

FORUMUL JUDECĂTORILOR — DIN ROMÂNIA —

WHITE PAPER CHANGES TO THE ROMANIAN „JUSTICE LEGISLATION”– POTENTIAL COLLAPSE OF ROMANIAN MAGISTRACY

The combined effects of some of the regulations contained in the provisions adopted in Parliament in relation to the justice legislation, although not declared unconstitutional (either because they have not been challenged or because the objections of unconstitutionality were not comprehensive, and the arguments were essentially absent) have the potential to be disastrous for the Romanian magistracy. The magistrates' body will be reduced by at least 25% (on a very short term), de-professionalised through the removal of promotion exams, over-worked by increasing the volume of activity and over-controlled through the head of the Judicial Inspection and through the Special Section for the Investigation of Criminal Offenses within the Prosecutor's Office adjacent to the High Court of Cassation and Justice.

I. The lack of adequate consultation with the magistrates' body is not a guarantee of an effective reform of the judiciary and violates the European Commission's Mechanism for Co-operation and Verification

In a truly democratic state, “the pro-active role of the judiciary system and of the judicial committees is essential, as these must always be involved in all the stages of any reform process, either directly or through appropriate consultation. The judiciary system must be involved in creating successful criteria and key performance indicators to assess reforms effectively”.¹

The parliamentary debate on the above mentioned law drafts ignored the overwhelming view of the majority of the magistrates' body and the negative consecutive notifications issued by the plenum of the Superior Council of

¹ See the **Report of the European Network of Judicial Committees – Judiciary Reform in Europe – part II. Guidelines for an effective justice act (2012-2013)**, available on the web page: <https://www.csm1909.ro/ViewFile.ashx?guid=1b241460-f8ab-48da-8b4c-4f7c224de4b1|InfoCSM> [consulted last time on 11 February 2018].

Magistracy. During October 2017, approximately 4,000 Romanian judges and prosecutors, ie more than half of their total number, acquiesced to the *Memorandum for the withdrawal of the draft law amending the "justice laws"* addressed to the Government of Romania, and in November 2017, over 90 % of the general assemblies of the Romanian courts and prosecutor's offices opposed the current law projects adopted by the Parliament. Consequently, over 6,000 Romanian judges and prosecutors did not accept this draft bill, but their will was not taken into account and any dialogue with them was avoided. Moreover, the silent protests of the Romanian magistrates, taking place in front of the courts' offices since 18 December 2017, are notorious, being presented by the press from around the world.²

The latest report of the **Mechanism for Cooperation and Verification (2017)**³ expressly recommends, in the case of Romania, that "in order to further improve the transparency and predictability of the legislative process, as well as to strengthen the internal guarantees of irreversibility", the "Parliament (...) should ensure full transparency and **take due account of consultations with relevant authorities and stakeholders in the decision-making and legislative work** related to the Penal Code and the Code of Criminal Procedure, anti-corruption laws, (incompatibilities, conflicts of interest, illicit wealth), **the laws of justice (concerning the organization of the justice system)**, and the Civil Code and the Code of Civil Procedure."

In the Joint Statement of the President of the European Commission, Mr. Jean-Claude Juncker, and of the Vice-President of the European Commission, Mr. Frans Timmermans on 24 January 2018, it was clearly underlined that "the laws of justice are an important test of the extent to which the legitimate interests of stakeholders in the judiciary system and other relevant stakeholders have the chance to be expressed and are sufficiently taken into account in making the final decisions. What we have seen so far have not appeased to our concerns." **The European Commission has called on the Romanian Parliament to rethink the proposed actions, to launch the debate as recommended by the Commission and to build a broader consensus from now on.**

II. In the absence of basic impact studies, the application of the new legislative provisions will result in a blockage of the judicial system, by de-professionalizing (removal of meritocracy when promoting) and by reducing the magistrates' body; these vulnerabilities will be exacerbated by an artificial increase in activity

Part of the provisions promulgated in Parliament on "the justice laws" (Law amending and supplementing Law no.303/2004, Law amending and completing Law no.304/2004 and Law amending and supplementing Law no.317/2004) **have been declared unconstitutional, but their future alignment with the decisions of the**

² See, for example, the web page <http://www.euronews.com/2017/12/18/romanian-judges-protest-over-government-backed-legal-reforms> [consulted last time on 14 February 2018].

³ See the web page https://ec.europa.eu/info/sites/info/files/com-2017-44_en_1.pdf [consulted last time on 14 February 2018].

Constitutional Court, in Parliament, will not mean that all the concerns expressed by the European Commission will be eliminated.

Although not challenged, other provisions from the same normative acts, corroborated, are extremely damaging to the independence of the judiciary and will influence the careers and professional activity of magistrates, causing imbalances in the judiciary system. Even though the draft contains proposals from the Superior Council of Magistracy, from magistrates or from professional associations, these are simply corrections to the current system, **a shallow and superficial preparation of an actual "judicial experiment", in the absence of any impact and forecast studies, a move which can have very serious consequences in the future - difficult or even beyond repair.**⁴

For example, one can speak of the de-professionalization and reduction of the magistrates' body, exacerbated by an artificial rise in activity and the imposition of unrealistic procedural deadlines, which will result in a blockage of the judiciary system.⁵

An impact study similar to those carried out in France,⁶ would indeed have indicated the risks of combined measures in terms of human resources: doubling the initial training programme at the National Institute of Magistracy (4 years instead of 2 years), doubling the magistrates' internship (2 years instead of 1 year), increasing the seniority in office necessary to be promoted to work in courts, courts of appeal and HCCJ, as well as in the prosecutor's offices, DNA and DIICOT, lowering the threshold for retirement to 20 years of service (with no age limit), increasing the number of judges in panels (doubling the number of judges in the appeals panels and increasing the number of judges in the appellate panels from 2 to 3, without increasing the court HR chart, which will lead to a significant increase in the volume of activity for each judge in the higher courts).

Under such circumstances, estimating that around 2,000 magistrates,⁷ who are at the peak of their professional career, could immediately leave the system

⁴ Such basic impact studies have not been carried out even at the level of the Superior Council of Magistracy, and the Association of Romanian Judges has requested statistical data during January 2018 in order to be able to clearly estimate certain risks, data not yet received.

⁵ Please see, more broadly, Bogdan Pîrllog, *Main elements with the potential to seriously affect the judicial system*, study available on the web page <http://www.forumuljudicatorilor.ro/index.php/archives/3122> [consulted last time on 11 February 2018].

⁶ The main difficulties faced by the legislative system are the low quality of regulations and the lack of performance indicators in carrying out impact assessments. The role of impact studies is to anticipate the effects that certain policy changes will produce. The detailed reasoning behind legislative measures becomes both a tool for monitoring and for evaluating the development of public policies. All draft legislation and public policy documents must be based on impact assessments. **For example, in France, impact studies contain hundreds of analysis pages, graphs, calculations, connections, precisely to anticipate in concrete terms the effects of the proposed legislative measures.** See, as basic comparison, the web pages https://www.legifrance.gouv.fr/content/download/9093/111391/version/1/file/ei_independance_impartialite_magistrats_cm_31.07.2015.pdf or <https://www.senat.fr/leg/etudes-impact/pj13-175-ei/pj13-175-ei.pdf> [consulted last time on 11 February 2018].

⁷ According to a response given to the Neamţ Tribunal by the Ministry of Justice on 07.02.2018, at the level of the courts of appeal in Romania and at the level of these courts'

(including approximately 90% of the judges of the High Court of Cassation and Justice),⁸ by lowering the threshold for granting the retirement pension, and given that the amount of these pensions already exceeds substantially the salaries of the magistrates in work, and another 2,000 magistrates would do the same in the next five years, and corroborating these data with the introduction of 3 years in which no graduate from the National Institute of Magistracy will be able to become a judge or prosecutor, it is clear that we are witnessing a disastrous human resources policy promoted by the new legislative changes.⁹ It is also not clear whether the current number of magistrates working in courts and prosecutors' offices lower than their professional grade will be able to cover at least 10% of the vacancies from the courts corresponding to their professional grade, for the rest of these positions, the selection being considerably diminished as a result of the increase of the seniority required to participate in the promotion exam. Not even the admission to the magistracy will be more stable, as the selection base is currently low.¹⁰

constituencies, there are 1,219 judges who currently meet the conditions of 20 years of service (the statistics exclude the Military Court of Appeal). There are some public data regarding the seniority of prosecutors in Romania. Thus, at the end of 2016, 713 prosecutors were within the age bracket of 15-20 years, and 604 had over 20 years old in office. The data has been extracted from the **Report concerning the activity of the Public Ministry in 2016**, available on the web page http://www.mpublic.ro/sites/default/files/PDF/raport_activitate_2016.pdf [consulted last time on 14 February 2018]. The total number of judges and prosecutors in office in Romania on 04.10.2017 for prosecutors and on 1.09.2017, respectively, for judges, was 6,979. This figure is based on the lists of positions filled and vacancies displayed on the website of the Superior Council of Magistracy. Thus, on the dates mentioned there were: 4,944 positions of judges on the chart, excluding the HCCJ (125 judges), out of which 4,362 occupied judges' positions, excluding the HCCJ (119 judges); 2,969 occupied positions of prosecutors + 49 envisaged posts from the reserve fund, out of which 2,514 occupied positions of prosecutor + 30 occupied posts from the reserve fund. As the number of prosecutors is inferior to that of judges, and the estimations regarding seniority are close, we can estimate the number of magistrates with seniority of over 20 years in office at over 2,000, respectively at another 2,000 the number of magistrates with seniority in the 15-20 years gap.

⁸ Currently, there are 97 judges with seniority of over 20 years of magistracy service (including the president, vice-presidents, section presidents and a suspended judge) and 22 judges with seniority of between 15-20 years of magistracy service active in the High Court of Cassation and Justice (including a suspended judge).

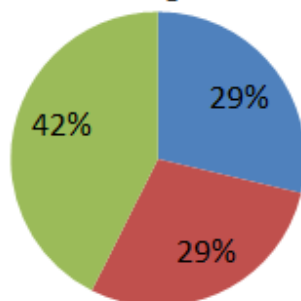
⁹ Magistrates at the peak of their professional careers are encouraged to leave system, including by offering them pensions that are 30% higher than the salaries received as judges or prosecutors in office, as an effect of the recent increase in gross salary and other related tax measures. A similar policy in the case of the police force has had disastrous results.

¹⁰ See **Report on justice (2016)**, issued by the Superior Council of Magistracy, available on the web page <http://old.csm1909.ro/csm/index.php?cmd=24> [consulted last time on 14 February 2018]. One can note that *"compared with previous years, in 2016, the number of participants in the NMI admission exam declined, so that the selection basis for the employment of judges diminished. Moreover, in the case of the admission exam in magistracy with 5 years seniority, the impact on the selection base was influenced by the fact that the percentage of new candidates in 2016 was about 15% of the total number of participants, the remaining 85% of those taking the exam being candidates who showed up for exams in previous years."*

Under these circumstances, the last resort solution used to fill these vacancies will be admission into magistracy following a formal interview, solution created at the right time, through the most legally possible legislative means.¹¹

The representation of magistracy in relation to the seniority of judges and prosecutors in Romania

- Percentage of total magistrates fit for retirement on 14.02.2018 according to the new provisions
- Percentage of total magistrates fit for retirement between 15.02.2018 – 2023 according to the new provisions
- Percentage of total magistrates fit for retirement between 15.02.2018 – 2023 according to the new provisions



The MCV reports, which have commended the evolution of the magistracy and have given a clear indication that a meritocratic promotion is the basis for ensuring an independent judiciary, free from all types of influences, both internal and external. The return to promotion on subjective criteria, lacking any objective control on the part of the magistrates and any possibility of contestation and predictability, will deprive the judiciary of this basis.

Following the new provisions on "the laws of justice", meritocracy will be eliminated from the magistracy system, the proficiency examination becoming subjective, 50% of the final grade relying on the evaluation of the "professional file" and effective promotion to courts and prosecutors' offices being based on subjective criteria, namely "evaluation of the activity and conduct in the last 3

¹¹ In a MCV report from 18 July 2012, the European Commission considered that "The widespread use of direct accession into the magistracy system also raised questions about the rigor of the selection procedures applied to these candidates and the preparation of the newly recruited candidates. The Romanian authorities have gradually taken steps to address these issues, but not before already using these recruitment channels significantly. In 2007-2008, 164 magistrates were appointed without passing rigorous exams. The law in force at that time allowed legal professionals who have accumulated 10 years of experience to enter the magistracy system directly, subject to a simple interview with the Superior Council of Magistracy. **Following concerns expressed by the Commission, this procedure has been removed.**"

years". In the case of the High Court of Cassation and Justice, the examination is doubled by a formal interview held before the Plenum of the Superior Council of Magistracy, a measure which eliminates the written exams, which had a theoretical and/or practical nature, thus setting up an obvious control on the system of promotions.

III. The magistrates' body will be controlled via the head of the Judicial Inspection and the Special Department for the Investigation of Criminal Offenses within the SCCPJ and prosecutors will de facto lose their independence

Changing the status of the prosecutors in the sense of repealing the legal provisions guaranteeing their independence (points 4, 5 of the Law amending and supplementing Law no.303 / 2004), respectively the loss of the stability guarantee, makes them, de facto, plain executors of the orders of the heads of the prosecutors' offices and, implicitly, of the orders of the Minister of Justice (paragraph 38 of the Law amending and supplementing Law no. 304/2004).

The creation of the Special Criminal Investigation Section of the ICCJ will allow for the influencing of dozens of high-profile corruption cases under the investigation of the National Anti-Corruption Directorate, by simply formulating fictitious complaints against a magistrate, which will mean a de facto dissolving of DNA, an institution constantly praised by MCV reports.

The Mechanism of Cooperation and Verification was established at the time of Romania's accession to the European Union in 2007, in order to mitigate the shortcomings of the judiciary system and to support the fight against corruption. **Among the commitments made by Romania as part of the accession to the European Union,¹² it is worth noting a sustainable and irreversible demonstration of its progress in the fight against corruption, which implies the institutional strengthening of the DNA.** The statement adopted by the General Assembly of the European Partners' Network Against Corruption and the European Contact Points Network (EPAC/EACN), held in Paris on 20 November 2015, reveals that corruption is a serious threat to development and stability, has negative consequences at all levels of government, undermines public confidence in democracy and requires European decision-makers to strengthen the fight against corruption, in particular the introduction of automatic cross-border exchange of financial intelligence in relation to corruption investigations, accessible to law enforcement agencies, the establishment of an appropriate instrument at both national and transnational level to protect key witnesses under threat and those who denounce corruption offenses and intensify cooperation and exchange of information between anti-corruption authorities and police surveillance structures in Europe, using the new EPAC/EACN communication tool of the Europol Expert Platform.

Therefore, demonstrating sustainability and irreversibility of progress in the fight against corruption does not mean the fragmentation of the specialized

¹² See COM (2006), Monitoring report for preparing Romania and Bulgaria's accession to EU membership.

prosecutor's office, while its results are commended and encouraged by the European Commission, but on the contrary, its institutional strengthening.

Annually, there are thousands of fictitious reports filed against magistrates, for which a minimum investigation must be carried out. Currently, these complaints are being investigated by more than 150 prosecutors in 19 prosecutor offices (PCA, PECCC, DIICOT and DNA). It is obvious that the 15 prosecutors in the new section will be overwhelmed by the volume of activity. This reinforces the suspicion that the new measures are not intended to make criminal investigations more efficient in cases where criminal charges are brought against magistrates, but the intention is to create a unit that could potentially be used precisely against a judge or a prosecutor which is „*inconvenient*.”¹³

In fact, the Constitutional Court, through its Decision no. 33 of 23 January 2018 concerning the objection of unconstitutionality on the provisions of the Law amending and supplementing Law No. 304/2004 on the organization of judiciary, considered that "135. The setting up of a specialized prosecutor's offices in areas of material competence (DNA or DIICOT) or personal competence (Section for the Investigation of Criminal Offenses) is the expression of the legislator's option, which, depending on the necessity to prevent and fight certain criminal phenomena, decides on the appropriateness of the regulation." As the President of the Chamber of Deputies, in the point of view sent to the Constitutional Court, showed that the Criminal Investigation Section of Justice "was not established in relation to a mass phenomenon of criminal offenses that would exist among magistrates, but rather to remove any possible pressures that could be exerted by criminal prosecution bodies on judges and prosecutors", it is logical that there is no opportunity or need to prevent or combat criminal phenomena at the magistrates level.

Last but not least, the re-organization of the Judicial Inspection will de facto transform it into the technical support team of the Chief Inspector, who gets absolute powers within the Inspectorate, appointing from among the judicial inspectors those who will take the leading positions, controlling the selection of judicial inspectors, leading and controlling the activity of inspection and any disciplinary measures,

¹³ The appointment of the Chief Prosecutor will be made by the SCM plenum following a "competition" consisting of a project being submitted to a committee of three judges appointed by the Judges Section and a prosecutor appointed by the Prosecutor's Section, while the other 14 prosecutors will be selected following a "contest" consisting of an interview held before a commission including the Chief Prosecutor of the Section and three judges appointed by the Judges Section and a prosecutor appointed by the Prosecutor's Section. Thus, the appointment of prosecutors, including the head of the section, is fully supervised by the Judicial Section, which is in direct opposition with the expressed necessity of separating careers in the magistracy, one of the reasons for which these laws were adopted. See, for broader information, Bogdan Pîrlog, *Main elements with the potential to seriously affect the judicial system*, study available on the web page <http://www.forumuljudecatorilor.ro/index.php/archives/3122> [consulted last time on 14 February 2018].

practically imposing solutions in a discretionary manner. The chief inspector will be the chief credit officer and the sole holder of any disciplinary action.¹⁴

IV. Necessary conclusions and measures given the current context

The combined effects of the regulations contained in the provisions adopted in Parliament on "the laws of justice" (Law amending and completing Law no. 303/2004, Law for amending and completing Law no. 304/2004 and Law for amending and completing Law no. 317/2004), although not declared unconstitutional, either because they were not challenged, or because the objections of unconstitutionality were not comprehensive and the arguments were absent in essence, may be disastrous for Romanian magistrates (and could affect the independence justice itself).

The magistrate's body will be reduced (on a short-term, by at least 25%), will be de-professionalized by the elimination of the meritocratic promotion exams, will be overwhelmed by the increasing workload, will be controlled by the head of the Judicial Inspection and through the Special Section for the Investigation of Criminal Offenses within the SCCPC, the prosecutors will de facto lose their independence, with control over them being implicitly accomplished by the Minister of Justice, a political element, who will be able to offer guidance on how to prevent and fight crime effectively.

It is obvious that all these changes are unnecessary to the justice system of any democratic state and are in no way beneficial for the judiciary and for society, contrary to what the president of the Superior Council of Magistracy, Mrs. Simona Camelia Marcu, claims in an interview for Q Magazine, in which she states that "most of the amendments to Laws no. 303/2004, 304/2004 and 317/2004 will be beneficial for the judiciary and for *society*."

"The laws of justice" have seen numerous changes in the period 2004-2016, and there is no substantial argument that they no longer meet current needs. This statement, made by the representative of the constitutional guarantor of the independence of the judiciary system, is purely hypothetical and unreasonable in the context of a lack of any studies and analyzes made by the Superior Council of Magistracy regarding the amendments adopted by the Parliament and unchallenged or not declared unconstitutional by the Constitutional Court of Romania.

Under these circumstances, the Association of "The Romanian Judges' Forum" publicly calls on the Romanian Parliament to rethink the proposed and adopted amendments, to launch the public debate according to the recommendations of the European Commission and to build a broad consensus only after conducting credible impact studies, considering all the major aspects, on the effects of the amendments proposed to the "laws of justice". The Superior

¹⁴ The appointment of the Chief Inspector is made by the SCM plenum following a "contest" consisting of a project submitted to a committee of 3 judges appointed by the Judges Section, a prosecutor appointed by the Prosecutor's Section, one representative of the civil society, called the SCM Plenum, and a psychologist who will draw up a consultative report.

Council of Magistracy also has a constitutional obligation to guarantee the independence of the judiciary, forsaking inaction and taking a pro-active role, involving the judiciary in creating successful criteria and key performance indicators to assess the proposed reforms in an efficient manner.

The Association of “**The Romanian Judges’ Forum**”, a private legal, independent, nonprofit, non-governmental and apolitical law association, a professional association of judges, aims to contribute to the progress of society through actions aimed at achieving an independent, impartial and efficient justice system, and defending the independence of the judiciary from the other state powers, as well as initiating, organizing, supporting, coordinating and carrying out projects related to the improvement, modernization and reform of the justice system.