Policy Brief no. 114, April 2021.

The Ministry of Justice sending the three draft bills to Parliament in their current form risks opening a Pandora's box, since the end result and duration of the legislative process is difficult to anticipate. EFOR support the idea that the solution must be pragmatic, focused on solving the overdue problems of the Romanian justice system, rather than putting forth over 500 articles for negotiation in Parliament.

The laws on justice: Don't reopen Pandora's box!

The recent years in Romania have been marked by a deep crisis associated with the amendments brought to the laws governing the justice system and the attempts to amend the Criminal Code and the Criminal Procedure Code. Whereas the amendments to the criminal codes have been declared fully unconstitutional, some of amendments of the laws on justice came into force, while others were declared unconstitutional or just abandoned in the Parliament.

This saga stretched over approximately four years – the technocrat government in 2016[1] decided to restart the discussion on the laws on justice, in their entirety.

The subsequent government seized the opportunity and significantly changed the draft laws by including some harmful provisions - for instance, moving the Judicial Inspection under

[1] http://www.just.ro/proiect-de-modificare-si-completare-a-legilor-justitiei/

the Ministry of Justice - and sent them to the Parliament in 2017[2].
What followed was a host of lively debates in the Parliament, reports by the European Commission[3], the Venice Commission[4] and GRECO[5], rulings of the Constitutional Court of Romania, reviews of some of the problematic provisions, adoption of the laws in the Parliament in October 2018, followed by amendments of the recently adopted provisions through Government Emergency Ordinance (OUG) 92/2018 just 3 days after adoption, and then through OUG 7/2019 and OUG 12/2019.

This entire legislative trail has taken a lot of energy from both those who wanted the problematic provisions removed from the laws on justice, and those who wanted such provisions to be maintained. The result was a real social conflict, with massive protests and strong stand-taking. Last, but not least, this experiment showed how risky it was to submit the entire justice package to debates in a polarised Parliament.

Today we are facing a potential reopening of the whole case of the laws on justice. The drafts were published on the website of the Ministry of Justice in September 2020 by Minister Predoiu and supported, with amendments, by Minister Ion. On 26th of March 2021, the Ministry of Justice published a final proposal of the new laws on justice. After publication, reactions in the public sphere clearly showed that the announced proposals are currently not agreed by all three political parties in the governing coalition, and the publication of the drafts without prior consultation and negotiation within the coalition was subject to criticism.

Unfortunately, recently there was a similar unfortunate episode regarding **the draft bill on the dismantling of the Special Section**, where, once again, the governing coalition did not agree upon the solution.

Although the dismantling of the Special Section is a goal undertaken by the governing coalition in their Governance Plan, the proposal of the Ministry of Justice was amended in Parliament by the coalition partners. A member of Parliament, representative of the minority group[6] introduced an amendment that will provide magistrates with additional protection when indicted - virtually no judge and no prosecutor could be sent to court without the agreement of the competent Section of the Superior Council of Magistracy. Moreover, the same coalition partners have recently included an additional amendment, whereby the cases of the Special Section would not be reassigned to the prosecutors' offices based on the subject matter of the case, but rather they would be sent to the Criminal Prosecution and Forensic Section of the General Prosecutors' Office, where all the prosecutors of the Special Section will be transferred.

These recent events show that the full reopening of the debate on the laws on

[2] http://www.just.ro/en/principalele-modificari-propuse-la-legile-justitiei-legea-nr-3032004-legea-nr-3042004-si-legea-nr-3172004/
[3] https://ec.europa.eu/info/sites/default/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf
[4] https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e#,
[5] https://rm.coe.int/ad-hoc-report-on-romania-rule-34-adopted-by-greco-at-its-79th-plenary-/16807b7717; https://rm.coe.int/follow-up-report-to-the-ad-hoc-report-on-romania-rule-34-adopted-by-gr/1680965687
[6] An initial version of the report wrongly mentioned that this amendment was introduced by an MP member of UDMR.

justice is a dangerous endeavour, and that it is very likely that we will see a cavalcade of harmful amendments included in relation to institutions and concepts that are nowadays very well regulated. In an attempt to achieve legislative perfection, we might end up losing the good things that the current legislation contains. The draft bill on dismantling the Special Section is a painful example in this respect.

The Ministry of Justice sending the three draft bills to Parliament in their current form risks opening a Pandora's box, since the end result and duration of the legislative process is difficult to anticipate. We are talking about roughly 500 articles in the three draft laws that will be reviewed and amended in Parliament on an item-by-item basis

Expert Forum believes that the path to follow should be a **pragmatic** one, focused on **solving the remaining problems** of the Romanian judicial system. The decisions of the ECHR, the rulings of the Constitutional Court of Romania (CCR) and the recommendations of the Venice Commission and the European Commission serve as a solid base for developing some distinct projects on the aspects that need correction: introducing mechanisms to challenge in court the requests to revoke chief prosecutors; introducing solid mechanisms to revoke CSM (Superior Council of Magistracy)members; stronger regulations governing Judicial Inspection and mechanisms for material and disciplinary liability of judges and prosecutors.

These individual projects can be promoted in Parliament; the benefit of that would be that the discussion would focus on them rather than on all the articles of the justice laws, including issues that have never been called into question. This is the path to follow in order to solve these problems and, if implemented successfully and backed by solid political support, it could also pave the way to the CVM (Cooperation and Verification Mechanism) being lifted.

Beyond the considerations over how suitable it is to open the debate on the laws on justice as a whole, presented above, Expert Forum deems that some of the legislative solutions proposed are either problematic, some insufficiently explained, or they are incorrect transpositions of the decisions of the Constitutional Court; some could generate difficulties when applied in practice. It must be mentioned right away that the comparative analysis of the proposed texts with the legal provisions currently in force is difficult, since no comparative table is available and, in some cases, the internal logic of the texts was changed as well.

Review of the key problematic provisions

I. Law on the Superior Council of Magistracy (CSM)

1. Change of the mechanism of electing the members of the CSM

The draft law completely changes the election mechanism for CSM members: the members shall be elected by all the general assemblies of judges and, respectively, prosecutors, irrespective of the rank of the court/prosecutors' office they run for. Thus, a judge has the right to elect all the 9 judges who are elected to the Superior Council of Magistracy, not only those candidates who represent their level of jurisdiction. The same mechanism would apply to prosecutors. The argumentation is that the "*solution can better engage all*

judges/prosecutors in the good governance of the judicial system as a whole, not only on various levels of jurisdiction", and that "*the intention is to have magistrates who are representative for the entire body of magistrates elected as members of the Superior Council of Magistracy".*

However, the representativeness of the members of the CSM decreases in relation to the category of courts and prosecutors' offices that the members represent. Although some challenges are shared by the entire judicial system, it must be said that there are issues specific to first instance courts, tribunals, courts of appeal and the Higher Court of Cassation and Justice (HCCJ), as well as to the prosecutors' offices attached to these courts, and that such issues are best known to the magistrates who work there.

For instance, according to the data published by the CSM in April 2021[7], the number of the staffed judge positions is spread as follows: in the HCCJ – 107; in courts of appeal – 917 (out of 922); in tribunals – 1692 (out of 1708); in district courts - 2316 (of 2319). By changing the election mechanism, it becomes clear that courts which have a greater number of judges – first instance courts and tribunals – will have a stronger voice in terms of electing members of the CSM, including for members representing the courts of appeal and the HCCJ, compared to the magistrates who actually work in those courts. In addition, the way in which the articles regarding the election mechanism are written has the potential to generate a lack of clarity in practice – it is mentioned that judges need to vote for a number of candidates that may not exceed the maximum number set forth by the law, without, however, specifying that allocation per levels of courts needs to be taken into account.

"Art. 11
(7) In the election procedure for members of the CSM, each judge and prosecutor shall vote, subject to compliance with Articles 4 and 5, for a maximum number of candidates equal to the number of members of the Superior Council of Magistracy."

One positive aspect is that there is no pre-screening of candidates anymore, practically any magistrate is free to run for elections. It is important to mention that no international report has criticised the current procedure for electing CSM members.

2. Competences transferred from the Section for Judges / Prosecutors to the CSM Plenary

A number of attributions assigned under the competence of the Section for Judges and, respectively, the Section for Prosecutors in 2018 are now transferred back to the CSM Plenary. In principle, these responsibilities mainly have to do with admission into magistracy, promotion of magistrates, and appointment to leading positions.

„Art. 33 (...)
b) proposes to the President of Romania the appointment or release from office of judges and prosecutors, except for those holding junior positions;
c) appoints junior judges and prosecutors, based on the results obtained in the graduation

[7] https://www.csm1909.ro/ViewFile.ashx?guid=85115823-3d12-4667-95aa-f68aa5299aca-InfoCSM

examinations taken within the National Magistracy Institute;
d) orders the promotion of judges and prosecutors;
e) releases junior judges and prosecutors from office;"

„Art. 34 (...)
b) performs the responsibilities established by law in the matter of the capacity examination of judges and prosecutors and the examination for admission into magistracy, and validates the results of such exams;
c) performs the responsibilities established by law in the matter of contests for appointment of judges and prosecutors in leading positions and validates the results of such contests;
d) performs the responsibilities established by law in the matter of organising contests for the promotion of judges and prosecutors, and validates the results of such contests;"

The practical effect is that decisions to promote and appoint prosecutors and judges in leading positions will be made by CSM members who are judges, who have majority inside the CSM (9 members are judges versus 5 prosecutors). Thus, the principle of separation of the careers of judges and prosecutors is diluted, which goes against the recommendations of the Venice Commission in its 2018 report on the changes of the laws on justice[8]. At that time, the Venice Commission reiterated its recommendation that, if prosecutors and judges are represented in joint Judicial Councils, it is necessary to make sure that judges and prosecutors decide in their own appointment and disciplinary procedures, without any risk of judges deciding for prosecutors and the other way round.

In addition, the draft law fully omits the issue of who decides on delegation and secondment of prosecutors, which is no longer under the attributions of the Prosecutors' Section, nor of the CSM Plenary.

II. The law on the statute of magistrates

1. The procedure to appoint the Prosecutor General, the Chief Prosecutor of the DNA (National Anti-Corruption Directorate) and the DIICOT (Directorate for Investigation of Organised Crime and Terrorism)

The procedure to appoint the Prosecutor General, the Chief Prosecutor of the DNA and the DIICOT is modified by including the **mandatory approval of the Prosecutors' Section of the CSM**, and by the fact that the President of Romania is no longer limited to one justified refusal of the proposal like under the current law.

The same procedure applies to the first deputy prosecutor, the deputy prosecutor, as well as the heads prosecutors of sections (art. 145-149).

The draft law introduces the mandatory approval of the Prosecutors' Section of the CSM on the proposal and creates the obligation for the Ministry of Justice to restart the selection procedure in case of a negative opinion from the CSM, without the possibility to propose

[8] See para. 135 of https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e#: "if prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's appointment and disciplinary proceedings because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings [...]"

the same person again. However, the draft law provides for the possibility for the procedure to continue, if the Prosecutors' Section of the CSM fails to issue its opinion within 30 days.

First, the mandatory approval of the Prosecutors' Section of the CSM will raise constitutionality issues. Through **Decision no. 358/2018**, the Constitutional Court ruled on the role of each party involved in the procedure of revoking chief prosecutors and established that the main decision-making role lies with the Minister of Justice[9]: "*in the procedure to revoke prosecutors holding leading positions, the central and decision-making role in starting such procedure is assigned to the minister of justice, a conclusion which is based on Art. 132(1) of the Constitution, according to which prosecutors operate under the authority of the minister of justice*." The caselaw of CCR in the matter of dismissal is relevant here because, as a rule, the appointment procedure mirrors the dismissal procedure.

This mandatory approval creates a massive imbalance in the appointment procedure, since, *de facto,* it gives the whole power to the Prosecutors' Section of the CSM, which is contrary to the caselaw of the Constitutional Court. Moreover, the draft laws provide for an advisory opinion of the Prosecutors' Section of the CSM when dealing with the procedure for dismissing high-ranking prosecutors. When analysing this mandatory approval of the Prosecutors' Section of the CSM together with the introduction of a super-immunity for magistrates, who cannot be sent to court without the approval of the CSM, it become evident that, in actuality, **the CSM becomes the key player in national criminal policy, which exceeds its constitutional role.**

CVM reports have indeed suggested increasing the significance of the CSM within the context of appointments and revocations in high positions in the prosecutors' offices; however, this can be achieved with a better capitalization by the other players involved in these procedures of the opinions and the arguments provided by the CSM. The solution is practical and has to do with the implementation, rather than with the inclusion of unnecessary and possibly unconstitutional limitations into the mechanism of appointing and revoking chief prosecutors.

2. Interdiction on delegation and secondment from and to DNA and DIICOT

It is not clear why the draft law forbids secondment and delegation of prosecutors to and from DNA and DIICOT (art. 173(3) and art. 182), since these specialised prosecutors' offices are currently faced with great challenges in recruiting staff. As a matter of fact, this change is not found in the recitals of the draft bill either, although it is an element that will have a significantly negative impact on how these two specialised structures work. Currently, delegation and secondment procedures within these structures facilitates recruitment and operates as a probation period both for the prosecutor who is relocated to DNA or DIICOT and for the specialised structures, with both parties having the possibility to decide whether they wish to continue the collaboration - in which case that prosecutor will sit in a contest for a permanent position within these units.

[9] CCR Decision 358/2018, para. 14 (http://legislatie.just.ro/Public/DetaliiDocumentAfis/2013940)

3. Permission for magistrates to be seconded outside the judicial system for 6 years at most, contrary to the caselaw of the CCR

The draft law provides for the possibility to second magistrates to institutions other than courts and prosecutors' offices, for 6 years at most. This provision is not in accordance with the caselaw of the CCR, which establishes that seconding magistrates to other institutions outside the judicial system is unconstitutional.

As per Decision 45/2018[10], *the* CCR established that *"in our constitutional system, the aforementioned norms are very strict in what concerns the incompatibilities that come with the position of judge/prosecutor; the rationale behind this is that confusion between such functions and any other public or private functions, irrespective of their (political or economic) nature must be avoided. Otherwise, if, through various legal mechanisms, such constitutional text was evaded, the activity of the judge/prosecutor would then fall under lack of independence and bias, as applicable, and the perception of citizens regarding the judiciary would be seriously and irreparably damaged"*[11].

"As long as a person is a judge or prosecutor, they may only perform those activities that are specific to such positions. Appointing or reassigning them to a different public office, irrespective of how that office is called, cannot be accepted under the requirements imposed by the Constitution, since this would inevitably alter the type of work which they do and which actually justifies the rights and obligations inherent in their status"[12].

"Thus, the Court has found that the secondment of judges/prosecutors is only allowed within the Ministry of Justice or its subordinated units, and within the structure of the judicial authority [at the Superior Council of Magistracy, the National Institute of Magistracy, the National School of Court Clerks, and within the system of the courts/prosecutors' offices, as applicable], since their activity is strictly connected to the public service of serving justice"[13].

Therefore, the wording in art. 186 of the draft bill is unconstitutional, since seconding magistrates outside the aforementioned institutions is currently forbidden.

4. Material liability of magistrates

According to the draft law, once the injured party has obtained a final ruling, the Ministry of Public Finance notifies the Plenary of the CSM to verify through the Judicial Inspection, whether the magistrate acted in bad faith or in gross negligence. CSM's Plenary notifies the Judicial Inspection, which then investigates the matter. The Judicial Inspection forms a commission composed of three inspectors (judges or prosecutors, as applicable), who investigate the matter within 30 days. The Judicial Inspections writes a report which needs the approval of the Chief Inspector. The report is then lodged with CSM's Plenary, who decides on whether to pursue a recourse action. It is unclear whether the magistrate may challenge such ruling in court.

[10] https://lege5.ro/App/Document/gi3temzxga4a/decizia-nr-45-2018-referitoare-la-obiectia-de-neconstitutionalitate-a-dispozitiilor-art-i-pct-2-cu-referire-la-art-2-alin-3-teza-a-treia-pct-7-cu-referire-la-art-5-alin-1-tezele-penultima-si-ultima-si

[11] CCR Decision 45/2018, para. 169

[12] CCR Decision 45/2018, para. 170

[13] CCR Decision 45/2018, para. 175

The recourse action may be filed within 6 months from the time when the State pays the amounts owed as compensation. It is very unlikely that all these phases be carried out within the 6-month term. Therefore, recourse actions are not quite feasible in reality.

III. The law on judicial organisation

1. The remuneration and pensions for the justice system

The system on which pensions of magistrates is calculated remains unchanged in the draft law, although it was the subject of a number of promises during the electoral campaign and of unending discussions about how unfair this system is: 85% of the gross revenue (including the bonuses received in the last month on the job).

The Government declared that the aspects related to salaries and pensions would be included in the law on remuneration in the public system. Despite that, the draft law includes provisions that regulate salary rights. For instance, it is stipulated that IT specialists who work in the judicial system enjoy the same salary rights as the specialists who work for the General Prosecutors' Office (Art. 131(6)), and that all judicial police officers and agents will receive the same basic salary and bonuses that are granted to those working within the DNA (art. 132(8)).

2. The duration of the mandate of the members of the management board is not correlated with the duration of the mandate of the chief prosecutors

The high-ranking prosecutors' term in office was extended from 3 to 4 years, but these provisions were not correlated with the duration of the term of the members of management boards in the prosecutors' offices, which is still 3 years, even though their tasks are closely linked, as they form together the management team of the institution.

Proposals solving the problems that exist in the current legislation

1. Implementation of ECHR's decision in the case of Kovesi v. Romania

The possibility to challenge the revocation order issued by the President of Romania in administrative litigation proceedings was introduced. The administrative litigation court will have the possibility to check both the lawfulness and the soundness of the decision of dismissal (art. 170 of the Law on the statute of magistrates)

2. Implementation of the recent decisions of the CCR

In compliance with CCR's Decision Nº 121/2020[14], the law on the statute of magistrates contains detailed provisions on the procedure of organising the contests for admission into the magistracy and the contests for promotions in the magistracy. Clearer provisions are also included in relation to the mechanism based on which CSM

[14] http://legislatie.just.ro/Public/DetaliiDocument/226639

members are revoked, in compliance with CCR Decision 196/2013 [15].

3. Changes related to the Judicial Inspection

The Judicial Inspection was often the subject of public controversy, as well as the subject for some recommendations of international institutions in recent years. The project includes clear provisions on the appointment of the heads of the Judicial Inspection, as well as control mechanisms related to the activity of this institution. The proposal includes detailed provisions regarding the competition organised to fill the positions of Chief Inspector and Deputy Chief Inspector. The commission that organises the competition is composed of a president and members - appointed by resolution of the Plenary of the CSM selected amongst the specialized staff of the CSM and the INM (National Institute of Magistracy). This commission checks whether the candidates are compliant with the legal provisions. The examination commission is appointed by the Scientific Council of the INM and is composed of 2 judges from the HCCJ(High Court of Cassation and Justice) (appointed by the HCCJ management board) and 2 prosecutors from the PHCCJ (Prosecutors' Office within the High Court of Cassation and Justice), DNA and DIICOT (appointed by the management board of the PHCCJ), one management specialist. The commission dealing with complaints has the same composition as the examination board, but the members are different. The contest procedure is described in detail in art. 68 of the Law on the CSM.

The Head of the Directorate for Judges in the Judicial Inspection and the Head of the Directorate for Prosecutors are appointed by the CSM Plenary. Furthermore, the law introduces a new procedure for the revocation of the Chief Inspector and the deputy Chief Inspector (Art. 70 of the draft Law on the CSM).

4. Written exam included in the procedure for promotion to HCCJ judge

A written exam is included as part of the procedure for promoting to the HCCJ and contributes to making the promotion (career advancement) mechanism more impartial.

5. Obligation of magistrates to close their caseload before they retire

This provision solves some of the issues encountered in the everyday life of the judiciary and should have long ago become the rule in Romania in order to avoid making the activity of magistrates vulnerable.

[15] http://legislatie.just.ro/Public/DetaliiDocumentAfis/147213

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Report published in a project implemented with the support of the Bureau of International Narcotics and Law Enforcement Affairs (INL) in partnership with CEELI Institute (Central and Eastern European Law Initiative) and International Foundation for Electoral Systems (IFES)