Translation from Romanian language

Amendments to the laws of justice (Laws 303/2004, 304/2004 and 317/2004)

1. Preamble

The attached draft laws aim to amend the three laws governing the justice system in Romania: Law 303/2004 on the status of judges and prosecutors, Law 304/2004 on judicial organization and Law 317/2004 on the Superior Council of Magistracy.

Adopted in 2004, the three laws have been extensively amended by Law 247/2005 on Reform in Property and Justice. The respective law was adopted without any public or parliamentary debate, by engaging the Government's responsibility.

The amendments that the Government of 2005 wanted to bring to Laws 303/2004 and 317/2004 have been negatively endorsed by the Superior Council of Magistracy, however the Government has assumed and sustained them in Parliament.

After the project was adopted by the Parliament and before being promulgated by the President, the draft was appealed to the Constitutional Court both by the opposition and by the president of the High Court of Cassation and Justice at the time, who claimed the violation of independence of justice through the changes made. The claims were partially admitted, and the law was returned to Parliament in order to be reconciled with the Constitutional Court's decision[1].

Following Law 247/2005, the three laws of justice were made minor amendments by several emergency ordinances.

The only significant changes after 2005 to these laws were the regulation of liability discipline and the Judicial Inspection, which were adopted by Law 24/2012. And this law was subject to the Constitutional Court's verification before promulgation, at the request of the President of the High Court of Cassation and Justice[2].

The three laws have proven their limits over time, being necessary to be adapted to new socio-legal realities and needs that are very different from those envisaged in 2004 at the time they were adopted.

Thus, for example, in the transition from communism to democracy an important role was played by the reform of the judiciary.

In the judges and prosecutors' career, this transition was translated into sustaining a system based on very young judges, who were allowed to gain an extraordinary fast in their careers in a way unprecedented in other European states (23-24 years old the young man gets a judge, then reaches the court of appeals until 30-35 years of age, where he pronounced final decisions, and promotion to the High Court of Cassation and Justice was made at 35-40 years.) If this was justified at that time by the

[1] http://legislatie.just.ro/Public/DetaliiDocument/63039

[2] https://www.legalis.ro/wp-content/uploads/2012/02/CCR-DECIZIA-2_2012_asupra-obiectiei-de-neconstitutionalitate-a-dispozitiilor-Legii-pentru-modificarea-si-completarea-Legii-nr.-303_2004-privind-statutul-judecatorilor-si-procurorilor.pdf

transition from communism to democracy, it is now necessary to re-establish the system on the basis of the life and professional experience of the magistrates, as well as to familiarize them with all aspects related to other legal professions.

Also, the form of the laws of justice in force allowed too much interference of judges' career with that of prosecutors, their functions overlapping very often in the collective mind. However, this fact posed problems not only at the image level, but also in a concrete way, leading to too much a judge's approach to prosecutors and vice versa, which became worrying when reflected in how the judges resolved prosecutors' requests. A recent study revealed that, between 2010-2015, the Romanian courts admitted the prosecutors' requests on interceptions in overwhelming proportion, with six courts of appeal admitting them in a proportion of 100%.[3]

Another issue was the regulation of the material liability of judges and prosecutors for judicial errors. In recent years, Romania has been leading the European Union with the worst case of ECHR convictions for violating Article 6 of the Convention, and despite this, no magistrate has so far been materially or disciplined for grave violations of fundamental rights which generated legal errors. This has revealed the shortcomings of current legislation.

The lack of effective liability of judges and prosecutors has made, according to several opinion polls, over 80% of Romanians wanting a magistrate's responsibility.

Last but not least, extremely important provisions of the law, such as the procedure of revoking members of the Superior Council of Magistracy or disciplinary procedures, were declared unconstitutional by the Constitutional Court, imposing the urgent intervention of the legislator.

All these changes, along with others, important for the modernization of the legal system in Romania, will be briefly presented below and can be studied in detail by reading their English version.

We make it clear that since 2004, since the three laws of justice have been adopted, it is now the first time that the amendments to these laws are made through the transparent parliamentary procedure, through public debates and involving all stakeholders.

The final form of the amendments to the laws of justice, which resulted from the debates in the Parliament, represents in large proportion proposals for amendments of the Superior Council of Magistracy and of the professional associations.

2. Law 303/2004 on the status of judges and prosecutors

The main changes target the following points:

1. Clarifying the prosecutor's notion of independence and bringing it into line with the provisions of the Constitution and the recommendations of the Venice Commission.

[3] http://raduchirita.ro/interceptari.pdf

The text in force provided that "prosecutors are independent, under the law." Or, according to the Constitution, "prosecutors operate in accordance with the principles of legality, impartiality and hierarchical control, under the authority of the Minister of Justice." As a result, there is at least an apparent contradiction between the legal and constitutional text and ambiguity at the statute of prosecutors.

Through the proposed amendments, the notion of prosecutors' independence was defined more clearly, meaning that: "(1[1]) The prosecutors are independent in ordering the solutions, under the conditions stipulated by the Law no.304 / 2004, regarding the judicial organization, republished, with the ulterior amendments and additions."

This distinction is also important in the light of the recommendations of the Venice Commission, which in the document "Report on European Standards for the Independence of the Judiciary - Criminal Investigation Bodies" highlighted that "[...] *there are fundamental differences regarding the way in which the concept of independence or autonomy applicable to judges is perceived as that applicable to prosecutors' offices. (...) the independence or autonomy of the prosecutor's offices is not as categorical as that of the courts. Even where the prosecutor's office is an independent institution, there may be hierarchical control over the decisions and activities of prosecutors, other than the general prosecutor.*"[4]

2. For the first time in Romania's post-December history, lustration in justice is regulated: Article 6 paragraph 2 ^ 2.

3. Stricter and more efficient regulation of intelligence services in their relationship with judges and prosecutors; establishing the public character of all information related to the administration of justice.

The law in force provides for the prohibition of judges and prosecutors to be officers under cover, collaborators or informants of the intelligence services, the compliance to verify with this prohibition belonging to the Supreme Council of National Defence. However, this body has neither the legal competences nor the tools or administrative capacity necessary to effectively make such control.

Also, recent years have revealed that one of the greatest dangers to the independence of justice, the rule of law and the guarantee of fundamental rights is precisely the interference of information services in justice and the lack of any effective control leverage in this respect.

Moreover, the Constitutional Court found in 2016 the unconstitutionality of ambiguous provisions in the Criminal Procedure Code, through which the intelligence services were involved in the criminal investigation.

The last two years have revealed the existence of secret decisions of the SCND aimed at justice, which are incompatible with the rule of law. Moreover, there were concrete data on the conclusion of secret protocols between the Prosecutor's Office and the Romanian Intelligence Service, which involved legal proceedings, as well as the creation of mixed criminal investigation teams, consisting of prosecutors and intelligence officers.

[4] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)040-e

Amendments to Art. 7 of Law 303/2004 aims precisely to remedy these serious deficiencies of the rule of law, as follows:

- The control of the interdiction of judges and prosecutors to be covered officers will also be made by the specialized committees in Parliament, according to their attributions. Intelligence services will be required to provide all necessary information and data in this respect.

- It is incriminated the act that the intelligence workers recruit magistrates by imposing harsh punishments in order to discourage such actions.

- It is expressly provided that judicial organization, as well as institutional cooperation between courts and prosecutors' offices, on the one hand, and any other public authority, on the other hand, constitute information of public interest.

4. Recruiting and promoting judges and prosecutors

At present, the period of training of a judge or prosecutor is 2 years at the National Institute of Magistracy (NIM) and one year of internship. Under the new regulations, the NIM training period will be 4 years and the 2 year internship.

The way of recruiting and promoting judges and prosecutors in the original philosophy of Law 303/2004 was based on a highly dynamic system, with very young judges and prosecutors, with almost exclusively emphasis on their good professional training.

Necessary at that time, the system has proved its limits in time, being necessary to adapt to the new realities and the standards imposed at the level of the European Union, where a necessary emphasis is placed also on components related to professional maturity, complex knowledge about the justice system, balance, integration in society, etc.

The new changes therefore aim at an initial preparation of the more complex and longer-term future judges and prosecutors, under the aegis of the National Institute of Magistracy, for a period of 4 years, followed by 2 years of internship.

In the initial period, in the first year the justice auditors will follow courses at the NIM as they do today. The period of practice, however, will be extended from one year to three years, during which time they will be trained in courts and prosecutors' offices, law offices, prisons, different institutions or state authorities related to justice.

During the two years of internship, they will also attend the trial sessions of the final judges, and will be guided by them to draft decisions, in parallel with the management of some of their own meetings, of the trainees' competence. In this way, a much more complex training of the future magistrates is provided to compensate for the complete lack of their professional experience.

Also, the promotion system has been modified, with the necessary seniority for promotion to courts and higher prosecutor's offices, and the theoretical examinations have been doubled by an assessment of their professional activity as a grading criterion.

5. Exclusion of the political factor in the appointment of permanent judges and prosecutors

The law in force allowed the President of Romania to refuse the appointment of judges and prosecutors in office, which was equivalent to an interference in the selection process, on the basis of criteria that exceeded those strictly provided by law, including on the basis of information received from the intelligence services.

According to European standards, the role of the president, where provided by the law, is a solemn one, and does not necessarily imply a distinct role in recruiting magistrates, this being the first and indispensable condition of their independence.

6. The president may only refuse once proposals for appointment at the head of the prosecutor's offices

According to the adopted form, the President of Romania may refuse, **once** motivated, the appointment to leading positions in the prosecutor's offices, informing the public about the reasons for the refusal.

This limitation is a reconciliation of the law with the Constitutional Court's dispensations to the attributions of the president appointing in various positions, in order to avoid his arbitrariness and institutional blockages.

Thus, by decision no. 98/2008, the Constitutional Court decided that *"in order to prevent the occurrence of an institutional blockage in the law-making process, the constitutive legislator provided for art. 77 para. (2) of the Basic Law the right of the President to ask Parliament to review a law before the promulgation,* ***once. The Court considers that this solution has constitutional value in principle in the settlement of legal disputes between two or more public authorities which have a concomitant role in the adoption of a measure provided by the Basic Law and that this principle is of general application in similar cases."***

As such, in any situation in which the law allows the President to refuse the exercise of an attribution, such refusal may operate only once, irrespective of the particular situation to which it refers, the principle having general application.

7. Material liability of judges and prosecutors

According to the Constitution, "The State is liable patrimonial for damages caused by judicial errors. State liability is established under the law and does not remove the liability of magistrates who have performed their duties in bad faith or serious negligence. "

This constitutional provision is in line with European recommendations on the independence of the judiciary, as well as the Commission's Opinions in Venice, which show that when judicial errors are caused by bad faith or serious negligence, judges and prosecutors must answer, including pecuniary, for those.

The magistrates' liability does not contradict their independence, but rather complements it.

Despite these principles, the current text governing the magistrates' material liability is effectively inapplicable. Despite numerous condemnations of the Romanian state at the ECHR, its regress against guilty magistrates was effectively blocked by how to regulate liability in the current law.

This has also led to a growing popular dissatisfaction and a worrying diminution in citizens' trust in the act of justice and in magistrates, seen as a caste that do not account to anyone for their deeds, even when acting in bad faith or serious negligence .

The modification of this legal text has been the subject of numerous public debates over the last few years, always hitting the constant and categorical opposition of the judiciary system.

Under the new law, material liability is regulated in an effective manner, allowing its effective enforcement, but with respect for its independence, provided that no actors outside the judiciary are involved in the proceedings, that the conditions for drawing the liability of judges and prosecutors being determined exclusively by the courts of law.

It has also set up the possibility of professional liability of magistrates in order to give them financial security as a guarantee of their independence in decision-making process, eliminating the pressure given by the fear of financially answering for any errors.

8. Other changes regarding the career of judges and prosecutors

The law draft includes substantive changes related to the career of judges and prosecutors, adopted at the proposal of the Superior Council of Magistracy.

These proposals are the result of a vast consultation process with the judiciary over the past few years, and relate to changes in the suspension of their functions, periodic psychological checks, psychiatric expertise, regulation of professional evaluation in an objective manner and other changes that respond to the needs felt by the judiciary system.

3. Law 304/2004 on judicial organization

1. Control of the superior hierarchical prosecutor on the reliability of the documents filed by the prosecutor.

According to the modifications made by the project, *"The solutions adopted by the prosecutor can be invalidated with reasons by the hierarchically superior prosecutor, when they are considered illegal or unreliable"*, the amendment referring to the addition of the reason for unreliability to that of illegality.

Highly criticized by a part of the press, the Chief Prosecutor of the National Anticorruption Directorate and the Prosecutor General, this amendment only makes the provisions of the law on judicial organization compatible with those of the Criminal Procedure Code, which explicitly provides for the indictment to be endorsed by the hierarchically superior prosecutor of both legality and reliability.

The amendment was made inclusive at the proposal of the SCM.

Far from prejudicing the prosecutor's operational independence, this measure is nothing more than a manifestation of the hierarchical control principle absolutely necessary for the proper conduct of criminal prosecution activity and the avoidance of potential abuse.

For example, a prosecutor may decide to sue a person, as long as there is no evidence to support the accusation. Endorsement of the indictment for reliability by the hierarchical prosecutor avoids these situations where a future acquittal is predictable but will have irreparable consequences for the defendant. Similarly, the Chief Prosecutor may invalidate a proposal or not to commence criminal prosecution when, in spite of obvious evidence, the case prosecutor decides to close the file.

Potential interference by senior hierarchical prosecutors in conducting criminal prosecution or adopting the solution may be, according to art. 64 of the law, challenged at the Prosecutor's Office of the SCM, thus ensuring real and effective guarantees of the full independence of the prosecutors in the investigation of the cases and of the solutions ordered.

2. Increasing seniority to become a National Anticorruption Directorate prosecutor and introducing the contest as a selection mode

The National Anticorruption Directorate was established as a directorate within the Prosecutor's Office attached to the High Court of Cassation and Justice, in order to meet constitutional requirements regarding the competence of criminal prosecution in the case of Deputies and Senators (Article 72 of the Constitution). As such, once selected to be a NAD prosecutor, he/she will operate within the Prosecutor's Office near the HCCJ, although he/she does not meet the legal conditions of seniority or professional status to operate within it.

The derogatory rules on the selection of NAD prosecutors allowed the prosecutors with a minimum seniority in the magistracy (6 years, including the initial training period and internship) to operate under this structure as a result of a completely non-transparent interview held in front of a committees appointed by the NAD Chief Prosecutor. This has led, over time, to too much NAD addiction of the NAD prosecutors by the head of the directorate. Moreover, the high number of releases, especially in recent years, reveals the need to increase the demand for selection of NAD prosecutors.

As a consequence, the project stipulates the increase of the seniority required for the admission to the position of NAD prosecutors at 8 years, as well as the contest held in front of the MSC Prosecutor's Section as a selection procedure, a contest which will consist of an interview and an evaluation of the previous activity of these prosecutors.

3. Establishment of the Section for the Investigation of Criminal Offenses in justice

In 2014 by the order of the Chief Prosecutor of the NAD, the "Anti-Corruption Justice Service" was created within this department, which has the exclusive competence to investigate the judges and prosecutors.

The appointment of the chief of this service was done by the NAD Chief Prosecutor, as well as the distribution of the prosecutors within it, without knowing publicly what prosecutors are operating within them, on what criteria they were selected, what their seniority and professional status were.

Moreover, the activity of the last year of this service, which later became a section, revealed true confrontations of interests between NAD prosecutors and judges who were investigating NAD files, as well as the pressures on which they were exposed.

If in 2014 the NAD report included in Appendix 3 an analysis of the acquittal decisions that were all defined as "illegal" or "non-reliable", while things got worse, going to the prosecution by NAD prosecutors of judges for solutions pronounced.

There were clear, publicly disclosed cases where judges who were in the process of having important NAD files were summoned to the NAD for hearings as long as the files were pending or intercepted during the trials. Also, in one case, the HCCJ established that NAD prosecutors violated the secret of deliberation, seriously infringing their independence.

This led to the creation of a new section within the HCCJ as a means of protecting the independence of judges and prosecutors, ensuring all the guarantees of independence and professionalism of the prosecutors who will work within it: the selection is made by the Plenum of the Council without any political interference, prosecutors are selected through a rigorous contest, which requires as a condition of participation an experience of 18 years and professional level of minimum court of appeal, presentation of an annual report in front of the SCM Plenum referring to the activity of the department. Also, this section will only carry out the criminal prosecution, in front of the court, other prosecutors following to sustain the accusations, precisely to ensure their full objectivity.

4. The draft law also includes other changes regarding the composition of the judge panels, the assignment of judges on the sections, etc.

These changes were proposed by the Superior Council of Magistracy, following the necessities of the consultations with the magistrates' body.

4. Law 317/2004 on the Superior Council of Magistracy

1. Separating judges 'and prosecutors' carriers

On 29 May 2017, judges from all courts in the country, through their presidents, signed a resolution requesting that the legislative power, as well as the other decision-making authorities, promptly set aside all steps in to lead to the recognition and assurance of the necessary guarantees for an independent justice.

In the same resolution, it was requested to strengthen the status of **judges by immediately separating the powers of the Superior Council of Magistrates regarding the career of judges and prosecutors**, as well as on the organization and functioning of the courts and prosecutors' offices in the sense that they belong separately to the two sections of the Council, respectively the Section for Judges in respect of judges and courts and the Prosecutor's Section regarding the prosecutors and prosecutors' offices.

Recognition of this guarantee would lead to a strengthening of the independence of the judges, the only ones who make justice, and this is not entirely possible as long as the judges' career is decided through mechanisms other than those of the judiciary power.[5]

[5] https://www.juridice.ro/513577/rezolutia-judecatorilor-de-la-toate-tribunalele-din-tara-constanta-29-mai-2017.html

This resolution was immediately supported on 30 May 2017 by the courts of appeal and subsequently by the professional associations.

The amendments to Law 317/2017 are in this respect, strictly delimiting the competencies of the judges section and that of prosecutors for the career of the two professions.

In fact, this standard also derives from the Venice Commission remarks, in which it draws attention explicitly: *"66. (...) Where the councils of judges and prosecutors establish a single body, steps must be taken to ensure that judges and prosecutors vote only in the section to which they belong in respect of appointments and disciplinary proceedings. This is because prosecutors - due to the specificity of their current activities - may have a different attitude to judges as far as it concerns judicial independence. "*

2. Procedure for revoking members of the SCM and transparency of its activity

By decision no. 196/2013 of the Constitutional Court were declared unconstitutional the provisions of Law no. 317/2004 establishing the procedure for the revocation of SCM members at the initiative of the judges or prosecutors who elected them.

Although four years have passed since then, the law was not in line with the RCC's decision, so there is currently no mechanism to regulate CSM members' responsibility, despite repeated requests from judges and prosecutors to do so.

The draft law regulates a smooth and effective procedure to withdraw the trust of SCM members, but which ensures the guarantees required by the RCC regarding the observance of the right of defence of the member concerned to be revoked and the institutional stability of the Council.

One element of novelty is the regulation of SCM members' interpellation, a procedure that ensures the transparency and responsibility of SCM members, absolutely necessary for its proper functioning.

New rules have also been introduced regarding the publicity of plenary sessions and sections, as well as the publication of the agenda and of the Council's decisions, to guarantee the same desideratum, the transparency of the work of the Council and its members.

3. Disciplinary Procedure and Judicial Inspection

Under the regulations on disciplinary action, a series of changes were made to bring the law into line with the decisions of the Constitutional Court.

The Minister of Justice was removed as the holder of the disciplinary action, thus abandoning a change brought by the 2012 law in order to eliminate any potential political influence in this procedure.

The Judicial Inspection was strengthened, being maintained as a legal personality structure within the Superior Council of Magistracy. The appointment of the chief inspector is done through a contest organized by the Plenum of the Superior Council of Magistracy.

Inspectors are selected for a three-year term, which can only be renewed once, in order to avoid the situation permitted by the current law in which the judicial inspectors are magistrates who for more than 10 years have not performed effectively their duties judge or prosecutor.

5. Conclusion

All changes to the three laws of justice were made to provide answers to the current problems and needs of the judiciary system.

Most of the proposals come from the SCM or the professional associations of magistrates.

These changes to the laws of justice are the first to be carried out in a transparent parliamentary procedure with the involvement of all stakeholders.

At present, laws are checked for constitutionality at the Constitutional Court, as has been the case with previous laws, being used all the filters necessary to ensure the independence of the justice.

I, Dragomir Alina Gabriela, an English and French authorized translator and interpreter under Authorization no. 16561 dated 14.06.2006, issued by the Romanian Ministry of Justice, hereby certify the accuracy of the translation from Romanian into English, that the text submitted has been fully translated without any omissions, and that the contents and meaning of the document have not been misrepresented by translation.

SWORN TRANSLATOR,
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