

Romanian Judicial System. Organization, Current Issues and the Necessity to Evoid Regres

Dragoș CĂLIN¹, Ionuț MILITARU² and Claudiu DRĂGUȘIN³

1. Introduction

The present study aims to present the Romanian judicial system, namely the organization of courts and prosecutor's offices, the Superior Council of Magistracy, as well as the current problems in the functioning of the Romanian justice system.

Romania is traditionally a democratic state, the standards of democracy being established mainly by the Constitution Bills of 1866 and 1923.

Between 1945 and 1989 the rule of law was flagrantly affected by the establishment of a deeply undemocratic communist regime. In those times, the citizens' rights and freedoms were an utopia, private property was disregarded, the state confiscated houses and lands of millions of people, and the intellectual elite of the country was physically eliminated.

Starting January 1st, 2007, Romania, a semi-presidential republic, according to the Constitution of 1991, became a member of the European Union.

Article 148 paragraph (2) of the Romanian Constitution accepts the priority of the application of European Union law⁴.

1 Judge, Bucharest Court of Appeal, co-president of the Romanian Judges' Forum Association, Director of the Judges' Forum Review. Professional e-mail: dragos.calin@just.ro.

2 Judge, Bucharest Court of Appeal, co-president of the Romanian Judges' Forum Association, Chief Editor of the Judges' Forum Review. Professional e-mail: ionut.militaru@just.ro.

3 Judge of the 4th District Court of Bucharest, Secretary General of the Romanian Judges' Forum Association. Professional e-mail: claudiu.dragusin@just.ro.

4 See, **D. Călin**, The Constitutional Court of Romania and European Union Law, in *International and Comparative Law Review* 2015, tome 15, no.1, pp.59–86; **D.-M. Șandru, C.-M. Banu, D.A. Călin**, The Preliminary Reference in the Jipa Case and the Case Law of the Romanian Courts on Restriction on the Free Movement of Persons, in *European Public Law*, Issue 4, 2012, pp. 623–641

Romania also joined the Council of Europe on October 7th 1993, becoming a party to the European Convention on Human Rights and Fundamental Freedoms (June 20th 1994) and to the 14 additional Protocols.

When inconsistencies are found between the pacts and treaties on fundamental human rights ratified by Romania, and domestic laws, then the international regulations prevail. That also includes the case law of the European Court of Human Rights, which prevails against the national regulations and case law unless the Constitution or domestic laws contain more favorable provisions. This is stated in article 20 paragraph (2) of the Romanian Constitution.

The judicial system inherited from the communist era was deeply reformed, thanks to the 1991 Constitution, revised in 2003. But the secondary legislation adopted on the matter prior to the moment of joining the European Union, in fields like the judicial organization, the status of judges and prosecutors, and the Superior Council of Magistracy, has been characterized by violations of principles such as the judges' independence.

That made the judiciary system seemed unstable and ineffective.⁵

However, by the European Commission Decision 2006/928/EC of December 13th 2006 was established a Mechanism for cooperation and monitoring of progress made by Romania created for achieving specific benchmarks in the field of the judicial reform and the fight against corruption⁶. Within this mechanism it was noted that the European Commission had identified unresolved issues, in particular regarding the accountability and efficiency of the the judiciary system of Romania⁷.

5 For details, see **H. Dumbravă, D. Călin**, Die mühsame Demokratisierung der rumänischen Justiz, in *Betrifft JUSTIZ* no. 100 von Dezember 2009, pp.200–204, available at http://betrifftjustiz.de/wp-content/uploads/texte/Ganze_Hefte/BJ%20100_web.pdf [last accessed on October 17th, 2017], as well as and **H. Dumbravă, D. Călin**, The Evolution of the Judicial System in Romania during the Past 60 Years, in *Judges' Forum Review* no. 1/2009, pp.123–131, study available on <http://www.forumuljudecatorilor.ro/wp-content/uploads/Art-18-forumul-judecatorilor-nr-1-2009.pdf> [last accessed on October 17th, 2017].

6 Published in the Official Journal of the European Union L 354 of December 14th 2006.

7 By Decision no. 2 of January 11th, 2012, the Constitutional Court of Romania considered that, by being a member of the European Union, Romania has the obligation to apply this mechanism and follow the recommendations established by this framework, according to the provisions of art. 148 paragraph (4) of the Constitution, according to which “the Parliament, the President of Romania, the Government and the judicial authority shall guarantee the fulfilment of the obligations resulting from the accession documents and from the provisions of paragraph 2”.

The latest Report of the Cooperation and Verification Mechanism (2017)⁸ expressly recommends, in order to achieve “*further improvement of transparency and predictability of the legislative process, as well as for strengthening the internal guarantees of irreversibility*”, that “*the Romanian Government and Parliament (...) should ensure full transparency and **take into due account of consultations with relevant authorities and interested parties in decision-making and legislative work** related to the Criminal Code and the Criminal Procedure Code, anti-corruption laws, (incompatibilities, conflicts of interest, illicit wealth), the laws of justice (relating to the organization of the justice system), as well as the Civil Code and the Civil Procedure Code.*”

2. Courts

According to the Constitution of Romania and to the Law no. 304/2004 on judicial organization, the judicial power is ensured by the High Court of Cassation and Justice and other courts established by law (courts of appeal - 15, county courts - 42, specialized courts - 4, military courts - 5 and first instance courts - 176).

The magistrature is defined as the judicial activity carried out by judges in order to ensure justice and by the prosecutors in order to protect the general interests of the society, the rule of law, as well as the citizens' rights and freedoms⁹.

The Superior Council of Magistracy guarantees the independence of justice.

The High Court of Cassation and Justice is the supreme court of Romania, having the main role to ensure the unitary interpretation and application of the law by the lower courts. The High Court of Cassation and Justice is organized in 4 sections – 1st Civil Chamber, 2nd Civil Chamber, Criminal Division, Administrative and Tax Litigation Chamber, but it also functions as Joint Chambers with its own competence. Also, within the High Court of Cassation and Justice, it functions a panel for the Settlement of Appeals in the Interest of Law, panels competent to solve law interpretation disputes, as well as 4 panels of 5 judges.

The leadership of the High Court of Cassation and Justice is exercised by the chairman,

8 See the web page https://ec.europa.eu/info/sites/info/files/com-2017-44_en_1.pdf [last accessed on October 17th, 2017].

9 See Art. 1 of the Law no. 303/2004 republished on the status of judges and prosecutors.

the deputy chairman and the management board. The latter consists of the chairman, the deputy chairman and nine judges elected for a period of three years by the general assembly of judges.

The General Assembly of the judges of the High Court of Cassation and Justice has the following tasks: a) to approve the annual activity report; b) to approve the budget of the High Court of Cassation and Justice, with the consultative opinion of the Ministry of Public Finance; c) to elect the two members for the Superior Council of Magistracy.

The Courts of Appeal have the status of moral persons, organized at the level of several counties and of Bucharest. In their jurisdiction several courts and specialized courts operate.

At Courts of Appeal level one can find divisions or, as the case may be, specialized panels of judges for civil matters, criminal matters, juvenile and family matters, administrative and tax litigation matters, labor disputes and social insurances matters, companies matters, trade register, insolvency, unfair competition, or other matters, as well as, in relation to the nature and number of cases, specialized divisions for maritime and river matters.

The judicial circuit of each Court of Appeal includes all the district courts of its administrative-territorial units.

The district courts are called *tribunals*.

The specialized courts are courts with no moral persons statut, which can operate at the level of counties and of Bucharest. In these respect, one can find commercial courts (3) and juvenile and family courts (1).

The tribunals are organised in chambers or, as the case may be, by specialized panels for civil matters, criminal matters, juvenile and family matters, administrative and tax litigation, labor disputes and social insurance matters, companies matters, trade register, insolvency, unfair competition or other matter. Also, some of them are organised in relation to the nature and number of cases and to their localisation, by specialized divisions for maritime and river matters.

Each court (court of appeal, county court, specialized court, district court, military court) is run by a president judge who performs managerial duties.

Presidents of appeal courts and country courts also have the tasks of coordinating and controlling the administration of the lower courts in their jurisdiction.

Within each court there is a managerial board which decides on the court's general management issues. Also, annually or whenever necessary, the courts summon their general assemblies of judges which have the following duties: a) to discuss the annual activity carried out by the courts; b) to elect the members of the Superior Council of Magistracy; c) to discuss issues of law; d) to analyze draft normative acts at the request of the Minister of Justice or the Superior Council of Magistracy; e) to formulate points of view at the request of the Superior Council of Magistracy; f) to elect and revoke the members of the managerial board; g) to initiate the procedure of revoking the members of the Superior Council of Magistracy; h) to perform other duties provided by law or regulations.

3. Prosecutors' offices

The Public Ministry is run by the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice.

Prosecutors operate in accordance with the principles of legality, impartiality and hierarchical control, under the authority of the Minister of Justice.

Prosecutors are bound to respect and protect human dignity and to defend the rights of the individual.

Prosecution offices are independent in their relation to the courts, as well as to other public authorities.

The Public Ministry exercises the following attributions through the prosecutors: a) carries out the criminal prosecution in cases and under conditions provided by law and participates in solving the conflicts by alternative means; b) manages and supervises the criminal investigation activity of the judicial police, manages and controls the activity of other criminal investigation bodies; c) asks the courts for the initiation of criminal trial cases; d) exercises civil actions related to prejudices stemmed from criminal deeds; e) attends court hearings; f) appeals against court decisions; g) defends the legitimate rights and interests of minors, legally incapacitated persons, missing persons and others; h) acts for prevention and combat of crime, under the coordination of the Minister of Justice, for the unitary realization of the state's criminal policy; i) studies the causes that generate or favor crime, develops and submits proposals to the Minister of Justice in order to eliminate them

and to improve the legislation in the field; j) monitors the way the law is respected in remand custody places; k) exercises any other duties provided by the law.

The provisions of the hierarchically superior prosecutor, issued in writing and in accordance with the law, are mandatory for the subordinate prosecutors.

The prosecutor is nevertheless independent when issuing a professional solution in a certain case. In this matter, according to a procedure provided by the law, a prosecutor may appeal to the Superior Council of Magistracy against the intervention of his/her hierarchically superior prosecutor, in any form, in conducting the criminal prosecution or in adopting the solution.

When legally justified, the illegal solutions adopted by the prosecutor can be invalidated by the hierarchically superior prosecutor.

Public Prosecutors' offices are attached to each court of appeal, county court, juvenile and family court. Prosecutors' offices are located in cities where the courts to which they are attached are seated and have the same jurisdiction.

Prosecutor's offices attached to courts of appeal and prosecutor's offices attached to county courts have moral person status.

Prosecutors' offices attached to juvenile and family courts and prosecutor's offices attached to district courts have moral person status.

As a unit of optimizing the fight against corruption, the National Anticorruption Directorate, specialized in the fight against corruption, was established and operates attached to the High Court of Cassation and Justice. The National Anticorruption Directorate is an autonomous structure within the Public Ministry, coordinated by the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice.

The President of Romania appoints and revokes the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, the Chief Prosecutor of the National Anticorruption Directorate, their deputies, the Chief Prosecutors of these Prosecutor's Offices, and the Chief Prosecutor of the Directorate for the Investigation of Organized Crime and Terrorism.

4. Superior Council of Magistracy

According to the Constitution and to Law no. 317/2004 on the Superior Council of Magistracy, this organism guarantees the independence of the judiciary system.

The Superior Council of Magistracy is composed of 19 members: a) 9 judges and 5 prosecutors, elected in the general assemblies of judges and prosecutors; b) 2 representatives of civil society, specialists in the field of law, who enjoy high professional and moral reputation, elected by the Senate; c) the President of the High Court of Cassation and Justice, the Minister of Justice and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, as *ex officio* members.

The Superior Council of Magistracy functions in Plenum, but also in two sections: the judges' section and the prosecutors' section.

The Judges' Section of the Superior Council of Magistracy consists of: a) 2 judges from the High Court of Cassation and Justice; b) 3 judges from the courts of appeal; c) 2 judges from the county courts; d) 2 judges from the district courts.

The Prosecutors' Section of the Superior Council of Magistracy consists of: a) 1 prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice or from the National Anticorruption Directorate; b) 1 prosecutor from the prosecutor's offices attached to the courts of appeal; c) 2 prosecutors from the prosecutor's offices attached to the county courts; d) 1 prosecutor from the prosecutor's offices attached to the district courts.

In cases when he/she decides to participate, the President of Romania presides, without the right to vote, the meetings of the Plenum of the Superior Council of Magistracy.

Judges and prosecutors are elected as members of the Superior Council of Magistracy for a single six-year term which can not be renewed¹⁰, by the general assemblies of judges or prosecutors.

10 See the decision of the Constitutional Court of Romania no. 53 of January 25th 2011 on the petition for unconstitutionality of the Senate Plenum's Decision no. 43 of December 22nd 2010 regarding the validation of the magistrates elected as members of the Superior Council of Magistracy, as well as the Decision of the Constitutional Court of Romania no. 374 of June 2nd 2016 on the exception of the unconstitutionality of the provisions of the first statement of Article 54 (1) and Article 57 of Law No. 317/2004 on the Superior Council of Magistrates.

The Romanian Senate validates the list of magistrates elected as members of the Superior Council of Magistracy.

In order to elect the two representatives of civil society in the Superior Council of Magistracy, professional organizations of lawyers, professional councils of the accredited law faculties, associations and foundations that have as their objective the defense of human rights may propose one candidate. The Senate elects the two representatives of civil society among these candidates.

In principle, the meetings of the plenum and of the sections of the Superior Council of Magistracy are public.

As exception, the meetings are not public when a requests for permission of searche, for detention, for remand in custody or for home arrest of judges, prosecutors or assistant magistrates, as well as when complaints regarding the good reputation of judges and prosecutors are dealt with.

Professional associations of judges and prosecutors may participate in plenum and section proceedings, expressing, if they consider necessary, a point of view on the issues being debated at their own initiative or at the request of the members of the Superior Council of Magistracy.

As regarding its powers, the Superior Council of Magistracy has the right and the obligation to make an *ex officio* appeal to defend judges and prosecutors against any act that could affect their independence or impartiality or raise suspicions about them.

The Superior Council of Magistracy also defends the professional reputation of judges and prosecutors and ensures the observance of ethics in the professional careers of judges and prosecutors.

The Plenum of the Superior Council of Magistracy has the following attributions regarding the career of judges and prosecutors: a) proposes to the President of Romania the appointment and dismissal of judges and prosecutors, except for trainee judges; b) appoints trainee judges and probationary prosecutors on the basis of the results obtained at the graduation exam of the National Institute of Magistracy; c) orders the promotion of judges and prosecutors; d) relieves from office the trainee judges and prosecutors; e) proposes to the President of Romania the awarding of distinctions to judges and prosecutors, according to the law; f) performs any other duties established by law or regulation.

The Plenum of the Superior Council of Magistracy establishes the annual number of trainees, approves the date and establishes the topic for the admission competition at the National Institute of Magistracy, issues opinions and adopts regulations, in the cases and under the conditions stipulated by the law; also, it organizes and validates the proficiency examination of judges and prosecutors and approves the training program for judges and prosecutors; organizes and validates the contests for the appointment of judges and prosecutors to senior positions; orders the organization of competitions for the advancement of judges and prosecutors; appoints committees to assess the professional activity of judges and prosecutors; appoints and revokes the Director and Deputy Directors of the National Institute of Magistracy; appoints the Director and Deputy Directors of the National School of Clerks.

The Plenum of the Superior Council of Magistracy solves the appeals filed by judges and prosecutors against the decisions of the Superior Council of Magistracy's sections, except for those issued in disciplinary matters.

The Plenum of the Superior Council of Magistracy adopts the Code of Ethics for judges and prosecutors, the Regulation for the organization and functioning of the Superior Council of Magistracy, the Regulation on the procedure of electing the members of the Superior Council of Magistracy, the Rules of Internal Order of the Courts.

The Plenum of the Superior Council of Magistracy approves the drafts of normative acts regarding the activity of the judicial authority.

The Superior Council of Magistracy annually prepares a report on the state of justice and a report on its own activity, which is presented to the Reunited Chambers of the Romanian Parliament until February 15th of the following year.

The Superior Council of Magistracy also coordinates the activity of the National Institute of Magistracy and the National School of Clerks.

The National Institute of Magistracy carries out the initial training of judges and prosecutors, the continuous professional training of judges and prosecutors in office, as well as the training of trainers.

The National Institute of Magistracy is not part of the national education and training system. The training staff of the National Institute of Magistracy is usually provided by the judges and prosecutors in office.

The sections of the Superior Council of Magistracy have the following attributions regarding the career of judges and prosecutors: a) order delegation of judges and relocation of judges and prosecutors; b) appoint judges and prosecutors to senior positions; c) analyze the compliance with the legal conditions of the trainee judges and prosecutors who have passed the proficiency examination and by the judges and prosecutors proposed for appointment to management positions; d) solves the appeals against the ratings awarded by the annual evaluation commissions of the professional activity of judges and prosecutors; e) take measures to solve the complaints received from judges or other persons regarding the inappropriate conduct of judges and prosecutors; f) propose to the President of Romania the appointment and dismissal from office of the president, deputy chairperson and chairpersons of the chambers of the High Court of Cassation and Justice; g) approve the proposal of the Minister of Justice for the appointment and dismissal of the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, the Chief Prosecutor of the National Anticorruption Directorate, their deputies, the Chief Prosecutors of these Prosecutor's Offices and the Chief Prosecutor of the Directorate for the Investigation of Organized Crime and Terrorism and its Deputy; h) approve the transfer of judges and prosecutors; i) order the suspension of judges and prosecutors from office. The Judges Section of the Superior Council of Magistracy approves the search, detention, remand in custody or home arrest for judges and magistrates-assistants. The Prosecutor's Section of the Superior Council of Magistracy approves the search, detention, remand in custody or home arrest for prosecutors.

5. The role of the Superior Council of Magistracy in disciplinary proceedings

Through its sections the Superior Council of Magistracy fulfills, the role of a court in the field of disciplinary liability of judges and prosecutors, as well as for assistant magistrates of the High Court of Cassation and Justice. The disciplinary action in the case of misconduct of a judge is taken by the Judicial Inspection, by the judicial inspector, by the Minister of Justice or by the President of the High Court of Cassation and Justice.

During the disciplinary investigation shall be established the facts and their

consequences, the circumstances in which they were committed, as well as any other conclusive data from which to assert the existence or non-existence of guilt.

Hearing of the person concerned and ensuring the defense of the investigated judge or prosecutor are mandatory. The refusal of the investigated judge or prosecutor to make statements or to submit himself to the investigation shall be recorded and shall not prevent the conclusion of the investigation. The investigated judge or prosecutor has the right to be informed about all the documents of the investigation and to request evidence in defense.

In the disciplinary proceedings before the Superior Council of Magistrates, the summons of the judge or prosecutor against whom the disciplinary action is taken by the Judicial Inspection on its own motion or on the motion of the Minister of Justice, the President of the High Court of Cassation and Justice or of the Prosecutor General of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, as the case may be, is mandatory.

The decisions of the sections of the Superior Council of Magistracy in disciplinary action shall be drafted compulsorily no later than 20 days after ordering the decision and shall be immediately communicated in writing to the judge or prosecutor concerned and to the Judicial Inspection or, as the case may be, to the initiator of the disciplinary action which was carried out.

Within 15 days of the notification an appeal may be filed against these decisions by the sanctioned judge or prosecutor, or, as the case may be, by the Judicial Inspection or by the other initiators of the disciplinary action that they have filed.

The competence of solving the appeal belongs to the panel of 5 judges of the High Court of Cassation and Justice, which cannot include the sanctioned judge (if applicable) or any member of the Superior Council of Magistracy with a right to vote.

The Judicial Inspection is a structure with legal person status organised within the Superior Council of Magistracy, lead by a Chief Inspector, appointed after a competition organised by the Superior Council of Magistracy.

The Judicial Inspection acts according to the principle of operational independence, performing, through the judicial inspectors appointed under the law, analysis, verification and control tasks in the specific fields of activity.

Assessment of the quality of Judicial Inspection's management is done annually

through an independent external audit.

6. Current vulnerabilities in the functioning of the Romanian judiciary system

As shown in the introduction, in the context of Romania joining the European Union, the justice system of the former communist state seems to have changed and efforts were made to be aligned with those of the democratic states of Western Europe.

On one hand, many young magistrates have entered the judiciary system, the National Anticorruption Directorate has consistently achieved good results, and hundreds of corrupt politicians, public servants and magistrates have already been convicted by final decisions.

On the other hand, the mechanism for cooperation and verification of Romania's progress in achieving specific benchmarks in the field of judiciary reform and the fight against corruption, imposed as a condition for joining the EU, has not been lifted even after 10 years from the EU accession, and the tendencies to resist those who struggle with the scourge of corruption are still present today.

Although in a society still grinded by corruption, it would seem necessary to increase the institutional capacity to fight it, including the recovery of damages, which may discourage the phenomenon, recently there has been a fight back from some politicians that have managed to gather a majority in the Parliament, of the idea of tempering the anti-corruption path which the country was engaged since the accession to the European Union.

In this sense, the Romanian politicians proposed in January 2017 a pardon of penalties for some corruption related crimes, or the reduction of penalties for others similar criminal deeds¹¹.

This proposal did not materialise due to the vigorous opposition of the civil society, more than 500.000 citizens being out in the streets to oppose it.

Also, in December 2017 the Minister of Justice transmitted to the Parliament more propositions regarding major changes to the judiciary laws.

11 The Romanian Judges' Forum Association's reaction was immediate. See webpage <https://rlw.juridice.ro/11226/the-romanian-judges-forum-association-ref-the-projects-of-emergency-government-ordinances-concerning-the-collective-pardon-and-the-amendments-of-the-criminal-code-and-the-procedural-criminal.html> [last accessed on October 17th, 2017].

The Parliament approved these provisions in its last session of december 2017 at the end of some parliamentary proceedings which were considered non-transparent by different domestic and european organisations, including voices stemming from the European Union.

The laws did not enter into force yet, as they were returned to the Parliament following some decisions of the Constitutional Court which found some minor unconstitutional issues that needed correction.

The decisions of the Constitutional Court were largely criticized by civil society movements as they failed to address key issues that shall affect the areas like the good functioning of the magistracy, the independence of judges, the activity of the prosecutors.

Anyways, if the Parliament votes against the entering into force of those provisions, there will be no way of stopping their entry into force.

Currently, there are other changes in debate in Parliament in order to alter criminal provisions.

These proposed changes were regarded by approximately 4000 Romanian judges and prosecutors, as in violation of the Co-operation and Verification Mechanism, of its constant findings and of the foundations of a healthy magistracy in a democratic state.

In this respect, the 4000 magistrates, more than half of their total, signed a petition named *Memorandum for the withdrawal of the draft amendment to the "laws of justice"*.

According to the signatories of the Memorandum, the Romanian Government (to which the Minister of Justice belongs) cannot disregard in a Member State of the European Union, converges in the sense of removing any doubt about the diversion of this project detrimental for magistracy, requiring its immediate withdrawal, the Ministry of Justice failing to develop an effective, concrete dialogue with the magistrates, the Superior Council of Magistracy, the professional associations of judges and prosecutors, to improve the legislative framework, after carrying out the necessary impact studies and after presenting serious and credible grounds regarding the proposed changes, in order to modernize the judicial system, in accordance with the Cooperation and Verification Mechanism.

Contrary to the recommendations of the Co-operation and Verification Mechanism, the Superior Council of Magistracy has not taken any further steps to provide adequate support to the magistrates, who criticized the undermining of the independence of the judiciary system.

7. Conclusions

Even if currently the laws affecting the magistracy did not enter into force yet, the decision that has the potential to affect the european path of Romania is on the edge.

When democracy and fundamental freedoms are in jeopardy, the judge's duty to be reserved in expressing oppinions becomes subsidiary to the indignation obligation¹².

Therefore, the judges' reactions, through their representatives or their professional associations, are legitimate and most explainable by their wish to ensure the proper functioning of the judiciary, by keeping its allignement to the modern legislative tendencies of the Member States of the European Union.

12 See the Declaration on Judicial Ethics, adopted by the General Assembly of the European Network of Judicial Councils, held in London on June 2-4, 2010.