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Prosecution of political corruption – green-lighted in Romania?

Debate has re-ignited in new EU member state Romania about the prosecution of former and current ministers under suspicion of political corruption.

The waters had barely calmed down around the attempted appointment of PNL Senator Norica Nicolai to the position as Minister of Justice when, shortly before the publication of the long awaited European Commission interim report on progress in the area of Justice in Romania, local politics were divided again over an older dispute: whether eight former and current ministers should be investigated on suspicion of political corruption.

Last year, these same issues were a matter of debate for virtually all Romanian constitutional bodies (including the Parliament, Government, President and Constitutional Court), the mass-media, civil society organizations, researchers and observers. Since they are bound to remain a subject of debate, it is, therefore, worth examining the situation and its current developments. It is meaningful especially in light of the next progress report on Justice which, as noted by an EU official for NewsIn Service, will likely find that one of Romania's „biggest problem[s]“ is the gridlock of high-level corruption case-flow.

Dispute unfolding in 2008

Debates on putting eight former and current ministers under investigation for suspicion of political corruption again became topical in January this year: the prosecutors with the National Anti-Corruption Directorate (DNA) associated with the General Prosecutor's Office asked the President of the state, Traian Basescu, to sanction the

start of these investigations. According to a DNA spokesperson, the prosecutors enclosed legalized photocopies of investigation documents in support of their request. The original papers are with DNA. President Basescu granted the requests and forwarded the paperwork in his possession (the prosecutor's request in writing and excerpts from the investigation files) to interim Justice Minister Teodor Viorel Melescanu (PNL). Initially, the Minister refused to send the files along with the President's written opinion through to the prosecutor's office, claiming that he should have been given the full content of the files and not just excerpts of those. With this position, Melescanu added fuel to the smoldering fire in the President – Government relationship, creating new and fierce differences dividing the Presidency and the Government: Basescu publicly accused Melescanu of abuse of office and even threatened to have him suspended over his disobedience. Among those who supported Basescu was the President of the Democratic-Liberal Party (PD-L), Emil Boc. Mr. Boc stated in a press conference that the interim Justice Minister had no right 'to act as a gatekeeper and censor' and agreed with President Basescu in that Melescanu was in fact seeking to delay the unavoidable – the beginning of criminal proceedings.

Melescanu's conduct was not only criticized in the country, but internationally, too. The most important piece of criticism came from the European Commission (EC). According to HotNews Agency, the EC reportedly warned the Romanian Government, urging it not to block criminal investigations and to forward the President's approval to the anti-

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corruption authority. This was not a negligible warning, especially given that it was made on the heels of the publication of the Commission progress report and the possibility that the safeguard clause might be activated in the area of Justice in the summer of 2008 was never ruled out.

The Commission's caution was effective. Tuesday, January 22, interim Justice Minister Melescanu sent the President's opinions on the investigation cases to the National Anti-Corruption Directorate (DNA) and to the Organized Crime and Terrorism Investigatory Directorate (DIICOT), respectively. Melescanu very diplomatically stated during a press conference held at the Ministry of Justice that he never had the intention of censoring or encroaching on investigations. He claimed to have acted in observance of the law during the entire procedure and that it was never his intent to postpone investigations. At the same time, the interim Minister of Justice dismissed all responsibility for the outcome of criminal investigations.

Current dispute: need for Parliament approval. Yes or no?

Is this the green-light for the prosecution of the eight (ex-) ministers? Apparently, not yet. Melescanu had barely sent through the papers he had received from the President and the photocopies of the files when a new dispute had begun. A question now being posed in the political circles is: does the Parliament need to give an opinion on the beginning of criminal investigations of those former or current ministers who are also members of Parliament?

Those *in favor* of asking for the Parliament's approval

The Speakers of the two chambers of the Parliament – Bogdan Olteanu (PNL) and Nicolae Vacaroiu (PSD) – last week said the Parliament's approval would be necessary. Their opinion is endorsed by the Social Democratic Party (PSD), by the National Liberal Party (PNL) and by the Conservative Party (PC). This is no surprise since four of the people on the list of 'the eight' are members of those parties and MPs: former PSD President, Adrian Nastase, who was Prime-Minister from 2000 to 2004; former Transport Minister and PSD Vice-President,

Miron Mitrea; former Minister of the Economy, Codrut Seres, who is currently PC Vice-President; and the Labor Minister in office, Paul Pacuraru (PNL). Ex-PM Nastase is a suspect in a case of bribery and forgery of official documents in the process of awarding public road work contracts. PC Vice-President Codrut Seres is accused of treason and supporting trans-national criminal organizations in connection with the privatization of Romania's largest oil company Petrom.

PNL Vice President and the PNL-supported candidate for the office of Minister of Justice, Norica Nicolai, together with PNL MP Dan RADU Rusanu are demanding that the Government ask the Constitutional Court, before starting criminal proceedings, if it is necessary to obtain the consent of the Parliament. Both of them say that both the Constitution and the Ministerial Liability Act (No. 115/1999) foresee the obligation to obtain such an approval.

Those *opposed* to asking for the Parliament's approval

Last week, however, Romanian Prosecutor General Laura Codruta Kovesi opposed the theory that the Parliament's approval needs to be sought. She also stated that the Parliament's opinion is not even necessary in cases where MPs in office at present are put under investigation for the commission of criminal offenses. She argues the General Prosecutor's Office is a subject of law that may fulfill its duties without the intervention of other public institutions. Kovesi's view was supported by the Chief-Prosecutor of the National Directorate against Corruption (DNA), Daniel Morar, who refers to a November 2007 verdict of the Constitutional Court. The Court ruled that the provisions of the Ministerial Liability Act which allowed for the intervention of state authorities in this matter, was unconstitutional.

What does the Constitution say about that?

The legally decisive Constitutional provision is Article 109 of the 2003 Romanian Constitution. It regulates the competence of the members of the Government. Under art. 109, paragraph 2 'Only the Chamber of Deputies, Senate and President of Romania may ask that members of the Government

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should be put under investigation for offenses committed in the exercise of their office'. According to art. 3, both liabilities and penalties that may be considered in the case of members of the Government may be regulated by an act dealing with ministerial liability.

This is all the Constitution provides regarding the criminal investigation of former and current ministers. It contains no dedicated provision on what the preliminary procedure should look like or on how the President and the two Chambers of the Parliament, respectively, must exercise their competence and duties regarding the beginning of criminal proceedings. The Constitution does not address the right of the Parliament to vote against the request of the President thereby allowing them to block the beginning of criminal investigations.

What do the Act on Ministerial Liability and the Constitutional Court say about ministerial liability?

Ever since it was adopted in June 1999, the Act on Ministerial Liability has been amended in its most relevant points for the current situation. The Constitutional Court has repeatedly analyzed both the legislative changes and the construal of Constitution Art. 109. Both the legislative changes and the verdicts of the Constitutional Court in that respect may, even if sometimes in a rather oblique manner, answer questions that have recently been matters of concern for policy in the area of justice. For this reason they will be briefly described below:

According to the original version of Act no. 115/1999 of 28.06.1999, all criminal offenses a minister commits while in office are to be investigated. The request for the beginning of investigations is to be sent by the competent criminal investigatory authority to the President or to one of the Chambers of the Parliament. Art. 13 of Law no. 115/1999 foresees that the President will send the criminal investigation request to the Minister of Justice who shall proceed 'according to the Law'. The law does not explain what is to be understood of the second condition. Legal experts construe art. 13 as follows: the Minister of Justice must submit the request he/she has received from the President to the

competent Prosecutor's Office without having the right to refuse doing so. For that reason, the refusal of the interim Minister of Justice Melescanu is interpreted by experts as being against the law.

The new version of the Ministerial Liability Act of 2007 (post Emergency Ordinance No. 3/2005 and Act no. 90/2005 approving the said Emergency Ordinance) should bring in major novelties. It foresees that, in the case of criminal investigations against former ministers the 'regular' steps of criminal proceedings are to be followed, according to the Code of Criminal Procedure. Act no. 115/1999 would not apply in a case like this. The amendments were required by the European Commission as part of the accession negotiations to lift the immunity from prosecution former ministers used to enjoy.

The Romanian Constitution nonetheless does not indicate if ministers in office alone or together with former ministers benefit from immunity from prosecution. It is the majority opinion that art. 109 grants immunity only to ministers in office. The Constitutional Court found the same in its Decision on July 5, 2007 (no. 665/5.07.2007), and categorically stated that art. 109 should be applied only to ministers in office. The Court however denounced amendments to Act. no. 115/1999 as unconstitutional. According to the Constitutional Court, a legislative modification discriminating between former and current ministers regarding criminal proceedings infringes on the principle of equality before the law (art. 16 of the Constitution). In this way, with this need for prior approval, former ministers would not be protected, to the same extent as ministers in office are, when they are subject to investigation for the commission of a criminal offense.

The result of the judgment of the Constitutional Court was that the case of ex-PM Nastase was returned to DNA (it was all about his particular case). The decision was criticized both from the point of view of the case law it was creating and in terms of judicial practice. From a legal point of view, it is not clear why the Constitutional Court decisively stated, on the one hand, that only ministers in office are to be protected by art. 109, therefore recognizing that their

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situation is not to be compared to the one of former ministers, and, on the other, that the discrimination violates the principle of equality before the law.

We can only wait and see what the Constitutional Court's answer will be to the question of whether the Parliament's approval is needed for the investigation of former and current ministers, where the latter category are also members of Parliament. The Constitutional Court's decisions in this respect so far have been criticized over ambiguity and partial contradictions and may lead to assumptions in both ways. But one needs to take into account the fact that the Constitutional Court, in its decision on November 27, 2007 (Decision no. 1133/27.11.2007), explained the amendments to the Ministerial Liability Act foreseeing that the Premier should ask the relevant Chamber of the Parliament to approve criminal proceedings, having obtained the prior consent of the President, in case of ministers who are also MPs.

The Constitutional Court addressed the constitutionality of the amendment starting from a petition claiming its unconstitutional nature which was filed by the Ombudsman. The petition was based on the following arguments: last autumn, former Minister of Justice Tudor Chiuariu (PNL) decided, through Emergency Ordinance no. 95/2007 to change the membership of the Commission that advised the President on answering the Prosecutor's Office request to start criminal proceedings against members of the Government. The so-called 'Cotroceni Commission', under the aforementioned Emergency Ordinance, should have been only composed of judges. Following protests by Romanian lawyers and legal NGOs (including the Society for Justice-SoJust), the Ombudsman submitted a complaint claiming that the amendments were unconstitutional, arguing, among other things, that the Commission could not be only made up of judges. The Constitutional Court ruled on the petition in its Decision on 27 November 2007, and proclaimed the Emergency Ordinance unconstitutional. According to the Constitutional Court, the right of the President to decide on the request to start criminal proceedings cannot be restricted. In its opinion, the President of the country takes full political responsibility for his decision. By that, the Constitutional

Court practically stated that the President's Commission was redundant.

Prospects

2008 is a year of major stakes for Romanian politicians. First and foremost, it is an electoral year (local and parliamentary elections). That is why the unfolding of the dispute is important not only for the subjects of criminal investigations but also for their respective parties. A second important fact is that the terms in office of the DNA Chief-Prosecutor Daniel Morar and of his deputy, Doru Tulus, will expire in August this year. The denouncers of the position of the Government in this dispute, including former Justice Minister Monica Macovei, think the prolongation of the debate is an attempt to stop or slow down criminal investigations until a new chief-prosecutor is appointed 'to surely reach that purpose before being charged'. And, as suggested by foreign observers, it is now crucial who the Minister of Justice will be, because he/she has the right to propose the candidates.

Third, we must not forget that Romania is being monitored by the European Commission: in a SWP survey of October 2005 conducted by the political analyst and expert on Romania, Anneli Ute Gabanyi, in which she tried to anticipate if the accession would take place on 1 January 2007 or if it would be postponed to January 2008, the author's conclusion was "Romania will (...) need to take many measures in order for it to convince the European Commission of how reliable its measures against corruption are. The fact that no satisfactory solution to the phenomenon could be found in the old member states – and, most of all – in the 2004 member states, does not change the given context in any way'. The statement remains as valid now, in Romania's second year in the EU, as it was then.

The Commission report expected in February will show the consequences, if any, of the current political circumstances and of how Romanian Justice understands how to handle top-level corruption. Political actors and constitutional bodies in Bucharest will have to live under the specter of the high-level corruption prosecution. Most recent press coverage suggests that the list of 'the eight ministers' may soon

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contain a new personality – former Minister of Justice Monica Macovei. She is suspected of agreeing during her term in office, to the assessment of the National Strategy against Corruption by the NGO Freedom House Romania without going through the public tendering procedures. The first person to officially raise such accusations against the former apolitical minister was no other than the ex-Minister of Justice, Tudor Chiuariu, who is himself on the list of ministers who are suspects in corruption cases.

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Impressum

Konrad Adenauer Stiftung e.V.
Rechtsstaatsprogramm
Südosteuropa

Dr. Stefanie Ricarda Roos
Strada Plantelor 50
RO – 023975 Bukarest
Rumänien
Tel.: +40 (0) 21 323 31 26
Fax: +40 (0) 21326 04 07
stefanie.roos@kas.de
www.kas.de/rspsoe