JUDICIARY LAWS:
METAMORPHOSIS

The new proposals for modifying the Laws of the Judiciary (also known as the *justice laws*) – now initiated by a group of MPs, instead of the minister of Justice – represent both a *metamorphosis* and a *postponement* in comparison to the previous project. In the following paragraphs, we explain why we believe the two descriptions are accurate, as well as the most prevalent threats that may be noted in this stage of the "reform."

Modifying the *justice laws* was framed as an absolute emergency during the second half of 2017. The intellectual emulation that ensued in the public sphere, catalyzed by the said „emergency", has stimulated the proposal of some beneficial changes, timed appropriately and useful for the better functioning of the Judiciary (around 160 in total, dispersed in both projects), but also the proposal of poorly thought out, hastily constructed, controversial or down-right unacceptable changes (about 50 in total).

In our opinion, the chairs of parliamentary parties should be able to agree upon legislating only the bundle of consensual provisions, as those are of primary interest for the citizens; thus, they should maintain in the current legislative procedure only the proposals that have a positive impact on the functioning of the Judiciary. As for the rest of the proposals, we believe that a well thought out solution can be attained (probably by February-March 2018) through proper consultations with all political actors, professional associations of magistrates and representatives of other stakeholders.

Metamorphosis

The parliamentary drafts for modifying the *justice laws* suffered a *metamorphosis*: Unlike the ministerial precursor, some key-proposals regarding the political control over magistrates are now missing. But „what goes around comes around," as a great deal of progressive or beneficial provisions are missing form these drafts regarding Laws 303, 304 and 317 of 2004 (the statute of magistrates, the organization of the judiciary, and the functioning of the judicial council, respectively).

Among the new proposals, we find extremely dangerous and totally non-transparent the newly proposed mechanism for revoking elected members of the judicial council (CSM). As shown below, under *Risks*, once legislated, such revocation mechanism could completely

weaken the representative forum of the magistrates – our fellow citizens entrusted to exert judicial power.

Another risk relates to deepening the segregation of CSM in completely distinct Sections for judges and prosecutors, well outside the spirit of the Constitution (Art. 133-134). Once these proposals get legislated, key decisions about a magistrates' careers could be adopted in secrecy, in the distinct Sections, instead of the current, transparent procedure in the CSM Plenary, which is available online for anybody to see.

Postponement

Despite the *emergency* claimed in the public discourse, the parliamentary version of the *justice laws* consciously delay the adoption of a clear-cut solution: The reorganization of the Judicial Inspection is delayed by 6 months, even if this was one of the most controversial proposals of the past three months. In an almost frivolous regulatory manner, the draft laws propose an uncertain institutional model, with a structure that will be regulated later – a Council (CNIJP) whose organization and functioning lack a detailed description.

The previous version contained increased powers for the minister of justice over the magistrates; the minister was supposed to take over the Judicial Inspection from CSM, and receive the exclusive right to nominate the chief prosecutors. In the parliamentary version, the President remains involved in the procedure to appoint the chief prosecutors, and the Judicial Inspection does not become an extension of the minister's political will. Yet, the apparent compromise in regards to the Judicial Inspection could represent nothing more than a temporary delay for this controversial topic.

The parliamentary draft Bills fail to clarify an essential aspect about the Judicial Inspection: whether it will be an autonomous administrative authority subordinated to the Government or an autonomous entity subordinated to the Parliament, because the Constitution does not allow for another variant (apart form the current situation, with the Judicial Inspection subordinated to CSM). Before this choice is made, however, the premises of this "reform" need to be explained: what is the reason or the purpose for moving the Judicial Inspection under new subordination, and how will this move serve the better functioning of justice; also, whether a magistrate's activity can be inspected by a civil servant who is not part of the Judiciary.

Risks

The only remarkable progress in the parliamentary version of the *justice laws* is renouncing the idea of hierarchical control over decisions made by prosecutors. In the previous proposal,

this could have functioned as a leverage of political control over the activity of prosecutors, because the minister of justice was also charged with nominating the chief prosecutors. Thus, the abrupt tendency to subordinate magistrates to political will is partially corrected in the parliamentary drafts; yet, other key changes are present, of similar high risk to political interference in the Judiciary.

In our opinion, the extreme segregation of magistrates in the two Sections of CSM (separate for judges and prosecutors) represents another step toward the goal we identified in our previous document: prosecutors may be stripped of their status as magistrates. The new proposals state that the CSM Plenary loses all prerogatives in appointing the General Prosecutor and the chief prosecutors of specialized structures (DNA, DIICOT), as well as in appointing the President of the High Court, along with many other prerogatives regarding the magistrates' career evolution; all these prerogatives will be passed to the Sections for judges and prosecutors. In other words, there will be a Council of judges separated *de facto* from a Council of prosecutors, just like in Moldova or Bulgaria, two countries that take inspiration from the existing Romanian model, when it comes to their intended reforms regarding justice independence and impartiality.

The parliamentary drafts include a new, very dangerous mechanism for revoking the elected members of CSM: collecting signatures from a majority of electors that are relevant in the case of that particular member. We consider this revocation mechanism a major risk of the institutional stability and the functional effectiveness of CSM. Unlike the transparent decision to summon the general assemblies of the magistrates, with a formal voting procedure, a signature collecting campaign – informal and opaque – could stem from any source of interest (including the *occult* type). If the signature collecting mechanism could be utilized only for summoning general assemblies, the solution would be greatly improved.

Limitations

We choose to abstain from commenting on substance the proposals that concern entry to the profession of magistrate, considering that magistrates themselves are best equipped to evaluate the issue, as they know better than anyone else both the needs of the system, and the potential drawbacks that might arise from the parliamentary proposals.

Our analysis does not consider the statements of reasons in the preambles of the parliamentary draft laws. We cannot address the authors' explanations on the same level of detail as we did back in September (pp. 9-13), because the statements of reasons (less than one page each) rather display disinterest with the substantive and systemic effects of the

proposed modifications. In an ideal world, these statements of reasons should have included references to impact assessments, but no such studies were included.

Conclusions

Even though we were highly critical of the ministerial proposals from late August, we did identify about 140 valid proposals in the previous texts (marked "OK" in September); our critique focused more on the remaining 40 proposals, 15 of which were directly aiming to impose political will on the Judiciary (marked as #controlpolitic in the September analysis).

The parliamentary version of the *justice laws* contains only 35 valid proposals, whereof only 16 come from the ministerial project. Along with the improper statements of reasons, the missing impact assessments and the disregard of the regular route of promoting draft legislation from the Government to Parliament, this quantitative evaluation of the parliamentary drafts adds to the overall picture: these projects were hastily put together, out of an improperly justified emergency.

Out of the same haste, we imagine, the new drafts ignore the initial proposal for fixing the housing privileges of magistrates. Back in September, the minister of justice and other supporters claimed that such a solution cannot be opposed. The provision, however, is missing either due to an honest mistake or to an ulterior motive, as "bait" to a sizeable proportion of magistrates. Along with this mistake, however, we also see that the parliamentary drafts propose to extend to other categories of public officials, outside the Judiciary, a large number of rights that are specific to magistrates.

Haste may have also been responsible for the parliamentary drafts failing to transpose in predictable provisions Constitutional Court Decisions regarding secondment of magistrates and revocation of CSM members, in spite of such correlation being used in the political rhetoric that supports the modification of the *justice laws*. In contrast, where MPs wanted to make a difference, they introduced 8 new articles establishing a new structure for prosecuting crimes committed by magistrates; where they preferred lack of clarity, they postponed the introduction of about 15 articles to regulate the Judicial Inspection.

We conclude with an observation regarding the gradual approach to controversial issues, as it transpires from the parliamentary version of the draft *justice laws*: If the *metamorphosis* is not complete, in the sense of renouncing political control of the Judiciary, the 15-40 brutal changes of the initial project may be *postponed* for delayed adoption, one by one, as suggested with the manner of (not) regulating the Judicial Inspection.