

The priorities of the Romanian justice system yesterday and today

PRIORITIES OF JUSTICE



Justice is a public service and any reform of the judicial system must start from this principle. Discussions on judicial reform cannot be held behind closed doors with only representatives of the judicial system. As we requested every time that changes have been made in the field of justice, reform must be accompanied by serious consultations and debates that include diverse voices of magistrates who criticize the system, as well as non-governmental organizations that have been working on the issue for years. Otherwise, we risk returning to the harmful practice that allowed the adoption of changes to the justice laws whose effects terrify us today.

How did end up in the current crisis in the judicial system?

Some of the problems arose with the changes made to the justice laws in 2018. However, the justice laws adopted in 2022 made it possible to concentrate power in the hands of a few people in the judicial system by introducing non-competitive and non-transparent procedures regarding the careers of judges and prosecutors.

A brief history of the justice laws

The current justice laws were adopted by the Romanian Parliament at the end of 2022. Initially, their purpose was to fix the problems created by the 2018 changes promoted by Tudorel Toader, which had been heavily criticized by both society and the European Commission. But in reality, the 2022 justice laws, adopted through an emergency procedure that intentionally left very little room for calm and transparent debates about their impact

on Romanian society, actually created new problems. These have led to a concentration of power in the justice system and undermined its independence. Expert Forum documented the saga of the drafting and adoption of these laws through a process lacking in transparency and consultation¹, including by not requesting the opinion of the Venice Commission as the government had committed to doing in its governing program². The Minister of Justice at the time, Cătălin Predoiu, justified some of the problematic provisions as being the result of the wishes of the justice system, as expressed by the Superior Council of Magistracy (CSM), ignoring critical voices within the system. However, justice reform should not be treated as internal issues of the justice system, and its rules of organization and functioning do not only concern judges and prosecutors, but must ensure its proper functioning as a public service.

In this policy brief, we present the urgent issues in the justice system that need to be resolved as soon as possible in order to strengthen its independence and citizens' confidence in its ability to deliver justice. There are solutions, but they require political will to amend existing legislation.

Beyond these urgent issues, Expert Forum believes that it is also necessary to focus during this period on the major themes for medium and long-term reform of the justice system: the excessive length of judicial proceedings, the accessibility of the justice system for society at large and the use of the legal aid system, the burden on the courts of repetitive proceedings to correct flawed

administrative practices, and the rethinking of the structure of the courts and public prosecutor's offices, especially the smaller ones, to make more efficient use of human resources.

What are the urgent issues

1. The power to investigate judicial corruption must be returned to the DNA

Any serious reform effort must begin with the return of the power to investigate judicial corruption to the National Anticorruption Directorate (DNA) as a first step toward reducing the impunity that magistrates currently enjoy.

To explain how the fight against judicial corruption was blocked after 2018, a **brief history** is necessary. The power to investigate judicial corruption was taken away from the DNA in 2018 with the creation of the Special Section for Investigating Crimes in the Justice System (SIIJ)³ on the initiative of the then Minister of Justice, Tudorel Toader. From the outset, the SIIJ was a prosecution structure that did not have the necessary guarantees and resources to truly investigate corruption crimes. Subsequently, amid criticism from civil society and European partners, the new government in 2019 undertook to abolish SIIJ. However, in 2022, instead of returning the power to investigate corruption crimes to the DNA, the prosecutor's office with expertise in this area, the Minister of Justice at that time, Cătălin Predoiu, proposed a bill

¹ Expert Forum, New justice laws: reform or a return to pre-accession bad habits?, September 2022 (<https://expertforum.ro/noile-legi-ale-justitiei-reforma-sau-intoarcerea-la-metehne-din-perioada-de-preaderare/>)

² See the 2021-2024 Government Program, Chapter on the Ministry of Justice, Justice and the Rule of Law, Vision and

Principles

(https://gov.ro/fisiere/programe_fisiere/Program_de_Guvernare_2021%E2%80%942024.pdf)

³ Law No. 207/2018 amending and supplementing Law No. 304/2004 on judicial organization (<https://legislatie.just.ro/Public/DetaliuDocument/203052>)

that created a new structure just as ineffective as the SIIJ, by appointing prosecutors from the PHCCJ and from prosecutor's offices attached to the courts of appeal to investigate crimes committed by magistrates.

Law 49/2022, which abolished the SIIJ and created this new structure, provides even fewer guarantees of independence than the SIIJ⁴. Whereas in the SIIJ prosecutors were appointed following a competition, in the new structure, the plenary of the SCM appoints these prosecutors without any clear selection criteria. The discretionary power of the SCM regarding the appointment of these prosecutors is confirmed in practice. Looking at the SCM's decisions in recent years regarding the appointment of these prosecutors, it is unclear what criteria are used to accept or reject candidates. In 2024, although the General Prosecutor's Office complained that it was having difficulties filling these positions, the SCM rejected three of the Prosecutor General's proposals⁵.

What we know for sure, however, is that since the establishment of the SIIJ and the structure that succeeded it, judicial corruption has not been investigated, which has led to impunity in the judicial system. By comparison, between 2002 and 2018, the DNA prosecuted 160 cases of judicial corruption⁶. The structure created in

2022 is still primarily concerned with closing the cases inherited from SIIJ⁷.

At the time, Expert Forum criticized the solution proposed by the government⁸, as did the professional associations of magistrates. The solution was also criticized by the Venice Commission⁹, which considered the decision not to return this competence to the DNA regrettable. Minister Cătălin Predoiu explained in 2022 that the solution of returning the competence to investigate judicial corruption to the DNA is not agreed upon by the CSM, and the proposed bill is a compromise solution¹⁰. In other words, the decision was made solely on the basis of the interests of a few representatives of the justice system, to the detriment of the position expressed by the magistrates' associations¹¹ and the Venice Commission. In 2024, the same Cătălin Predoiu, now in the position of Minister of the Interior, stated that it was necessary for the Government and the SCM to find a solution for investigating magistrates and that the solution to abolish the SIIJ was temporary¹², without taking responsibility for creating this inefficient structure.

⁴ Expert Forum, Draft law adopted by the Government: fewer guarantees than in the case of the Special Section, February 2022 (<https://expertforum.ro/proiectul-de-lege-adoptat-de-guvern-mai-putine-garantii-decat-in-cazul-sectiei-speciale/>)

⁵ Public Ministry, Activity report on activities in 2024, (<https://www.mpublic.ro/ro/content/raport-de-activitate>)

⁶ <https://hotnews.ro/crin-bologa-de-cnd-dna-a-pierdut-competenta-de-a-investiga-magistrati-niciunul-nu-a-mai-fost-acuzat-de-coruptie-105145>

⁷ Public Ministry, Activity Report on activities in 2024, (<https://www.mpublic.ro/ro/content/raport-de-activitate>)

⁸ Expert Forum, Draft law adopted by the Government: fewer guarantees than in the case of the Special Section, February 2022 (<https://expertforum.ro/proiectul-de-lege-adoptat-de-guvern-mai-putine-garantii-decat-in-cazul-sectiei-speciale/>)

⁹ Romania - Opinion on the draft law on the dismantling of the section for investigating criminal offenses within the judiciary, adopted by the Venice Commission at its 130th Plenary Session (Venice and online, March 18-19, 2022)

<https://www.coe.int/en/web/venice-commission/-/cdl-ad-2022-003-e>

¹⁰ <https://romania.europalibera.org/a/saga-sec%C8%9Biei-speciale-contin%C4%83-sub-alt%C4%83-denumire-desfiin%C8%9Bat%C4%83-%C8%99i-re%C3%AEnfiin%C8%9Bat%C4%83/31664993.html>

¹¹ <https://www.forumuljudecatorilor.ro/index.php/archives/6497>

¹² <https://www.presshub.ro/catalin-predoiu-spune-ca-e-cazul-ca-guvernul-si-csm-sa-gaseasca-o-solutie-pentru-anchetarea-magistratilor-310610/>

2. Amending the laws on justice to correct provisions which formalized mechanisms for capturing power in the judicial system

2.1. Review all promotion procedures for both executive and management positions

Return to a competitive procedure for promotion to the HCCJ and reintroduction of periodic evaluations for HCCJ judges

The (High Court of Cassation and Justice) HCCJ is Romania's supreme court, which has jurisdiction to hear corruption cases involving powerful figures such as deputies, senators, ministers, etc. **It is therefore important that the promotion procedure to this court be based on transparent and objective performance criteria.** However, unlike other promotion procedures to a higher court, the promotion of judges to the HCCJ no longer includes a written test since 2018¹³. The competition for promotion to the HCCJ consists of an interview before the Judges' Section of the SCM, as well as an evaluation of the candidate's work. The current mechanism gives discretionary power to the Judges' Section of the SCM both at the interview stage and at the stage of analyzing the judges' previous activity.

Thus, in recent years, this promotion procedure for the HCCJ has meant that only judges loyal to the current majority in the SCM and the HCCJ leadership were promoted to the HCCJ.

The need for a competitive and transparent procedure has been emphasized by the Venice Commission, but also by the European Commission on several occasions in its evaluations under the Cooperation and Verification Mechanism (CVM):

In particular, in 2011, the government proposed legislative changes that brought substantial improvements to the selection procedure for High Court judges. (...) The new law - Law 300/2011 - introduced a three-stage selection procedure involving an assessment of the candidate's documentation, including the court decisions prepared by them during their career, an interview, and a written exam. In the first two stages, a candidate must obtain a score of at least 80 points in order to be eligible to take the written exam. The evaluation of the candidate's documentation is worth a maximum of 75 points, and the interview is worth a maximum of 25 points. In addition to creating the basis for a more objective and thorough assessment of candidates, the new procedure also brings greater transparency, as applications are subject to public scrutiny." (*European Commission, CVM, Progress Report on Romania 2012*)

"The principle that all decisions regarding the appointment and professional career of judges should be based on merit, through the application of objective criteria within the law, is indisputable."

(*Venice Commission, Report on the independence of the judiciary. Part I: independence of judges*)

¹³ Law 242/2018 amending and supplementing Law No. 303/2004 on the status of judges and prosecutors. Law 303/2004 was

repealed by the adoption of Law No. 303/2022 on the status of judges and prosecutors.

Expert Forum explained in detail the problems related to the promotion procedure at the HCCJ at the time of the adoption of the justice laws in 2022:

A procedure is introduced to **verify the integrity** of eligible candidates by the Judicial Inspection, which draws up a report that is then included in the assessment made by the evaluation committee based on the interview¹⁴. The Judicial Inspection is required to communicate this report to the examination organizing committee 10 days before the interview and to the candidate without specifying a deadline. Given that this report is part of the candidate's evaluation, its content is very important and can significantly influence the evaluation committee's decision. Therefore, it is necessary to specify the elements taken into account by the Judicial Inspection in assessing the candidate's integrity. Is it possible to challenge the assessment report? The procedure as regulated in the draft laws is **unclear and unpredictable**. Under these circumstances, there is a risk that the procedure will not be an objective assessment tool, but rather a **highly subjective one that could be used precisely to eliminate certain candidates**. From the perspective of the Constitutional Court's case law, these flaws could lead to these provisions being declared **unconstitutional**.

In addition to **eliminating the competitive procedure for HCCJ judges**, we note that the SCM's opinion on the draft laws proposes the complete elimination of periodic evaluations on the grounds that they are inefficient and time-consuming. As the justice system is a public service, an assessment of its efficiency is necessary. The evaluation of magistrates should be a predictable tool, applicable to all magistrates without exception. The current evaluation system is indeed open to criticism in terms of its efficiency and relevance. However, eliminating periodic evaluations and transforming evaluations into a tool at the disposal of the president of the court or the prosecutor general does not solve these shortcomings, but risks turning them into instruments of pressure.

(Expert Forum, New justice laws: reform or a return to pre-accession bad habits?, September 2022)

Return to competitive procedures for filling ALL leadership positions in courts and prosecution offices.

The competitive procedure for leadership positions was also changed by the justice laws adopted in 2022. Currently, only the president of the court/ chief prosecutor of the prosecution office is selected competitively, and the magistrates who occupy the other leadership positions (i.e., vice presidents and heads of panels) are proposed by the head of the institution and appointed by the relevant section of the SCM. As Expert Forum warned in 2022, this mechanism allowed all decision-making power to be concentrated in the hands of a single person: the head

of the court or prosecution office. Between 2005 and 2022, leadership positions in courts and prosecution offices were filled through competitive procedures, and the changes proposed in 2022 have returned the judicial system to standards lower than those in Romania's pre-accession period.

The impact of these promotion procedures is then felt in all decisions taken within the court by the management boards¹⁵. The court's management board has broad powers, such as the establishment and composition of court panel¹⁶. The non-competitive procedure for appointing heads of courts and prosecution offices allows the majority of the management board to be made up of people loyal to

¹⁴ Art. 121 of Law 303/2022 on the status of judges and prosecutors.

¹⁵ „Colegii de conducere” in Romanian.

¹⁶ Articles 54, 57, and 58 of Law No. 304/2022 on the organization of the judiciary

the head of the court¹⁷. While until 2022 the composition of the management board was representative of the judges in that court, today it **represents the interests of the head of the court**, without the other judges having a say – there is no system of *checks and balances*.

The magistrates who will occupy these positions will be chosen by the head of the institution and appointed by the relevant section of the SCM. The draft laws do not contain provisions on the criteria to be taken into account by court presidents or prosecutors general when choosing their subordinates. Under these circumstances, there is a real risk of over-concentrating all decision-making power in the hands of a single person: the head of the court or the prosecutor's office. **Since 2005, leadership positions in courts and prosecutor's offices have been filled through competitive procedures, and the changes proposed today would return the judicial system to standards lower than those in the pre-accession period**

(Expert Forum, New justice laws: reform or a return to pre-accession practices?, September 2022).

Revision of procedures for promotion for all other positions

There are two types of promotion procedures in the judiciary: **promotion on-the-spot**, which consists of a competition, and **effective promotion**, which consists of an assessment of the activity and conduct of magistrates over the last three years of service.

The practice of promotion on-the-spot in the judicial system means that judges and prosecutors who pass the competition remain and work at the lower court or prosecution office, but receive a salary commensurate with the professional grade obtained at the

higher court or prosecution office. For example, a judge who is promoted from a first instance court to a tribunal will be paid a tribunal salary, but will continue to work at the first instance court where they are currently employed. **The practice of promotion on-the-spot** has created a real staffing crisis in the judicial system because magistrates are less motivated to effectively promote and work for a higher court or prosecution office as long as they are paid a salary at that level by promoting in situ. The huge wave of retirements from the system, together with the practice of promotion on-the-spot, has led to a bottleneck in human resources in the system, particularly for the Public Ministry which is facing difficulties in filling positions in higher public prosecution offices. Currently, the on-the-spot promotion procedure has been temporarily frozen by the justice laws until the end of 2025, with the risk that this practice will be reinstated in 2026¹⁸. Given that many judges and prosecutors currently hold higher ranks than the courts and prosecution offices where they work, we believe that this provision should either be eliminated or its suspension extended.

Effective promotion is also problematic because it does not involve a competitive procedure, but consists only of an evaluation of the judge's/prosecutor's activity and an interview with the relevant section of the SCM. In other words, effective promotion is currently a procedure that gives the SCM a great deal of discretionary power. A competitive, transparent, and merit-based procedure should be introduced for effective promotion, with the elimination or suspension of on-the-spot promotion.

¹⁷ The governing bodies of the courts are composed of the president of the court, the vice-presidents, the heads of sections, and two elected judges.

¹⁸ Art. 204 para. (5) of Law 303/2022 on the status of judges and prosecutors.

3. The impact of retirement decisions obtained by magistrates upon reaching 25 years of service, without payment

Given that the laws on justice did not include a condition regarding the retirement age for magistrates, the practice in the judicial system has been that, upon reaching the conditions of seniority in office, prosecutors and judges obtain retirement decisions securing the value of their pensions without actually retiring. At present, there are no clear statistics on the number of judges and prosecutors who have these decisions and have not put them into effect. For example, at present, **approximately 80% of the judges of the HCCJ have retirement decisions that have not been put into effect**¹⁹. The decision to request the implementation of the retirement decision belongs exclusively to the judge and prosecutor in question, subject to a deadline for informing the management of the institution. Given the tense relations between the judiciary, the executive, and the legislature at this time, it is not out of the question that we could find ourselves overnight in a situation where a significant number of judges and prosecutors with more than 25 years of service request the enforcement of retirement decisions already obtained, under the more favorable calculation conditions provided for by the previous legislation. This is a huge vulnerability for Romania, not just for the judiciary. It is therefore urgent to find out how many magistrates have retirement decisions which have not been paid and in which courts and prosecutions offices they work. It is then important to find a legislative solution that

introduces predictability in this area and equal treatment between magistrates and other professional categories.

4. Review of disciplinary practice

The Judicial Inspection's practice of initiating a cascade of disciplinary proceedings against judges and prosecutors is serious. To outside observers, it appears that the aim is to find a judge who will decide, in at least one of these cases, to exclude the judge from the judiciary.

Correcting the Judicial Inspection's abusive practice of using disciplinary actions against magistrates who are critical of the justice system has been a constant demand made by all relevant actors over the last decade: magistrates' professional associations, civil society, the European Commission, and the Venice Commission. Although this was one of the priorities assumed by the government with the adoption of the 2022 justice laws, in reality this has not happened. The justice laws have made the Judicial Inspection even more dependent on the SCM in terms of its budget and the procedure for appointing its leadership and judicial inspectors.

Moreover, there are magistrates in the system who have been complaining for years that those who dare to criticize decisions taken regarding the justice system are then targeted by disciplinary actions.

The practice of the Superior Council of Magistracy of sanctioning magistrates when they speak out about irregularities in the system is worrying. The standards regarding freedom of expression for magistrates are clear,

and it is a mistake to try to silence critical voices. In fact, in 2024, the ECHR ruled that the sanctioning of Judge Cristi Danileț by the HCCJ following a disciplinary investigation by the Judicial Inspection constituted a violation of freedom of expression²⁰.

Expert Forum believes that measures are needed to ensure that disciplinary actions are not used to silence critical voices within the system and to ensure compliance with European standards on freedom of expression.

5. The need for an independent audit of the random case allocation mechanism

We have magistrates in the system who spoke out about problems in the random allocation of cases or in the changing of trial panels after cases have been allocated. These practices undermine public confidence in a judicial system that is already facing credibility issues at this time.

Expert Forum believes that an independent audit of the random case allocation system and its subsequent management is needed to clarify where and what vulnerabilities exist in the system. Only if we solve these problems and introduce guarantees that the mechanism can no longer be manipulated will there be a chance to begin rebuilding trust in the judicial system.

²⁰ <https://hotnews.ro/fostul-judecator-cristi-danilet-a-cstigat-la-cedo-procesul-mpotriva-romniei-csm-l-sanctionase-pe-danilet-pentru-o-postare-pe-facebook-16124>

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