subject to the prosecutor's approval (Art.. 228 Paragraph. 3^1 from the Criminal Procedure Code); naturally, the institution of the criminal prosecution will become effective only as of the date of the deed's confirmation; it is only after the confirmation that the suspect becomes the person charged. Nevertheless, from celerity reasons, or simply from ignorance, the judicial police

[182] See the Article on: http://www.adevarulonline.ro/2006-07-11/Actualitate/un-procuror-din-mures-s-a-jucat-de-a-judecatorul_190975.html

[182] The `Ţundrea`- type mistakes (see Ziua daily newspaper from 24 September 2005) can be thus explained.

drafts the resolution on the initiation of the criminal prosecution and then proceeds immediately to taking the suspect into custody; only then do they report to the prosecutor in order to get the confirmation of the criminal prosecution. By all means, such a remand on custody is illegal.

9. concealing the prosecutors' mistakes

a) we can state that prosecutors are more afraid of negative statistics than of the conviction of an innocent person[184]. Hence, although in a certain file which is in front of the judge, the sitting prosecutor is aware of the fact that the person indicted is innocent, in his conclusion to the conviction he will request the defendant's conviction only for the sake of his own bill of indictment. Even if the legislation allows (we would say `forces`) the sitting prosecutor to formulate conclusions according to his own conscience in relation to the evidence produced not only in the criminal prosecution stage but also in the trial stage, he states as a rule that he cannot pose conclusions contrary to the bill of indictment, because, in his quality of a Public Ministry representative, he must support the latter's view (which, in a way we cannot understand, is necessarily the one from the bill of indictment, although indictments are not drafted jointly).

This situation of a decision performer has generated hilarious solutions in practice: brave prosecutors have formulated ***double conclusions***: *of conviction/arrest `in the name of the Public Ministry`, as well as of discharge/release `in their own name`*[185] or the situation in which the respective prosecutors draw the attention of the court onto the fact that they have an intimate belief which is different from that of the prosecutor's office and hence they request a stay, only to be replaced by other colleagues when the next deadline comes along. These examples prove once again the need to clarify the boundaries of the prosecutor's independence and subordination. In the same framework, we wonder if we can call the prosecutor impartial, as he is strangely enough compelled by the Constitution to be, as early as 1991?!

b) at the same time, a prosecutor fears more a file (case) restitution for the completion[186]/restoration of the criminal prosecution than he fears a discharge (acquittal). Even the change of the legal specification performed by the judge turns into a problem. We

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[185] the „Ziarul Clujeanului" newspaper, No. 303 from 10 June 2004.

[186] the institution was dismantled through the latest amendments of the Criminal Procedure Code introduced by Law 356 from 2006.

mention this because SoJust holds in its possession certain orders issued in 2005 by the prosecutors general from the prosecutor's offices which belong to the appellate courts; in keeping with them, before the sitting prosecutor formulates in his conclusions an opinion which runs contrary to the one supported so far in the prosecutor's office documents (for instance: acquittal, the denial of the proposal for arrest or search, the change of the legal specification, etc), he is ***forced to inform the management of the prosecutor's office*** three days prior to the trial deadline[187]. We wonder how the prosecutor is going to proceed in the situation in which the matter of the acquittal or change of legal specification arises even at the trial deadline in question. Will he request a stay in order to be able to inform his superiors? In any case, we hope that the practice of the prosecutor having to report to his superiors in such situations will disappear.

Given all these on-going internal/practical regulations, many sitting prosecutors do not go to the trouble any more to draw up an opinion in relation to the file: they know that their task is for their bill of indictment be „*confirmed"* by the court.

c) even if they do not get a conviction, the prosecutors will exercise the remedy, even if they agree with the ruling. Thus, there are cases in which the judge gives a ruling in agreement with the very conclusions of the prosecutor, or a ruling which differs from the official view of the prosecutor's office, but which is in agreement with the personal view of the sitting prosecutor. The remedy will be exercised without any reservations, as ´the prosecutor's office is not allowed to lose`. And even if the ruling challenged is going to be preserved in broad lines by the higher court, the prosecutors will be satisfied even with a small amendment of the ruling in question, in order for the statistics to mention `sustained appeal/judicial review`[188].

[187] although this type of oder is unstatutoty, no prosecutor has challenged it so far. To avoid its application, in practice some prosecutors show the judges (during those informal meetings in chambers) that it is possible in a certain case to have a different legal specification from the original one, but they ask the judges to raise the issue of changing the legal specification themselves, ex officio, so that this does not appear to be their own initiative.

[188] For instance, in a case in which the indicted person was sentenced to 9 months of detention with suspended sentence on parole, the prosecutorul deemed the sentence to small and launched an appeal. The court of judicial control has sustained the appeal and ruled a sentence of 11 months of detention with suspended sentence. Although the difference between the two sentences is insignificant and ungrounded in practical terms, in the statistical literature that prosecutor's office will be mentioned with the following results: `one appeal introduced, une appeal sustained`, hence, a 100% efficiency. Maybe if remedies were introduced only in the cases in which the true amendment of the sentence is mandatory, the number of cases pending in courts would drop considerably. Our feeling is that it is not only the parties that go to trial for any reason, but even the prosecutors.

As a rule, the statement of a remedy is decided in the so-called **`ruling examination meeting`**, organized in each prosecutor's office on a weekly basis. During these meetings, the rulings issued by the judges are debated upon; we found no regulation about such a procedure. Here is the way in which the meeting takes place:

The sitting prosecutor introduces the ruling given by the judge and states his opinion about it. If he agrees with the ruling, it may happen that his superior or his colleagues disagree, and then the latter force him to declare the remedy; the prosecutor cannot retort, due to the hierarchical subordination that he believes he has to observe, although the legislation in force makes use of a different concept, namely the concept of „hierarchical control", which is something else. Until not so very long ago, the prosecutor in question was `forced` not only to declare but also to justify the remedy thus declared, against his own belief. Of late, this practice has changed and another prosecutor is usually tasked with the justification of the remedy. There are situations in which the appeal is declared by the head of the prosecutor's office, although there is no regulation for this latter case either. Hence, the same absurd situation is reached, as in the above-mentioned case (`*double conclusions* `): on the one hand, one prosecutor supports one opinion and on the other, another prosecutor from the same office supports the opposite opinion.

It is pointless to show that, given the principle of subordination of one prosecutor's office to the higher ranking one, if the file was investigated by a higher ranking prosecutor's office and the bill of indictment was not *confirmed* by the court, then the meeting does not take place at all; the sitting prosecutor (from the prosecutor's office that matches the court but lower ranking than the one that has investigated the file) must declare the remedy.

It is equally impossible to explain the fact that the judges themselves accept the fact that another „colleague" has ruled in the same cases which are now in front of them (the magistrate-prosecutor), and the latter's *„defence"* is the one which is preferred. Hence, a caste feeling is being preserved among the magistrates, even between judges and prosecutors, a feeling which is much stronger in other towns and cities than it is in Bucharest.

Finally, we would like to report the resuming of a practice at the level of prosecutor's offices, subordinate according to the law, but with independent prosecutors, according to the same law: the prosecutors from the Prosecutor's Office with the High Court of Cassation and Justice issue orders about the way in which the law should be applied and cases should be

solved[189]. In Romania the limit of subordination should be once established as well as the meaning of the concept of prosecutorial independence, in order not to reach such equally absurd and ridiculous situations.

10. disloyal procedures and pressures

a) there are still cases in which the judges are told by **the parties that they have been physically or mentally abused by the prosecutors and police officers**. Some of these stories were collected from the very judges investigated by prosecutors. A case about a judge under investigation represents a true `trophy` for a prosecutor, especially during the full-fledged campaign of the fight against corruption. Recently, we were reported a case in which a judge - eventually discharged and in the course of winning the damage claim introduced against Romania for the period of his unstatutory detention - is being threatened by the investigating prosecutor who wants him to withdraw his claim.

b) there are cases, quite frequent, in which probation is being „transferred" to the stage of preliminary documents, with the non-observance of the provisions in Art... 224 from the Criminal Procedure Code, without it being sanctioned by the judge. The criminal cases start by the institution of the criminal prosecution. In order to avoid an opening of the procedure which might result in a non-suit, in practitioners' terms, the seriousness of the matters raised in the preliminary documents is being checked. Although they should consist in a minimum collection of clues, quite often **during this preliminary procedure the very evidence is being investigated**: witnesses are being heard,[190] expert appraisements are being done,[191] subpoenas are being sent to the potential subjects of the crime, as ´perpetrators`[192]. All these procedures are not allowed by the law, but neither do we find too many judges willing to ascertain such illegalities. Many judges do not even notice them in the files they examine, especially when, after the drafting of the preliminary documents, the prosecutor launches the criminal case, but the procedural document (the minutes or the resolution for the initiation of the criminal prosecution) is placed at the very beginning of the file, so that it gives the impression that the operation has taken place before, and the preliminary documents are in

[189] The Order from 20.07.2006 which is mentioned at http://www.ziua.ro/display.php?id=207323&data=2006-09-16.

[190] We cannot speak about „witnesses" before the inception of criminal proceedings; if the persons heard in such quality mislead the judicial body, they cannot be made criminally accountable for the crime of perjury.

[191] Although the current legislation in force provides explicitly that such evidence-based procedures can be used only after the inception of the criminal prosecution.

[192] The quality of `perpetrator` is not regulated properly in the Romanian criminal procedure.

fact the evidence. Of course, a thorough examination of the dates when the procedural and trial-related documents were drafted would inform the judge about the order in which they were drafted.

c) the media itself (the print) has reported another disloyal procedure, even illegal, namely cases in which the investigators conceal the new address of the person prosecuted, which the latter has communicated according to the legal provisions in force; then they ask the judge to take a measure as if the person in question had eluded the criminal prosecution process[193].

d) **flagrante delicto („sting")** operations represent one of the frequent ways to violate the provisions of Art. 68, Paragraph. 2 from the Criminal Procedure Code, which provisions *prohibit the judicial bodies from inciting or allowing the continuation of a criminal activity they are informed about*. Hence, a file can be easily built if a police officer or a prosecutor gives a good (as a rule an amount of money) to an individual for him to hand it to a civil servant/magistrate and see if the latter can be bribed. If the person in question accepts the good, a file is immediately built for corruption. But in reality this is an `arranged *flagrante delicto', which* should lead to the dismissal of a case not because the defendant is innocent but because the evidence found against him was collected illegally.

e) in connection with the arrest measure, we highlight the practice of submitting the file to the judge while the person charged is detained or put in pre-trial custody only a few hours or even minutes before the expiration of the previous pre-trial arrest measure. Thus, confronted with a huge file which should be examined both by the judge and the lawyer in the short time left, quite often the judge gives it up and is satisfied with the factual situation presented in his chambers by the …prosecutor. In any case, in such situations, ***it is quite obvious that the judge does not have enough time to read the file,*** hence bringing much damage to the defence and the principle of a fair trial.

f) **UAs** (cases with unknown authors) represent a problem for the criminal prosecution bodies. Their non-resolution is taken for incompetence, so that illegal methods were developed to `get rid ` of them. The current practice is that such cases are taken up on a

[193] See: http://www.evz.ro/Art..icle.php?Art..id=250602. We would like to mention that indeed the avoidance of criminal prosecution is a ground for arrest.

voluntary basis by other persons under investigation. Especially the relapse offenders who are sentenced to more important punishments agree to take up the UA cases that might trigger smaller sentences (usually thefts); because during the merging of the sentence they have to serve with the one related to the new offence[194], more often than not, the judges do not rule extended sentences, and the convicted persons serve in the end the same sentence ruled initially. Minors as well are preferred by the investigators, due to the milder punishing regime imposed on them. The rewards for those who pick up UA cases are the following: a walk outside the penitentiary premises, a pack of cigarettes and the like. Due to the fact that admission of guilt is not yet considered evidence in the Romanian criminal trial, quite often, apart from the respective person's hearing, a reconstruction of the deed perpetration is also needed; but, during the guilt admission process, at least two attending witnesses must participate, who are either taken from the ranks of the perpetual law enforcement collaborators or statements are drafted by the law enforcement bodies themselves on behalf of fictitious persons. Theoretically speaking, the attending witnesses should be heard again in court once the file in question is in front of the judge; if the latter cannot be found, the legislation in force stipulates that the statement made during the criminal prosecution is being read, which statement will be taken into consideration. Therefore, the practice of using „fictitious attending witnesses" is continuously „developing"[195].

g) among the practices meant to impose give a certain trend onto the criminal prosecution process, we would like to mention the following `tactics`. Because if threatened with the loss of freedom a person subject to investigation is more easily influenced, there are prosecutors/police officers who do not refrain from threatening the person charged/indicted that if he does not admit his guilt (crime), he will request his arrest. Quite often judges are informed about cases in which the hearing of certain individuals takes place with a gun put on the table by the investigating officer, in front of the individual being heard, or about cases in which the individual heard is handcuffed.

In the case of groups of persons under investigation, the method sometimes used consists in the deliberate arrest only of some of the group members; thus, the persons who are still free are easily persuaded that if they do not cooperate they will be also arrested.

[194] According to the Romanian system, the merger between two sentences with imprisonment means the application of the longer sentence of the two, plus a potential extension.

[195] See for instance : www.clujeanul.ro/Art..icol/ziar/cluj/trocul-an/3373/.

Because the legislation in force does not allow the sentencing of an indicted person unless his statements are corroborated with other pieces of evidence, the person's own statement being otherwise completely irrelevant, the method is used whereby certain individuals are `changed` from investigated persons into witnesses; thus, even the statement of a witness, even if it differs from the version of the investigated person's statement, can represent the grounds for a sentence ruling. It is almost no point in mentioning the use of `professional `witnesses, blackmailed or threatened.

h) in court, a disloyal method used by the prosecutor and tolerated by the judge appears in the case of witnesses who come back on the statements made in front of the criminal prosecution bodies. Although it is known that the judge is not forced to observe the version of the statement made in the criminal prosecution or the trail stage, because in such cases the sitting prosecutor states verbally that the **perjury** offence is being committed and that he will be seized ex officio. Hence, the pressure is double: on the one hand, the pressure is on the witness, who, if he was honest in front of the judge, is now threatened with prosecution on grounds of perjury based on a simple hunch of the sitting prosecutor (who did not attend the investigation and who has no way of knowing whether the investigating officer himself was the one to put pressure on the witness), a witness who will have to choose between making the statement wanted by the sitting prosecutor or standing that he becomes himself a party into another case; on the other hand, the pressure is on the judge who, having a doubt as to the truthfulness of the statement, will tend to consider the opinion of the prosecutor, as things become „too serious". There is obviously no reaction on the part of the judge to put an end to such prosecutorial practices.

j) as far as the **provision of a (defence) lawyer** is concerned, in the cases in which legal aid is mandatory, we have identified several procedures. When the party to a trial does not have a defence counsel (lawyer), the criminal prosecution body must use a lawyer appointed ex officio. On the list drafted by the Romanian Bar Association to this effect one can find especially trainee lawyers, for whom the income generated by the ex officio legal aid cases are quite often their only way of making a living. Hence, as the criminal prosecution bodies are the ones that make use of a certain defence lawyer appointed ex officio, the latter has no interest in reporting, on the occasion of drafting certain procedural acts, certain illegalities, for the justified fear that in the future his/her services will no longer be required. For instance, the persons under investigation are heard while their defence lawyer is absent;

afterwards, the latter is summoned to come to the judicial institution for the sole purpose of co-signing the statement, without having any knowledge about the way in which that particular statement was taken.

We have encountered situations of arrested culprits who, when they were first heard by the judge in order to verify the legality and the grounds for the arrest measure, although they had their own lawyer, the latter had not been informed in due course and the case was taken up for examination by a lawyer appointed ex officio, who did not have the time to read the file. It is well known that there have been cases in which the European Court of Human Rights (ECHR) has found the violation of the relevant rights provided by Art. 6 from the Convention, in terms of formal defence, against certain countries which are members of the Convention for the defence of fundamental human rights and freedoms.

i) recently, highly publicized cases have revealed a new way of prosecutors putting pressure on judges: ***press releases***. The prosecutor's office does not only inform the public as to the initiation of proceedings or sending someone to court; we have even found press releases about things having happened in the court room itself[196]. Such a situation is unacceptable: any comment on the debates taking place in a court room should be made by the state's bodies only inside the court room, and the criticism against certain measures or acts of the judges cannot but represent a reason for the exercise of remedies.

Conclusions

Under the circumstances in which the status of the Romanian prosecutor is far from being clarified, and the separation between the judicial functions is not explicitly legislated or sufficiently safeguarded through adequate means, while certain procedures and habits are still being preserved at the borderline of legality or beyond it, the public perception will preserve the confusion between the role of the judge and the role of the prosecutor; hence, the subjects of the law are entitled to have suspicions as to the impartiality of judges, the image of justice thus being impaired.

Moreover, prosecutors are being forced to preserve themselves the impartiality of judges, according to Item 19 from the Recommendation of the Committee of Ministers of the

196 http://www.mpublic.ro/presa/2006/c_06_06_2006.htm, http://www.mpublic.ro/presa/2006/c_07_31_2006.htm. The judges, in their turn, explain their rulings through press releases; the prosecutors do the same, but they criticize them. SoJust has reacted to such attitudes.

Council of Europe No. (19) 2000[197]. „*The members of the Public Ministry must strictly observe the independence and impartiality of judges. They must not question the rulings of judges or hinder their execution except for the exercise of remedies or any similar procedures*".

The afore-mentioned aspects must equally draw the attention of judges so as not to tolerate the potential pressures placed on them; due to their very nature, they are the first magistrates who should prove impartiality, weighing in a fair manner the evidence submitted by the parties.

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[197] http://www.legislationline.org/legislation.php?tid=155&lid=5002.

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CHAPTER VII: COURTS OF LAW

Core ideas:
Romania does not have yet a staff and court needs policy.
Courts are not sufficiently autonomous.
Courts as public service providers are not close enough to the citizens.
There is no court and file (case) management system yet in place.
Professional associations do not play an inside-the-system regulatory role.

1. A brief post-December 1989 history of the court institution evolution

Shortly after December 1989 courts have equally joined the „mixer" of events that brought about change. But this change was not entirely the one expected. Nevertheless, the court system did bear certain changes; to this effect, we would like to mention the re-establishment of the courts of appeal, the development and the extension of the court network, the disestablishment of the military section of the High Court of Cassation and Justice, but the preservation of the other military courts (military tribunals, The Territorial Military Tribunal and the Military Court of Appeal) and last but not least the establishment of specialized panels or courts.

The number of the courts in the country is determined by the Law on the organization of the judiciary, starting from – we like to believe – certain statistical data which reflect the need to set up a trial court in a certain community, on the basis of the number and frequency of the disputes at law in that particular community. Unfortunately, regardless of such statistical data, some parliamentarians have included in their political platforms promises on the setup of new trial courts, promises which they have subsequently managed to keep by putting pressure on the Minister of Justice, in office at that point in time.

Today, we have courts in very small communities, which courts do not justify their existence from the caseload point of view, and which encounter big problems as far as their staffing is concerned (Târnăveni, Reghin etc.). Or, even more seriously, courts which have been inaugurated, but which ... do not work: between the two ballots occasioned by the election of the President of Romania, at the beginning of December 2004[198], the then Minister

[198] See: http://www.expres.ro/article.php?artid=178308 .

of Justice had inaugurated with much pomp, in the presence of local politicians, the Sângeorgiu de Pădure trial court, which counted at the time 4 communes that it was supposed to „shepherd" in legal terms. Almost two years have elapsed and the trial court in question did not actually open for the simple reason that the new law on the organization of the judiciary stipulated the decision of the SCM Plenum resolution on the setup of this trial court; in the haste of celebrating a political agreement, detached from reality, the politicians have forgotten this element. Hence, billions of old Romanian Lei, the cost of the new trial court head office, go down the drain; the „inaugurated" building is now under conservation because SCM has no longer issued the resolution in question; on the contrary, this particular trial court (like others in similar circumstances) is about to be disestablished, according to the intention of SCM[199]. Paradoxically, this trial court is mentioned in Annex No. 1 Letter A from Law No. 304/2004 on the organization of the judiciary, as an established entity. In any case, the political power has attracted the judicial authorities, by such means, into actions which exceed its responsibilities, hence representing a clear interference in the activity of the judiciary.

Short of a clear policy as to the organization of the judiciary, in 2003 the issue was raised as to the diminution of the number of courts of appeal, country wide, based on the ***regionalization*** concept approach; the discussion was dropped and after a few months the amendment of the competence norms has triggered on the contrary the completion of the staffing schemes within such courts too. There followed successive changes, additions and restorations to the previous competences which had confused the entire judicial system, with severe consequences on the whole system, on the subjects of the law and last but not least on society at large. Such „judicial experiments" must stop if we want to have an accessible and predictable system of justice.

2. The main principles of judicial organization

2.1. Safeguarding the independence and impartiality of justice

Romania never had, until the 2003 revision of the Constitution, an explicitly stipulated principle of the separation of powers. It was only in the autumn of 2003 that Art. 1 Paragraph 4 from the Constitution of Romania stipulated that the organization of the state is based on the

[199] See: http://www.romanialibera.ro/editie/index.php?url=articol&tabel=z29072005&idx=161, http://www.expres.ro/article.php?artid=260944 .

principle of the separation and balance of powers – legislative, executive and judicial – in the framework of constitutional democracy.

The recognition of the judicial power as a distinct power in the state has had major practical consequences, especially with regard to the appointment of judges, the independence of judges and the legitimacy of administrative jurisdictions. The independence of justice is equally imperative for the good operation of justice as a public (civil) service and it also safeguards individual freedoms, as well as the protection of the citizen in front of state authorities. The constitutional safeguards for the independence of justice involve the judges' security of tenure, their incompatibility with any other public or private positions, with only one exception, namely that of holding teaching positions in higher education institutions, the interdiction imposed on judges in relation to their membership to any political parties and to their voicing in public their political allegiance as well as their exclusive subordination to the law[200].

The relations among the powers of the state, especially the relations between the executive and the legislative power on the one hand and justice on the other, have generated vivid discussions in society and among specialists and sometimes, in this given context, politicians have taken quite diverse stands, from positive and constructive views in many cases, up to ***severe and sometimes undeserved criticism***. The fact that the head of state in office has repeatedly expressed the view that he would be critical against justice, because his specific conduct and the pressure upon justice are both determined by the citizens' petitions, is a matter of common knowledge. Nevertheless, we do express our doubts as to the fact that the critical discourse of the president could be the best instrument to mend and remove malfunctions. As a matter of fact, the Constitutional Court had the opportunity to debate such a matter, showing through Decision No. 435 from 26 May 2006 on the request formulated by the president of the Superior Council of Magistracy with a view to settle the legal dispute of a constitutional nature between the judiciary on the one hand and the President of Romania and the prime-minister on the other, that „*the freedom of expression and of criticism is indispensable to constitutional democracy but it must be respectful even when it conveys a critical and firm attitude. As the independence of the judicial authority is safeguarded by the Constitution, the Court believes that the actual protection of the magistrates, in constitutional*

[200] We would like to mention in this context another constitutional safeguard of utmost importance, namely, the one mentioned under Art. 152 from the present Constitution, where it is said solemnly that the *independence of justice* cannot be subject to revision.

terms, against the attacks and disparagement of any kind is imperative; all the more so as magistrates, who lack any right to reply in connection to their legal order restoration activity, should be able to rely on the support of the other state powers, the legislative and the executive ones.[201]"

Such principles have been strengthened and developed through the laws regarding the judicial system passed in 2004 and subsequently amended considerably by means of Law No. 247/2005 on the reform in the field of ownership and justice, as well as certain related measures.

The remark to be made herein is that at present there are enough constitutional and legal safeguards, as well as convention-derived safeguards (The European Convention for the defence of human rights) with respect to the independence and the impartiality of justice, but, despite these elements, we dare highlight a fact which has already been incorporated into our recent history. Thus, after the adoption of the 1991 Constitution which has proclaimed the principle of *the judges' security of tenure,* the afore-mentioned status was granted to all the judges in office, without any minimum and necessary evaluation of the latter being made in ethical, professional, good-name terms, etc; this measure has generated the preservation inside the system of persons who proved in time ***not to honour the judiciary and its dignity***. We believe that thus a good opportunity to cleanse the judiciary as a system and the magistrates as its leading actors was missed.

2.2. The organization and operation of the courts - making courts autonomous

If, as far as justice as a whole is concerned, it must be independent, courts should be awarded a higher level of autonomy, in other words, they should have an independent administrative capacity. The trend, in both legislative and regulatory terms, is for courts to become more and more autonomous. Although significant steps were taken in this direction, we cannot claim to have reached this goal. For instance, the lack of certain prerogatives in terms of court management, for courts to be able to propose, adopt and efficiently run their budgets, the lack of certain responsibilities which aim at the establishment of those specific rules necessary for the good operation of the courts according to the specific and normal needs and characteristics of each and every court.

Although at present the responsibilities for the good operation of a court belong to the managers of the court in question, the managers of the higher court, SCM and the Ministry of

[201] Decision No. 435 from 26 May 2006 was published in the Official Gazette, Part I, No. 576 from 04.07.2006.

Justice, ***the management per se (both court management and case management***[202]) is almost completely lacking. This is reflected in the continuous dependency of courts to the Ministry of Justice:

- the secondary and the tertiary credit users do not have the ability to put together a solid budgetary planning. In order to do so, they go to the Ministry employees, who have no knowledge about the situation in the field;

- many courts in the country have name plates which bear first the name of the ′Ministry of Justice` and below it the name of the respective court; this situation generates the visual sensation of the court's subordination to the former. Likewise, the registration plates of the cars owned by the courts include the initials *MJR* (Ministry of Justice Romania);

- a large portion of the court employees have not been given for years professional I.D.s by the courts of appeal; hence, they are still using the old professional I.D.s issued by the Ministry of Justice.

Courts are subject to the same system of administrative organization as any other public institution; they have a manager – as a rule a credit user, a board (college) of management, heads of section and their subordinates. If in the act of serving justice judges are independent, in the process of coordinating the ancillary courts sections they are subject to the court management, according to the principle of administrative subordination; the same is true for the ancillary staff (court clerks, records people, registrars) and the supporting staff (procedural agents, drivers).

Considering the fact that the following aspects are true for both court managers and prosecutor's office managers, we would like to highlight them as follows:

The recruitment of court managers

The recruitment of staff for managing positions (president and vicepresident) in courts has turned into a real problem of the judicial system. For years on end such positions have been taken without a genuine process of selection, the main grounds for selection being subjectivity (on a political basis in particular) and the lack of transparency. We would like to highlight that *only the magistrates who took such managing positions after September 2005 had their knowledge checked in the field of management, communication and human*

[202] One has to mention that several European countries have instituted a „system of quality" in the area of their judicial organization. Such a system incorporates the issue of an adequate internal organization of courts, efficient procedures, judicial quality and the wishes of the subjects of the law. The main objective is to improve the quality of the judicial system as a whole.

resources, in the framework of competition-based examinations organized according to the legislation in force. The others, still the large majority, are in such positions since before the introduction of the requirement to pass an examination in such fields – thus, a total renewal of the court management system in keeping with the new requirements will take place only in 2009. SoJust believes that an evaluation of such persons as well as some training courses organized for their specialization should have taken place. In time, one has to ponder whether the system ***should keep or drop the rule whereby the court president position must be held by a judge*** – as this position is prevailingly administrative in nature, and it could be hence held by a professional manager, while judges could deal only with case settlement issues and get involved in court administration matters only during the managing colleges. In any case, we believe without any shred of doubt that, in the framework of a modern judicial system, as part and parcel of the European judicial system, the court administration activity will be the task of specialized staff, while court presidents will become true leaders in the communities which will promote them in such positions through their vote.

A particular situation is related to the managers of prosecutor's offices. In keeping with the provisions of the Criminal Procedure Code, they can repeal the acts of the prosecutors in their subordination. Or, in order to hold such a managing position, we have said that the new legal provisions in force stipulate the passage of a competition-based examination which checks only the managerial skills of the prosecutor candidates and not their professional ones. Consequently, the situation can be reached in which ***a prosecutor who is a good manager, but whose professional training is poor must rule as to the legality and the grounds of the acts drafted by those in his/her subordination.*** Hence, SoJust draws the attention onto the need to change the current system of recruiting prosecutors for managing positions.

There are a lot of managing positions not taken at all or taken by delegated staff, which represents another acute problem and which has a direct bearing on court activity. Absurd situations sometimes occur: a candidate for the position of (vice)president does not pass the examination organized to this effect (i.e. plan management, interview, written examination); nevertheless, he/she takes this position in virtue of a written order issued by SCM (on the basis of a simple interview). Thus, practically speaking, the delegation institution is used as a way to circumvent the law; we are saying this because the delegation order is issued for a period of 6 months at the most in one year, and the person delegated to be court president in the second half of the year has every chance to continue being delegated in the first half of the following year; hence, the same person can be court president for one year

by delegation, and then, as a rule, a „swap" is being performed with the court vicepresident for the same period, a.s.o. *We do not see on which criteria SCM considers that those persons who do not pass the examination can still hold – even if on a temporary basis – the position in question*[203].

With respect to the same issue of managing positions delegation we would like to report yet another aspect: **SCM delivers on a regular basis retroactive decisions** in this respect. Thus, SCM orders un-statutorily the appointment to such positions of persons who start their activity before an order is issued to this effect. From this perspective, the most alarming situation took place during the meeting of 15 September 2006, when a person had been delegated to the position of court section president as of 12/06/06[204]; as any delegation can be issued only for a period of 3 months at the most, the conclusion is that at the moment when the delegation was ordered, it had already stopped, i.e. 12/09/2006!

The responsibilities of court managers

Presidents of tribunals and courts of appeal are secondary and tertiary credit users. Along the same lines, related to the impossibility/incapacity of certain court presidents to deal with all their administrative tasks, some of them have devolved the exercise of the credit user function to their economic director – this is allowed by the law as long as the economic director does not become both credit user and credit executor, which situation occurs in courts where the economic department has very little staff. In any case, the negative fact-finding reports of the Court of Audit are almost non-existing. Nevertheless, as far as we could check, two magistrates from two different but equal level courts, having the same professional rank and the same seniority do not get the same monthly income; some court managers often use the official court cars for their own private interest, etc.

A major role is bestowed on court managers as far as the ***IT equipment of the courts*** is concerned. Unfortunately, the reluctance of magistrates to computer utilization is quite high in certain areas: some claim that they will become typists, unable to see the true advantages of automation: not simply typing but also information regarding the legislation in force, through the current software programmes in the field, information about the domestic and international judicial practice, communication among the magistrates, communication with the Ministry or with SCM, etc. Moreover, the entire flow of information in courts will be changed due to the

[203] Situations encountered in many courts, some of which are quite important – for instance, The Court of Appeal in Suceava, Oradea, Galați.

[204] http://www.SCM1909. ro/SCM/linkuri/ 15_09_2006__5870_ro. doc (pct.2.1).

IT system implementation and this will catch courts totally unprepared; in addition, special attention will have to be given to information security.

The main credit user is still the Ministry of Justice. Law 304 from 2004 provides that the court budget will pass as of 2008 under the responsibility of The High Court of Cassation and Justice, while the European Commission Country Report from October 2005 recommends that this be done in favour of SCM. SoJust highlights the fact the, for the time being, ***neither THE HIGH COURT OF CASSATION AND JUSTICE nor SCM have proven having the capacity to take over the entire court budget***. We cannot fail to notice a legislative abnormality, namely: although the minister of justice holds the prosecutor's offices under his authority, it is not he who holds their budgets but the prosecutor general of the prosecutor's office within the supreme court who is the main credit user for all the prosecutor's offices; whereas the minister of justice is the main credit user for the courts, except for the Supreme Court which has a separate budget, although the courts should be financially independent from the executive.

There are courts whose presidents have started not to assume responsibilities any more, making more and more often use to the college of administration. Hence, major decisions are taken by this collective body, although their members do not receive the same income as a court president. The college of administration is being summoned to convene even when simple measures are to be taken, such as the approval of the staff leave of absence petitions.

Anyway, certain court managers do not have the same caseload to settle as their peers; they claim to owe this to the fact that they hold a managing position; there are other courts where the presidents do not settle cases at all, and this is also true for prosecutors who hold managing positions. And this happens under the cirsumstances in which they are paid higher salaries than their peers because they hold a managing position.

Finally, yet another piece of criticism directed at court managers regards the articles in the local print about magistrates. In 2004, the minister of justice has issued an order whereby he requested court presidents to report such articles to the ministry's inspection body. When SCM took over the inspection responsibility, a large number of the court presidents deemed it necessary to inform on their own account the inspection body. We believe that such

responsibilities can be shared between the spokespersons of the courts and the spokesperson of SCM.

Colleges of Administration

The college of administration activities occur in some courts under circumstances of an equally total lack of transparency and even contempt of the judges who have assigned the college members to such a body of collective management. In many courts, convening the college is not made in keeping with the spirit of the law, the agenda of the meeting is not drafted, and the documents to be debated upon during the meeting are not made available to the members of the college. There are courts in which the judges are not informed as to the timetable and the agenda of the college meetings, nor are they informed about the decisions passed by the college.

Sometimes the college meetings are described briefly in the minutes, without a detailed presentation of the way in which the matters for discussion have been debated. Of particular severity is the non-justification by the college of administration in certain courts of the decisions passed, hence leaving the impression of shallowness, arbitrary or the mere pursuit of personal interests.

Standing Rules (Orders)

At present, all the courts in the country are operated according to a single regulation, edicted by SCM. It is only THE HIGH COURT OF CASSATION AND JUSTICE that has adopted a different regulation[205]. SoJust is clearly against such a procedure. The existence of a single set of rules for about 230 courts is counterproductive – these courts have different ranks, different staff, and they operate in different geographical areas (which situation has specifically contributed to the creation of particular local practices).

In order to make courts autonomous and to equally streamline their activity, ***SCM should only adopt a framework regulation***, and for the rest each court should be given the opportunity, potentially through its college of administration, to pass the norms it needs for a good operation, in keeping with the specificity and the natural needs of the region or the remits. We believe that this will not only be conducive to the general streamlining of justice as a public service, but it will equally, if not more importantly, serve the interests of the subjects of the law, of citizens in general.

[205] Available at http://www.scj.ro/legi/Regulament%20HIGH COURT OF CASSATION AND JUSTICE.html

One of the most absurd aspects is related to the ***working hours of magistrates***. There are courts in which the presidents insist upon signing into the attendance book although this particular requirement does not derive from any legal regulation. Then, although the current internal Rules provide under Art. 88 Paragraph (1) that „*the working hours in courts are 8 hours daily, 5 days a week; the working hours start usually at 8:00 a.m. and they end at 4:00 p.m.",* quite often, court sessions extend beyound the regular working hours, whether we talk about civil or criminal cases. Anyway, SoJust advocates for a flexible working schedule for judges; they must be present on the court premises only in order to carry out their judicial or administrative duties, at the most. Such a flexibility attached to the presence of judges in courts is equally required, at least at present, by the meagre physical conditions which exist in courts: the chambers of the judges are overcrowded and they lack elementary hygiene standards; such elements have a negative impact on the judge's activity.

2.3. The moral cleansing of magistrates and their increased professionalism

Payment

The main issue posed by magistrates is payment. The budgetary efforts dedicated to the increase of the sectoral reference indicator, the provision of IT equipment, court building repair work, the settlement of unpaid salaries - all this seems to have passed onto a secondary level. As far as the 40% salary increase is concerned, awarded discriminatorily only to those judges who deal with corruption and terrorism cases, the illegal situation was reached whereby certain trials are being extended, as well as the dishonourable situation whereby all the judges in the criminal section are appointed as specialists in terrorism or anticorruption cases, for the sole reason of having more people collect such increased amounts.

It is equally true that magistrates do not have yet a well developed feeling of accountability, nor do we have the instruments needed for the definition, imposition and control within the system.

Financial disclosures

There are judges who do not observe the rules set legally for the increased transparency of the system: from amongst the *financial disclosure statements* posted on the Internet, very many of them are not signed; hence, it is difficult to understand whether they are assumed or not by their authors.

Finally, following the examination of the magistrates' financial disclosure and expression of interest statements, we discovered that ***some of them are shareholders*** (for

instance, at the HIGH COURT OF CASSATION AND JUSTICE there are 9 judges in this particular situation, and at the prosecutor's office within HCCJ there are 6 such prosecutors); this situation is forbidden by the law and has been recently confirmed by SCM. Or, the violation of the law in this regard represents an infraction of discipline; although the financial disclosure statements have been posted on the Internet for a year now, SCM was not seized with respect to such irregularities.

Transfers

Magistracy has become a genuine ***source of human resources for transfers*** to other institutions: SCM, the Ministry of Justice, the National Administration of Penitenciaries, the Government, the Ministry of Foreign Affairs, etc. – although the system is being faced with an acute shortage of magistrates; given the fact that there is no clearcut policy in the field of human resources, such transfers damage the quality of the work done by those left behind. In this context, one can wonder if, when the transfer period is over, the magistrate in question has any moral duty against the institution he/she was transferred to; such a situation could alter his/her impartiality at one point in time.

The Romanian magistracy is faced with an acute shortage of staff, generated by several factors. A major factor, which has deepened the crisis, consisted in the amendments brought in June 2005 to the three laws (the law on the organization of the judiciary, the law on the status of judges and prosecutors, the law on the organization and operation of SCM). Meant to cleanse the magistracy, these amendments have proven that ***a significant number of magistrates see in this profession only a well-paying position.*** Otherwise, we cannot explain why, for instance, a 49 year old magistrate has decided to be subject to early retirement as soon as the opportunity arose, although he still had another 16 years until the normal retirement age[206].

The former „securitate"

One strongly suspects that some magistrates were secret police (former „securitate") agents or collaborators during the communist regime[207]. We will never know how many of the

[206] http://www.evz.ro/article.php?artid=203557

[207] In a proposal signed by Teodor Coman, the Minister of Internal Affairs, No. 01598 from 25.05.1976/410 (as it is formulated at page 440 in the volume *The Archives of the „Securitate"*, Nemira Publishing House, 2004) we can find the following piece of information: "The Ministry of Education, according to the proposals coming from the Ministry of Internal Affairs, must take measures to increase the number of places /seats in the regular and distance learning courses of the Law School, in order to have enough Law School graduates to cover the needs of certain Securitate and Militia apparatus departments".

magistrates after 1990 came from their ranks, given the vast number of magistrates who have retired to date. But for those who work today in the judicial system, a system whose main role is to protect the rights of the individual, we do not understand how a magistrate who has had his share in the preservation of the climate of terror instated by the former „securitate" could fulfil this high social duty.

Although Law No. 247 from 2005 has stipulated the obligation of ***CNS to verify the declarations of the magistrates by 22 January 2006 at the latest,*** with respect to their membership or collaboration with the former „securitate", the results of such verifications have not been published yet. The law does not stipulate any sanctions for the magistrates in question, apart from the fact that they may not hold any managing positions or any positions as SCM members, but SoJust considers that they must resign for reasons of morality[208]. Anyway, we deem necessary the publication of such declarations.

The first magistrate proven, according to the information published in the print[209], to have collaborated with the former „securitate" is a very member of SCM. His refusal to resign, as well as the refusal to initiate his recall procedure by the SCM president or vicepresident, based on the petition submitted by *SoJust, AMR and the Association 15 November 1987,* have persuaded us that those who should impose the observance of a moral conduct among magistrates do not have the will to apply onto themselves the same moral standards. The failure of SCM in this respect has determined the magistrates nationwide to initiate themselves the recall procedure for the judge in question – during the last week, the general assemblies of the judges from the Cluj and Oradea higher courts (tribunals) have already voted in favour of the recall.

Transparency

In order to enhance the transparency of the system, we believe that all the information of public interest related to magistrates should be made public. Hence, we deem necessary the publication of the professional biography (education and career stages, works published, significant activities in the field of justice) of each magistrate in the country, plus a photograph[210].

We highlight the fact that, although Art. 113 Paragraph 1 from Law 161 of 2003 ***stipulates that the declarations of interest be made public, there are courts which have not***

[208] http://www.sojust.ro/content/news.php?item.44 şi http://www.sojust.ro/content/news.php?item.48 .
[209] http://www.cotidianul.ro/index.php?id=6636&art=16663&cHash=d47a1d3ff1
[210] http://www.sojust.ro/forum/viewtopic.php?t=39

complied (the Higher Court of Bucureşti, the local trial courts, the trial courts in Braşov a.s.o.). Although this conduct represents an infraction of discipline, and its punishment falls under the competence of SCM, so far the latter has not seized itself in this respect.

Along the same lines, there are courts which do not comply with Law 544 of 2001 on ***the provision of public interest information***. The biggest court of appeal in the country has been recently sanctioned for such an infraction; at present, the institution in question refuses to implement the court ruling on its own free will[211].

Recruitment

Apparently, the number of magistrates is not enough for the settlement of a number of about 2 million files a year. The situation is made even more difficult by the shortage of the ancillary staff as well as by the artificial case overload of courts, due to the unserious cases they must sometimes settle. Because in practice a lot of positions are taken but their occupants are either on maternity leave of they are transferred to various other institutions, we suggest the establishment of a temporary employment system for the positions of magistrates and for ancillary staff positions.

(Workplace) Health and safety

To attach an increased quality to the work of judges and ancillary staff, SCM must implement the labour rate-setting programme as soon as possible.

Likewise, in keeping with the legal regulations in force, each court must set up health and safety departments, to provide workplace health and safety services. The lack of such departments and the shortage of labour medicine practitioners are reflected in the fact that some magistrates who suffer from certain physical and mental disorders are not treated in due course [212].

The vocational training of judges

A parallel must be drawn in this respect to this year's situation of the teachers: at the tenure examination many have received a 5, while the admission mean was 7. Nonetheless,

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[211] http://www.sojust.ro/forum/viewtopic.php?t=127

[212] A judge masturbates in front of a female hitch-hiker: http://www.evz.ro/article.php?artid=136087, another judge removes his trousers in front of the audience: http://www.ziua.net/display.php?id=152577&data=2004-07-16, a lady judge practices black magic: http://www.ziua.net/display.php?id=195506&data=2006-03-11, and another one brings charges on account of the theft of ovules: http://www.ziua.ro/display.php?id=202102&data=2006-06-22.

due to the low number of teachers, those who have received grades between 5 and 7 will teach this year as substitute (deputy) teachers[213].

The same goes for judges: if we examine the data mentioned in the tables with the grades to the latest exam for promotion to executive positions (from the trial court level to higher court (Tribunal) level and from Tribunal level to the Court of Appeal level) in 2006, we may reach the following conclusions: out of 780 candidates, a number of 180 on material law, 140 on processual law, 158 on the case law of THE HIGH COURT OF CASSATION AND JUSTICE and The Constitutional Court and almost 500 on the European Court of Human Rights and the European Court of Justice (put together) jurisprudence, have received grades below 5 (out of 10)[214]. And yet, after their knowledge was thus tested, they keep on trying in court, without any certainty that they will fill the gaps thus identified.

A similar situation was encountered in the process of recruiting magistrates from the ranks of lawyers with a 5 year long seniority. A year ago, a lawyer presented himself at the magistracy entrance examination and he received a 2 at the very subject matter he was teaching in Law School. After a new attempt, he passed the examination and managed to join the magistracy …

2.4 The development of judicial activities

The judge or the court of law

Neither the justice legislation passed in 2004 nor its amendments passed in 2005 managed to bring about the understanding that ***justice is not served in courts, but it is served by judges.*** It is true that the mistake derives from the constitutional regulation according to which „Justice is being served by the HIGH COURT OF CASSATION AND JUSTICE and the other courts regulated by the law". Apart from the fact that we fail to understand the dichotomy between the HIGH COURT OF CASSATION AND JUSTICE on the one hand and all the other courts of law on the other, it is obvious that a ruling is not given by the entire court but only by the judges who work in that particular court. This is a fundamental distinction from the other public powers: whereas for the ediction of a law or a decision, they must be subject to the approval of Parliament in its plenary session or the approval of Government in its plenary session, *only one judge is needed for the exertion of judicial*

[213] http://www.cotidianul.ro/index.php?id=6257&art=15564&cHash=8feb63541f
[214] http://www.inm-lex.ro/index.php?MenuID=39&DetailID=445

power[215]*;* still unlike the other public powers, the magistrate positions are taken through an examination and not through an election process, like in other countries.

To this effect, *courts of law* can only play an administrative role (as a matter of fact, they are organized as administrative institutions), and they shelter inside *the judges' chambers* – the true servers of justice.

The random distribution of files

In the past, the files were distributed to the judges for ruling purposes by the president of the court or of one of the court's sections, which fact represented a direct pressure put on the magistrate (for instance, the „troublesome" judges were given more numerous and/or more difficult cases) or was meant to raise suspicions of corruption. This latter reason triggered the formulation of the SCM Decision No. 71 from 9 March 2005; hence, at present, the distribution of files is made on a random basis and is computer-aided.

As far as the operation of the system is concerned, we would like to mention that ***the selection of the judge is made by the computer as well as the selection of the first court settlement deadline; and this is an improper procedure.*** As the computer keeps no record of the pending files, but only of the newly admitted ones, a situation may be reached whereby a judge who already has several or more difficult cases to try, be overloaded because he is also assigned some of the newly admitted cases, as the computer is unable to make the necessary distinction.

That is why, SoJust considers that it is only the judge who should be appointed electronically. Then the judge himself/herself will determine the first court settlement deadline, according to his/her caseload and the amount of time he/she deems necessary for the proper examination of the file. Hence, the administrative autonomy of the judge inside the court is increased. On the other hand, in many situations, the computer cannot pe programmed to determine and establish the first court settlement deadline so that the celerity and emergency case settlement principles are observed (the cases which must be tried urgently and prevailingly are considered here).

The schedule of court sessions

[215] or a panel of 2 judges (appeal), 3 (judicial review; first instance at THE HIGH COURT OF CASSATION AND JUSTICE), or 9 judges (judicial review at THE HIGH COURT OF CASSATION AND JUSTICE), in keeping with the law.

One of the problems facing the subjects of the law is that they cannot predict the finalization of all legal procedures. The institution of proceedings often means the inception of a trial which is expected to be lengthy but whose exact duration is impossible to predict. Hence, the subjects of the law tend to believe that the principle of never ending proceedings applies to all court trials[216]. ***The subjects of the law must benefit from predictible trials (from the onset) and optimum settlement timeframes.*** Nevertheless, we have to remember that a predictible timeframe is not an acceptable timeframe in itself. Taking action in order to have a better trial timeframe predictibility is only an addition to the action of diminishing the trial timeframe as such. Transparency should be achieved by making public the information on the duration of trials per type of case, both at national level and at court level.

At present, the subjects of the law are summoned to court at the same hour, in the morning, regardless of the number of summons they have. It so happens that some of them have to wait from morning till night time for their turn to come. This situation is most frequent in criminal cases with first instance courts, where a trial day lasts longer due to the large number of hearings. A better organization of the courts should include ***summoning people at certain hours***: firstly, files which include stay petitions; secondly, files with incomplete proceedings, followed by files where the submission of evidence is simpler (only documents) etc.

During the period of *judicial recess (holidays)*, although the law provides that it is only the urgent cases which must be settled and, in criminal cases, only the files with arrested culprits, many court presidents order normal proceedings, during the summer recess also, in order to enjoy a higher ranking in the national statistics, in terms of the number of cases settled. This decision is not one of the most fortunate ones: the summer recess should be left for judges to become updated on the latest legislative publications, and for the entire staff to be able to enjoy their statutory holidays. Anyway, most lawyers are also on holidays, so that the establishment of a trial deadline during the summer recess is simply formal; it is meant only to move the file as the postponement of its settlement is almost a fact. Equally significant are the useless expenses from the courts' budgets, incurred by the summons of the parties during the judicial recess, given the fact that most cases are being deferred anyway due to the defence lawyers' absence.

[216] Such a situation probably explains the discrepancy between the public opinion and the view of the members of the judiciary, when the latter, according to the statistics, claim that a considerable percentage of the cases are finalized within an acceptable timeframe. This average timeframe amounts in Romania, officially, to 6 months!

The publishing of judgements

Although the opportunity was officially created for the posting of each court's judgements on the Internet (http://portal.just.ro), this opportunity is not sufficiently used.

It was only in the case of the Arges county courts that we found posted on the Internet all the judgements, *in extenso*, in a way to enable the consultation of the judgements passed in one day, in real time, the search for a judge's practice in one matter of the law or the supervision by the court president of the manner in which the judgement drafting deadline is being observed. This software application should be extended countrywide: apart from the opportunities given to the parties and to the lawyers, to have access to the files and the contents of the judgements, for the rest, it makes the preservation of paper records in courts useless.

Last but not least, the access of magistrates to the full text of court judgements serves the purpose of having a uniform judicial practice, which aspect deserves all the attention at present.

The explanation of judgements

The way to draft a court judgement in Romania is the one we all know: the preamble, the grounds and finally the enacting terms. There are few judgements organized or structured on an argument- or a number-basis. It is a well-known fact that the judgements of the European courts (the European Court of Human Rights and the other European Community courts – the European Court of Justice, the Court of First Instance and the Public Function Court) are based on a different method of idea systematization which facillitates a lot the way in which problems are addressed; the drafting style used is the best because it is very easy to read. In order to make a classification of the problems encountered when drafting a judgement one needs a synthesizing capacity, an overall vision and a certain aesthetic feeling.

This drafting method is not specific to Romanian judges; the rule of thumb consists in the presentation of all the matters, without using numbers or paragraphs; hence, one cannot make any reference to any previously mentioned matter or paragraph. Moreover, the justification of a judgement is quite often nothing more than a useless description of all the procedural acts developed by the parties or by the court, followed in the end by the dry quotation of the applicable legal text.

Hence, ***we believe that the manner in which judgements are being drafted should be revised,*** as it is somewhat obsolete and old-fashioned, so that the judgement enables the judicial control courts as well to refer to certain matters by indicating the item or the

paragraph in question; it should also facillitate the reading and the understanding of the judgement, as well as its examination by the subjects of the law; last but not least it should make Romanian judgements be recognized by the European courts[217].

The relationship with the subjects of the law

As far as the citizens are concerned, in their position of "consumers of justice", there still is a long distance between them and the magistrates: quite often the subjects of the law leave the court room unsatisfied, because they are not explained sufficiently what is happening in court, the rulings given are not convincing enough, the court orders are not predictible. As, in their respect, „a consumer protection body" does not operate, of relevance is the effectiveness of court activity, of each and every court as well as of the entire court system, plus the SCM energetic action and reaction. Although last year „A Guide for the Subject of the Law" was printed, the information presented in the Guide consist in mere copies of several legal texts instead of being easy-to-understand descriptions of processual information[218]. We have found courts in which this Guide is not even posted (except on the Internet), but is kept in the judges' or court clerks' offices.

This highly tense situation is also maintained by the often improper reactions of the subjects of the law. Ever since the insult and slander assault has been repealed, there are a lot of cases in which the parties or the witnesses swear at the magistrates and no measure can be taken against them, except for the processual fine. Likewise, due to the insufficient number of jendarmes on court premises, more often than not, the safety of magistrates is endangered by troublesome subjects of the law. Finally, we should also mention that the numberless petitions submitted to administrative or legislative bodies (Presidency, Government, Parliament, SCM) or to the media, in the search of parallel justice[219], do nothing else but deepen the negative impact and increase the population's lack of trust in the justice system.

An increasingly extended practice is the repeated submission of certain petitions originally rejected in court, which practice cannot be stopped in accordance with the currrent legislation in force (for instance, one day the petition for the **revocare** of the pre-trial arrest measure is rejected by one judge, and the next day the culprit formulates a new petition on the same grounds but he submits it to a different judge). Such situations should be settled in

[217] http://www.hotnews.ro/articol_49245-Renate-Weber-Hotaririle-judecatoresti-din-Romania-risca-sa-nu-fie-recunoscute-in-UE-cel-putin-pentru-un-timp.htm

[218] We recommend the usage of the example provided by the EJN – *The European Justice Network for civil and commercial matters:* http://ec.europa.eu/civiljustice/

[219] This is also due to a severe lack of legal culture on the part of the citizen, who does not know the judicial competences of the various state entities. See http://www.sojust.ro/forum/viewtopic.php?t=99

legislative terms, as found recently on the matter of recuzării challenge stipulated by Law 356 from 2006.

The civil society (specific institutions, non-governmental organizations, citizens) both at national and international level, should be encouraged to take part to the debate on the improvement of the judicial system operation in Romania.

3. The independence of justice

The independence of justice can only regard the judges[220]. Under the circumstances in which they enjoy the security of tenure, they have also the right (and why not, even the duty) to disclose in public the attempts to deviate the course of a trial. As such disclosures have not occured, we can only infer that the events in question did not take place at all or that judges are fearful[221] and hence they do not deserve to hold such high positions. Of course, it is preferrable that the prosecutors as well – who do not serve justice – not be subject to such attempts. But they have occured in time. And they have occured also in 2005 (the telephone calls and the meetings between certain persons under investigation and certain official representatives).

Everything must be thus regulated (in both legislative and practical terms) so that people understand that any discussion about a trial must take place before the judicial body, with whom they must cooperate fully in order to find out the truth.

Along these lines, *SoJust is critical of the vote cast in Parliament with regard to the search of an MP's place of residence.* In a country in which the suspicion of corruption is acute and the mistrust in justice is large, such a decision did nothing else but generate the belief that, although they say that we are equal before the law, some are more equal than the others. SoJust does hope that Parliament has not become a platform from which defences are made or, even worse, cases are settled.

General negative comments were made by some ministers and even by the President of Romania regarding the operation of the legal system. SoJust considers that, within certain limits, such comments are necessary: the political class, at least today, shows a great deal of interest for the objective operation of the legal system; there also is the political will to conduct the reform. The political discourse is part of the politician's set of instruments, but we

[220] There is also the opinion according to which the independence of justice must be regarded from two perspectives: the independence of justice as a system and the independence of each and every judge. For further information, see the opinion of a judge at: http://www.ziua.ro/cluj.php?id=22890&kword=Independenta+justitiei&style=3

[221] We believe that fear can spring only from blackmail: either the magistrate is incompetent or he is corrupt, or he has yet other interests (for instance, he wants a promotion but he does not wish to offend his „superiors").

draw the attention onto the principles which must be advanced through such a discourse: the quality of the processual acts, the need for the population to trust the system, an independent decision-making process, reasonable deadlines for case settlement[222].

On the other hand, it is equally true that one must not go to the other extreme: lack of responsibility. „The independence of justice does not mean the impugnment of magistrates", a high European commissionner has stated recently[223]. We must not forget that the magistrate abides by the law, and the law must be applied according to its letter and its spirit to an equal extent by all the magistrates – only in this way will the law be applied uniformly as well. On the other hand, the disciplinary and the moral entities of the magistracy – SCM and the magistrates' associations – must not work for the purpose of protecting the magistrates, of concealing the shortcomings of their nature or education, but for the purpose of protecting the population against potential abuses or mistakes. In the long run, ***independence is not a priviledge for the magistrate but a benefit for the citizen*.**

4. The role of the High Court of Cassation and Justice (HCCJ)

The HCCJ should be the „benchmark" court. The professional and moral profile of the judges from this supreme instance (court) should be beyond any doubt. SoJust draws the attention onto the fact that the appointment of judges at THE HIGH COURT OF CASSATION AND JUSTICE is a major decision for the society at large and for the judicial system reform process. Considering that the judgements of this Supreme Instance impact the lives of millions of Romanians, the appointment of judges at this court is a matter of public interest. Hence, SCM should have very clear and proper criteria in this respect. ***SoJust suggests that the appointment procedure be focused on the following principles:*** 1. the principle of professional competence; 2. the principle of advancing the fundamental rights and freedoms engraved in the Constitution and in the international documents that Romania is a party to; 3. the principle of promoting and protecting the independence of the Judiciary; 4. the principle of transparency; 5. the principle of getting all the judges in Romania involved in action. The candidates should be evaluated according to the following criteria: their experience in the settlement of complex cases; discipline of procedure; integrity; the knowledge and the use of the ECHR judicial practice; the coherence and clarity of the

[222] http://www.sojust.ro/forum/viewtopic.php?t=104

[223] The official in question is the vicepresident of the European Commission, Franco Frattini, August 2006, Bucharest: http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=101099&versionfiltered=1&template_id=39&parent_id=2

grounds; independence and impartiality; continuous education and the interest vis-à-vis legal research.

Or, the verification of such requirements calls for a very careful and equally lengthy supervision of the potential candidates for THE HIGH COURT OF CASSATION AND JUSTICE. In such a context, it is impossible for us to understand the manner in which the head of the SCM Judicial Inspectorate was promoted at the supreme instance on 15 September 2006[224]. Thus, the law stipulates that a condition for the promotion of the candidate is for the person in question to have been a judge for the past two years, while the candidate in question did not work in court but had been transferred to an institution, other than a court of law. Secondly, the very institution where the person had been transferred – SCM – is the one competent to decide on the promotion of judges, which situation obviously gives rise to a conflict of interest. Moreover, the Judicial Inspectorate is even empowered to make verifications of the SCM members. As during the past year such verifications have had a negative outcome, we cannot help but think that, as a matter of fact, the promotion of the head of the Judicial Inspectorate, apart from being illegal, is a kind of reward. In addition, as long as he has not yet resigned from SCM, we do not believe that the new supreme instance judge will institute any procedure against those who have cast their vote in his favour.

Although in 2005 legislation was passed to the effect that the president of THE HIGH COURT OF CASSATION AND JUSTICE is the representative of the judiciary, SoJust has not yet detected any action undertaken by the acting president, to match his position. Moreover, any distinct public appearances of the latter are inexisting.

The role of THE HIGH COURT OF CASSATION AND JUSTICE on the matter of ***formulating a uniform practice*** is perhaps the most important. The provision of a uniform interpretation of the law will be of particular importance for the consolidation of trust which underlies the principle of mutual recognition by international courts. Unfortunately, it was even at the level of the supreme instance that we have encountered situations of non-uniform practice: not only the fact that one panel rules contrary to the ruling of another panel in a similar case, but there are yet other situations in which a judge from a certain panel rules in one manner, and when he is in a different panel, he rules differently in a similar case. Likewise, there are situations in which the courts receive the practice of THE HIGH COURT OF CASSATION AND JUSTICE in fascicles that describe a certain practice, while the parties receive a judgement which describes another practice.

[224] http://www.SCM1909.ro/SCM/linkuri/15_09_2006__5869_ro.doc (item 28, Valeria Dumitrache).

It is interesting to note that the professional training method of the judges from THE HIGH COURT OF CASSATION AND JUSTICE is not known. It is very seldom that a judge from this court attends the training workshops organized for the other magistrates. Anyway, an activity report of THE HIGH COURT OF CASSATION AND JUSTICE for 2005 has not been published yet[225].

The material competence of THE HIGH COURT OF CASSATION AND JUSTICE must be revised: if the court goes on working according to the existing regulations, it is clearly overloaded. Maybe the reform process could start here as well if THE HIGH COURT OF CASSATION AND JUSTICE had to rule only on matters of principle (such as the judicial reviews in the interest of the law etc.), and not pass judgements on specific cases for individualized punishments against offences which fall under the competence of various courts (tribunals) and for claims of 5 billion and 1 Leu in civil cases.

Then, if we start from the supreme court, seen as a court of cassation and not as a court of justice, the competence of all the other courts should be equally reviewed; the role and place of the courts of appeal should be also clarified, as they are the most inadequate instances for the current system (their competence extends over first instance cases, appeal and judicial review). The most adequate option, to our mind, consists in the division of the first instance courts competence between trial courts and tribunals, while the competence to settle appeals (which should become the only ordinary remedy) be given to the courts of appeal alone; and the matters of prejudice (for instance, the interpretation of a text of law or a change in the jurisprudence), as well as the judicial review, but only for matters of the law, be awarded to the High Court.

5. The optimum settlement of cases

For a sound case settlement, both in administrative and in political terms, concerted measures need to be taken both centrally and locally. Such needs have been already examined at a European level[226] and the solutions found there must only be implemented in Romania as well.

Hence, *at state authority level,* the following lines of action should be pursued:

a. taking action on resources:

[225] http://www.scj.ro/informatii.asp

[226] Strasbourg, 13 September 2005 , CEPEJ (2004) 19 REV 2, COMISIA EUROPEANĂ PENTRU EFICIENTIZAREA JUSTIȚIEI (CEPEJ), A new objective for judicial systems: processing each case in an optimum and quantifiable timeframe, Framework Programme, item 24.

- all the participants to the act of justice must receive a payment sufficient and proportional to their contribution;

- development means the advancement of „court projects" towards case-settlement objectives;

- making sure that all those responsible for the administrative management of courts are provided the adequate professional training and have clearly defined specific responsibilities for each and every category;

- the improvement in the management of cases under trial and of cases not yet tried;

- the modernization of resources, especially through the use of IT instruments.

b. taking action on the quality of legislation: in the case of each and every law, the evaluation of its impact on the judicial timeframe and on court activity.

c. improving the predictability of the timeframe: providing information about the duration of proceedings for each type of case.

d. defining and monitoring standards for an optimum timeframe for each type of case:

- developing a standardized timeframe to be incorporated into the court operability enhancement programmes;

- monitoring the compliance with the optimum timeframe;

- developing the information and analysis capacity of the timeframes implemented concretely by the courts;

- raising the awareness of courts as to the importance of attaching a special attention to older cases;

- setting one single time limit between the moment in which the judgement is stated verbally and the date at which it is communicated in writing to the parties.

e. improving the information and communication strategies:

- providing adequate statistical instruments, whereby the individual cases are recorded on the basis of a national system, managed by a central department of statistics;

- encouraging the involvement of civil society organizations into the debates focused on the enhancement of judicial system operability;

- developing research- and analysis-oriented activities on various matters raised in connection to the reasonable timeframe.

At the level of proceedings, the following actions should be implementated:

a. enabling the timeframe alteration :

- developing a procedure whereby the relevant courts and the parties agree on a limited timeframe (deadline);

- introducing the mandatory information of the people as to the timeframe provided in the cases in which they are the involved parties.

b. taking action in the course of certain cases pending in court, by providing the adequate usage of the appeal procedure and yet other relevant procedures:

- without impairing the right to an effective trial, the appeal options must be limited. The ECHR has confirmed the fact that, if subject to certain conditions, such a limitation does not run contrary to the provisions of the Convention[227];

- introducing the screening mechanisms as far as the Supreme Court is concerned;

- examining the punishment options for those who launch an appeal procedure abusively and manifestly.

c. taking action in connection to the quality of the procedures used:

-creating or consolidating the position of the judge who is in charge with the preparation of cases for hearings (*juge de la mise en état*), in civil cases;

- forbidding the *sine die* stay of the proceedings;

- introducing consequences of proceedings in case of groundless absences or delays;

- attaching priority attention to the quality of the judgements delivered in first instance courts.

d. defining priorities in case management: developing a system of priority processing based on the initial classification of the categories of cases pending in courts.

e. having a better organization of trials in order to have a shorter waiting time, as well as a higher attention given to victims and to witnesses: organizing hearings so that there be less uncertainty about the time when those summoned to court must actually be heard in court.

f. instituting a procedure whereby a case pending in court is restituted: setting up a procedure whereby the party is enabled to submit a complaint in emergency conditions

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[227] ECHR, 17 January 1970, Delcourt v. Belgium: *‚Article 6 Paragraph 1 from the Convention does not compel member states, true enough, to establish courts of appeal or cassation. Nevertheless, a state which does not establish such courts must make sure that the persons who are subject to the law will enjoy before such courts the fundamental safequards provided by Article 6'* and ECHR, 29 July 1998, Omar v. France: Reports 1998-V, page 1840, § 34: *The Court reiterates the fact that the right to be heard in court, of which the right to free access is only one component, is not absolute; it can be subject to certain limitations allowed by way of implication, especially with regard to the admissibility conditions of an appeal. Nonetheless, such limitations must not restrict the exertion of rights in such a manner or such an extent so as to cause the breach of the fundamental rights. It must pursue a legitimate purpose and a reasonable proportionality must exist between the means committed and the aim whose accomplishment is being desired*'.

where it states that the authority dealing with the case is too slow; hence, adequate measures can be taken, if necessary.

g. making the rules on the territorial jurisdiction of first instance courts more flexible: requesting courts to accept all the appeals, and then distribute immediately the cases to the competent courts, while the parties are informed accordingly.

Finally, ***as far as the involved professional categories are concerned,*** the following actions would be needed:

a. involving the relevant categories in court management activities:

- providing information on a regular basis with regard to the operation of courts and setting up the necessary fora dedicated to the development of a consultative environment with court presidents;

- conducting surveys in courts on the issue of beneficiary satisfaction.

b. enhancing the professional training of judges, prosecutors and, in general terms, of all the professional categories involved:

- strengthening the interdisciplinary nature of professional training;

- introducing specific modules focused on the duration of proceedings, in the training programmes.

c. organizing the relationship with lawyers: attaching a special attention to the role of lawyers within the judicial system, regarding the implementation of the measures proposed in this Framework Programme.

d. improving the monitoring of the timeframe compliance by the experts within the judicial system:

- setting up a mechanism for expert report supervision;

- making expert report submission deadlines public.

e. defining the means whereby ushers, court clerks, notaries as well as other professions can be involved in the system.

6. Professional associations

General remarks

As far as the preservation of the system independence and the internal regulation of its malfunctions are concerned, a special role is to be played by the magistrates' professional associations. ***In Romania there is no true judicial body, and hence, no true spirit of association.*** The corps of judges, and the corps of prosecutors respectively, have not yet

developed a mature professional awareness and have not yet grown accustomed to the common nature of participatory actions, conducted in their own professional common interest combined with the public interest, able to meet their new responsibilities: defending the independence of justice, safeguarding the effective application of the law and providing a high professional standard for the entire system.

Until 2004 judges could not even belong to non-governmental organizations, but only to specific professional organizations. This has contributed to their isolation in relation to the public idea environment, to their inhibition as regards their involvement in public life and to a source of confusion as to the purpose of professional associations, which are generally expected to settle labour-related problems, such as increased salaries, improved living conditions, diminished workload, and a.s.o.

An inhibiting factor consisted in the reaction of the ministers of justice, as well as that of court and prosecutor's office managers (appointed by the minister in those times), who saw in the establishment of associations run by a leader, a factor meant to destabilize and undermine their own influence on the system. Quite often, those having joined associations were and still are considered rebels, revolutionaries, etc. But the truth is that, without such „revolutionaries", many strange things having happened in the judiciary would not have been disclosed.

Although in Romania there are several associations of magistrates[228], a lot of them have not stood out by any activity at all, and others have limited their activity mostly to labour-related claims[229]. Their being ignored is also reflected in the fact that the Ministry of Justice and SCM[230] have organized only one meeting with *all* these associations over the past five years. Moreover, associations represent an undeniable reality in the life of many courts, but SCM did not find it necessary to regulate – through its Standing Rules/Orders – the method of granting permission and officially supporting the activities of such associations.

Only two associations were given the opportunity to make their activity public: AMR[231] (whose Internet page has not been updated since February 2005) and AMI[232].

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[228] Such a list can be found at http://www.just.ro/rtrv_mc.php?param=date_magistrati_21032006.

[229] Although the Romanian legislation forbids magistrates to set up trade unions (which is being allowed in other European countries), in fact, one association at least has currently developed such activities. Nevertheless, no state authority took any measure in this respect.

[230] The workshop called „The Superior Council of Magistracy and the Associations of Magistrates – major differences in terms of responsibilities and objectives, as well as in terms of partnership fields" from 39.06.2006. Lthe meeting was attended by only one SCM member, for half an hour …

[231] The Association of Magistrates in Romania – www.asociatia-magistratilor.go.ro

[232] The Association of Magistrates in Iaşi – www.magistrat.ro.

More often than not, the issue of such associations' representation was posed, especially in the context in which AMR has claimed for years that it is the only association of magistrates, the local associations simply being its branches. SoJust has solved this dilemma. According to the law, magistrates are compelled to submit declarations of interest, which include information about the associations they belong to. By monitoring these declarations, we came to the following conclusions:

- certain magistrates did not comply with the legal requirement that requested them to make public their declarations of assets and of interest (the courts in Bucharest, Craiova, Prahova, Buzău, Dolj, Călăraşi); this violation of the law is an infraction of discipline, but so far the Judicial Inspectorate has made no verification whatsoever;
- certain magistrates do not know the name of the association they belong to. Some cannot give the precise name (Mangalia), others claim to belong to the „Association of Magistrates" (Constanța, Călăraşi) or to the „Association of the Magistrate" (Călăraşi), still others to the „National Association of Magistrates" (C-lung Moldovenesc, Pucioasa) or the „Association of Magistrates Argeş", but all these associations do not exist;
- some claim that they belong to a union of associations of judges; or, such a union cannot include individuals!
- others belong to associations, but they do not say so; thus, for instance, the Association of Magistrates in Iaşi counts approximately 83 members (according to its official website), but only 6 have voiced their membership to the organization; another example is that of the „Association Braşov-Covasna" where only two judges have admitted their membership, while the law stipulates that the minimum number of members in an association is three;
- some magistrates do not know the positions they hold in these associations[233].

The importance of the magistrates' stating their membership to an association consists in their avoiding the conflict of interest situation. Unfortunately, even those who are called upon to check the compliance with the law in this respect become quite often themselves subject to a conflict of interest situation: SCM is seized by AMR on account of various

[233] For instance, a SCM member states in June 2006 http://www.SCM1909.ro/SCM/linkuri/02_06_2006__4506_ro.pdf that he is the vicepresident of AMR, whereas we learn from http://www.asociatia-magistratilor.go.ro/pgid3_site_RO.html that AMR has different vicepresidents.

petitions, and never have the AMR members from SCM refrained from making decisions on such matters.

The types of actions conducted by the associations are either declarative, noisy, or vocal (AMR), or strictly professional (AMI); there is no mature and coherent association-driven thinking, able to influence the public policies and the public debates in the field of justice. The Associations do not have a charter or a code of ethics.

The Association of Magistrates in Romania (AMR)

AMR, established in 1993, is the oldest association of magistrates in Romania. AMR claimed upon its establishment to be the successor of the former Association of Magistrates and Attorneys (AMA) from the post-war period, but this issue was not settled in contradiction to the AMA successors. As a matter of fact, attorneys have recently expressed the wish to re-establish AMA, through the inclusion of AMR, which would be a huge mistake.

Next to the recently established Association of Prosecutors in Romania (set up in 2005), it is an association established at a national level, with county-level branches. There is no clear information, internal or external, about the number of branches, the number of members and even to a lesser extent about those who pay dues and actually do something to meet the goals of the association. Surprisingly, although the current legislation in force regarding associations and foundations forces branches to acquire legal status (to become legal persons), only 8 territorial entities have responded to this requirement, thus becoming autonomous structures.

AMR is member of the International Magistrates' Union and of the European Magistrates' Association. Unlike the vast majority of the associations included in these two international organizations, AMR includes both judges (638) and prosecutors (414)[234]. Contrary to the public statements made by the AMR management on countless occasions, according to which the association would include more than 3000 members, less than 1100 have asserted their membership. Even if this is true, this significant number also includes members who have never attended any meetings, both locally, where there are branches which have not held in years their statutory meetings, and centrally.

From the information collected by SoJust, where even some AMR members are actively involved, the work of AMR is regarded by judges as being controversial, incoherent

[234] The figures refer to the magistrates in office as of 1 September 2006.

and generally speaking too little known and too unpredictable even to its own members. The President of the Association proved to be in time too loud a voice in the public arena, being strongly reflected in the media and hence attracting the likes of the judges on account of her powerful stand favouring certain specific rights and interests of magistrates.

Nevertheless, the Association does not conduct activities typical for such professional organization bodies: the publishing of magazines or news bulletins, the organization of training programmes for magistrates, the legal education of the public a.s.o. AMR does not have a clear and coherent public message, easy to identify by any institutional dialogue partner or any citizen. AMR does not have a strategy for the development of policies in the field of justice, nor did it build a system of values to uphold, to underlie and to legitimate its public actions. AMR does not seem concerned with the development of a strategy meant to respond to the predictable evolution of the judicial system, to its necessary changes, determined by the obligation to make it compatible with the European legal systems. Through the voice of its President, AMR seems to lead an on-going and personal fight with the minister of justice and with the SCM members, although a secretary of state from the ministry and three SCM members are at the same time AMR members (not being even suspended).

But AMR is an organization with a strong leverage on the public debates focused on the topic of the progress of justice. This could be probably capitalized upon optimally the moment it will find types of public expression to consider the common interests of its members, following consultations meant to highlight the real needs of this professional body.

The most controversial AMR activity consists in the fact that its president supports certain persons before SCM to be promoted to the HIGH COURT OF CASSATION AND JUSTICE. The SoJust comments are as follows: such an activity does not take place with the approval of the AMR members; the persons supported are not always AMR members; the support does not rely on objective criteria (SCM does not use such criteria either); the spouse of the AMR president also sits on THE HIGH COURT OF CASSATION AND JUSTICE College of Administration, which endorses the candidates.

It is worthwhile mentioning that on 11/02/2004 AMR has founded ***The Alliance for European Justice in Romania (AJER)*** **–** an organization not officially incorporated **–** next to other non-governmental organizations having a well-known activity in the field of human rights and the rule of law: the Centre for Legal Resources (CRJ), the Romanian Association for Transparency (TI-Romania), Pro-Democracy Association (APD), the Institute for Public Policies (IPP), the Association for the Protection of Human Rights in Romania – The Helsinki Committee (APADOR-CH), the Romanian Academic Society (SAR), the Press Monitoring

Agency „Academia Caţavencu", the Open Society Foundation (FSD). **U**nfortunately, the different visions of these organizations have caused the alliance to do nothing more than comments and negotiations on the various draft laws which were about to be included in the legislative package on the 2004 justice reform. At present, AJER doesn't function anymore.

The AMR Branches

A normal reaction to certain internal malfunctions of the association led to the separate evolution of certain AMR branches with a legal status, which have developed all by themselves a portfolio of specific public activities, and have asserted more and more their functional autonomy vis-à-vis the central organization. The process of decentralization and consolidation of various types of local association structures is still predictable.

The most powerful branches were built in Transylvania: AMR Cluj and AMR Mureş are well-known for their independent activities, such as: reactions to the main political interferences, to the policy of payroll discrimination or of granting financial incentives on subjective criteria, cases submitted to ECHR or meetings with European officials. The most impressive activities developed over the past year consisted in the immediate reaction to the accusations of court corruption launched by the President of Romania[235] and the initiation of the procedure meant to invalidate a judge who was a former „Securitate" collaborator from his SCM membership position[236].

Although the AMR records mention the fact that an AMR branch might operate in Harghita county as well, in reality, in this county there is another association, separate from AMR, namely, "The Association of Magistrates in Harghita".

A general remark in connection to the AMR branches: it seems that it is the large number of prosecutors in certain areas that generates the strength of this association: in Galaţi 2 members are judges and 17 members are prosecutors, in Timişoara all the members are prosecutors, in Alba there are 9 judges and 40 prosecutors, in Craiova there are 30 judges and 57 prosecutors.

The Association of Magistrates in Iasi (AMI)

A regional association of judges with a significant professional activity is AMI. Due to its interests and activities, AMI is placed in total opposition to AMR; its contribution is indeed impressive through the number of professional projects it has conducted – it is worthwhile

[235] http://www.ziua.ro/cluj.php?id=15863&kword=tulus&style=3
[236] http://www.ziua.ro/cluj.php?id=23029&kword=tulus&style=3

mentioning in this respect the pilot programme called *The Court for Minors in Iaşi.* The Association does not hold any public stands on various general topics of interest concerning the justice system or the status of judges.

AMI was set up in 1997 and it currently counts only the judges from the courts under the jurisdiction of the Court of Appeal in Iaşi. Although the Internet official page of the Association mentions a membership of 83 judges, the expressions of interest submitted by the judges reveal the fact that only 6 acknowledge their membership to the Association (such discrepancies are as a matter of fact a common denominator for several associations of judges; anyway, in the case of Iaşi, there is some confusion as to the membership of certain judges: do they belong to AMI or to the AMR branch in Iasi?).

The „Constantin Stătescu" Professional Association of Judges in Târgovişte (CSPAJ)

CSPAJ is an organization which includes judges from Dâmbovița county. It is the only association to publish its own journal, which includes regular reports on the association's activities as well as views on the legislation or judicial practice. As a matter of fact, the purpose of the association is to provide the continuous education and training of its members. It has a long lasting cooperation with the Union of Romanian Lawyers, reflected in various events organized jointly. Since 2004 it has organized various events on the occasion of the European Civil Justice Day.

At the end of June 2006 it has organized the first *National Conference of Judges in Romania* (Târgovişte, 29-30 June 2006), where topics of great interest were debated, such as: the role of judges, the independence of justice, a uniform judicial practice. This was the first signal as to the need for the system self-regulation.

The Association for the Defence of Bihor county judges' rights and independence

Created in 2005 out of the wish to set the foundation of a single association of judges and against the background of a hostile local media (print), the Oradea association organizes meetings with its counterpart associations from Hungary and takes part to activities developed jointly with AMR Cluj and AMR Mureş. Likewise, it has organized several round tables with media representatives, insisting on the need to have a transparent judicial activity.

The Association of Magistrates in Timis (county)

The Association has developed various local projects that have measured for the very first time in Romania the trust of the people in the system of justice. Likewise, it has published booklets which contain minimum information for the citizens who seek justice in courts. Nevertheless, the official declarations claim that the association has only two members, although the information provided by the association reveal a much higher number.

The conclusion is that in Romania there is no self-regulatory body as far as the judicial power is concerned. There are no judge-focused congresses or councils, to exert a minimum influence on the matter of court administrative organization. SoJust believes that professional associations should place a greater emphasis on themselves as vectors of progress and change in the field of justice organization and the public view on the latter. Likewise, as shown previously, the president of the High Court of Cassation and Justice, the only representative of the judiciary, hence of judges, should play a major part in the debates on the public policies in the field of justice.

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CHAPTER IX. THE OTHER LEGAL PROFESSIONS

Cora Ideas :

The ancillary staff from the justice system have status and payment related problems.
The judicial police does not examine human rights sufficiently.
There is no progress made in enforcement related activities.
The judicial experts represent a working community which is not organized according to modern rules.
The translators are not subject to sufficient controls.

A. ANCILLARY STAFF

The evaluation of the progress made by a country on its way towards the reform of the justice system is full of challenges. Thus, one should make a distinction between the types of evaluation instruments/criteria and other independent evaluations. A survey of the justice system highlights the specific conditions, the general provisions and the mechanisms which exist in the system, and it evaluates how well are they correlated when the evaluation is being done with the criteria specific to the reform process; such a survey is not a study in statistical terms but a legal investigation which reveals a whole plethora of information which describe the law system.

As far as the magistrates category is concerned, new terms/indicators have been introduced, such as security of tenure, the appointment and dismissal procedure, payment related safeguards, etc.

A potential comparative study on the topic of magistrates-ancillary staff would reveal a rather significant aspect, namely the fact that the reform did not „touch" the latter category at all.

One can easily note that there are not enough human resources to support the work of judges. Generally speaking, they do not have any support in administrative or secretarial terms. Moreover, there are too few court clerks, they are not being used efficiently and many of them are undertrained.

Theoretically speaking, the National School of Court Clerks (NSCC) is authorized to train new court clerks and to improve the education of the existing ones who work in various courts. Practical experience has shown that the classes of graduates from the National School of Court Clerks do not meet the needs of courts in both quantitative (in numbers) and qualitative (professional) terms.

Their training is oriented only in a theoretical direction, and focused mainly on law-related issues, while the practical training stages are insufficient and not adjusted to the requirements of court activities. The training and improvement programmes do not include courses in the field of short-hand, judicial statistics, court management, etc. One of the few courses useful to the court clerk trainees of the NSCC is the one on IT, where the file management programme is being introduced – ECRIS – but we consider that the programme should exceed the mere introductory stage and be presented in detail within a court, during the practical training stage, and be equally supported by IT experts who work as trainers at the NSCC and by court clerks who already work with the ECRIS system.

Practical experience has also shown that a NSCC graduate who is employed as a court clerk in a court of law cannot be put to actual „use" sooner than 6 months from his/her appointment, as this period is an absolute must for him/her to acquire all the knowledge needed in his/her profession.

Another delicate issue consists in improving the training of the court clerks who actually work in courts, as some of them are unable to adjust to changes, due to more or less objective reasons. One must also mention the „resistance" to the new requirements of those with seniority in the system; hence, the working method in courts as well as the mentality must change. One has to remember at this point that the court clerk position is by no means attractive, due to the high volume of work and the high level of responsibility to be assumed, on the one hand, and on the other, due to the lack of a financial incentive (salary) able to attract candidates to the vacant positions.

There are a lot of cases in which the NSCC graduates have expressed their wish to leave the system after the 5 years of work since their appointment, in order to occupy better paying positions and have fewer responsibilities. Similar opinions are also being voiced by senior court clerks, due to the same reasons.

We think that it is not enough to organize competitions for the vacant positions, but an adequate payment scheme is eqully needed, in compliance with the activity performed; clear regulations about the tasks and functions, as well as the limits of the court clerk's position are also needed.

At present, the tasks and functions of the cort clerk's position are described in a manner which leaves a lot of room to interpretations; the reference made goes straight to Art. 50 item 5 and item 2 from articles 52, 53, 54, 56, 57, 58, 59, 60, 62 from the Standing Rules, according to which the court clerk must fulfil any other tasks given by the court manager, within the limits of his/her position. Hence, this provision allows court mangers and judges to have court clerks „available" to them, while the „tasks" bestowed onto them are amongst the most diverse: the drafting of certain court rulings, the preparation of certain administrative documents instead of the judges/court managers, the editting of certain personal documents, as well as others that have nothing to do with the court activity (shopping, running errands, etc). As far as the position limitations are concerned, no mention of such limitations exists in any normative regulation.

We consider that such situations arise because of the attitude of certain magistrates who strongly believe that court clerks exist in courts of law in order to „serve" them, and of certain court clerks who understand incorrectly their subordination to the magistrates. This false „subordination" starts mainly from their poor professional training and the lack of human dignity that each of us should have.

Although it may sound strange, maybe an individual performance evaluation system for court clerks should be introduced; their evaluation is to be done by an independent, unbiased body/organism, which might have a positive impact on the quality of the act of justice and would implicitly lead to relieving the well trained court clerks, who do most of the work in courts, from certain less important duties, but very time-consuming.

Likewise, magistrates should also contribute to the training and professional improvement of court clerks; the syntagm „we are not willing to train you at the expense of our nervous system" is a sad reminiscence and it has to disappear by all means.

„The treatment" applied to the people in the system must be uniform and regulated by the same norms. From this point of view, things are quite unfavourable to court clerks – and to the entire ancillary staff for that matter. We must remember the differences with regard to the adoption of the payment legislation for magistrates, which includes two pay raises in the course of three years (EGO No. 177/2002 – to be applied as of the 1st of January 2003 and EGO published in the Official Gazette No. 314/07.04.2006 – to be applied as of the 1st of April 2006), while the payment legislation for the ancillary staff is more than 10 years old. Although this may seem a trifle, the distinction between the two categories has generated a lot

of ill-feelings, which added themselves to the already existing ones; this situation has had a certain impact on the act of justice.

The development of separate codes of ethics for the afore-mentioned categories has deepened the tension and the gap between the two; the fair attitude would have been the development of a single code, with specific provisions for the two categories and with common elements.

On the other hand, this separation has also generated a feeling of „superiority" of magistrates against court clerks. Personally speaking, I think that the professional relationship between magistrates and court clerks must be founded on an interhuman relationship, on mutual understanding (not to be mistaken by tolerance), on respect, thus generating a state of harmony in the panel of judges and in the overall court activity.

One must remenber that the ones to blame for this situation are not only the magistrates; it is the result of the combined attitude of both categories and the result of a lack of adequate regulations.

One must also remember the discontent of certain magistrates with respect to the transfer of certain administrative duties to court clerks, thus giving some of them the impression that they „play" in the „hands" of court clerks; to this effect, we must recall that some (many, unfortunately...) of the magistrates do not use either the PC or the ECRIS I.T. Program.

The implementation of the ECRIS file management system represents a big challenge for the Romanian judicial system; for its users (the largest weight lies with court clerks) this is a positive aspect of the judicial reform process.

The system per se, as viewed by the ancillary staff, is undergoing a full-fledged process of change; therefore, some positive aspects should be equally mentioned. Apart from the introduction of I.T. technology in the courts, which is maybe one of the most spectacular novelties, there are still others which should be equally mentioned, such as: the adoption of an ancillary staff Statute, a brand new regulation, necessary and obviously improvable, the adoption of a new body of Standing Rules for courts of law and prosecutor's offices, which must be updated whenever changes are made in the way in which courts operate.

As long as we talk about the amendment and the adjustment of norms and regulations, perhaps the competent authorities should consult all the parties involved in the system, so that the new Regulation be applied as soon as possible after its adoption, without having to draft any more detailed rules, clarifications or explanations, etc.

The consultation process implies communication and at this point we have to mention that the system is, generally speaking, to blame. As a matter of fact, it is impossible to communicate under the circumstances in which the ancillary staff do not know to whom they are directly subordinated (to the Superior Council of Magistracy – professionally speaking and to the Ministry of Justice administratively speaking). Hence, problems are being examined by both entities and most often the solutions given are contradictory, the outcome being not in the least a source of joy.

The reform of the judicial system implies an analysis of everybody's scale of „values", be it magistrate, court clerk or any other category of ancillary staff, the recognition of merits or the sanction of failures, mutual respect and, mainly, respect for the citizen who seeks justice. I believe it is very important to do our job as well as possible in order to gain back the trust of the citizen in the system. Regaining the trust will be possible only when normal relations will exist between the magistrates and the ancillary staff, when the concept of „team" will function.

B. JUDICIAL POLICE

The current report must be regarded from the perspective of Romania's accession to the European Union, of the judicial and administrative system reform which takes place in our country as well as of the need to implement more efficient measures for the operation and development of the police structure, of the need to have a transparent decision-making process; all these aspects must be found in the reform of this particular institution, not only by the re-organization of its legal framework but also by the observance of the existing one, in the sense of its actual and immediate application.

Here are some of our remarks and recommendations:

1. The continuation of the internal administrative reform by the discharge of the staff trained in the Police Schools from before 1990 and involved in the former Securitate activities, the downsizing of the managing positions, by the application of an elite-based and fair system of staff rewarding and by appointing young, open-minded civil servants into managing positions after a thorough check of their professional knowledge based on clear, competitive and effective programmes.

2. The actual observance of the provisions on the operational subordination of police officers exclusively to the prosecutor.

The criminal investigation bodies have the duty to report to the chain-of-command structures from the Ministry of Administration and Internal Affairs only in strictly administrative terms, Art. 219 paragraph 1 from the Criminal Procedure Code which reads as follows: the prosecutor can issue orders as to the conduct of any criminal prosecution act. In the case of the criminal investigation bodies belonging to the judicial police, the higher ranking bodies of the latter cannot issue recommendations or give orders in terms of criminal investigation, as the prosecutor is the only person authorized to do so. In terms of the subordination of criminal investigation bodies to the prosecutor, which is an operational (professional) subordination, they have the duty to execute the orders of the prosecutor who conducts the criminal prosecution supervision; from this perspective, the higher ranking body from the Ministry of Administration and Internal Affairs does not have the right to overturn the prosecutor's orders.

Although the legal framework is very clear, the practical implementation of such provisions is hindered by certain aspects, as follows: the qualifying grades are granted to the staff for promotion purposes only by their administrative superiors, the files (cases) are distributed by the latter who also perform the transfer of a file from one staff member to another, without the prosecutor's interference. Perhaps the vocational training itself should be supervised by the prosecutor as well.

3. Effective measures for the training of the staff with respect to the observance of the European Convention on Human Rights.

3.1. In the majority of the cases settled amicably in court the Government committed itself to taking the necessary measures in order to inform the police forces. For instance, the case Notar vs. Romania, published in the Official Gazette, Part I, No. 1105/26.11.2004.

3.2. To this effect, insofar as the initial training of police officers within the Police Academy or agent schools is concerned, we recommend the introduction of this subject (matter) in the curriculum, in order to secure a better understanding of the European Court of Human Rights jurisprudence, prevailingly of the cases which involve police officers and those which concern criminal judicial matters.

3.3. Introducing the European Court of Human Rights jurisprudence in the curriculum of the competition for the direct employment of staff.

3.4. As far as the training of the working staff is concerned, we recommend the introduction of such training (courses) through the Ministry's Post-Graduate Studies Centre, as well as its introduction as a competition discipline in the contests dedicated to the filling of managing positions.

3.5. To the same effect, depending on the available funds, leaflets should be published to target both the members of the staff and the subjects of the law; they should include not only the text of the Convention but also the relevant jurisprudence and the procedural safeguards derived from the Convention which the police forces must provide.

4. Providing the transparency of the institution and its activity by removing the legal provisions which contain the classified nature of certain internal administrative acts which in fact are part of the activity of any public institution.

4.1. In order to observe the principle of access to law, the normative administrative acts must be published in the Official Gazette of Romania, in keeping with the provisions of Art. 10 from Law No. 24/2000 on the legislative technique norms for the development of normative acts, republished in the Official Gazette No. 777/25.08.2004 (for them to come into force, the normative acts of the local (autonomous) administrative authorities, as well as the orders, instructions and other normative acts issued by the specialized central administration bodies must be published in the Official Gazette of Romania, Part I), as well as of the European Court of Human Rights jurisprudence (the Judgement (Ruling) given in the case Rotaru versus Romania, published in the Official Gazette No. 19/11.01.2001, the Judgement given in the case Petra versus Romania, published in the Official Gazette of Romania, No. 637/27.12.1999, the Judgement Amann versus Switzerland, No. 27.798/95).

4.2. In order to provide an example for a situation inconceivable from a legal point of view, we invoke the joint Orders issued by the Public Ministry and the Ministry of Administration and Internal Affairs, unpublished and in-house, which depart from the provisions of the Criminal Procedure Cod, Art. 258 respectively, according to which in the cases in which the criminal action is launched, the presentation of the criminal prosecution material is done by the criminal investigation body for the criminal investigation procedure to be completed. According to such an Order, the presentation of the criminal prosecution material is done only by the prosecutor, before or after the receipt of the case file with the conclusion report on criminal prosecution discontinuance; this latter case runs obviously

contrary to the Criminal Procedure Code provisions. The adequate procedure consists in the initiation of a legislative proposal for the amendment of the Criminal Procedure Code.

4.3. To the same effect, the police bodies have records, files with judicial identification information as well as records about intelligence-related activities (the suspect's folder), in connection to the detection of perpetrators, which also include photographs of the persons who are suspected of having perpetrated crimes or which contain information about their private lives; this activity can represent an interference with the exercise of the rights safeguarded by Art. 8 from the European Convention of Human Rights; a violation of this Article could arise if such records were used in investigations outside the legal framework, which situation would require the declassification of the normative acts that regulate the data collection and storage procedures, the persons who have responsibilities in this respect as well as other requirements, in order to fulfil the condition imposed by Art. 8, namely, that the legislation allow for the interference of public authorities in the exercise of this fundamental right.

5. The prohibition or restriction of the cases of pre-trial detention by police officers without higher education.

This measure is needed for the protection of the rights of the persons under criminal prosecution and is relies on the fact that the legal knowledge foundation of a police officer without higher education cannot be the same with the level of knowledge of a police officer who has graduated Law School; at the same time, the custodial measures represent one of the most serious interferences with the fundamental human rights, namely, the right to freedom; this measure is allowed only as an exception, in those cases explicitly provided by the law; the identification of such situations, from our perspective, must be made by a civil servant who has the necessary legal training.

The administrative detention measure according to Art. 31 from Law No. 218/2002 does not fall under this recommendation.

6. Observing the presumption of innocence for the persons under investigation as well as their right to their own image.

To this effect, one should consider the means by which the information about the pending investigations are to be conveyed to the media.

The tendency to make public a successful operation or investigation does not justify the violation of a person's right to his/her own image, the right to a private life or the right to

a fair trial. We refer here explicitly to the audio-video recordings made on the occasion of certain criminal deeds, on the occasion of searches or reconstructions, recordings which are given to television stations for broadcasting purposes and hence for making them public, without observing one's right to one's image or the right to privacy in the case of the persons in question, by hiding their identity and their face, in the case in which there is no explicit consent of such persons.

7. Conducting the investigation of police officers on matters of a criminal nature exclusively by the prosecutor or by central police bodies, and not by police officers from the same unit as the one to which the police officer under investigation equally belongs. This measure is meant to enable a formal, in-depth and genuine investigation.

8. Observing the legal deadlines for carrying into effect any criminal prosecution acts as well as any other administrative acts.

In this regard we would like to mention that Art. 6 from the European Convention on Human Rights guarantees the right of any person to have his/her case tried in a fair way and *within a reasonable timeframe* by an independent and impartial court, which will rule as to the soundness of the grounds of any criminal charges brought against him/her. The reason for this is to give any person the chance to get in a reasonable timeframe a final ruling as to the soundness and lawfulness of the charges brought against him/her, so that the person in question does not stay for too long and pointlessly under such charges.

9. Continuous education

Although it seems that there are internal orders (rules) which regard the organization of certain training and specialization workshops on a regular basis, in practical terms they do not exist or they are mere reasons to see and meet former colleagues. Hence, regular checks must be made on the level of training.

C. BAILIFFS

- **aspects which can have a bearing on the speed of enforcement**

The enforcement procedure is the second stage of the civil trial (proceedings) and its aim is the final and practical reinstatement of certain rights acknowledged through a court order or any other enforceable title (deed).

The reform strategy of the judicial system approved by the G.D. No. 232/2005 involves the provision of an efficient system for the execution of court orders or any other enforceable titles; hence, the enforcement procedure is a means to safeguard the actual access to justice and a necessary tool for the mutual recognition of court orders throughout the European Union.

Against this background, one has to remember that Romania has suffered several judgements from the European Court of Human Rights due to the stays in the enforcement of several court orders.

The malfunctions recorded in the enforcement activity, an isue which was equally mentioned by the European Commission in its Progress Report on Romania, in connection with Romania's accession to the E.U., report published on 25/10/2005, have imposed and still impose certain practical measures for the simplification and improvement of the procedural regulations in the field of enforcement, meant to put in practice and highlight the celerity principle.

A first step in this regard was taken through the E.G.O. No. 190/2005 on the development of measures needed in the process of European integration, which contributed to the amendment and completion of Law No.188/2000 on bailiffs; one of its most significant amendments consists in the fact that bailiffs cannot make the enforcement of court orders conditional on the advanced payment of their fee. Subsequently, based on such amendments, the change of the Regulation for the implementation of Law No.188/2000 became imperative as well, and it took place through the Minister of Justice Order No. 658/17.02.2006.

At the same time, in order to also improve the legislative framework of the enforcement activity, the draft Civil Procedure Code, Book V – enforcement - amendment was submitted to Parliament.

Starting from the evaluations made on the application of the exiting specific regulatory framework, and from the remarks and recommendations made by the practitioners, yet further legislative amendments are needed, particularly with a view to matching them with other legal provisions.

The negative aspects which may have an impact on the celerity of the enforcement procedure can be placed into several categories, as follows:

1.The relationship between the bailiff and the court

Most of the problems arise in connection with the approval (permission) of enforcement, but these problems are going to be solved once the Civil Procedure Code will be amended; hence, the formality of the enforcement institution/initiation procedure approval in court will be removed. In practice, we notice the following:

- the approval of the enforcement procedure takes very long, sometimes, in some courts, as long as 2-3 months.
- during the court vacation period, the enforcement approvals are given only for emergency situations.
- in certain courts, it is not the title deed's enforcement which is being approved but the enforcement modality (distraint, foreclosure, seizure etc.). Thus, new enforcement files are being developed for each type of enforcement put up for approval, which implies a new application and a new stamp duty.
- the conclusion (report) to the enforcement approval is communicated to the debters, and the latter have enough time to transfer their assets (property).
- the conclusion (report) to the enforcement approval is given with the appeal remedy although the Civil Procedure Code provides only the judicial review remedy**.**

Other problems relate to the situation when an enforcement order is appealed to a higher court, as follows:

- enforcement (order) suspensions are granted very easily upon the demand of debtors without a minimum investigation of the claim substance. In keeping with Art. 403 Paragraph 3 from the Civil Procedure Code, the simple payment of the bail sometimes represents the only condition to be fulfilled for the judge to rule the enforcement (order) suspension.
- the trial deadlines given are too; a claim against the enforcement order can receive a final solution even after 2 years, although Art. 402 Paragraph 1 from the Civil Procedure Code stipulates that the trial be made in emergency conditions and prevailingly.
- some courts bring into the case and summon the bailiff's office as well, although he is not a party to the enforcement claim settlement procedure.
- bailiffs are also requested to serve the original copy of the enforcement file, sometimes even by telephone, on the very day of the enforcement deadline. Likewise, the enforcement file is being **acvirat** in the court files until the claim receives final settlement, situation in which a sine die suspension of the enforcement takes place. All these disadvantages will be

overcome by the new amendments brought to the Civil Procedure Code, and the enforcement body will have to send to court only the certified copies of the documents in the file.

- the courts of law cancel the enforcement deeds without showing which enforcement deed in particular is being cancelled. Thus, the situation was reached when even the enforcement request or the the conclusion (report) to the enforcement approval was cancelled**.**

2. <u>The relationship with banking institutions</u>

- Contrary to the provisions of Art. 373^2 Paragraph 3 from the Civil Procedure Code, banks, third-parties under seizure, do not disclose the information requested by the bailiffs, on grounds of confidentiality.
- The seizure is not instituted at the time when the seizure notification letter is received or, in certain cases, *the debtors are informed*, and the seizure is instituted only after their accounts are emptied.
- The institution of the seizure onto the debtor's account is not being communicated.

3. <u>The relationship with the land registry and real estate advertising offices</u>

- The registration of the foreclosure summons provided by Art. 497 from the Civil Procedure Code is done in a delayed manner, even after 2 months and its registration is denied if it was sent by mail or if the land registry or land book numbers were not entered.
- The information requested by the bailiff with regard to the legal status of a certain building is given in a delayed manner or the information conveyed is ambiguous (given the fact that the building in question will be sold at an auction).

The registration of the foreclosure summons is an operation which must take place in emergency conditions as it involves major legal consequences (the transfer/alienation of the building after the registration of the summons does not run contrary to the enforcement).

4. <u>The relationship with public authorities</u>

The removal of the provisions which hinder the collection of the claims from physical and legal persons held against the government and public institutions, namely, the *abrogation of G.O. No.22/2002*, must be implemented, as, on the one hand, it represents an unjustified

discrimination, and on the other it represents one of the very objectives of the judicial system reform strategy.

5. <u>The relationship with police authorities</u>

- Although the provisions of art. 373^2 paragraph 2 C from the Civil Procedure Code have an imperative nature, the police bodies make their own presence at the enforcement location conditional upon the submission of a debtor opposition minute, or their provision of assistance is made conditional upon a written explanatory note and supporting documents.
- the bailiffs' requests concerning the identification of a debtor's goods consisting in cars as well as stopping them while in traffic if they are under distraint are not answered.
- the Computerized Population Records Department communicates very late the requested information for the detection of the debtor's domicile or residence or in connection with the records and communication of information about the debtors who live abroad.

The cooperation between bailiffs and the *gendarmerie* (military police force) is good, as the latter meet promptly the former's requests. Nevertheless, we talk about the use of such military forces for the purpose of civil trials. Likewise, we observed that the police forces in urban areas contribute to enforcement procedures much more willingly than those in rural areas, where, due to the smaller communities who live there, the cooperation in this respect is more difficult.

All the afore-mentioned issues represent only a part of the problematique which affects one way or the other the speed of the enforcement procedure; hence, what we need is an adequate legislation, the strict application of the legal provisions in force by bailiffs and finding the most appropriate methods for the cooperation with the other bodies called upon to bring their own contribution to this last stage in the civil trial procedure, so that the quality of the enforcement activity be improved in the near future.

D. Judicial Experts

Expert appraisals represent a very special testing means due to their scientific nature, which nature must be reflected in the very process of appraisal conducted by well-trained

experts and in the scientific conclusions resulting from the research work they undertake; in turn, they can have a decisive influence on the rulings given by the courts or by the criminal prosecution bodies.

In Romania, according to the legislation in force and the literature, four main categories of judicial appraisals can be defined:

- accounting expert appraisals[237],
- forensic expert appraisals[238],
- criminal judicial expert appraisals[239,240,241],
- technical judicial expert appraisals[242].

In keeping with the Civil Procedure Code, the law gives to the court the capacity to rule in favour of an expert appraisal in the cases in which, for the clarification of certain factual circumstances, it deems necessary to learn the opinion of experts.

1. The technical (judicial) expert appraisal

Although the legislation in force regulates the Central Office for Technical Judicial Expert Appraisals under the subordination of the Ministry of Justice, an office whose task consists in the coordination, guidance and administrative control of the expert appraisal activity, its involvement operates at a minimum level; its activity consists in the registration of the experts and the drafting of a nominal list of experts.

According to our view, the activity of the Central Office must be reflected to a larger extent in the quality of the expert appraisals conducted in the cases put up for court rulings or criminal prosecution body rulings. Hence, the submission of technical and accounting expert appraisals to the Local Appraisal Offices (which operate with each court of law) for endorsement purposes must necessarily imply the verification of the expert appraisals drafted, in both legal and qualitative terms. Because a formal endorsement, and a mere statistical registration of the expert appraisals and of the fees received by the experts do not justify in

[237] G.O. No. 65/1994 on the acquisition of the chartered accountant and certified accountant status, published in the Official Gazette No. 243 from 30 August 1994.

[238] G.O. No. 1 from 20 January 2000 on the organization of the activity and operation of the forensic institutions, republished in the Official Gazette No. 996 from 10 November 2005.

[239] G.D. No. 368/1998 on the organization and operation of the National Criminal Judicial Appraisal Institute, published in the Official Gazette No. 248 from 3 July 1998.

[240] Art. 26 paragraph item 15 from Law No. 218 / 2002 on the organization and operation of the Romanian Police Force, published in the Official Gazette No. 305 from 9 May 2002.

[241] Art. 1 letter (a) from the Government Decision No. 1411 from 02.09.2004, published in the Official Gazette No. 833 from 09.09.2004 on the approval of the development, under the Romanian Intelligence Service, of certain activities financed entirely from their own revenues.

[242] G.O. No. 2/2000 on the organization of the judicial and extra-judicial technical expert appraisal activity, published in the Official Gazette No. 26 from 25 January 2000.

any way the need for an endorsement or the quality of a main piece of evidence for the settlement of cases by the courts or by the criminal prosecution bodies. No expert appraisal report, we believe, which was submitted by any Local Appraisal Office, includes an endorsement note according to the true meaning of the word, to include comments about its legality or quality; such a situation makes more often than not that the poor quality of certain appraisals be reflected strongly in the rulings given by the courts or by the criminal prosecution bodies.

We also believe that the Central Appraisal Office should organize testing sessions on the level of knowledge of the technical and accounting experts (chartered accountants), given their very status of experts which necessarily implies an on-going training in their field of expertise.

With regard to the contents of the field of expertise provided explicitly by Art.21 from G.O. No. 2/2000 we believe that there is a way to enhance the legislative framework. Hence, we think that the most significant part is missing from the law which stipulates the introduction, the actual conduct and the conclusions to the appraisal activity, namely, the appraisal per se, which is the very core of the law and which must stipulate the scientific conclusions drawn by the expert, their examination and demonstration; once the core substance is being defined, the conclusions can be drawn as well. Unfortunately, in life, many expert appraisals are deprived of this core substance, which, as shown, is not even mentioned in the law on expert appraisals.

Last but not least, I believe that we have to draw the attention onto the fact that the submission of a report, which is a writ, does not necessarily represent the undertaking of the expert appraisal requested by the courts or by the criminal prosecution bodies.

2. The criminal (judicial) expert appraisal

As far as criminal expert appraisals are concerned, in keeping with Art.1 (1) from Law No. 488 of 11 July 2002 for the approval of the Government Ordinance No. 75/2000 on the certification of criminal judicial expert appraisers: "*(1) Criminal expert appraisals are to be made by the official experts in the criminal appraisal institutes and laboratories, established in keeping with the legal provisions in force.*" Hence, in Romania criminal appraisals are a state monopoly and they are performed in an institutionalized framework, by official expert appraisers who are government employees with the National Institute for Criminal Expert Appraisals under the subordination of the Ministry of Justice[3], the Criminal Expert Appraisal

Institute from the General Inspectorate of the Romanian Police[4] and within the Advanced Technology Institute from the Romanian Intelligence Service.

In 2005 a series of changes have appeared in the Romanian legislation. Thus, in criminal matters, according to Art.IX-2 and X-2 from the Title XVI of Law No. 247/2005 only DNA and DIICOT have the capacity to make use of private experts from the country or from abroad, and not the judges or the parties : *„(4) the technical and scientific fact finding reports and the expert appraisals can be equally undertaken by other specialists or experts from public or private, foreign or domestic institutions, organized in keeping with the law, as well as by individual specialists or experts certified or recognized, in keeping with the law."* In civil matters, according to Art.I-10(5) from Title II of Law No. 247/2005: *"(2^1) to have his/her title deed determined, the petitioner may submit* ***written evidence introductory notes****, authenticated* ***testimonies****, extrajudicial expert appraisals, as well as any other documents which jointly found the presumption of the petitioner's title deed existence on a particular building, on the date of its abusive takeover."* Ultimately, in keeping with Art.4(5), Title XIII from Law 247/2005: *„(5) the extrajudicial expert appraisals submitted by the parties in land property cases have the same proving value as the expert appraisals ordered by the court, on condition that such appraisals be performed by expert appraisers certified by the Ministry of Justice".*

The afore-mentioned legislative provisions are contradictory in nature and the arms equality principle is being violated.

Moreover, in keeping with the provisions of item 242901 from the List of Professional Occupations in Romania, only jurists (lawyers) can be criminal experts. This provision does not match the scientific updates. There are two types of criminal expert appraisals:

- the traditional appraisals, which can be performed both by law school graduates and by graduates of other higher education schools, such as the graphical, ballistic, dactyloscopical, traceological appraisals.
- The criminal appraisals in which the appraiser must have higher education training in specialized fields: (physics-) chemistry, traffic accidents, audio recordings, photographs and video recordings, IT technology, means of telecommunication, DNA analysis, drugs, etc. Law school studies are not enough and they are not appropriate for the second type of expert appraisals where in-depth knowledge from various technical fields is imperative.

The current institutionalized system for the development of criminal expert appraisals in Romania is of Soviet origin and it was implemented by the communist regime in 1956 through the discontinuance of the Corps of Experts within the courts and the establishment of the Public Ministry Laboratory for Expert Appraisals, transferred in 1958 to the Ministry of Justice. The repression reasons underlying this decision are easy to understand. According to the Soviet theory of those times it was only a law school graduate who had studied criminology that could become a criminal expert appraiser. In other words, all the prosecutors, judges and lawyers in Romania were experts because they had attended the criminology classes and there is no more need of specialized Institutes. 16 years after the Revolution, the institutionalized organization of criminal expert appraisals is the same.

In the ’70s the Criminology Institute within the General Romanian Police Inspectorate was set up, whose core activity is the performance of criminal expert appraisals. In other countries (for instance, Germany, The Netherlands, Italy) there is only one state-owned specialized Institute; the other expert appraisals are being done in the private sector. Preserving two or three state-owned institutes (if we also count the Institute under the subordination of the Romanian Intelligence Service) (the law does not even mention explicitly whether they are in competition or not) represents a considerable financial effort which other countries cannot afford but which Romania can[243].

As far as the provisions of Law No. 488 from 11 July 2002 for the approval of GO No. 75/2000 on the certification of criminal experts are concerned, one must note the following paradoxical situation: **certified experts (appraisers) do not perform themselves but only take part** in the performance of criminal expert appraisals by the official experts, **through their observations with respect to the appraisal objective and the appraisal report**, which must be submitted to the judicial body. To be able to make such observations, one must be more competent than the person who has actually made the appraisal, in other words, more competent than the official expert. No other EU member state has the same limitations imposed on the private expert. Moreover, in the EU there is true competition which generates progress between the private experts and the public ones; some countries even acknowledge the fact that it is only the private expert who can truly be a third-party, and not the official (public) expert or the specialist employed by the Ministry of Internal Affairs, the Ministry of Justice or the Romanian Intelligence Service.

[243] For the mere basic endowment of such an Institute, millions or tens of millions of Euro are needed.

But in Romania there still are people who support the communist idea according to which the official criminal expert appraiser can conduct any type of criminal appraisal. This situation does not exist in any EU member state, it has no scientific foundation and runs contrary to the following:

- Scientific updates, practical experience and international legislation, the best practice professional codes of the international associations of expert appraisers in various fields of specialization, and so on,
- The provisions of Art. 6 and 7 from the Chapter on „Competences" from the ENFSI Code of Conduct, to which the Ministry of Justice and Ministry of Internal Affairs institutes belong,
- Art.4 from GO 75/2000 according to which the candidate to the certified expert appraiser examination is required to have specialized higher education studies and 4 years of practical experience, while the (public/government employee) official expert appraiser is not required to have such specialized studies.

Hence, we have in Romania situations in which criminal appraisals for traffic accidents are conducted by people whose basic education is chemistry (!!!); (physics) and chemistry-related appraisals are conducted by mechanical engineers and ballistic appraisals are conducted by lawyers. Likewise, the technical appraisal for traffic accidents, and the criminal appraisal for traffic accidents sometimes solve the same problems, but the means to become a technical expert are different from the means to become a criminal expert. At the same time, one cannot determine the distinction between the technical chemical appraisal and the criminal chemical appraisal, in other words, between the technical and the criminal appraisals from various fields.

Such aspects do not find their match in the EU and Romania must implement as soon as possible a series of measures to amend the existing legislation in force, so as to professionalize and to liberalize the criminal expert appraisal activity, for any expert appraiser to be able to opt (like in the EU) for a specialized public Institute or the private sector.

3. The accounting expert appraisal

With respect to the accounting expert appraisal activity, this activity is regulated by Ordinance No. 65/1994 on the acquisition of the chartered accountant and certified accountant status.

Hence, in keeping with the legislation in force, the chartered accountant profession is being exercised exclusively by physical and legal entities that fulfil this status, under the

conditions set by Ordinance No. 65/1994 on the organization of the accounting appraisal activity and of the certified accountants, a law with the amendments generated by GO No. 89/1998 and Law No. 186/1999 as well as the Regulation for the organization and operation (By-laws) of the Corps of Chartered Accountants and Certified Accountants (CECCAR). Recently, the media has revealed severe irregularities which take place in this institution: the list of chartered accountants and certified accountants seems to include persons who are actually incompatible with the exercise of such activities, as they **perform salary-paid activities outside the Corps or commercial activities** other than that of a teaching staff within the educational branch in question[244]. Or, the exercise of any task specific to the chartered accountant and certified accountant status, undertaken by unauthorized persons or persons who are incompatible with such task **represents a crime and is thereby punishable according to the criminal legislation in force"** ; hence, the validity of the judicial appraisals performed by such persons is being questioned.

We are currently witnessing a process of fragmentation of the accounting profession by the extraction of certain activities, such as: auditing, evaluation, fiscal consultancy, negative phenomena with implications on the organization and development of the judicial accounting expert appraisal, from its scope of activity; such a situation imposes the review of the regulations in force. All these newly created speciality fields require by force the amendment of the legislation on the conduct of expert appraisals. If before, until the publication of the GO No. 2/2000, the judicial chartered accountant examined both matters of accounting records, audit, evaluation and fiscal consultancy, today such issues have become autonomous in professional terms due to the development of a distinct legislative framework and specific professional bodies, that have single responsibilities in these fields, such as: financial audit is being regulated by GO No. 75/1999 ; fiscal consultancy is regulated by GO No. 71/2001, approved by Law No. 198/2002 ; the administrative evaluation is based on the regulations imposed by various normative acts, for instance, the Fiscal Code Law No. 571/2003 .

The development of all these bodies is a positive contribution as long as they are autonomous and independent, thus eliminating the incompatibilities and the conflicts of interest which may appear in the exercise of this profession. Their creation has also generated new specializations that can no longer be covered by a chartered accountant; hence, a new

[244] http://www.curentul.ro/curentul.php?numar=20060914&art=42336

piece of legislation is needed to fill this gap and provide the opportunity for other experts in the field to conduct the respective appraisals.

E. CERTIFIED TRANSLATORS

The current certification system has generated paradoxical situations. The existing legislation in force [245] enables the holder of a licence or equivalent degree (diploma), which proves his/her proficiency in a particular foreign language, to be certified as translator and interpreter by the Ministry of Justice, without his/her specific legal knowledge being checked as we ll. The certificate is issued and valid for life, and in time the translating (mental) capacity of the person in question or his/her ability to stay tuned is no longer being checked.

Hence, at present no distinction is being made between a translator and an interpreter, nor between a legal translator and a general-purpose translator, as in the case of other European countries (France, England, Poland).

There is no authority within the Ministry of Justice able to develop a national translation standard, for the purpose of checking and updating the knowledge of translators on a regular basis. The terminology used in translation work is undergoing continuous changes; hence, a national translation standard is necessary as well as training courses to update the specific terminology.

[245] Law No.178 from 4 November 1997 on the certification and payment of interpreters and translators used by the Superior Council of Magistracy, the Ministry of Justice, the Prosecutor's Office with the High Court of Cassation and Justice, the National Anti-Corruption Prosecutor's Office, the criminal prosecution bodies, the courts of law, the notary public offices, lawyers and bailiffs, published in the Official Gazette No. 305 from 10 November 1997, plus its subsequent amendments.

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CHAPTER X: THE NATIONAL INSTITUTE OF MAGISTRACY
- organized examinations and initial training -

Fourteen years after the graduation of its first class, the National Institute of Magistracy (NIM) attempts to become a term of reference for the Romanian legal system, both because it plays a pivotal role in the recruitment of magistrates and because of the model it provides from the standpoint of a better organization of activity based on competence and the formulation of clearly defined objectives followed by efforts made for their fulfilment.

Building on the foundation laid by the team that has mainly provided between 1997 – 2000 the physical endowment of the Institute, the current NIM management (made up of young and capable magistrates, supported by a scientific council and an elite faculty) constructs educational structures meant to equally provide both the initial training of the magistrates – finalized by an examination which enables their appointment as judges or prosecutors – and the continuous education of those magistrates who already work in courts of law and prosecutor's offices.

This team is one of the few in the system which, in its activity report, does not commend itself on its great accomplishments, but conducts an analysis of the current state-of-play, of the shortcomings and measures that need to be taken, both in the short and the long run[246].

The value of the Institute's activity is reflected first of all in the value of the new generation of judges and prosecutors; everybody shares the opinion that their level of competence is very high, and this opinion is voiced by their older and more experienced colleagues in the system.

Against this favourable background, certain negative aspects must be nevertheless highlighted, as they do have an impact on the NIM activity; they have been perceived - either objectively or subjectively -, they can be equally subject to debate and they should also give food for thought, to NIM included.

[246] See to this effect the NIM 2005 Activity Report on www.NIM-lex.ro/index

I. ORGANIZING THE ENTRANCE EXAMINATIONS AS WELL AS THE EXAMS FOR THE PROMOTION OF MAGISTRATES INTO EXECUTIVE OR MANAGING POSITIONS

A major first issue consists in the examinations organized by the Institute, whether we talk about the exams for NIM admission in general or admission to a specific position, as well as the exams related to the promotion into executive positions or appointment into managing positions – the latter being organized together with SCM (the Superior Council of Magistracy).

The greatest candidate dissatisfaction source was generated by the way in which the practical topics have been scored, although everybody agrees that they must hold the largest weight within the examination, as the trend to give prevalence to the candidates' capacity of interpreting the law and conducting de facto analyses is obvious, to the detriment of their memorizing ability.

Unfortunately, in the case of many examinations, the norm has mentioned the option of grading only one choice of the practical test, although it had allowed for several choices (the mention of the obligation to grade all the answer choices is stipulated in the Regulation of the 1st of March 2006 approved by SCM on the organization and operation of the magistracy entrance examination as well as the procedure for the appointment as judges or prosecutors without a contest, published in the Official Gazette No. 230 of 14 March 2006), which has generated the de-scoring of candidates. Subsequently, the possibility to challenge the norm has been introduced, and practice has shown that such claims have been sustained (the promotion examination from the May – June exam session 2006[247]), which raises questions as to the way in which the exam subject drafting/preparation committees do design the marking master.

As a matter of fact, this has been the very reason why SCM, through its plenary session Resolution No.439/2006 published in the Official Gazette No. 560 from 28 June 2006, has removed the practical test from the entrance examination: see, to this effect, the NIM opinion on this change of Regulation[248], which opinion is equally supported by SoJust[249]. The issue is that this has been a specific example of lack of correlation between the SCM and the NIM activity because, due to the dissatisfaction formulated by the candidates,

[247] www.NIM-lex.ro/index.php?MenuID=3&Detail ID=444.
[248] www.NIM-lex.ro/file.php?FileID=1623.
[249] See in this respect www.sojust.ro

the Institute has made attempts to solve the problem, but the moment it was solved, SCM considered that the only remedy would consist in the elimination of the test. SoJust believes that this measure is inadequate, under the circumstances in which, by the same Regulation approved on 1 March 2006, SCM requested that the drafting of the examination topics take into account the highlight of the mind operations – analysis, synthesis, generalization – through features of the reasoning process – flexibility and critical thinking. It is hard to believe that by eliminating the practical test such qualities would become apparent easily from the candidates' personality. What might be a real problem is that of the various committees involved in the examination subject preparation, examination paper marking and petition settlement (three different committees), whose composition is decided by the SCM, theoretically upon the NIM proposal. We have noticed that the appointment of these committees (commissions) is decided by a totally non-transparent procedure, as for each committee member (commissioner) three proposals must be submitted, and the selection made by SCM is quite arbitrary. There have been cases, quite a few as a matter of fact, when NIM has proposed a list of magistrates for these committees and SCM, without any critical debate based on clear criteria, has reversed the proposals and appointed other magistrates. Probably this aspect too has generated major discrepancies in the activity of the committees, composed quite often on the basis of the personal preferences of the SCM members.

On the other hand, the composition of the committee appointed by SCM for each and every examination (competition) is not made public. Hence, the public information requests, formulated by some of the candidates, with regard to the composition of a certain committee, have received from SCM a reply in full disagreement with the provisions of Law No. 544/2001, as follows:"the names of the commissioners represent classified information until the completion of the examination session, moment in which the information in question becomes public knowledge". On the other hand, the statutory provisions on the committee members' incompatibility cases are being evaded, and the candidates do not have the means to identify them or notify SCM in due course as to the occurrence of such situations.

On the other hand, especially in the case of promotion examinations, the vocational training/education of those who correct the papers must be at least equal with that of the candidates, whereas the simple quality of a judge with the Appellate Court doest not institute an absolute presumption in this respect, as on many occasions judges from the criminal law section or prosecutors correct papers on family law or private international law for the simple reason that they have formulated an option in these respects.

In the summer of 2006 the appellate courts were asked to centralize the applications of judges who expressed their willingness to sit on such committees, with the mention that – the SCM letter read – the selection process of the judges for the examination committees would be done based on a full transparency principle.[250] We believe that if the true transparency of such appointments were considered, a discussion around such applications would be required – even if as a matter of principle – also at the level of the magistrates' associations that can produce a view much more realistic than the one coming out of the simple reading of the applications.

In the case of the executive position promotion examinations, a special situation has appeared, as the existing legislation recommends the selection, as examination board members, of judges who have attended judicial management courses. Under the circumstances in which such courses have been and are still organized by NIM exclusively for court presidents, without testing in any way the knowledge acquired by the participants, we do express our reluctance as to the competence of such people to examine candidates. One has to state at this point that in the case of all the other law-related disciplines the theoretical knowledge of the markers was tested on the occasion of the multiple professional examinations involved by the magistrate's career (signature examination, tenure examination, promotion examination); the field of judicial management does not belong to any of the testing areas included in such an examination.

Equally relevant are the organizational issues occasioned by such examinations. Thus, if we take as an example the examination organized during 12-21 November 2005 for the promotion of judges and prosecutors into executive positions, the following malfunctions have been reported:

a. the adopted Regulation acted contrary to Law No. 303/2004, adding to it, under the following circumstances:

a1. Art.4 paragraph.4 from the Regulation provided the condition of having worked at least one year with a court of law or a prosecutor's office of a lower rank than the ones for which the examination is being held. Though such a restrictive condition is not provided by Law No. 303/2004;

[250] We mention that the report was filed on 7 August 2006 while the form centralization deadline was 1 September, in other words exactly during the vacation period of judges.

As a result of the candidates' complaints, SCM has amended the Regulation, abrogating the above-mentioned condition, as late as 28 September 2005 (HSCM 401/28.09.2005), after the examination enrolment application period was over (23 September 2005). The obvious consequence of this amendment was the prejudice brought to the candidates who could not submit enrolment applications until the set deadline, as they did not meet at the time the condition abrogated subsequently.

a2. Art. 15 from the Regulation set out a new restrictive condition not mentioned by Law 303/2004, which regulated the obligation of having at least 7 as general average grade for each subject matter;

a3. Art.18 paragraph 2 from the Regulation has introduced a discriminatory provision in the sense of giving priority, in the case of an equal average grade, to those candidates who are proficient in the language of the minority group in question, although, even in those localities in which the NATIONAL minority group in question has a weight of at least 50% from the number of inhabitants, the official language is Romanian. According to the opinion of SoJust, this is an unfair provision, (it is worthwhile mentioning that this provision is taken from the law itself), as the constitutional provisions (Art. 128) stipulate that the procedure takes place in Romanian, and the parties involved in the trial, who do not speak Romanian, are ensured the right to take note of the file deeds and proceedings, to speak and voice conclusions in court by means of an interpreter. Such a regulation exceeds the constitutional framework provided by Art. 6 paragraph 1; thus, it is obvious that the equal opportunities principle is being infringed for the candidates who do not know the language of the minority group in question.

b. the examination procedure was amended during its very development, as follows:

- the change of the enrolment conditions after the set deadline (SCM Decision 401/28.09.2005);

- on 23 September 2005 (the last enrolment day) SCM has issued information as to the fact that only the actual promotion is considered, and not the seat related one, and the candidates must opt for one of the specializations;

- on 10 October 2005, through Decision 396/28.09.2005[251], SCM has amended the displayed topics, in the sense of removing from the list of topics certain cases taken from the

[251] http://www.SCM1909.ro/SCM/linkuri/01_11_2005__1615_ro.pdf

jurisprudence of the European Court of Justice and of certain "notes" referring to the said jurisprudence as well as community law issues considered when selecting the jurisprudence, as they were not translated into Romanian (Information about the topics – 10 October 2005)

c. irregularities about the topics, bibliography and subject matters:

- there have been contradictions between the bibliography and the list of examination topics: for instance, in the case of *Family Law,* the bibliography mentioned Law 273/2004 on the legal status of adoption, with no such topic being included in the list of examination topics;

- some of the subject matters included in the examination focused on topics removed from the list of examination topics in accordance with SCM Decision 396/2005; for instance, *The relation between community law and domestic law. Pre-eminence. Direct Effect*;

- some of the subject matters included in the examination could be approached only by copying the texts from the codes (which were made available to the candidates), and thus being conducive to the maximum scoring; for instance, the civil procedure case related to the material error correction institution, could be solved by copying Art. 281 from the civil procedure code; likewise, the civil procedural law topic in theory – *the grounds for cassation in the appeal procedure* – could be approached by simply copying the grounds from the civil procedure code;

d. irregularities about the exam organization:

- on the day set for the written examination, after the subjects were selected, their multiplication lasted for some 40- 45 minutes, in which interval the candidates could exit the examination room and make telephone calls; such circumstances gave rise to suspicion as to preserving the confidentiality around the selected subjects;

e. irregularities about the examination timetable:

- according to the timetable adopted by SCM, the petition settlement was supposed to take place on 20/11/2005, and the posting of the final results on 21/11/2005; in reality, the petition settlement was completed only on 23/11/2005 (3 days later than the set date), and the final classification was made only on 24/11/2005.

As far as the **examination or competition related to the managing positions in appellate courts and tribunals, organized between September, 25 – October 9, 2005,** is concerned**, the following deficiencies have been reported:**

a. the change in the examination/competition timetable took place one week before the date set originally for the inception of the examination period. Thus, the timetable set initially by SCM looked as follows:

- 24-25 September – psychological testing;
- 28-29 September – project presentation;
- 2 October – written examination on management issues.

On 23 September 2005, **during the competition,** SCM has changed the said timetable, as follows:

- 24-25 September - psychological testing;
- 3-8 October – project presentation;
- 9 October – written examination on management issues.

Such a change, only one day before the start of the first examination, shows the superficial approach of the competition organization; the initial timetable did not include the detailed description of the time lapse needed for the settlement of petitions or the posting of results.

As a matter of fact, this timetable was set by SCM arbitrarily, without any sound preliminary substantiation. Under the circumstances in which the psychological testing was an eliminating test, the natural procedure would have been to organize such a test a long time before the occurrence of the other two; and *the obligation to submit a managerial project should have been attached only to those candidates who have passed the psychological test.* Moreover, under the circumstances in which the candidates who did not pass the psychological test could not present their projects, *the SCM refusal to return the original copies of their projects to these candidates* is quite unexplainable.

Eventually, one has to mention equally the fact that, under the circumstances in which *the law does not provide the eliminating nature of the psychological test, the regulation adopted by SCM (Art.11) as well as the entire competition organization procedure are not statutory, hence adding to the legislation the following:*

b. irregularities about the psychological testing;

The total lack of transparency in the organization of the psychological testing, the assessment of the decision-making capacity and of the capacity to assume responsibility as well as the capacity to resist stress, were generated by the following aspects:

- the selection criteria of the specific tests proposed by the SCM experts were not made public;

- the evaluation criteria of the psychological testing, as well as the minimum score which had to be obtained in order to pass the tests were not communicated to the candidates;

- the lack of the evaluation master for the candidates' answers to the psychological tests;

- the lack of transparency concerning the composition of the examination board and the way in which the board members were appointed, so that potential inconsistencies could be checked as well as their meeting the legal requirement of having graduated management training courses;

- it is not known who has initially interpreted the candidates' answers to the psychological tests and hence who has settled the petitions; the law stipulates that the same board (commission) may not settle the petitions as well;

- severe organisational deficiencies: the non-classification of the test papers by folding their black corner or by stamping them in the testing room; such a behaviour was meant to raise suspicions as to the fairness and objectivity of the testing process; the improper supervision of the candidates during the test itself;

- the arbitrary nature of the petition settlement procedure, under the circumstances in which the re-marking of the paper was not done in the presence of the candidate in question, nor were explanations provided as to the criteria which the candidate had not fulfilled;

- the SCM refusal to release copies of the psychological tests, upon the request of the candidates rejected on the spot or at the end of the examination day, the copies being released only after a couple of days and much too much insistence;

c. irregularities about the managerial project presentation;

- the lack of respect for the candidates, due to the poor organization of the managerial project presentation test which started at 12.00 a.m. and ended at 12.00 p.m. every day. During this time span, the candidates were given not even the minimum decent conditions, as they had to wait for hours on end in the institute hallways;

- the disregard for the posted list of candidates, meant to generate suspicion about the fairness of the examination process;

- the non-observance of the examination period set by SCM in relation to the topics – 15 minutes for the project presentation and 15 minutes for the answers to the board's questions – some of the candidates were not allowed to present their projects, as they were questioned for 50 minutes);

- the grade received at this oral test was not communicated to the candidates;

- the criteria according to which the projects were graded, were not posted;

- the result of this test could not be challenged, as the regulation did not stipulate any such provision, and this gave raise to the arbitrary nature of the procedure;

d. irregularities about the test on management issues;

- the lack of correlation between the topics and the recommended bibliography;

- only 2 out of the 8 test topics had any connection with the given bibliography;

- during the petition settlement process, the papers were not resealed nor were they re-corrected, which situation runs contrary to Art.17 Paragraphs 2 and 3 from the Regulation; it derives from the fact that the initial grade was preserved, which is impossible, as the re-correction was to be done by the other 4 members of the board; the arithmetical mean of the 4 grades could not coincide with the initial grade obtained as the arithmetical mean of the grades given by the first 3 members of the board;

- the grades resulting from the re-correction of the papers were not posted; hence Art.17 Paragraph 3 from the Regulation was infringed.

e. irregularities about the topic list and bibliography:

- the literature mentioned in the bibliography was not available, as the works in question could not be purchased from any bookstore but only from the Economic Publishing House in Bucharest, which situation makes their purchase difficult for the candidates who are not from Bucharest.

- the paper called "The Management of Organisational Change" – Burduş E., Căprărescu Gh., Androniceanu A., Miles M**., cannot be found on the market in its 2000 edition**, as it is mentioned in the bibliography. Only the **revised 2003 edition is available,** and the chapters in the two versions are different. As a matter of fact, at the court headquarters only the 2003 edition was sent, without any changes being made in the bibliography mentioned on the SCM website. Under item 1). from the list of topics, a particular topic is recommended – "management methods and techniques", which cannot be found in the given bibliography. Hence, this topic is covered in chapter IX from the paper called "the Management of Organizational Change", which chapter was not included in the recommended bibliography.

Following the complaint filed by a candidate with SCM, one week before the examination or contest period started, hence, **during the contest,** the bibliography was changed, meaning that Chapter XII, called "The Change of the Organisational Culture" was replaced by Chapter IX, called "Managerial Methods and Techniques" *(SCM website 20 September 2005 – Notice about the recommended bibliography).*

- the criteria considered by the examination board when selecting the bibliography are unknown, as the handbooks included in the list are not frequently used at the line School from the Academy of Economic Sciences nor are they easily accessible to the candidates.

- **the given list of topics does not find its match in the bibliography.** Thus, topics like "The Particulars of Judicial Management", "The Management of Human Resources"(career management and the performance evaluation of different staff categories) or "Communication in Public Relations" are not approached by any of the recommended authors, in which case the candidates have the "freedom" to generate their bibliography all be themselves and, by way of consequence, they do not enjoy equal treatment before the examination board.

- the paper called "Justice, Judge, Management" by Ioan Avram Dunăreanu does not meet the requirements imposed by the list of topics, as it does not include information about: the organization of the judicial and administrative activity of courts; the coordination of the district courts activity and the evaluation of the effectiveness of various court department activities. This can be inferred from the simple reading of the afore-mentioned paper. Moreover, the book does not represent a guide for the candidates as to judicial management, but only the author's opinion about the evolution of the judicial system in Romania.

- last but not least, one has to highlight the fact that, although the legislation provides the verification of the candidates declared admitted to managing position at **CNSAS** (Art. 48 Paragraph12 from Law 303/2004) before their actual appointment, no such verification was made at any contest.

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Part of the irregularities mentioned above were solved subsequently by SCM through the amendment of the contest Regulation, but only as a result of the dissatisfaction voiced publicly by the candidates. We still have in this context the very serious matter of the arbitrary grading/scoring of the candidates' managerial projects, as there are no clear criteria for their evaluation and differentiation, and as there is no possibility either for them to challenge the results.

In terms specific to organisational communication, there is no feedback, and the underscored/graded candidate is not informed about the shortcomings of his/her project. Such a situation, together with the impossibility of challenging the results, is meant to generate dissatisfaction and, last but not least, suspicion about the objectivity of the board members.

As a result of the numerous petitions formulated by the candidates, SCM has amended the Regulation, by adopting Decision No. 607/2005, so that the contest organized between 4 - 26 March

2006 took place under its auspices. The amendments made by SCM try to eliminate the flaws regarding the contest organization and development procedure, thus attaching full transparency to the said procedure and protecting the reputation of the magistrate candidates. The new Regulation regulates the petition settlement procedure for the results of the psychological test and the management test respectively, thus determining the express competence of the examination board. Of particular importance is the introduction of the possibility for SCM to invalidate totally or partially the contest results, in the case in which one reports the non-observance of the legal provisions in force or the existence of proven fraud (Art.19 Paragraph2).

Despite these normative amendments, the contest organized between 4-26 March 2006 was placed under the same sign of amateurism or, even more serious, under the sign of a total lack of wish regarding the organization of an objective and transparent contest.

Hence, the candidates have reported many infringements of Law No. 303/ 2004 on the status of judges and prosecutors (*Art. 48 Paragraph 4, 5 and 6*), infringements of the Regulation on the organization of the contest or examination for the appointment of judges and prosecutors into managing positions, approved by the SCM Decision No. 283 / 2005 and amended by the SCM Decision No. 607 / 2005 (*Art. 4 letter b, Art. 3[1], Art.8 Paragraph 2, Art.12 Paragraph 1 and 2, Art. 14 Paragraph 1 and Art.15*) and of the Methodology for the organization and development of the contest/examination by the National Institute of Magistracy (*Art. 12 Paragraph 1 letter a, Art. 20 Paragraph 4, Art. 22 Paragraph 2 and 3, Art.32 Paragraph 1, 2, 6 and 7, Art. 33 Paragraph 1).*[252]

In essence, the most serious irregularities detected on the occasion of the contest referred to the following:

- the arbitrary nature of the candidates' psychological testing procedure: although the set of psychological tests was the same as in the case of the first two contests, some of the candidates who had passed the test during the first contest, were nonetheless rejected at the following test, or the other way round, the candidates rejected at the first test have passed the following one, without receiving any logical explanation for the given situation;

- the project presentation took place on 21 March 2006, before an incomplete board of examination, in the presence of 6 out of the total number of 7 board members, while in the other contest days, certain board members have left the examination room repeatedly during the presentations of some of the candidates. Consequently, **the grades given for the projects do not represent the mean of the grades given by each member of the board;** hence, not all the candidates have enjoyed an equal treatment**; some of the candidates did not have the opportunity to present their projects** before the

[252] http://www.SCM1909.ro/SCM/linkuri/23_01_2006__2736_ro.pdf**.**

examination board, as they were subject to questions for some 20 - 45 minutes; ***the non-existence of evaluation criteria*** to be considered by the board, ***of a tentative evaluation scoring system***, mentioned on the individual scoring lists of the examination board members, able to justify the results, as well as ***the non-existence of differentiated evaluation criteria***, ***according to the level of the court*** – trial courts, courts of law (tribunals), courts of appeal – considering the fact that the powers specific to managing positions are significantly different from one court to another.

- the stage of the written test on management, communication and human resources includes ***irregularities about the manner in which the board has developed the list of topics and the bibliography, namely the subject matters,*** in the sense that the list of topics was copied from the first contest organized in October 2005, whereas the bibliography was radically changed, ignoring at the same time the correlation between the topics and the bibliography, situation in which whole chapters from the list of topics could be found in the bibliography; the bibliography included literature papers that had nothing to do with the specificity of the judicial system – as a public service, such as: „Company Management"; **the contest subject matters did not match the list of topics and the bibliography approved and published by SCM and NIM**. Hence, the subjects cannot be found in the list of topics – subjects 1A (the competencies of managers) and 1B (organizational culture) or in the bibliography – subjects 3A (obstacles in interpersonal and organizational communication), 3B (the aphorism „*misunderstandings represent the most frequently encountered type of communication"*), 3C (the application of the communication principles in the college sessions).

The only irregularity considered by SCM to affect the legality of the contest was the one referring to the set-up of the examination board, which led to the partial invalidation of the contest, but even in this situation, not for all the positions regarding which the candidates were examined by an incomplete board, but only for that position where there were several candidates – president of the Prahova Tribunal.

Due to a praiseworthy consistency, SCM undertakes a new amendment of the contest Regulation, attaching a normative regulation nature to all the irregularities reported by the candidates, which are considered by the same SCM as insignificant from the viewpoint of the contest legality. Hence, by the Decision No. 320/2006, SCM transposes in the Regulation the provisions of the NIM Methodology; the main changes refer to the following:

- some cases of incompatibility among the examination board (committee) members;

- regulating the tasks and functions of each organization and examination committee;

- the psychological testing consists in a written test and an interview before a board made up of 2 psychologists; the preliminary nature of this test is eliminated;

- the audio recording of the managerial project presentation;

- the management knowledge testing consists in a multiple-choice test;
- the challenge of the grading master set up by the examination board.

The new contest organized between June – July 2006 highlights the same old irregularities as well as new ones, despite the amendments, as follows:

- the subjective nature of the entire process of managerial project presentation: ***the non-existence of certain evaluation criteria***, ***of a tentative evaluation scoring system,*** mentioned on the individual lists of the examination board members, to justify the results (scores), as well as the ***non-existence of certain differentiated evaluation criteria***, ***in keeping with the court level; the lack of any kind of feed-back about the results obtained by the candidates; the non-observance of the project presentation timeframe, as some candidates were heard for 20 minutes and others for 1 hour; the impossibility of challenging the results;***

- the existence of certain subjects not included in the list of topics and the bibliography within the management multiple-choice test, such as: s**ubject no. 4 regarding the** ***criteria which underlie the promotion of managers*** (this topic is included in the paper on « The Fundamentals of Organisational Management » - Eugen Burdus, Gheorghita Caprarescu, Chapter 3 – « Managers, Entrepreneurs and Leaders », Section 3.6 – « The Evaluation, Improvement and Promotion of Managers – page 112, which was not included in the bibliography) ; **subject no. 48 regarding the** ***ethical behaviour of an organization*** is debated in the paper on „Managers and Human Resources Management" – Ovidiu Nicolescu, Chapter 7 „The Managerial-Entrepreneurial Ethics", Section 7.3 „Company Codes of Ethics", Subsection 7.3.1. „An Evaluation of Company Ethical Behaviour" – page 117, which was not included in the contest list of topics and bibliography; **the non-allocation of a score to each partial answer**, which matches the master, in the case in which the correct answer involved two choices (options) and the candidate had chosen correctly only one (option).

CONCLUSIONS

After an analysis of all these aspects, SoJust draws the following conclusions, and adds that these improvements related to the organization of exams were of use only to those candidates who have participated in the next examinations; on each occasion, SCM has validated the examination results with an uncommonly high speed, despite the fact that some courts even had pending litigations related to these very results.

1. the first conclusion is that NIM is not able to impose a specific working methodology onto the members of the committees which draft the examination subject(s) matters and mark the examination papers. It is almost impossible to understand which was the precise attitude of NIM with regard to these contests and examinations which have generated on-going dissatisfactions among the candidates; nor can one understand which were the concrete proposals submitted to SCM for the elimination of such malfunctions, as it counts among its members a large number of faculty and experts in pedagogical sciences. A very simple example consists in the fact that the subjects are thus formulated so as not to be fully covered in the allocated timeframe unless the candidate writes non-stop for 4 hours – which is physically impossible –, in the case of the executive position promotion examination for instance; not to mention the huge differences between the grades, before and after the admission of petitions; this situation proves that the examination board members are not familiar with the way in which the subjects are to be formulated or the way in which the papers are to be marked.

2. the second conclusion is that many of the problems which face NIM do not belong as a matter of fact to the Institute, but are the result of a poor communication between NIM and SCM, as each of the two entities is under the impression that the other has to deal with organizational matters. Hence, a better correlation between the responsibilities of the two organizing entities should exist, in relation to such contests and exams, as well as, by all means, a greater willingness on their part to immediately solve the problems which occur in such cases, for instance, by assuming the responsibility of cancelling a certain contest or exam, if needed.

3. it is unacceptable that no one should be responsible for the inconsistencies which have appeared, despite the fact that they have caused more than a slight discomfort to the candidates. Quite surprisingly, but equally common in a judicial environment, **following the reported severe deficiencies, described earlier on, SCM found no one responsible, although the amount of time and money wasted was enormous.**

II. THE INITIAL TRAINING OF MAGISTRATES

The second topic which can be put up for debate refers to the main activity developed by the NATIONAL Institute of Magistracy, namely the provision of the initial training of magistrates.

Throughout 2006, the Institute has formulated several proposals which were submitted to the SCM for approval, amongst which the one concerning the diminution of the entrance examination average (grade) from 7 – the current value – to 5; the proposal was not approved. The arguments which have substantiated this proposal consisted in the fact that the trainees must finalize their

education through a highly complex examination, that after a year they must pass the tenure examination – equally difficult –; in this way their value is screened several times, and the diminution of the entrance examination average (score) to 5 would enable the occupancy of all the seats made available by the Institute, which seats have been left unoccupied during the previous years.

Theoretically speaking, these arguments are real. But practically speaking, one can note that the trainees tend to believe that the moment they enter the Institute is the same with the moment they join the bench. It is easy to witness their relaxation after they have passed the entrance examination, and it is almost customary for them to believe that once they have entered the Institute, they would graduate it automatically, even with average grades above 9. This is the reason why one can feel a certain reluctance on their part regarding the subjects which they view exclusively as threats meant to lower their grade: foreign languages – a compulsory subject for a magistrate who must read a lot of literature (doctrine, jurisprudence) and who must communicate directly with his/her peers from EU member states; IT science – indispensable in the XXI century, as well as their extra curriculum projects.

Quite often, the auditors of justice (trainees) blame their trainers for a lack of uniformity as regards the grading system, which situation may trigger unequal opportunities. This problem is a real one, and the Institute has taken some measures to this effect, through the Scientific Board Decision of 7 February 2006 on the following rules regarding the continuous evaluation of the auditors of justice:

- the weight of the written papers in the overall grade of the continuous evaluation will be 50%;
- the written papers will be always graded on the basis of a detailed master;
- the written papers will be always marked by two people, the chair holder and another trainer from the same chair, the same one for a particular paper;
- before communicating the grades to the trainees, the discipline holders will check the uniformity of their allocation, among the groups; they have also the right to re-mark the papers that have received certain grades in the case of the written test criterion;
- the Scientific Board Decision No. 10 of 20 September 2005 is being reconsidered, in the sense that the trainers do not have the duty to observe the recommended percentages when they award the grades, but their performance will be assessed also through the grades they give, via the following:
  - comparison with the grades received by the trainees at their final evaluation;
  - calculation of the dispersion percentage against the normal distribution curve calculated through its relation to the European Credit Accumulation and Transfer System, as follows:

- grades of 10 – 10% at the most;
- grades between 9 and 10 – up to 25%;
- grades between 8 and 9 – up to 30%;
- grades between 7 and 8 – up to 25%;
- grades lower than 7 – up to 10%.

It is certain that NIM still has a lot to do in order to improve its performance – such as enlarging its pool of books, even by the purchase of valuable books published in the inter-war period – but what becomes apparent at first sight is the fact that it capitalizes on its own experience, mending its mistakes as it goes on; it also presents a short-term and mid-term view on what the recruitment and initial training of magistrates must be like.

Last but not least, it can be asked of NIM to initiate a closer cooperation with the magistrates' associations, under the circumstances in which the courts and the prosecutor's offices are the direct beneficiaries of its work; the Institute's graduates are to be appointed, after their graduation, judges and prosecutors. Although a member of the magistrates' associations is currently a Scientific Board member who has not been agreed by all the associations, the person in question does not communicate at all with those he should represent: from the day of his appointment until today he has not yet mentioned the objectives he had established or the specific activities he had undertaken within the Board, either with regard to the magistrates' initial training or their continuous education.

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CHAPTER XI: LEGAL EDUCATION
– between effort and efficiency -

The continuing reform in the Romanian education system has led to substantial changes, although not always in terms of quality as well. The lower limit rose, but according to the law of compensation the upper one decreased, with mediocrity and sub-mediocrity clearly gaining ground. **SoJust does not shy from stating, in fact, that mediocrity and superficiality define the Romanian society as a whole, and the Romanian education in particular.** This is a statement which holds true for the entire Romanian education system. How does this global levelling affect us in the long run? We attempt to provide an answer, and at the same time a warning signal, in a field of vital importance to a society – *the legal education*. The SoJust analysis looks both at the graduate, and at the undergraduate segments (we will refer to the undergraduate segment primarily in terms of the implications of its absence from the system).

According to data posted on the "SEI Educational Forum"[253], in a poll on 14.03.2006, "Which university department is most desired?" out of 24 listed areas law comes sixth. Considering that the second and fourth positions are occupied by technical fields, this indicates that *legal sciences hold a major position in terms of high school graduates' preferences*. However, when asked to specify why law, most are unable to provide satisfactory answers as to what they will become or the future study subjects (see Appendices 1 and 2). How natural is it to choose a university department on which one has occasional, more or less accurate information? How natural is it for the undergraduate system not to ensure any contact whatsoever with the legal element? If we only refer to the market economy and the gap between the two systems, this is inexplicable; similarly, we can refer to general legal education—e.g. signing a document with legal effect without reading it first—and this would be enough to justify the need for legal education.

Most teenagers are unable to make the elementary distinction between a right and an obligation; therefore they cannot even stand up for a right. To ask them to distinguish

[253] See http://www.edu.ro.

between the attributions of magistrates, lawyers, civil servants, would be too much. And still, these will be the professions they will practice.

The market is facing an unbelievable afflux of law school graduates, and more importantly, in filters subsequent to their graduation few manage to get a job in magistracy, law firms, etc. There are various reasons why many law school graduates fail to find a place in the labour market, but without doubt we should start from the fact that the career beginning is in many ways affected by deficiencies.

The costs—which are in fact losses on both sides, student / teacher—include the intellectual effort, the time allotted (to teaching, in one case, and to learning in the other), the financial effort, whether we talk about the public or the private system. We emphasize that the financial effort in both systems includes the salary paid to a professor delivering courses to an uninterested audience—not necessarily for the professor's fault, but rather because most of the audience wound up in a place and space they have nothing in common with.

1. UNDERGRADUATE LEGAL EDUCATION

Transformation of the academic legal system into a system operating on market mechanisms, i.e. high efficiency and low costs, requires earnest attention to be paid to the undergraduate system as well.

Specifically, this depends on **the extent to which at high school graduation teenagers are aware of what they will study in law school**. And since they have no lever to obtain at least elementary information on their future subjects, we can conclude that the huge mass of law school graduates, which the market cannot accommodate in either quantitative or qualitative terms, is in part a consequence of the lack of communication between the graduate and undergraduate systems in this respect.

In this context, SoJust proposes the implementation of a **"Project to introduce core concepts of legal science in school curricula"** by relevant institutions and authorities: the Ministry of Education and Research, the Ministry of Justice, the National Magistracy Institute. The project is intended to meet both high school graduates' civic needs (the need for an elementary legal education for personal use) and the needs of prospective law students.

As far as this planned project is concerned, several concrete aspects would include:

A review of the number of free-choice courses, as stipulated in the "Explanatory note on the drawing up of framework education plans for 11th and 12th grades," posted by the Ministry at www.edu.ro, and subject to public policy debate June 14 to July 14, revealed that high school departments which are most suitable for inclusion of at least one, perhaps even two hours per week of core concepts of legal sciences, are philology and social sciences. According to Appendix 1, the share of CDS (curriculum chosen by schools) for the eleventh grade is 14.29-20%, i.e. 4-6 hours per week, and for the twelfth grade it is 17.86-23.33%, i.e. 5-7 hours per week (pages 5, 10 and 11 in the "Explanatory note …") These classes are pupil-chosen, with study subjects to be decided jointly with the pupils from a number of options.

The purpose is to offer pupils additional hours to put in order and review knowledge for their high school graduation exams, and implicitly, in some cases, for the future fields of academic study. This objective cannot be met by those who want to find out what exactly they will study in law school, because, regardless of how we look at it, they are denied any contact with the judicial system. According to the "Explanatory note …" drawn up by the Ministry, as of next year (academic year 2006-2007), "Elementary law concepts"–the name we propose for the subject to be studied in the undergraduate system—will become a subject at least for the aforementioned departments.

The "benefits" of implementing such a project would include:

a) Better communication between the undergraduate and graduate systems in the field of law studies;
b) Would-be students would have at least one lever to control what branch of legal sciences they will study (the outcome would be what may be called "self-selection", as a process whereby undergraduate pupils make an informed decision when selecting law school as their academic path);
c) Making the selection of future law school students more efficient, through the self-selection procedure;
d) Introduction of one or more classes whose contents would inform future law school students on the respective curriculum area.

Implementation means that we suggest and that we have already used in order to have an overview on the issue:

a) polls carried out in the undergraduate environment, in cities Tg.-Mures, Cluj, Oradea; (Appendix 1);

b) polls carried out in the academic environment (among both students, and teaching staff) in the said cities (Appendices 2 and 3);
c) processing the data and presenting the results to decision-makers in the two systems;
d) systematization of conclusions and launch of procedural steps to implement the project (Appendix 4);
e) drawing up a textbook with comprehensible contents and modern layout, for the proposed course.

For the project to be smoothly implemented, the academic legal system must also be involved. While in the undergraduate segment legal sciences are absent altogether, in the graduate system we have just the opposite—an overabundance, as the section below will prove; naturally, the innocence of those who choose law schools is also taken advantage of: universities prefer to receive ignorant students, as once they pay their taxes they tend to stay, rather than leave (Appendix 2). An even quick look at university pamphlets would reveal the excess.

The quantity/quality ratio is obviously negative, and has been noted by both system insiders and outsiders. The undergraduate-level proposal above is intended primarily to protect high school pupils from exclusively relying on indirectly induced perceptions on the judicial system, to save their energy and, why not, their money as well, before they choose this field. What does the academic system do to clean its human resources, which are the filters it uses and how do they work, in order to raise quality standards? Hard to tell! We may talk about the quantity aspect, but hardly about quality, as we will see below.

2. HIGHER LEGAL EDUCATION

Education is critical to the development of any state, and sustainable institutional reforms depend not only on structural reforms, but also, more importantly, on staffing reforms. Absence of a high quality legal education entails difficulties in promoting the principles of democracy and the rule of law. Therefore, **a qualitative reform of the legal education** is particularly called for in view of promoting the separation of powers in the state[254] and of making the judicial power more efficient. In this respect, developed states have

[254] Law schools provide human capital with decision-making attributions in the main public sector at a national level

always paid attention to implementing policies which integrate the legal education reform with general national reform initiatives[255]. Without a similar approach, the Romanian justice reform stands slim chances to succeed.

In Eastern European states, the legal education reform was only occasionally tackled in national reform projects. **Romania is the former communist bloc state with the highest resistance to international institution consultations in drawing up and implementing genuine reform programs for the legal education system and the justice system as a whole[256].** It is self-evident that one cannot talk about sustainable justice reform unless it includes a reform of the Romanian law school. Jensen[257] emphasized that any strategic intervention to increase justice efficiency must start from a true reform of the legal education, which is the foundation for the development of any national judicial system, a view that SoJust fully shares.

Legal education was left entirely in the hands of the Education Ministry, without institutions involved in the justice reform having any say in this respect over the 16 years since the Revolution. The attempt by the justice system, through the National Magistracy Institute, to cover the training deficit in law schools proved to be insufficient in practice. *Like many other former communist states, Romania chose to invest in post-graduate training programs for judges and prosecutors, at the expense of the basic legal education.* This proved to be a major mistake, as many magistrates already set out with an inadequate education background. Further, not all legal professions benefit from similar post-graduate training policies. These flaws will create serious dysfunctions in the system, particularly related to the inadequate education of law school graduates.

The national legal education system as a whole is flawed. Considering the absence of qualitative criteria in accrediting law schools, the student admission and examination methods and the inadequate training of teaching staff and irrelevant academic curricula, SoJust believes a true reform of the legal education is called for, which should tackle the following issues that have been identified[258]:

1. Methods of law school accreditation.

[255] Mark K. Dietrich, World Bank adviser for legislative reform in SE Europe.
[256] Reports by international institutions on the justice reform in SE Europe.
[257] E. Jensen, "The Rule of Law and Judicial Reform", Stanford University Press, Stanford, CA 2003, pp 359-360.
[258] Mark K. Dietrich, Nicolas Mansfield, Lesson Spurned: Legal Education in the Age of Democracy Promotion, EWMI, 2006.

Since 1989, a significant number of law schools have been accredited. With many of them, the actual demand for legal experts in the Romanian labour market was not considered. At present there are 38 accredited law schools[259], having 63,586 students.[260] More often than not, accreditation has been granted without international standard quality conditions being met, with respect to admission methods, number and quality of admitted students, courses taught, technical and material facilities offered by the education unit, adequate libraries, number and quality of the teaching staff, as well as the quality of training received by graduates.

The prestige of the Romanian school tradition has deteriorated a lot over the past decade. A degree in legal sciences is only conditional on university enrolment[261] and payment of the related taxes. Free access to law schools has led to an excessive number of graduates[262], impossible to assimilate by the system, along with a drastic decline of their training level. This favours corruption and violation of procedures for legal profession entry: cum laude graduates do not have "the necessary support" for a training contract, and most often they are forced to give up their chosen field of expertise, whereas graduates with mediocre school records manage to enter the system, by bending rigorous procedural conditions.

2. No value promotion among law students.

Corruption and nepotism were the main problems identified with respect to student assessment and grading[263]. Given that the positive or negative development of the judicial personnel takes place in school, one can hardly ask for those accustomed to corruption and personal favouritism practices ever since school to change their behaviour and mindset once they become part of the legal profession.

Although Romania is waging a national campaign to combat corruption in the justice system, few are the universities which tackle judicial ethics and professional dilemma management topics. The absence of ethics courses in the academic curricula more often than not prevents law school graduates from identifying and being aware of the pressure factors and conflicts of interests that, willingly or not, they will face in their professional life.

[259] Data from a survey on the Romanian judicial education, drawn up by the National Criminology Institute and completed by the European Law Students' Association (ELSA), 2006.

[260] 25,523 in public higher education units, and 38,063 in private higher education units.

[261] Few universities still organize admission exams.

[262] 10,898 law school graduates in 2005.

[263] World Bank Reports: "Initiatives in Legal and Judicial reform - 2004" and "Legal and Judicial Reform in Central Europe and Former Soviet Union. Voices from five countries - 2000"

3. Quality of teaching staff.

Teaching staff plays a critical part in the theoretical, professional and moral instruction of would-be jurists. The Romanian law school tradition used to take pride in having exceptional professors, whose classes filled amphitheatres and whose textbooks were sold within days. But over the past few years the number of competent professors has substantially decreased, and the relevant judicial policy is no longer updated.

Worth mentioning first and foremost is the lack of interest in continuing research and documentation among professors over 65 years of age. The low salary level in the academic education sector results in a mediocre education of young teaching staff, who have to either take additional jobs in the public or private sector, or teach in several institutions, and are thus unable to allot time to the development of teaching materials, to research and continuing professional training.

Criteria "imported" by former Minister of Education and Research Mircea Miclea, with respect to the teaching career stages and qualifications[264] are necessary for the development of the Romanian education system in line with national and international requirements. But modifications operated by the new Education Minister Mihail Hârdău lowered the standards outlined by the "Miclea criteria" for the granting of the professor and lecturer titles. SoJust believes that modification of these reform measures is detrimental to the efficiency of education, considering that **Romania is the one but last country in the world in terms of scientific research per thousand inhabitants.** But unfortunately such a reform is impossible to implement when most of the teaching staff fail to meet these standards. However, decision-makers should keep in mind that only the implementation of exigent criteria for the granting of academic titles can bridge the gap between the quality of the Romanian education and research and the quality of the Western one, allowing for an education level which meets market requirements and providing international prestige to the Romanian education system.

4. Teaching methodology.

At present, the judicial education is marked by dysfunctions which artificially separate theoretical instruction from judicial practice. The teaching methodology is restricted to the professor reading an abstract of a chapter in the textbook (more often than not written by

[264] Orders by Education Minister, no. 5098, 5099 and 5100 of 03.10.2005.

himself), while student assessment is based on students' rote learning capacity.[265] Moreover, most courses are accompanied by seminars taught by graduates, who lack the capacity to initiate analytical debates that involve a critical approach of the topic.

Because of the current academic curricula, law school graduates are unable to acquire during their student year the practical knowledge needed in their chosen profession; they are hardly ever encouraged to use their critical thinking, solve concrete cases or choose a solution from a number of alternatives and motivate their choice. The number of law clinics able to correct such educational flaws is very low in law schools in Romania, and they fail to meet current demands. Very often, the number of students per law clinic is too high—raging from 40 to 100—and implicitly the actual involvement of each student, the time allotted by professors to each student and the quality of information and practical knowledge thus gained are below expected levels.

The Bologna process[266] is the groundwork of the reform of the European academic education as a whole, including judicial education. Thus, the law school curricula will focus on the acquisition of practical knowledge, correcting some of the shortcomings in traditional Eastern European education systems, and linking the quality that the education system should ensure to requirements of the legal profession practice.

5. Academic curricula

The subjects taught and the teaching materials used in most law schools have not been adjusted to the socioeconomic and political changes that the Romanian society has undergone over the past decade or to the requirements that such changes imposed. Important subjects such as the European protection of human rights[267], statutory community law[268], judicial logic

[265] This teaching method has been ironically criticized by World Bank experts as a "method through which the professor's notes become the student's note, without reaching the minds of any of them."

[266] Declaration signed by education ministers of 29 European states at the Bologna University in 1999.

[267] Although Romania is a signatory of the European Convention on Human Rights (1993), its application was denied by magistrates for close to 10 years, when major modifications were operated on the Code of Criminal Procedure. (2003). Until that date there were no relevant textbooks. In 2005, the most authoritative work in the field was released—"European Charter of Human Rights, comments by articles" by Prof. Corneliu Bârsan, Ph.D., currently a judge with the Strasbourg Court (All Beck publishing house).

[268] While the number of institutional law books is more or less sufficient, few of them tackle the relevant statutory law as well. We don't understand why we don't have translations of textbooks already available in other, older EU member states.

and psychology[269], judicial ethics[270], IT for the legal profession and the use of Internet as databases in research are absent from the education plans of most law schools in Romania.[271]

Although the number of legal sciences graduates in 2005 was 10,898, results of employment contests organized by INM, the Ministry of Justice and Bars provide a clear image of their education level: of the 180 vacancies advertised by INM, only 56 were initially filled,[272] although the number of applicants in the contests was 2,859 law school graduates,[273] whereas out of the 25 positions available in MJ in December 2005 and 22 positions in April 2006, 20% remained vacant in December and 50% in April. Requirements involved in these contests proved to be virtually too high compared to the fresh graduates' instruction level. We may thus conclude without hesitation that **there is a mismatch between the judicial instruction provided by the law school and the demand in the Romanian labour market**.

Law schools lack an adequate educational strategy to instruct jurists in line with requirements imposed by recent socioeconomic and political changes. Ratification of the *European Convention for Protection of Human Rights and Fundamental Freedoms* in 1993, as well as Romania's accession to the European Union on January 1, 2007 should have entailed the inclusion of relevant courses for the two new judicial fields in law school education plans, as well as the organization of special continuing education programs for jurists in the field of the ECHR and ECJ jurisprudence. But over one decade after the European Convention ratification, graduates from Romanian law schools have rudimentary knowledge, at best, about the law system laid down by the Convention, and just months ahead of the EU accession courses in statutory community law are seldom included in law school curricula, and they are hardly ever paid due attention to. At present, subjects such as criminal law and criminal case law, civil law and civil case law, family law, commercial law, etc. are not taught in an integrated manner, which would require reference to the ECHR and/or ECJ systems.

On the EU accession date, the Romanian jurist will truly become a European jurist. While at present the concurrent application of the national and the *Convention* systems raises

[269] The absence of these subjects or their superficial approach reflects today on magistrates' untactful approach of trial participant hearing and on the lack of adequate justification of judicial decisions.

[270] The Law School in the Babeş-Bolyai University, Cluj-Napoca is the only one having the judicial ethics course as a compulsory subject. Law schools in the following universities have free-choice judicial ethics classes: Dunărea de Jos, Constantin Brâncuşi, Nicolae Titulescu, Tibiscus.

[271] Appendix 5 – data taken from the survey on the judicial education system in Romania, drawn up by the National Criminology Institute and completed by the European Law Students' Association (ELSA), 2006.

[272] Eventually, after petitions were admitted, 119 of the 180 positions were filled.

[273] Data from the National Statistics Institute.

serious problems, with Romania ranking second in Europe by number of petitions filed to the Strasbourg Court by citizens disappointed with rulings passed in Romania, as of 2007 their harmonization with the community law system of the European Court of Justice will give rise to further difficulties in the efficient case management. Jurists' inadequate instruction on the European protection of human rights has already cost the Romanian approx. 50 million euro so far[274]. Judicial education in statutory community law is also at an early stage, and consequences of the lack of sound knowledge in this respect will not be late in appearing as of 2007.

More often than not, problems generated by social and legislative are misperceived in terms of training needs with certain categories of jurists, rather than in terms of their basic instruction. *The idea that postgraduate education programs for judges, prosecutors and attorneys may shape the justice reform in reforming countries is completely wrong*[275]**.** The fact must be considered that the planning and implementation of justice reform programs requires full understanding of the priorities of a successful reform, as well as the capacity to envisage its medium and long term effects, with confidence granted to projects without an immediate impact.

SoJust strongly believes that the justice reform must be perceived as a long-term process which starts from legal education reform projects.

PROPOSED SOLUTIONS

Under these circumstances, SoJust recommends a *national strategy for the legal education reform,* comprising:

1. promotion and coordination of reforms in the justice system and the judicial education;
2. increased efficiency of inter-institutional cooperation in the judicial sector;
3. increased efficiency of the cooperation between justice system institutions and trade associations, NGOs, academic community, through organization of regular debates;

[274] In June 2006, Romania ranked third in terms of the number of petitions to the ECHR, after Russia and Turkey. In August, Romania moved to the second position, and chances are in 2007 it will be first.

[275] Mark K. Dietrich, World Bank adviser for legislative reform in SE Europe.

4. design and implementation of procedures aimed at establishing an adequate framework for approaching the judicial instruction;
5. design and implementation of an undergraduate judicial education plan;
6. organization of a law school admission contest / test at a national level;
7. design of a consistent instruction plan, allowing for the elimination of discrepancies in law school graduates' instruction level;
8. outlining the law school graduate profile, through consultations with employers of judicial workforce;
9. annual monitoring of the quality and performance of judicial education institutions/programs;
10. drawing up a ranking of legal education institutions and of postgraduate programs, against clearly defined criteria;
11. encouraging the implementation of postgraduate judicial programs in a partnership with international institutions;
12. encouraging and supporting the organization of LL.M[276] programs (lacking in Romania at present);
13. promotion of the international judicial doctrine and of the new lines of judicial research;
14. promotion of databases such as Westlaw, Nexislexis;
15. encouraging the emergence of high quality judicial doctrine, in line with international standards;
16. promotion of academics and researchers' instruction in "legal writing" in accordance with international requirements;
17. establishment of a law library, comprising international legal writings and publications;
18. encouraging the release of specialized legal magazines accredited by ISI (*Thomson Scientific Journal Selection* known as *Institute for Scientific Information*), etc.

[276] LL.M Programs are the equivalent, in judicial education, of what MBA programs represent for the business education.

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APPENDICES (CHAP. 1):

Appendix 1
Questionnaire addressing eleventh and twelfth graders (975 interviewees)

1. What does the concept of legal sciences mean to you?

2. To what extent do you find an introduction to legal concepts suitable in high school?
a) it would be necessary; 70%;
b) I don't believe it necessary; 7%;
c) can't tell 23%.

3. Do you believe that, if you choose law school as an academic path, you have enough information on what you will study?
a) I have minimal information; 54%;
b) I have no information; 10%;
c) I have average information; 35%;
d) I don't see its point 1%.

4. What do you know about the professions you may practice as a future law school graduate?
a) I know some things; 79%;
b) I don't know anything; 13%;
c) I know everything there is to know. 8%.

5. What is the difference between a right and an obligation?

6. What is the difference between a prosecutor and a judge?

Appendix 2:
Questionnaire addressing first year students, criminal law and administrative law (220 interviewees)

1. What did you know about what you were to study in law school, when you made that choice?
a) a lot; 18%;
b) a little; 20%;
c) some things; 24%;
d) nothing. 38%.

2. To what extent what you are doing now is consistent with your expectations?
a) fully consistent; 40%;

b) partly consistent; 37%;
c) partly inconsistent; 8%;
d) fully inconsistent. 15%.

3. If what you expected is not consistent with what you actually do, will you chose another university department?

a) yes; 9%;
b) no; 67%;
c) don't know. 24%.

4. What is the main reason for which you will remain in law school, although it does not define you?

a) taxes already paid; 31%;
b) indolence; 17%;
c) lack of a better alternative. 52%.

Note: 167 out of the 220 interviewees chose all three answers.

5. What do you think would have happened if you had been taught basic legal science concepts in high school?

a) I would have known something about what I was to do; 78%;
b) it wouldn't have helped in any way; 5%;
c) I would have been studying something else now; 17%.

6. Do you believe an introduction to legal sciences would have been useful?

a) some basic concepts would have been really helpful; 32%;
b) some basic concepts would have helped; 29%;
c) I manage anyway. 39%.

Appendix 3:

Questionnaire addressing teaching staff in the judicial higher education

1. Do you believe first year students make an informed decision when choosing legal sciences?

a) yes; 11%;
b) no; 33%;
c) most have no idea about what they will study; 53%;
d) most have minimal law knowledge. 3%.

2. To what extent do you believe the introduction of basic judicial law concepts in the undergraduate system would lead to a better selection of students who choose law school?

a) there would be self-selection in high school; 96%;
b) self-selection would not work; 4%.

3. To what extent would this implementation contribute to increasing the quality level of would-be law students?

a) there would be no change in the quality level; 25%;
b) there would be significant improvement in the quality level; 44%;

c) there would be major changes in the quality level. 31%.

4. Do you believe the idea of introducing a basic course in judicial law in the undergraduate system to be useful?

a) yes; 74%;
b) partly; 26%.
c) no

Polls carried out (with the support of Bihor, Mureş and Cluj County School Inspectorates) by:

Judge Dana Cigan - Oradea Court of Appeals;
Judge Andreea Tuluş - Cluj-Napoca Court of Appeals;
Nora Dumbrava - Teacher, Pedagogy High School, Tg. Mures;
Ion Buşe - Teacher, "Gheorghe Şincai" High School, Cluj-Napoca
Judge Mihaela Vasiescu – Tg. Mureş Tribunal

Appendix 4

Theoretical questions addressing pupils (Appendix 2) were intended to reveal the extent to which they have a fair idea of what "minimum, average, etc. knowledge," "I know some things, I don't know anything" mean. Considering that most pupils did not answer the first question ("What does the concept of legal sciences mean to you?") and that less than 10 % managed to give an acceptable answer to the other two questions, it is self-evident *that perception on the concept of minimal knowledge (54%) is starkly different that the usual significance attached to the phrase* (e.g. some of those who chose the "average knowledge" answer said there was no difference between a judge and a prosecutor). The conclusion is that the percentages obtained should be taken with a grain of salt, and not overplayed.

As for the idea of an introduction to legal sciences taught in the undergraduate system, it seems to have sound support both among pupils, and professors in the academic community. Mention must be made in this respect of the attempts made by some undergraduate system teachers to introduce basic judicial field concepts in eleventh graders' "Civic Education" free choice course. Its status as a free choice subject, as well as a name not very clear for all students, did not convince many of the usefulness of the subject, although the course was quite good.

What happens then, in the academic community, is a mere reflection of the undergraduate system. Whereas an option for the History Department, for instance, involves nine years of prior study on this subject, (the first history classes are taught as early as in the fourth grade), which entails a very clear image on the field of study, as far as the judicial system is concerned, the perception on what will be studied and on future professions is rather fuzzy. Although only 10% admit to having no judicial knowledge, answers to the theoretical

questions point to a much higher figure. This 10% (according to the poll, a larger number if we consider answers to the theoretical questions) are later on to be found among those who answer that *an initiation in legal sciences would have made them study something else*, or who stay in law school because of the taxes they paid or because of their indolence. Moreover, 52% admit that they don't have a better alternative, which indicates that legal sciences are still in high demand.

The conclusion of the survey reflects that the fact that, with the option for this field of instruction still highly popular among pupils, *there should be some cooperation in this respect between the two ministries (M.E.C. and Justice).* Flexibility (which school curricula tend to lack) should also mean market surveys, so that the undergraduate offering should be a preparation for the graduate instruction. This, on the one hand.

On the other hand, the Justice Ministry would benefit from these elementary courses, in terms of an increase in the *quality of the human resources which graduate from law schools*. At least this total 75% (Appendix 1, question 4), more precisely 167 interviewees out of 220, who chose the three situations (a, b, c), would be substantially decreased. As emphasized above, one of the purposes of this endeavour is to spear the efforts in the student-teacher relationship, a relationship established on unequal positions, given that one of the parties (students) are denied the opportunity to become familiar with the subject matter of their future studies, before they become actual students. Consequently, implementation of the legal studies introduction course (one of the project objectives) may contribute to reaching the other targeted objectives: would-be students having a control lever on what they will study and the "self-selection" process as a system for cleaning the human material in the graduate system and, not least, minimal judicial knowledge necessary to anyone.

Appendix 5:

Table on the study of law school subjects in the academic cycle in Romania[277]

University Dept.	Human rights	Statutory community law	Institution-al community law	Judicial logic	Judicial ethics	Law philoso phy	Foreign languag es	IT for legal system
Law School, Alba Iulia University	YES	NO	YES	YES *	NO	YES	YES	YES
Law and Sociology		YES *	YES			YES		

[277] Survey carried out by the National Criminology Institute and completed by ELSA Bucharest (European Law Students' Association).

University Dept.	Human rights	Statutory community law	Institution-al community law	Judicial logic	Judicial ethics	Law philoso phy	Foreign languag es	IT for legal system
School, Transylvania University Braşov								
"Alexandru Ioan Cuza" Police Academy Bucharest	YES	YES		YES		YES	YES	YES
Law School, Bucharest University	YES	NO	YES	YES **	NO	YES *	YES	YES **
Law School, Babeş-Bolyai University Cluj-Napoca	YES *	YES *	YES	YES *	YES *		YES	YES *
Law and Administrative Sciences School, Ovidius University Constanța		YES *		YES *		YES	YES *	
Law School, Dunărea de Jos University Galați	YES	YES	NO	YES *	YES *	YES *	YES	NO
Law School, Craiova University	YES *	YES	YES			YES	YES	YES
Law School, "Al. I. Cuza" University Iaşi	YES *	YES *	YES	YES *		YES *	YES	YES *
Legal Sciences Dept. Oradea University	YES	YES	YES	YES *	NO	YES *	YES	YES *
Law School, Pitești University								
"Simion Bărnuțiu" Law School, Lucian Blaga University Sibiu	YES	YES	YES	YES *	NO			
Legal Sciences Dept. "Valahia" University Târgoviște	YES *	NO	YES	YES *	Taken out	YES	YES	YES
Judicial and Administrative Science Dept. Constantin Brâncuşi University, Târgu-Jiu	YES	NO	YES	YES *	YES *,	YES *,	YES	YES *
Law School, Timişoara University	YES *	NO	YES	YES *		YES *	YES	YES
Legal Science Department "Vasile Goldiş" University, Arad		YES					YES	
Legal and Administrative Science Department "Dimitrie Cantemir" Christian University, Bucharest	NO	NO	YES	YES *	NO	YES	YES *	YES
Law School, Titu Maiorescu University Bucharest				YES*		YES*	YES	YES
Law School, "Hyperion" University Bucharest	YES	NO	YES	YES	NO	NO	YES	YES
Law and Public	YES	YES	YES	NO	NO	NO	YES	YES

University Dept.	Human rights	Statutory community law	Institution-al community law	Judicial logic	Judicial ethics	Law philoso phy	Foreign languag es	IT for legal system
Administration School, „Spiru Haret" University Bucharest								
Ecologic University Bucharest				YES*				YES*
Law School, "Gheorghe Cristea" Romanian Science and Art University, Bucharest	YES	NO	YES	NO	NO	YES*	YES	YES
Law School, Nicolae Titulescu University, Bucharest	YES	YES	YES	YES*	YES		YES	YES
Baia Mare Law School Bogdan Vodă Univ., Cluj Napoca	NO	NO	YES	YES*	NO	YES*	YES	NO
Law School, "Andrei Şaguna" University, Constanța	YES*	YES	NO	YES	NO	YES	YES	YES
Law School, "Danubius", University, Galați	YES*			YES*		YES	YES	YES
Law School, "Petre Andrei" University Iaşi								
Law School, "Mihail Kogălniceanu" University, Iaşi	YES*			YES*		YES*	YES	YES*
Law School, "Drăgan" European University, Lugoj	NO, taken out	NO, taken out	NO, taken out	YES*	NO	NO, taken out	YES	YES*
Legal Sciences School, "C-tin Brâncoveanu" University, Piteşti							YES	YES
Law School, Romanian-German University, Sibiu			YES	YES*		YES*	YES*	
Law School, Romanian-American University, Bucharest	NO	NO	YES	NO	NO	YES	YES	NO
Law School, Bioterra University Bucharest	YES*	YES	NO	YES	NO	NO	YES	YES
Law School, George Barițiu University, Braşov								
Law School, Dimitrie Cantemir University, Târgu-Mureş								
Law School, "Tibiscus" University, Timişoara	YES*	NO	YES	YES	YES*	YES	YES	YES
Law School, Mihai Viteazu University, Craiova	YES	NO	YES	YES	NO	YES	YES	YES*

University Dept.	Human rights	Statutory community law	Institution-al community law	Judicial logic	Judicial ethics	Law philoso phy	Foreign languag es	IT for legal system
Law School, Agora University, Oradea	YES	YES		YES		YES	YES	YES

* Free-choice subject matters
** Optional subject matters