Romania. How Judges and Prosecutors Fight for European Values

In this policy brief, Dr. Dragoș Călin and Bogdan Pîrlog discuss about the field of justice in Romania.

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> In Romania, the number of judges and prosecutors shall be reduced.

1. The Context

Three bills on Romanian judiciary laws were initiated on August 2017. Venice Commission issued a preliminary opinion on the 13th of July, confirmed by the final one in October 2018 (CDL-AD(2018)017-e Romania, adopted by the Commission at its 116th Plenary Session), GRECO assessed the same bills on March 2018 (Ad-Hoc Report on Romania - Rule 34, adopted by the Group of States against Corruption during the 79th Plenary Reunion Strasbourg, 19-23 March 2018) and the European Commission through the Mechanism of Cooperation and Verification performed a similar evaluation on November 2018.

In Romania, as effect of enforcing the amendments made to the laws of judiciary, the number of judges and prosecutors shall be reduced (on short term, by at least 25%, if no measure is found to fight the effects of early retirement - retirement of the Romanian magistrates shall be possible at the age of 42-43), de-skilled by waiving the meritocratic promotion exams,[1] overworked by increasing the volume of activity (introduction of the panels consisting in three judges, instead of two for solving the hearings). As per comparision, a similar action in the Romanian police, in 2017, ended with disastrous results (17000 police officers have retired in 4 months).

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The limitations proposed with regard to the freedom of expression of the judges and prosecutors should be eliminated, and the provisions regarding the material liability of the magistrates should be reviewed, modifying the mechanism of the recourse action.

According to the Opinion of Venice Commission of October 20, 2018, the legislature and the executive from Romania are bound **to immediately rethink the system of appointing/discharging the prosecutors in senior management functions**, in order to provide the conditions for a neutral and objective appointment/discharge process by maintaining the role of some of the authorities, like the President and the Superior Council of Magistracy (CSM), which are capable of counterbalancing the influence of the Ministry of Justice. Mrs. Laura Codruța Kovesi was discharged from her office of Chief Prosecutor of the National Anticorruption Directorate under the Decree no. 526/2018 issued by the President of Romania as a result of the Decision no. 358 of 30 May 2018 of the Romanian Constitutional Court[2].

> In 2017, Romanian judges, prosecutors, and trainee magistrates protested.

It is necessary for the legislature and the executive **to cancel the establishment of a separate prosecutor's office structure for the investigation of the offences committed by judges and prosecutors**. The Section for the Investigation of the Judiciary Offences was established as part of the Prosecutor's Office attached to the High Court of Cassation and Justice, which shall allow to forward tens of files of high-level corruption on the dockets of the National Anticorruption Directorate by simply filing fictitious complaints against a magistrate, destroying a significant volume of DNA activity constantly appreciated by CVM Reports.

This is the historical context in which the judges and prosecutors staged unprecedented protests, largely supported by university professors and students, as well as civil society and actors. In essence, the protests came after the Parliament adopted the so-called "justice laws", consisting in substantial changes in the three main laws affecting the organization and the statute of the judiciary without taking into consideration the firm opposition of more than half of the judiciary.

2. How Romanian Judges and Prosecutors Fight for European Values

· **Protests**. Judges and prosecutors have the right to stand against any other policies or actions affecting their independence (protests in front of their institutions, public letters etc.).

In December 2017, more than one thousand Romanian judges, prosecutors, and trainee

magistrates silently protested in front of their institutions, holding their robes or the Constitution, but most of them showing printed versions of the common oath they took when sworn into office at the beginning of their career. Bucharest, Cluj, Constanța, Timișoara, Iași, Galați, Craiova, Pitești, Brașov, Bacău, Baia Mare, Suceava, Botoșani, Brăila, Satu Mare, Oradea, Călărași, Miercurea Ciuc, Zalău, Slatina, Târgoviște, Târgu Mureș, Tulcea, Piatra Neamț. These are the main cities where magistrates protested against the actions of the Parliament.

Moreover, the silent protests concerned the announced changes in the criminal codes which would dramatically limit the investigation powers of police and prosecutors, as well as the possibility to protect the victims and identify criminals, no matter the nature of the crime (murder, theft, rape, corruption etc.).

On 4 April 2019, for the first time in history, magistrates from a member state of the European Union other than Belgium protested in Brussels for the rule of law. The protest at the Brussels Palace of Justice (Rond-point piétonnier at Place Poelaert) lasted for about an hour, attended by around 30 Romanian judges and prosecutors who were applauded at the open stage and encouraged by dozens of Belgian and German judges, as well as Belgian lawyers. For the first time in history, magistrates from a member state other than Belgium protested in Brussels for the rule of law.

> What is essential is the distinction between "*politics*" and "*policies*".

During and after these protests, there where some voices in the news that challenged our right to protest, saying that the law forbids magistrates to protest in any way. The judges can protest. There are causes and situations where their very oath *calls* on them to do so. The Romanian law only forbids *political* reunions by magistrates, not *any sort* of public reunion and gathering. The European Network of Councils for the Judiciary, in London Declaration on Judicial Ethics (2010), says: „*When democracy and fundamental freedoms are in peril, a judge's reserve may yield to the duty to speak out.*"

What is essential in understanding the prohibition of political activities, but not any type of public activity (e.g. silent public protest), is the distinction between "*politics*" and "*policies*". *Politics*, defined very simply as the activity concerning governance, is – without a doubt – beyond the scope of a magistrate's activity, falling under the interdiction stated above. Ironically, the changes made in the laws allow a magistrate to be a member of the executive branch (Government) and then resume his or her position as a magistrate. Although this is not the purpose of this short paper, it is worth mentioning that the most vocal critics of the magistrates' right to protest voted

that magistrates can be ministers in the Government; in simpler words, they are saying magistrates cannot criticize laws now, but they can pass laws in the future. *Policies*, on the other hand, explained very shortly as a course of principle of action adopted or proposed by an organization or individual, should be debated, discussed, and – if the case – protested against by all the stakeholders involved by the policies.

Romanian judges and prosecutors did not protest against a political party or another (an activity strictly forbidden without a doubt), but against public policies adopted in the field of justice, affecting them directly as main stakeholders, along with each and every citizen or resident of the country. Therefore, the question is not whether they *can*, but rather why and when magistrates absolutely *should* protest. Judges and prosecutors are merely instruments; not instruments for a group of people, be it the majority or the minority of the population, serving fleeting material interests, but rather instruments serving constant values and principles of justice that guard the safety of a society as a whole, no matter the passing political and economical trends.

> Romanian judges and prosecutors did protest against public policies adopted in the field of justice,

We also remember the **Opinion of the Bureau of the CCJE (Consultative Council of European Judges)** following a request by the Romanian Judges' Forum Association as regards the situation on the independence of the judiciary in Romania (2019): "74. Judges certainly have the right to stand against any other policies or actions affecting their independence resulting from new legislation or amendments to the existing one or in the case of discriminatory or selective approaches during the selection or appointment of judges, or political engineering to provide for a decisive role of the dominant political force, for example, during elections/appointment by Parliament, or interference into the judicial administration through executive bodies, for example by the Ministries of Justice, as well as in other cases."

· **Continuous dialogue of the associations of judges and prosecutors with the relevant European and international entities: European Commission; European Parliament; Venice Commission; Consultative Council of European Judges; Consultative Council of European Prosecutors; European Network of Councils for the Judiciary; GRECO; MONEYVAL etc.**

Representatives of the Romanian Judges' Forum Association, the Movement for the Defence of the Prosecutors' Status Association and the Initiative for Justice Association met in Brussels with senior officials of the European Commission and the European Parliament, including the First Vice-President of the European Commission, Mr. Frans Timmermans, in an action that concerned the state of justice in

Romania, and which included a flashmob organized by Romanian magistrates in collaboration with their colleagues in Belgium in front of the Brussels Palace of Justice. The meeting with Mr. Frans Timmermans was a technical one in which aspects of the changes to the laws of justice were discussed, widely criticized by relevant international entities. The European Commission has assumed its role of defending the rule of law under article 2 of the Treaty on European Union, and dialogue with Romanian judges and prosecutors is essential in this note for a technical appreciation of the whole context, with magistrates being technical experts only, within the limits of their status. In the event of further deviations from the rule of law and disregard of CVM recommendations, the Commission has coercive means at its disposal against the Romanian state, which it will not hesitate to put into practice.

In the absence of a rapid legislative solution, given both the adamant resistance of the political power to all criticism from relevant international bodies and the decisions of the Romanian Constitutional Court, which refused to take into account the opinions of the Venice Commission, under the argument of the control it performs exclusively by reference to national constitutional rules, the remedy for these deviations from the rule of law was to refer to the Court of Justice of the European Union with successive applications for preliminary ruling, "the requirement of the independence of judges being related to the substance of the fundamental right to a fair trial, which has an essential importance as a guarantor of the protection of all rights conferred to litigants by the EU law and of maintaining the common values of the Member States provided by Article 2 TEU, in particular the value of the rule of law."

> European Union has to stand for its values.

Facing this challenge, European Union has to stand for its values, as enforcement of Romanian rule of law needs reestablishment through the legal means of an infringement procedure, the only one able to remove the breaches of article 2, article 4 par. 3 and article 19 par. 2 of the Treaty on European Union, related to article 47 of the Charter of the Fundamental Rights of the European Union as it has been interpreted in the jurisprudence of the European Court of Justice. Any delay in taking action would result in irreversibly affecting the rights and freedoms of every single European citizen.

· **Requests for a preliminary ruling to the Court of Justice of the European Union**

Similarly to the situation of the

deterioration of the rule and law and of the judicial system reform in Poland, in relation to which the Court of Justice of the European Union has already delivered several solutions of principle or has other applications for a preliminary ruling pending, the Romanian courts have also referred to CJEU, on the interpretation of the European Union law in the context of legislative amendments or Constitutional Court decisions [interpretation of the content, nature and temporal scope of the Cooperation and Verification Mechanism; the obligation of the Member States to establish the necessary measures for an effective legal protection in the areas regulated by the Union law, namely guarantees of an independent disciplinary procedure for Romanian judges, removing any risk related to political influence on disciplinary procedures, such as the direct appointment by the Government of the Judicial Inspection management, even provisionally, or the establishment and organization of the Section for Investigating Criminal Offences in the Judiciary, within the Prosecutor's Office attached to the High Court of Cassation and Justice, thorough the possibility of indirectly exerting pressure on the judges and prosecutors; the interpretation of the principles of legal certainty and effectiveness in the sense that they oppose that, in a dispute in the field of consumer rights protection, the procedural rules be amended after the court was notified by the consumer, by a mandatory Constitutional Court decision, implemented by the legislator by a law amending the Civil Procedure Code, by introducing a new remedy that can be used by the professional, with the consequence of extending the duration of the trial and increasing the costs for its completion; the interpretation of Art. 19 par. (1) of the Treaty on European Union, Art. 325 par. (1) of the Treaty on the Functioning of the European Union, Art. 1 par. (1) points a) and b) and Art. 2 par. (1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests and the principle of legal certainty, in the sense that they oppose the adoption of a decision by a body outside the judiciary, the Romanian Constitutional Court, which assesses the legality of forming court panels with the consequence of creating the necessary premises for admitting extraordinary remedies against final court decisions delivered within a period of time; the interpretation of Art. 47 par. 2 of the Charter of Fundamental Rights of the European Union in the sense of opposing the finding by a body outside the judiciary of the lack of independence and impartiality of a panel including a judge with a management position and who was not randomly appointed etc.[3]

> The Romanian courts have also referred to CJEU, on the interpretation of the European Union law in the context of legislative amendments or Constitutional Court decisions.

3. Conclusions

Establishment of mechanisms for control and pressure on magistrates, through directly (the Minister of Justice) or indirectly politically controlled entities. Thus, pressure may be exercised on magistrates either through the magistrates' investigation section or through the Judicial Inspectorate, bodies controlled by the political factor through the aligned members of the Superior Council of Magistracy - Section for Judges. The patrimonial and disciplinary liability of magistrates will be attributed irrespective of the existence, inexistence or gravity of their fault. Prosecutors' independence is lost. Control over prosecutors can be exercised by the politic entities directly through the Minister of Justice, or indirectly through the General Prosecutor of Romania, the chief prosecutor of the National Anticorruption Directorate or the chief prosecutor of the Directorate for the Investigation of Organized Crime and Terrorism, whose appointment are controlled by the Minister of Justice. The Ministry of Justice, a political factor, will be able to control the prosecutors and give them *guidance* on

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preventing and effectively combating crime by engaging in criminal prosecution. These actions will place the judicial system in a position of subordination to the political factor, with the consequence of losing the status of rule of law and favoring high-level corruption or the judicial corruption. Moreover, the judicial structures, and especially the prosecutor's offices, will turn into political struggle tools at the disposal of the political power entities, returning to be a repressive, corrupted and non-functional instrument.

Even if the thesis of the mandatory legal effects for Romania of CVM and of the consecutive reports issued under it were not accepted, the Decision 2006/928/EC, in conjunction with the *principle of sincere cooperation*, deriving from Art. 4 par. (3) of the Treaty on European Union, impose on Romania a series of specific obligations under the Cooperation and Verification Mechanism, the benchmarks implementing the very conditions established in the Accession Treaty, in accordance with the European Union values and principles established by Art. 2, 6 and 19 par.(1) of the Treaty on European Union and by Art. 47 of the Charter, therefore, including Romania's obligation to take into account the recommendations made by the Commission in the CVM reports when adopting legislative or administrative measures in the fields covered by the benchmarks established in the annex of the CVM Decision, a corollary of the principle of the rule of law (Art. 2 TFEU) and of the principle of independence of justice (Art. 19 TEU).

At the same time, all these factual circumstances raise the issue of predictability and legal certainty of EU law, the Romanian state accepting the CVM and its reports and conforming to them for more than 10 years. The effects of EU law must be clear and predictable,

the purpose of this requirement being to it ensures that the legal relations governed remain predictable. Therefore, it is the obligation of the Member States to provide a predictable legislative framework, and not to change the rules of the game, according to the individuals interests.

In such an extremely probable situation, the Romanian Constitutional Court could not ignore anymore the recommendations made by the European Commission under the CVM, according to the principle of sincere cooperation. In the case of specific obligations under the Cooperation and Verification Mechanism as well, in relation to the conditions established by the Accession Treaty, in accordance with the European Union values and principles [Art.2, 6 and 19 par.(1) of the Treaty on European Union and Art.47 of the Charter], their disregard when adopting legislative or administrative measures in the areas covered by the benchmarks established in the annex to the CVM Decision will result in violation of the national constitutional provisions.

> It is the obligation of the Member States to provide a predictable legislative framework.

La lutte elle-même vers les sommets suffit à remplir un cœur d'homme. Il faut imaginer Sisyphe heureux."
(**Albert Camus**)
So, we must imagine Sisyphus happy.

[1] See Romanian Judges` Forum Association – White Paper: Romanian Magistracy. The Promotion of Judges to the Top Positions of the Judiciary. In Search of Meritocracy, available at http://www.forumuljudecatorilor.ro/index.php/archives/3921 and Romanian Judges' Forum Association: Press release on the Regulation of the Judges Section of the SCM regarding the organization of the judges' contest for promotion, available at http://www.forumuljudecatorilor.ro/index.php/archives/3814 [last accessed on December 17th, 2019].

[2] "The Romanian Constitutional Court has backstabbed the Romanian President in his efforts to protect the independence of the chief anti-corruption prosecutor. On 30 May 2018, the Constitutional Court ordered the President to dismiss the chief anti-corruption prosecutor via presidential decree. Before, the President had refused the proposed dismissal by the Minister of Justice based on an Advisory Opinion of the Superior Council of Magistracy that stated that the reasons brought forward against the chief prosecutor were not substantiated enough to justify a dismissal." See Bianca Selejan Guțan, The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court, available at https://verfassungsblog.de/the-taming-of-the-court-when-politics-overcome-law-in-the-romanian-constitutional-court/ [last accessed on December 17th, 2019].

[3] See Dragoș Călin, Ten requests for a preliminary ruling filed by the Romanian courts for maintaining the rule of law, a common value of all the European Union Member States, available at http://www.forumuljudecatorilor.ro/index.php/archives/3896 [last accessed on December 17th, 2019].