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Bad Politics Prompts Bad Justice

The will to terminate the political subordination of the Romanian judiciary is not strong enough

During the recent months, a string of media scandals surrounding the issue of the (lack of) independence of the Romanian judiciary gathered public attention. Evaluations from the international community were also critical, with no exception[1]. As the judiciary reform process is however advancing, Constitutional modification projects, as well as a new law for the Functioning and Organization of the Judiciary are presently under drafting. This report, therefore, will look not only at problems of current practice and legal framework, which are responsible for the low credibility and ineffectiveness of the juridical process in Romania, but also at potential consequences of the on-going attempts to reform them. However, since the proposals for amending legislation and specially the Constitution are still fluid and change constantly, it is difficult to build an argument based on the current drafts. In this report, therefore, we will discuss principles rather than details and will refer only to essentials. Equally, this report tries to issue a forecast based on an assessment of political will to change the present situation.

Fig. 1. Trust in judiciary, %

	Not at all	Hardly	To some extent	A lot
Does justice serve public interest?	29	40	18.5	3.4

Source: CURS poll, July 2002

The public is skeptical, with more than two-thirds considering that the justice system does not serve the public interest in Romania (Fig. 1). Under these circumstances, the political will to change and the awareness of the main actors concerning the issues at stake are crucial.

[1] Documents consulted for this report were: 'Indicators of the Judiciary Reform in Romania', May 2002, American Bar Association, Legal and Judicial Systems in Romania, A World Bank Diagnostic Review, September 2001, Preocuparile Partidului Social Democrat cu privire la Revizuirea Constitutiei, Phare Horizontal Program 'Reinforcement of the Rule of Law' Republic of Romania, Recommendations, 1.5.02 version, 'Legal and Judicial Reform in Central Europe and the Former Soviet Union', by Mark. K. Dietrich, World Bank, 2000, and the Open Society Institute 2001 Report on the state of the judiciary in Romania. Some of these documents were consulted as drafts, and therefore they are not quoted in the text. The authors wish to express their gratitude to all these organizations for their support. The content of the present article is the sole responsibility of its authors and does not involve in any way the organizations quoted above.

However, a report from the EU assistance program PHARE "Reinforcement of the Rule of Law" points explicitly to the absence of will to reform the judiciary: "Regarding the overall situation concerning the implementation of Rule of law standards in Romania it was found that important deficiencies in the existing legislation threaten the judiciary as an independent institution. Even more important than this, however, is the fact that the different actors in the field are perceived not always to be aware of all the implications of the concept of the Rule of Law. One of the most important of these being the absence of infringement on individual cases and control over the substance of the work of judges by the executives."

The overall attitude of the Parliament Committees and of senior figures in the judiciary is indeed close to denial in many instances, which jeopardizes even the attempt to a thorough analysis. In a focus group of the functioning of judiciary[2], a Supreme Court Judge who plays an important role in the reform designs appreciated that problems are mostly of logistics and that "Negative evaluations of the Romanian Courts come only from people who lose trials." A secretary of state in the Ministry of Interior stated on the same occasion that after attending a meeting of GRECO (the Council of Europe anti-corruption initiative), his conclusion was that "Romania has no special problems compared to the other states present" and that no radical judiciary reform is needed, but on the contrary such a reform should rather be avoided in order not to turn the judiciary into "a state within a state".

This report is structured as follows:

A. A review of alleged political interventions in the affairs of the judiciary

B. A diagnosis of the legal framework and of the potential of constitutional and legal modifications proposed to address the current problems

C. Recommendations on steps needed to restore credibility of the judiciary reform ahead of NATO's Summit in Prague.

A. Bad system or bad practice?

There have been many situations in which the poor performance of the judiciary was blamed on the intervention of the political factor. For the purpose of this review we will just discuss three:

1. Poor performance of the judiciary due to poor legislation
2. Politicization of the anti-corruption campaign
3. Pursuit of purely political objectives through the Office of General Attorney.

1. Legislation beats jurisdiction?

[2] June 22 at the Romanian Academic Society.

Examples of the first category abound. The most widespread concern the confusing and often contradictory property restitution laws passed by the Romanian Parliaments starting with 1991. As the concern to offer social protection to property-less categories over the owners dispossessed by the Communist regime overrode most of the time the concern to restore property and the rule of law[3], property restitution legislation worked poorly.

Case study one. Property restitution

The law 18/1991 was at the same time both a restitution, as well as, strangely enough, a privatization law. Not only peasants and former landowners had their property rights reestablished, but others received land in their property as well. Article 8 ran as follows:

'The establishment of the right to private ownership on lands belonging to the estate of former agricultural cooperatives is undertaken under the conditions established by the present act *either by the reconstitution of the property right or by its constitution.*

The law benefits former members of the cooperative who brought their own land when it was created, members who had been deprived in any form by the cooperative of their land, as well as their heirs by virtue of the civil law; *and also the members who did not bring any land and other specially defined persons*'.

The latter was supposed to refer to the 'late-settlers' in the village, and to the Communist time village bureaucracy, but it opened the door to arbitrariness. Poor wording was further aggravated by poor implementation: mayors were entrusted with a large authority as heads of restitution committees, and since the 1991 mayors were practically self-appointed (the first local elections took place in February 1992) it is not difficult to guess how fairly they distributed the land. For the land to suffice, the law imposed an upper limit at 10 hectares per family, but since the law left the decision on how much to the restitution committees, after cutting the shares of mayor's cronies there was too little land left to meet even the 10 hectares imposed limit. Land availability was in fact severely limited by the exemption of the lands belonging to state farms. Owners whose former holdings had fallen in the area of these units received 'shares' instead of land.

The small 'privatization' operated by this law was more than dubious. Even by Communist law, the land belonging to state farms was part of the public estate; the one belonging to the cooperative was held in collective, *but it was not state property*. In the case of most peasants their land was not nationalized, but 'willingly' reunited in the cooperative estate. The 1991 law thus practically privatized something which had never been state property, but in fact private property.

After the 1996 arrival to power of the National Peasant Party, traditionally tied to the interests of the peasantry, another law (169/1997) tried to counter the negative effects of the first one. This law extended restitution to 50 hectares in the limit of available land and opened the possibility to restore the land from state farms as well. Its implementation was however paralyzed by its dependency on the law of state farms privatization, blocked for three years in the Parliament by a powerful cross-

[3] See Program of FDSN, 1992.

party lobby of state farms managers. This other law was needed in order to 'calculate' the land available for restitution. With law 169 thus put on hold, most mayors stopped the restitution altogether, even when it was clear where the land should come from. In many cases, people who did not have legal rights over the land sold it formally or informally, prolonging the legal hell of land restitution. Others sued the state farms for their land and won in Court long before state farm privatization was politically agreed[4]. The few landowners who managed to recover up to the 50 hectares allowed still have no formal property titles, so they cannot dispose of it. The effects of this odyssey of land restitution on the land market are easy to guess.

After a decade of restitution, only 60% of land property titles were distributed. Over half a million lawsuits have meanwhile flooded the judiciary, which operated with its ancient procedure codes and in offices so poorly equipped that they hardly had a telephone connection, not to mention computers with Internet connection. The average length of a property trial, including all possible appeals up to the Supreme Court of Justice is difficult to calculate, but lawyers place it at four years, if the trial is not complicated. The trial, however, is often complicated by the fact that the losing part has estranged the disputed holding or used it for construction, often getting a construction permit from local governments. This means additional years and the need to get a sentence to have the decision enforced.

Little of this nightmare was the doing of the judiciary. The poor law, the defective implementation, the authorization to build on holdings without titles, the slowness of distributing titles – thus prompting informal sales, are all political factors. The Parliament passed the two laws and delayed the privatization of state farms; the local governments were ineffective to restore land, often corrupt as well, and refused to show up when summoned in Court, thus further delaying final solutions. The offices of the prefect, branches of the central government in the counties, entrusted with the writing and distribution of titles, behaved the worst of all, taking years to complete the job even when mayors had long finished theirs. Tampering with records of property was frequent, and as the records are kept by local governments this also added to the burden of Courts. In twelve years of freedom and ten after the Constitution was passed, no Minister of Justice has managed to pass a minor change in the procedural code, which would allow judges to move on with trials even when witnesses and defendants refuse to show up, claiming that they were not found. A simple doorman in a local government refusing to sign a citation from the Court can in this way postpone a trial indefinitely on grounds that the mayor was not notified. This is widespread practice and could have been solved long ago if political will was there to solve it.

Land restitution is just one example, but a spectacular given its role in preventing the creation of a land market, which seriously hampered Romania's economic recovery. The situation of nationalized real estate was by no means better. Two restitution laws, 112/1995 and 10/2001 managed to add burden to the judiciary's task as well. In view of the fact that most Central European countries fully solved their property restitution by 1995, struggling by that time with privatization only, the dates when Romania's above mentioned acts were issued are striking evidence of the difficulty to summoning enough

[4] The case of the state farm in Slatina, Arges. Cases alluded to in this case study are drawing on the Romanian Institute for Recent History Working Paper 4, 'A Tale of Two Villages. Modernization and de-modernization of the Romanian village', IRIR, Bucuresti, 2002

political will and consensus to enact restitution. But the laws passed were also poor laws, carrying the germ of further conflict. The 1995 law allowed tenants to buy (by a certain deadline) if the house had not been recovered by the former owner; and the 2001 law did not make in kind restitution the rule, but instead substituted it with vague compensations, such as shares in privatizing companies or money (to be regulated by another law, still not adopted, on a methodology for calculating the amount of compensations). This legal ambiguity led to situations when tenants bought houses under litigation, and which subsequently were won in courts by the original owners. The European Court of Human Rights (ECHR) in Strasbourg has already ruled in nine cases in favor of the original owners, and the total amount of compensations to be paid by the Romanian state as a consequence of these rulings, including costs of the judiciary procedure itself, is of more than $1.5 million. Other similar cases (around 90) are in line, some for smaller properties, some for buildings evaluated as high as $1.5 million each. The Romanian government is certain to lose them all, since they are similar to the first.

In the 'Brumarescu' case vs. the Romanian government, the ECHR ruled that compensations can be made either in kind or in cash, for an amount equivalent *to the market price*. Therefore, if the future law regulating the amount of compensations will advance a different solution, diminishing the cash compensations, it will only generate a fresh set of trials with easily predictable rulings. Furthermore, whilst the number of cases submitted so far to the ECHR is under 100, it is likely that much more cases will be filled after these path-breaking cases, as it becomes increasingly clear that the ECHR tends to rule in favor of original owners. However, it is not the numbers as such, but the substance of the dispute, which is worrisome. The ECHR ruled that Courts are competent to provide solutions each time, whilst the policy of Romanian post-communist governments has been precisely to deny the Courts the right to judge restitution of buildings, be those either nationalized private property or Greek-Catholic confiscated churches. According to the Romanian government, these cases should have been solved by legislation. This fundamental contradiction points to the *inconsistency of the Romanian Parliament and of its widespread practice to assume that one can legislate in a vacuum of both rights and international law*. The problem originates at the top of the political establishment, however, as both the President and the Ministry of Justice have publicly stated what the 'right' solutions are. Recently, the Ministry forwarded to Courts copies of a letter sent by Orthodox Patriarch Teoctist, who asked that Courts decline jurisdiction in the matter of confiscated Greek-Catholic churches (granted by the Communist régime to the Orthodox church).

Is it the fault of the Romanian Courts that these cases have reached the ECHR? To a limited extent only; the main responsibility seems again to rest with the political power. In order to reach ECHR, a case must be judged first at every level of judicial authority in the country. Most of the cases in Strasbourg had been objects of extraordinary appeals by the General Attorney, meaning that the Romanian courts had originally ruled in favor of the owners, i.e. similarly to the ECHR. Only after what can be seen as political pressure, namely the extraordinary appeal by the General Attorney to a final ruling in Justice, did the Supreme Court of Justice rule against the owners, thus leaving owners with no other option than to seek further justice in Strasbourg. Judges in the Supreme Court of Justice are not tenured, thus being the only judges in Romania who are appointed for six years only; under these circumstances, they cannot afford to alienate the political power.

2. A partisan approach to fighting corruption

The second set of issues concerns the politicization of the anti-corruption offensive. In 1997 the Romanian government started a process of cleaning Romanian state banks, crippled by preferential loans, in order to prepare them for privatization. Fully endorsed by the World Bank, IMF and the EC, the process consisted in creating more accountable and transparent loan-making systems, as well as in replacing the major actors involved in the bad loans and to a great extent in covering deficits with public money. While the process itself and the situation of the banks, notably BANCOREX and Banca Agricola, was beyond dispute, making those responsible accountable in front of the Court has proved a long and tedious process, as they were entangled with still very influential interest groups. The main actor in the BANCOREX case, Razvan Temesan, has recently benefited by an extraordinary appeal of the General Attorney (appointed by the Minister of Justice) against a sentence dismissing him as Board Chairman of BANCOREX. According to the last ruling, Mr. Temesan can claim his old job back or compensations of up to half a million dollars.

Fig. 2. Appointment of anti-corruption attorney

Preferred solution	%
Appointed by government	14
Appointed by Parliament with 2/3 majority	24
Appointed by Opposition	12
Other solutions	12
Don't know	37

The second notorious case involves the dismissal of the man responsible for the legal pursuit of Temesan and the like – former attorney Budusan, who headed the anti-corruption department within the General Attorney's Office. Mr Budusan, dismissed after the switch of power in 2000, won his case in front of the Romanian Supreme Court of Justice. He was then pursued for collaborating with the French justice in the investigation on Adrian Costea, a corrupt businessmen who had defaulted on a BANCOREX loan, but was a contributor to the electoral campaign of President Ion Iliescu. Again nothing illegal could be proved against him, but Mr. Budusan resigned and left the Attorney's Office.

The third case involves an attorney from North-Western Romania, Al. Lele, who ordered the arrest of the son of the Bihor prefect for gasoline smuggling. The attorney was fired and investigated for abuse shortly afterwards. A young attorney, Cristian Panait, sent from Bucharest to complete the investigation, committed suicide after deciding to close it, a decision reversed by his superiors after internal scandal. It was the suicide which attracted a lot of media attention, but the attention was subsequently diverted towards trivial or sensational issues instead of pursuing a clear internal investigation on how a decision by the investigating attorney can be reversed by his superiors.

Prompted by the need signaled by most international donors, notably WB and EC, that corruption must be decisively tackled, the current government reinvented the anti-corruption department which used to he headed by Mr. Budusan, under a different name and with more powers. The proposal was rushed through both Chambers in time to get it adopted by summer holidays. However, an essential point was dropped in the process from the original proposal by the EU consultant who provided advice to the government[5].

This point specified that the Parliament approves with a majority of two thirds the person nominated in the newly created powerful position of anti-corruption attorney. Under the current proposal the appointment is largely done by the Minister of Justice and President,

[5] Under the framework of Pre-Accession Program of the EU consultant David Martinez Madero.

and if they represent one and the same party, as in the current legislature, there is no check from the opposition and little guarantee that cases like Budusan will not occur again. If each régime finds guilty only the suspects of the previous one – and even this is doubtful, at the current length of trials – then the new law will curb corruption just as successfully as every previous attempt. The public is aware of this, and in a recent poll indicated the Parliament with 2/3 majority or even the opposition parties (such model was tried in Latin America) as being those who should appoint this Attorney. Only 14% believe that the government should do it.

3. Controversial powers and acts of the General Attorney

Many of the controversial decisions described above were due to the intervention of the General Attorney's Office. In order to remove a General Attorney who was an appointee of President Ion Iliescu, the 1996-2000 centrist regime changed the manner of appointment, allowing the Minister of Justice to make the recommendation to the President, thus openly subordinating this office to the government. The move, even if mistaken in substance, did not go formally against the Constitution, as Article 131 of the 1991 Constitution runs as follows:

> Article 131. Status of Public Prosecutors
> 1) Public Prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, *under the authority of the Minister of Justice.*

The authority of the Minister is further enhanced by the Law on the organization of the Judiciary, which makes the Minister an all-powerful attorney through articles 33, 34 paragraph 5 and 91 paragraph 2. Article 33 specifies that the Minister can ask the General Attorney to start an investigation each time he or she considers that public interest is affected.

The exceptional power of attorneys as compared to the judges, when shielded by the government, is proven in many cases. Attorneys in Romania are literally magistrates, and in the Court they sit at the same level with the judges while defense attorneys are seated in the public; the attributions of the attorney in Court are vague and poorly separated from that of the judge, except for the final decision act. The ECHR also ruled on this, establishing that in the Romanian system of law the attorney, even if he is a magistrate, has no such 'functional quality'.

The Codes of Procedure have traditionally included a procedure known under the name of 'extra-ordinary appeal', which allows the General Attorney to invalidate a decision of the Supreme Court in restricted circumstances. In a 1993 revision of codes the word 'extra-ordinary' vanished, and the name became 'appeal for invalidation'. In the same time the circumstances allowing such interventions were expanded. The instrument of the 'appeal for invalidation' has been used for canceling Courts ruling in favor of property restitution, mostly on grounds of incompetence to rule in such cases. Articles in the Civil and Penal Code regulating this appeal suffered frequent interventions, which is an indicator of the political stake, whilst articles which would allow trials to go smoother are still untouched. In 2001, besides the already broad grounds for appeal, another broad and vaguely defined category was introduced: "obviously unfounded". Suspicion of such can make the General Attorney attack final decisions of the Supreme Court at any time and

the Court must designate other judges for the new trial. Those know already that the original 'final' ruling was politically 'wrong', so they are bound to judge under considerable pressure. The procedure was extensively use against Court decisions that restored property prior and after the 1995 law, but has had other uses as well. Among the most controversial interventions by the present General Attorney Joita Tanase, one can quote:

a) Extraordinary appeal against the verdict condemning to 15 years in prison Generals Victor Atanasie Stănculescu and Mihai Chiţac, both of whom were involved in the repression of anti-Ceausescu protesters in Timisoara, ended with more than one hundred dead. Both generals were also involved in dubious transactions with public funds during the 1990 government. The final decision was postponed for fall 2002, but important political figures of the power made public statements in their defense.

b) Extraordinary appeal against the sentence validating the election of the Toplita independent mayor Nicolae Baciu, who had won against a candidate from the current government party.

c) Extraordinary appeal against a verdict ruling in favor of the validity of a guarantee contract between the collapsed investment fund FNI and the state back CEC, through which CEC guaranteed backup for the fund. If the contract is valid CEC should have to pay damages to investors cheated by FNI, which means that indirectly the state will have to pay. The Supreme Court of Justice managed to defend its initial ruling in this case, as the appeal was initiated a year after the verdict, the legal term being of six months. It is hard to accept the idea that Romania has a General Attorney so incompetent as to overstep by six months the term of an appeal. Rather, it is more plausible that the action undertook by his office was meant to intimidate the Court or send a powerful signal that its decision should not be enforced. The term for extraordinary appeals was subsequently prolonged to one year.

d) Extraordinary appeal against the decision of the Supreme Court of Justice ruling that the Presidency had illegally severed a civil servant, who was granted tenure by the law 188/1999. The few civil servants who sued the government for being dismissed at the change of power in 2001 have all managed to win, many cases being still under appeal. The appeal by the General Attorney quoted at length reasons, which could have been found in the initial motivation of dismissal by the Presidency.

e) Arrest of a former assistant to 1996-2000 President Emil Constantinescu, on charges of circulating false information. The material circulated through Internet was an anonymous attack against Prime Minister Adrian Nastase, consisting in a compilation of press cuts on Nastase's private fortune. The case was known under the apocalyptic name of 'Armageddon 2' and received extensive coverage in both domestic and international media.

f) Extraordinary appeal against a decision declaring bankruptcy of the International Bank of Religions, an alleged a money-laundering bank. The Supreme Court maintained the verdict.

B. The system under change

There have been repeated attempts to reform the justice system. The former Minister of Justice, Valeriu Stoica, notoriously sent to Parliament a large package consisting of reforms of the two procedural codes, the Criminal and the Civil code, but due to political reasons, the coalition government was unable to pass in 2000 the Stoica package. As it is often the case in Romanian politics, the current government started from scratch, to the despair of international donors who had assisted the drafting of the Stoica package. Since 1997, most modifications have been operated through government ordinances, another habit pursued by governments regardless of ideology. At present, two essential documents are under work, however, and they need being considered with full attention:

a) A full proposal for another law (that is to say, not just modifications) for the organization of the judiciary, intended to substitute the 1992 one. This is work in progress at the Justice Ministry, and no draft was yet made available to civil society, although foreign consultants had access.

b) A set of modifications to the status of the Judiciary in the Romanian constitution. These were published as part of the proposal to modify the Constitution by the government party. However, observing the situation of modifications proposed for other sections of the Constitution, it is quite likely for these modifications to be just a basis for political bargaining, and, therefore, there is no certainty that they will be passed. Constitutional changes need two-thirds majority of the reunited Chambers and approval in a referendum, which makes it more likely for the Law on the organization of the judiciary to be enacted first.

Modifications proposed to the current system are generally appreciated as positive. However, many observers fear that, although positive in essence, they are not enough to curb the practice of political interventions. The most important modifications regard:

1. A growing role for the Supreme Council of Magistrates. Already under way, the reform of this body as proposed by the new Constitutional articles 132 and 133 would create a two-sections Council made of seven judges and five attorneys (one being the General Attorney), completed each by three civil society representatives, all elected by the Senate for a mandate of six years. According to certain interpretations, the Senate was selected due to its prospective election via uninominal vote. This Council would take over important attributions currently held by the Ministry of Justice, such as nomination, control and revoking of judges, as well as appointments in leading positions. The Council would be presided by the President of Romania, who can be replaced by the Minister of Justice. The modifications proposed have the merit to remove the recommendations of the Minister of Justice in many instances specified in the current Law of Organization. However, seeing that the proposal by the minister of Justice was still in place in the recent appointment of the Anti-Corruption attorney (with just an approval by the President), these modifications may well remain on paper. The current Constitution already specifies that:

Article 132. Composition
The Superior Council of the Magistracy shall consist of magistrates elected for a term of four years by the Chamber of Deputies and the Senate, in a joint session.

Article 133. Powers
(1) The Superior Council of the Magistracy shall nominate Judges and Public Prosecutors for appointment by the President of Romania […] in accordance with the law. In this case, the proceedings shall be presided over by the Minister of Justice, who shall have no right to vote.

(2) The Superior Council of the Magistracy shall perform the role of a disciplinary council for Judges, in which case proceedings shall be presided over by the President of the Supreme Court of Justice.

The current composition of the Council favors the higher Courts, which means that the majority tends to be made of senior judges. In Romania, unfortunately, this means judges with a Communist past, as all senior characters served under the communist régime and were party members. Despite the considerable rejuvenation of the body of judges, which recruited mostly young females in the past ten years, the current Council is not representative for the age and gender structure of the judiciary as it has come to be over the last ten years. The same goes for the attorneys, who recently elected very controversial characters as delegates in the Council. Elections by the whole professional body can help only if they are direct and democratic, granting equal status to voters in different stages of profession.

2. The role of the Supreme Court of Justice will be changed from its current main current role as Court of Appeal, turning it into a Court of Cassation and on the same occasion granting tenure to member judges**.** This move is welcomed by many judges in the Court, overburdened by a growing caseload; in 2001 alone 92 judges solved 26 000 cases out of a total of 40 000. This, however, will give more weight to inferior Courts of Appeal, allegedly more sensitive to political intervention than the Supreme Court of Justice. The second risk related to this reform is that, due to a reduction in the number of judges, and to the full re-nomination of the Court once its name is changed (into High Court of Cassation), judges who are not politically obedient may simply and legally be cleansed and the Court may be filled with tenured judges with only one political orientation.

3. Empowering attorneys. The modifications proposed empower attorneys in their relation with the Ministry of Interior. The Ministry has started lately a process of demilitarization, but the double subordination of policemen who work in judiciary investigations provides grounds for discontent and makes their legal subordination to attorneys just a formality. The fact that policemen gave up recently their military grades does not mean that it will not take many years for the Ministry of Interior to become a truly civil structure. Establishing the leading role of attorneys in everyday practice is a necessary step. However, none of the proposed modifications allude to a change of the Article 131, thus leaving attorneys under authority of the Justice Ministry, despite granting them a special chamber in the Superior Council.

4. The Constitutional Court decisions, which could until now be reversed by the Parliament with a two-thirds majority, will by modification of the Constitution become final if neither Government nor Parliament do not adjust the unconstitutional content of the proposed law in thirty days.

C. Conclusions and recommendations

The main problem preventing the empowerment of the judiciary is still political. Politics overrides logistic factors, and it also overrides organization and administrative problems. The reason why many Courts do not have their own budgets and power to organize their own finances is also political. The reluctance to grant autonomy to Courts has long prevented financial decentralization of the judiciary. The Emergency Ordinance 179/11/1999, which modified the Law of Organization, tried to take some of the necessary administrative steps, by creating the position of 'economic director'. But due first to lack of political will and partisanship, this good move failed to take full effect.

The analysis of the current trend in Romanian judicial reform must rely on facts rather than on formal reforms proposed on paper, once it becomes clear that the lack of political will remains the main problem. It is hard to seriously consider good proposals to curtail political interventionism, when the two Chambers have just adopted a nomination mechanism for the Anti-Corruption Attorney, which again puts the Ministry of Justice in control. The complicated sequence of this appointment mechanism, done by the President on the basis of a proposal by the Superior Council, itself based on the recommendation of the Justice Minister, only illustrates the tough bargaining between stakeholders.

Caught between the Justice Minister and the President, the Council, which is now appointed by a simple majority in Parliament, is reduced to a decorative role. Unfortunately, in the current regime, as well as in the previous one (1996-2000), the government cannot help showing its distrust in the ability of the magistrates to regulate themselves, and takes the approach that only by strengthening the role of the Ministry can reform progress. Many sentences are inept in Romania and quite a number of judges are corrupt, but as the intervention of the Ministry failed to prevent the development of this environment it is hard to see why the Ministry believes further interventionism will set things right. Since the reform on empowering the judiciary is about process just as much as it is about ends, this constant enhancing of the power of government over the judiciary can in no way bring about progress.

Recommendations

(1) The Ministry should act as a watchdog of the legislative process – which is in bad need of streamlining, professionalism and systematization, rather than as a watchdog of the judiciary. The latter function should be passed to a representative body democratically elected. The role for the Ministry is

invaluable in enhancing the legal drafting capacity, and in strengthening the role of the Legislative Council or of a new body in charge with *ensuring consistency of contents, not just form, of the current and future legislation*. The Parliament in Romania functions poorly due to the lack of accountability created by the electoral list system and the lack of professionalism of many committees and experts. This can be compensated through internal regulations reducing its role as a transformative legislature. The Minister of Justice should rally political support in this direction. With regards to the body of magistrates, its responsibility should rather consist in creating the framework for not producing further incompetent and corrupt judges, since a direct fight against those already incompetent and corrupt comes at an unacceptable price.

(2) The practice of appointing in every major position, be it Supreme Court of Justice, General Attorney or Council, judges or attorneys endorsed by one political party is catastrophic and an end to it must be envisaged. Instituting *partitocrazia* over appointments, that is to say, dividing them on the basis of a political algorithm, is no guarantee for independence and fairness. The solution lies in the appointment of judges (proposed by a democratically elected Superior Council of Magistrates) by a majority of two-thirds of the Parliament. The composition of the Council itself should be modified to allow higher participation from judges below the level of Appeal Courts. The risk incurred by this proposal is the deadlock in Parliament, but as such a deadlock will entail a heavy political cost disclosing the will to continue interventionism, it is a risk worth taking. It is a historical opportunity for the Minister of Justice to initiate this procedure, the only one capable of granting credibility to the Romanian judiciary. When the World Bank and the European Commission, not to mention scores of professional associations and NGOs, all consider that nominations are political, at least a major problem of credibility must be acknowledged and a solution devised.

(3) The two General Attorneys – Supreme Court and Anti-Corruption – should be appointed with a two-thirds majority of the two Chambers. The ambiguous role of the attorneys in Court should be clarified. Extra-ordinary appeals, which only generate uncertainty over final solutions, should be severely limited as they were prior to 1993. They are proven to serve mainly as a tool for political interventionism, and provide too much power to the General Attorney over the Supreme Court. Article 131 of the Constitution should also be revised and the line saying 'under the authority of the Minister of Justice' should be eliminated. Alternatively, if prosecutors remain subordinated to the Justice Minister, their independence should be secured and an equal status with defense lawyers should be enacted.

(4) The same should happen with nominations in the new High Court of Cassation. Otherwise, this worthwhile reform will also be perceived as pure political cleansing. Judges should indeed be tenured, but not after political selection, or else an otherwise positive step will only enhance distrust.

(5) The Courts system should be empowered by decentralization, including decentralization of the budgets. Endowing the Superior Council with its own budget is a positive step, but needs more follow up. Many of the organization

problems of the Courts could be solved if Courts would have some freedom regarding their own organization. Same decentralization should apply to the Attorney's Office. Prosecutors should receive cases through a random procedure, and made sovereign over their files against even their superiors.

(6) Control of the judges should pass as fast as possible from the Ministry of Justice to the Superior Council of Magistracy.

(7) Procedure codes should be urgently revised to allow streamlining of the judgment process. Rather than starting from scratch, proposals left from the previous governments should be reconsidered and sent urgently to the Parliament.

(8) Reform steps should be discussed with civil society and opposition parties in early draft stage. Consultations are badly needed to enhance credibility of this process.

No ideal system is there to protect the judiciary from political intervention if there is political will to continue along these lines. Nothing short of full independence of the judiciary, protected by Parliament via a two-thirds majority of both Chambers, can stop the spiral effect of political interventionism and allow the strengthening of the judiciary. This requires clearly more political will than what seems to be available presently. Political will in this case means a broad consensus to empower the judiciary, going well beyond just the Minister of Justice, involving the leaders of the government party, the Prime Minister, the Presidents of the two chambers and the leaders of the opposition as well. All those are needed to reach a common decision and agree to stand by it while in office as well as in opposition. The ECHR by itself cannot reform the Romanian judiciary, though it will continue to rule against the Romanian government. This is merely to say that the transformation of Romania cannot be achieved just through outside pressure, be it from the European Commission, the IMF or other. It needs the Romanian government and Romanian Parliament to succeed. 58% of the public already declares its skepticism towards the newly created anti-corruption institutions. After all, there is no reason for the public to show more respect to the justice system than the government does. The best way to change this situation is for politicians to begin showing more respect. Restraint from publicly indicating preferred solutions in justice would be a good place to start.