

# Key political issues in the reform of Romanian judiciary under the Cooperation and Verification Mechanism

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## Abstract

*Unlike all other former socialist countries admitted as EU members before or after them, Romania and Bulgaria entered a particular supervision regime under the Cooperation and Verification Mechanism, which was supposed to help them to consolidate the rule of law and to actively impede corruption and organized crime. Years later, after the reforms it inspired engendered fierce political battles, the CVM came to an end. Should its policy instruments be abandoned or not after this sudden conclusion, it is increasingly obvious that their success or failure did not depend on technical decisions only, but also on multifaceted political intricacies of domestic partisanship and power struggles. Through the means of the political analysis, using a context-driven interpretative approach, this article underlines several crucial politically contested issues that have risen over the years and should be taken into consideration in any judicious assessment concerning the reform of the Romanian judiciary. Drawing from the observation of institutional change and public narratives, it distinguishes three persistent tensions: the uneasy relationship between judicial independence and autonomy, the problematic overemphasis of the role of public prosecutor's offices as agents of reform within a liberal-democratic normative framework and the prominence of mediatized contention at the expense of administrative problem-solving.*

**Keywords:** EU driven reforms, judiciary, rule of law, corruption, Romanian politics

## Introduction: post-accession judiciary reform considered from a political perspective

The newly reshaped regional environment brought up by the war in Ukraine raises immense challenges to the continental status-quo, already shaken by the Brexit and Covid-19 crises (Pekarčíková & Staníčková, 2022). Facing the perspective of a prolonged military conflict with multiple ramifications, European leaders felt

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obliged to take into consideration a new enlargement wave, and even to question the institutional settings in place. During the meeting of June 23-24, 2022, the European Council granted to Ukraine and Republic of Moldova the status of candidate countries, in accordance with the Commission's opinions, and "recognized the European perspective" of Georgia (European Council, 2022). Calls for rewriting the founding treaties of the Union have been heard, the veto power stemming from the unanimity rule remaining a particularly difficult issue to include on the Council's agenda.

In Romania, the same need for deepened solidarity in times of turmoil and the relatively optimistic signals coming from the European Commission created growing expectations. As the Romanian authorities have made significant efforts to prove their adherence to the values of the Union by sparing no expense or effort during the Ukraine crisis, the comments of the Vice President of the European Commission for Values and Transparency regarding the need to move forward, from the Cooperation and Verification Mechanism (CVM) to the Rule of Law Report Assessment, were received by the governing coalition as a sign that the CVM will conclude sooner rather than later, regardless of the intense criticism coming from some of the opposition leaders or policy-making NGO's.

On the other hand, recurrent domestic political debates and controversies, echoed by the European Parliament (European Parliament, 2022), were questioning the indirect role of the CVM in the endless postponing of the welcoming of Romania among the Schengen Area member countries, despite the opinions expressed by the Commission in relation to the fulfilment of all technical conditions of accession since 2011. The CVM itself was pointed at by some as being an unjust way to single out or admonish Romania and Bulgaria, considering that, during the three last enlargement waves, they and only they have received this status of member states under scrutiny and conditionality, and that they were put in the painful position to wait endlessly, due to the changing nature of the CVM, to become equal with all the rest. Previously, it has been argued that even the unprecedented attention given to the issue of corruption during the accession process that led to the 2007 enlargement wave, while having an objective basis in the deficiencies of the transitional political systems of Romania and Bulgaria, was influenced not only by domestic political conflicts in Romania and Bulgaria, but also by the western stereotypical perception of the Balkan countries as inherently corrupt and unreliable, and by the need of the European Commission to restore its credibility after the Santer corruption scandal (Ivanov, 2010, pp. 111-112).

After the monitorization of Bulgaria stopped in 2019, Romania remained the sole EU member state obliged to observe the recommendations drew by the Commission through the CVM reports. Of course, such developments could have

only encouraged the political parties or politicians whose political capital depends on the contestation of EU policies in Romania<sup>1</sup>.

Somehow unexpectedly - considering the harsh criticism coming from multiple associations of magistrates and the Venice Commission against the new laws concerning the justice system (European Commission for Democracy through Law, 2022) and the complaints of National Anticorruption Directorate (NAD) officials regarding the statutes of limitations that denies prosecutors the right to easily postpone the prescription of criminal cases (Romania Journal, 2022) - the European Commission finally decided that Romania's progress offered sufficient grounds for the conclusion of the CVM. As one Romanian journalist wrote, this looked very much like "a political decision designed to help Romania in its bid to join the Schengen area" (Tapalaga, 2022)<sup>2</sup>.

These are just few examples showing how heavily political considerations can weigh when evaluating the policies of judiciary reforms in countries like Romania. A major part of the criticism surrounding the CVM concerns not only the technical, procedural approach of the incentives applied by the Commission (Papakostas, 2012; Gateva, 2013), but also their political effects (Tanasoiu & Racovita, 2012; Toneva-Metodieva, 2014; Dimitrov et al., 2014; Mungiu-Pippidi, 2018; Dimitrov & Plachkova, 2021). After more than 20 years of EU driven reforms (pre-accession period included), it is increasingly apparent that their success or failure does not depend on technical decisions only, but also on multifaceted political complications of domestic partisanship and power struggles.

From a wider perspective, while the modalities of the relationship between political and judiciary institutions and the questions about their most suitable settings remain largely subject to debate, there is no doubt that politics and the legal system are inextricably intertwined. This is particularly evident in the field of constitutional justice and at the supranational level, where stellar political concepts like "freedom", "democracy", "rule of law" and "human rights" are forged into law.

Some common law judicial systems, like the one of the United States, where the elections of judges or the participation of citizens in juries remain the instituted standard, are stating the terms of this linkage more explicitly than the so-called "civil law" legal systems. In their seminal book about the judicialization of politics, Neal Tate and Torbjorn Vallinder (1995) highlighted the link between the expansion of judicial power internationally and the unrivalled superpower dominance of the United States after the demise of the Soviet Union, doubled by the "mounting influence of

<sup>1</sup>In a recent opinion survey conducted in Romania, 78.2% of the respondents agreed with the statement that "Romanians are seen as «second-class citizens» in the EU" and 50.2% with the idea that some European states block Romania's accession to Schengen Area for economic reasons (Peia, 2021).

<sup>2</sup>In the end, the optimistic anticipations of the Romanian public gave place to frustration when the speciously motivated opposition of Austria determined the refusal of the Council to approve the inclusion of Romania and Bulgaria in the Schengen area together with Croatia.

American jurisprudence and political science” (p. 2). Nonetheless, an impressive corpus of literature shows that the judicialization of politics became a widespread phenomenon (Martinsen, 2015; Tate & Vallinder, 1995; Vallinder, 1994).

Subsequently, the judicialization of politics is closely accompanied by its mirror image, the politicization of justice. Together with the desire of judges and prosecutors to contribute to political action on issues of policy (judicial activism) comes the unavoidable partisan bias associated with personally assumed involvement, a phenomenon which directly challenges the expectations of impartiality fostered by the modern understanding of justice.

Setting transnational politics aside in order to focus on domestic issues, this article attempts to highlight several politically relevant developments that have risen over the years and should be taken into consideration in any judicious assessment concerning the reform of the Romanian Judiciary. Such an assessment could prove to be particularly useful at the beginning of a new cycle of evaluation based on the new European Rule of Law Mechanism.

We will give much of our attention to politically contested issues, trying to emphasize, through the means of the political analysis, the dynamic of change and resilience within the network of power relations generated by elite groups which contend for resources, whether related to financing, to institutional control levers or personal security guarantees.

The following pages will focus on three major tensions revealed by the long process of institutional restructuring that developed since 2004, all of them related to the two foundational directions of reform reasserted through the *Commission Decision of 13 December 2006, establishing a mechanism for cooperation and verification*: “the fight against corruption” and enhancing the capacity and accountability of the Superior Council of Magistracy (SCM).

The above mentioned tensions may be articulated through the following set of oppositions: judicial independence vs. judicial autonomy, limited government vs. judicial-executive supremacy, media performance vs. public service efficacy. Far from being separated, these can be viewed as essential dimensions of a reform process whose elements are deeply interconnected. The order in which they are presented in the pages that follow does not imply that any of them is more impactful than the rest. However, we will begin with those that we consider to be broader, more comprehensive.

First, we will show how the reforms engendered a process of autonomization with problematic effects in terms of judicial independence. Secondly, we will consider one peculiar feature of the judicial activism in Romania, the prominent role of the prosecutorial offices, seen as main agents of reform during the “fight against corruption” campaigns that preceded and followed the initiation of the CVM. Thirdly, we will examine part of what was left out of the picture while these campaigns, which easily morphed into hyper-mediatized arenas of political battle,

were monopolizing the public debate and the attention of experts: the public service mission of the courts and the issue of the effectiveness of their administration.

## 1. Methodology

It is common practice among the decision-makers and experts to search for insights or policy recommendations from various vantage points at the end of each policy cycle in order to acquire a comprehensive picture of past events and to map the road ahead. This should also be the case with the one defined by the CVM, formally closed on 15<sup>th</sup> of September 2023 (European Commission, 2023a; 2023b), yet being supplanted in some of its functions by alternative intervention tools currently under development. Our paper aims to contribute with such assessments from a perspective attentive to the Romanian political context, reflective of its complexity and also amenable to instructive criticism. In addition, the fact that it comes at an early stage of the process of reformulating the policy choices that will emerge within the newly established rule of law reporting framework, at a point in time when scholarly articles with similar objectives are still in short supply, may be thought of as a contribution in itself. While an extensive scholarly literature addresses the reform of the Romanian Judiciary under the influence of CVM (Parau, 2015; Mendelski, 2016; Iancu, 2017; Mungiu-Pippidi, 2018; Selejan-Guțan, 2018; Dimitrova 2020; Lacatus & Sedelmeier, 2020; Dimitrov & Plachkova, 2021; Mendelski, 2021; Chrun, 2023, to cite just few examples), attempts at *ex post* summarisation or studies touching to the transition towards the Rule of Law Report Assessment mechanism and its foreseeable pitfalls are yet to come.

The questions that guide our research are straightforward. Firstly, taking the Romanian experience of judicial reforms under the CVM as a point of reference, what would be the crucial aspects of the interactions between the judiciary and other actors within the political system that deserve continued scrutiny after the conclusion of the CVM? Secondly, what are the core problematic issues that tend to polarize opinions or to be underestimated by policy-makers? Thirdly, how these issues could be laid out in a concise and sufficiently accurate manner?

The cross-disciplinary reach of the investigation, the multifaceted nature of judiciary reform and the evaluative-descriptive character of the study objectives advocate for a context-driven interpretative approach (Smith, 1992; Yanow & Schwartz-Shea, 2006; Maxwell, 2020) which acknowledges the fact that meanings, purposes, interests and intentions are key for the understanding of social reality, and that many of those who produce the knowledge about the politics of the judiciary are often co-participants in the phenomena they refer to - see, for instance, the scholarly, journalistic and memoir literature authored by magistrates and referenced as documentary sources in our paper. Thus, in order to gain a realistic reading of the linkage between political and judiciary actions, our perspective combines discourse analysis and documentary research with unstructured observation, seen as a way to

discover the issues of interest and to explore the context of significant interactions (McKechnie, 2008).

Our perspective is informed by normative political theory insofar it deals with values and addresses concepts or explanatory frameworks that compete to establish “how things should be” in relation to justice and politics - what are the necessary limitation of judicial powers in a liberal democracy, what is the meaning of the rule of law, how norms receive legitimacy. It involves the institutional analysis to the extent that it concerns the review of constitutional norms and legislation and the examination of formal or informal rapports between various national and international institutions.

With regard to the documentary groundwork, aside from scholarly literature, we consulted various textual sources, consisting in legislation, secondary regulations, pieces of jurisprudence, evaluation reports, political declarations, policy statements and newspaper articles. An abundant source of information concerning the inner workings of the judiciary was made available by the SCM through its website, which publishes large amounts of documents, including, but not limited to, recordings of official meetings, decisions, regulations, annual reports and statistical summaries.

Relaying on the interpretation of social interactions, this methodology incurs all the intrinsic limitations of the research style traditionally denoted as “qualitative”: a focus on particular decisions and institutions considered crucial for the understanding of much larger phenomena, contextual selectiveness, grounding the inquiry on insights coming from the particular position of the observer within the socially produced reality he is a part of. On the other hand, one should not underestimate its advantages. As Miles and Huberman (1994, cited in Maxwell, 2020, p. 83) argued: „Qualitative analysis, with its close-up look, can identify *mechanisms*, going beyond sheer association. It is unrelentingly *local*, and deals well with the *complex* network of events and processes in a situation. It can sort out the *temporal* dimension, showing clearly what preceded what, either through direct observation or *retrospection*”.

## **2. Independence and autonomy. How much judicial autonomy is too much?**

From the angle of the present-day social science scholar witnessing how power relations are structured and re-structured, the complex entanglement between the justice system and politics is more than obvious. It is easily noticeable, for instance, in the scholarly discourse of activist judges who may showcase rhetorically how a series of criminal proceedings and court rulings “made the national economy, the rule of law, and democracy stronger” (Moro, 2018, p. 166), or who may assume the firm ideological stand of anticommunism when discussing the power relations

generated by the transition to capitalism (Calin & Dumbrava, 2009)<sup>3</sup>. It transpires through the protest of the magistrates against political decisions coming from the executive or legislative (Calin, 2020), and it is strikingly obvious when famous magistrates run for office (Fishman, 2022). In fact, the opposite viewpoint, the one which asserts a sharp separation of the two, needs to be elucidated, not the other way around.

The increasingly popular myth of the inherent apoliticism of the judiciary might have many sources (Gee, 2012, 139-142), some of them stemming from prominent normative narratives. For sure, one of them consists in the defining attribute of impartiality anyone would seek in the workings of a court: people will rightfully ascribe to judges and prosecutors a general obligation of impartiality (abiding to the common sense, modern, notion of justice), thereby of political impartiality. Constituent assemblies or parliaments will inscribe it into law. On the other hand, as a result of the political conflicts stimulated by the process of judicialization of politics, this common sense ideal became the basis of increasingly numerous and vocal calls, coming from politicians, civil society leaders and magistrates, for the restraint of any political interfering in judicial matters - the case of Romania is revealing in this respect.

This normative perspective is reflected by the concept of judicial independence, which we will define as a set of guarantees that the judiciary institutions in general, and the magistrates in particular (be they judges or prosecutors), will not find themselves under external pressure to adopt any particular solution in the cases they are working on<sup>4</sup>. The closely related concept of “judicial autonomy”, understood as the ability of the judicial institutions to establish directly their own rules of operation and the appropriate interpretation of the law<sup>5</sup> without significant constraints coming from the executive or legislative authorities, is useful in evaluating how much power could the judiciary assume within the constitutional framework of checks and balances specific to liberal democracies.

While it can be argued that “judicial autonomy” is a broader concept than “judicial independence” (Fleck, 2021, p. 1298), the usual assumption that it will automatically reinforce the latter was repeatedly challenged during the reforms

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<sup>3</sup>This is even more evident when they advance sentences which are overconfidently simplistic, as in this statement regarding the social phenomenon of corruption under the socialist regime: “There was no corruption because nobody could do anything with money and because everyone was afraid” (Calin & Dumbrava, 2009, p. 125).

<sup>4</sup>This definition takes into account its two aspects, impartiality and insularity (Smith, 2008, p. 86), as well as the national constitutional jurisprudence on its individual and institutional facets (see the *Decision 873/2010 of the Romanian Constitutional Court*). For the ambiguities of the concept see Guarneri (2013).

<sup>5</sup>Following Parau (2012, p. 621), we adhere to the etymological meaning of the expression (gr. *autos* = self, *nomos* = law), in opposition to approaches that tend to reduce judicial autonomy to a mere synonym of judicial independence.

conducted in Romania. On the contrary, it seems that autonomization created political incentives entirely opposite to the ideal of judicial independence.

Judicial independence is a key feature of the “rule of law”, a principle central to the “value-based” political order promoted by the European Union to such an extent that it became the foundation, it has been argued, of a new phase of the European integration process (Tasev, Apostolovska, & Ognjanoska, 2020). Scholars already observed how, by supporting the model of Judicial Councils (the so called “Judicial Council Euro-model”) in order to enhance the independence of the judiciary, the Council of Europe and EU prioritized the aspect of autonomy (Parau, 2012, p. 639; Kosař, 2016, pp. 137-138), and how EU driven reforms of 2003 and 2004 put Romania on a path towards an excessive form of judicial empowerment. As Coman and Dallara (2012) put it, “since 2004 the principle of the independence of the judiciary has been understood in Romania as being synonymous with increasing the powers of the Superior Council of Magistracy” (p. 880).

Critics have shown from this early stage how the overempowered SCM harboured doubtful interests or eluded the few safeguards set in place against arbitrary decisions. Less has been written about how this trend evolved structurally over time.

First and foremost, politicians used the legitimate concerns voiced by experts in order to retake control over the process of selecting the leadership of the prosecutorial offices. Soon after the presidential elections of 2004, lost by a narrow margin by the leader of the alliance victorious in the parliamentary elections, Adrian Năstase (Downs & Miller, 2006), the government coagulated by president Traian Băsescu around a precarious and conflicted majority promoted a series of radical changes within the statute of the SCM, together with significant new rules regarding the property restitution issue (*Law no. 247 of 19 July 2005 on the reform in the fields of property and justice, as well as some accompanying measures*). Not only the power to administer the budget of the courts and to propose the appointment of high-level chief prosecutors were transferred back to the executive, but new provisions gave to the minister of justice (Monica Macovei at that time, the initiator of the law) powerful levers of control over the latter on grounds of “efficiency of organization, behaviour and communication, assuming of responsibilities and managerial skills” (art. 50).

Parau (2015) rightfully pointed out how easily this backsliding piece of legislation was acknowledged as the legitimate status-quo:

*Allied with her political faction, neither the European Commission nor the transnational legal community raised any alarms over Macovei’s move, although on the evidence just presented, similar steps, if taken by Stanoiu just months before would have been found intolerable. This evidence once again shows that the Commission and the legal community it relied on had indeed let themselves be drawn into domestic partisan politics (p. 437).*



Presented publicly as a way to curb the influence of the communist-era magistrates, the reform increased the influence of elected politicians over the enforcement of criminal policy. The minister of justice, supported by the president, proceeded to the revocation and replacement of chief prosecutors by the end of the same year. This institutional arrangement was carried on through the admission process and remained at the core of the political conflicts between the Presidency and the Parliament during the following years of “cohabitation”<sup>6</sup>.

Second, encouraged by the self-reinforcing centrality of anti-corruption policies and by a vague concept of judicial independence (Iancu, 2017, p. 598), the representatives of the prosecutors started to push for more autonomy within *le corps de la magistrature* itself. The impetus for this shift being already given by the design choice of creating one largely autonomous anticorruption directorate -attached, but not subordinated to the General Prosecutor’s Office - next to the Directorate for Investigating Organized Crime and Terrorism, this claim to increased autonomy was unsurprising. It was surprising however how it materialized in 2013, when, during a tumultuous meeting of the SCM, a prosecutor became the president of the Council for the first time in its history. Moreover, the judges who contested the questionable mandate assumed by the newly elected president of the SCM, Oana Schmidt Hăineală, were promptly subjected to criminal investigations by the NAD prosecutors, who proceeded to searches and seizures. As Mendelski (2016) noted, these developments were signalling “a broader division of interests within the judiciary”, influenced by the partisan approach of EU institutions, which: “by empowering and supporting contested change agents and their controversial reform tools, indirectly contributed to the increased level of polarization and conflict in Romania’s judiciary and the political system” (p. 362). This polarizing trend culminated with the establishment of the so-called “separation of careers” principle, inscribed into law after the crisis of 2017, which gave the decision-making power regarding the career of prosecutors exclusively to their representatives, but continued still.

Last but not least, fuelled by the polarization of an increasingly autonomous judiciary, intense inter-institutional conflicts surrounding high-level corruption cases progressively gave to the Romanian Constitutional Court (RCC) a role more active than usual, resulting in interventions that added to its attributions of judicial review the function of censoring the unlawful administrative decisions of the High Court of Cassation and Justice (Selejan-Gutan, 2021). The High Court itself felt confident in establishing its controversial rules on composing the criminal justice court panels, thus exercising its own extremely large margin of autonomy (Morar, 2022, p. 541-545). After multiple criminal cases were sent to reexamination due to the unlawful

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<sup>6</sup>For the effects of semi presidentialism and cohabitation in the case of Romania see Murphy (2020).

composition of the trial or appeal panels, these clashes were brought to the CJEU's table, which stated its policy-oriented opinions and judgement concerning the undesirable "systemic risk of impunity" subsequent to such exceptional constitutional decisions (Court of Justice of the European Union, 2021). This opened a series of CJUE cases promoted by the magistrates who denounced an opposition between various national legal provisions and the EU law, as developed through the recommendations of the Commission under the CVM.

### **3. Limited government or judicial-executive supremacy? The problematic overemphasis of the role of public prosecutor's offices as agents of reform**

The constant external support for the *independence-through-autonomization strategy* adopted by the Romanian judiciary, together with the control exercised by the divided two-sided Romanian executive over the appointment of high-ranking prosecutors, consolidated a dynamic in which the prosecutorial offices gained progressively much more power than the foundational principles of liberal democracy would concede to policing institutions<sup>7</sup>.

Following a general blueprint shared by numerous liberal democracies, the text of the Romanian Constitution is investing the courts with the judicial authority by stating that "justice shall be meted out by the High Court of Cassation and Justice, and the other courts of law set up by the law" (art. 126, par. 1) and that "judges are independent and subject only to the law" (art. 124, par. 3), unlike public prosecutors, who are carrying out their activity "in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice" (art. 132, par. 1), thus exercising a policing function of mixed nature - judicial-executive. As a confirmation of their ambiguous constitutional status, according to the law, prosecutors enjoy stability and independence, despite being subjected to hierarchical control.

From a functional point of view, public prosecutor's offices retain not only the prerogative of opening or reopening criminal investigations, which may or may not result in indictment, but also of closing them. This implies a considerable accumulation of discretionary power, requiring consistent institutional guarantees against misuse and abuse. Nevertheless, due to the political centrality of the issue of combating corruption, they began to be seen as privileged agents of reform, allied with the progressive factions of the Romanian elite against (and insulated from) a largely corrupt and uncooperative political class. Such a Manichean view, expressed through the CVM reports (Iancu, 2017, p. 598), overshadowed not just the augmentation effect of the autonomization, but also the impossibility to insulate the prosecutorial power from political influence, especially concerning the NAD.

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<sup>7</sup>A similar process was observed in the case of Bulgaria, where, according to Vassileva (2020, pp. 749-755), an „omnipotent and unaccountable Prosecutor's Office" emerged.

Consequently, along with the advance of an anti-corruption narrative with populist characteristics (Mungiu-Pippidi, 2018; Kiss & Székely, 2022) a series of undesirable effects developed, most of them correlated with what Mendelski (2016) calls “the partisan empowerment of change actors” (pp. 359-364), i.e. the tendency of EU officials and institutions to persistently support what they identify as the political agents of reform, regardless how much their actions deviate from the principles of liberal democracy. For instance, concomitantly with the accumulation of budgetary and organizational resources, proof of an ever larger autonomy, the NAD was encouraged to create an unparalleled “track record” in terms of accumulation of quantitative results, without giving proper consideration to the quality of evidence, to “fair trial” principles or legal procedural constraints (Mendelski, 2021), particularly in relation to the secret and exceedingly extensive collaboration with the militarized Romanian Intelligence Service (RIS), while enjoying the full support of the Commission.

Maybe the most important aspect of this tendency to policing overreach is the way in which it triggered a significant reaction among the magistrates and legal professionals. If the immense number of national security wiretap warrants receiving approval (proverbially most numerous than those approved in the USA during the same period) could have been considered worrisome, the fact that only around 1% of the requests were being rejected by the few judges in charge with their verification raised alarming questions about the sources of this lack of oversight (Mungiu-Pippidi, 2018, p. 110; Mendelski, 2021, p. 244-246). Moreover, NAD proceeded to arresting one of the members of the Constitutional Court, with blatantly spurious accusations, at the moment when constitutional judges were deliberating on the so called “Big Brother laws”, passionately promoted by the intelligence services (Clark, 2018, p. 18)<sup>8</sup>. Undeniably, the content of the secret agreements signed by the heads of the judiciary with the RIS created a great imbalance, leaning even more towards the presidential side of the executive, throughout the incessant conflict between the Presidency and the Parliament<sup>9</sup>.

The fact that the European Commission turned a blind eye to a state of affairs so problematic, ignoring the complaints coming from some of the associations of magistrates, members of SCM and even RCC (Morar, 2022, p. 645), just reinforced the polarization within the magistracy on alignments that resembled those of the domestic partisan battle, with one group blocking any attempt to limit the power of the prosecutors in the name of the absolute priority of “the fight against corruption”, while the other was resenting this unfettered control.

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<sup>8</sup>Another episode, in which NAD determined the removal of the Prosecutor General Tiberiu Nițu (later acquitted) by charging him with abuse of power for allegedly using a motorcade without having the right to, demonstrated the same overarching political power.

<sup>9</sup>The President of Romania nominates the head of the RIS and leads the Supreme Council of National Defense.

As these confrontations progressed, NAD and the representatives of the public prosecution within the SCM acted manifestly like an uncompromising collective “veto player”, while their opponents searched for allies in the parliamentary majority. Therefore, after the crisis of 2017<sup>10</sup>, when president Iohannis welcomed the massive protests against the initiative of the new parliamentary majority to introduce lenient criminal policy regulations and NAD initiated criminal investigations against the Government on this matter (Gherasim-Proca, 2018)<sup>11</sup>, a new set of reforms, meant to shift the competence to investigate the criminal offences involving magistrates from NAD to a new specialized body, under the control of SCM, has been received with appreciation by one side of the SCM, worrying about the fact that the anticorruption prosecutors have been using NADs unusually large backlog of inquiries and wiretap authorizations to intimidate the judges hearing their cases. Also, some of the managers of the courts expressed publicly their disagreement with the street protest organized by their peers on this occasion, acknowledging the fact that the right of magistrates to express political opinions is strictly limited by law. By contrast, on the other side, a minority boycotted the instalment of the new department within the General Prosecutors Office, creating an institutional paralysis that made it completely ineffective.

Indicative of the atmosphere within the embattled judiciary, a recent book, published with the support of the Konrad Adenauer Foundation<sup>12</sup>, describes these conflicts using a military metaphor as its title: “900 Days of Uninterrupted Siege upon the Romanian Magistracy. A Survival Guide” (Călin, 2020). Its conclusions, signed by the former minister of Justice, Raluca Prună, are punctuated by questions like “is the siege over?”, “is there peace now?” or “what would peace look like?”. Apart from communicating to an international audience the *pro domo* pleading of the most vocal “activist magistrates” who were subjected to disciplinary enquiries (some of them included in the list of authors), the text outlines in a fairly clear manner the two main camps that emerged within the magistracy during the political battles gravitating around the EU-driven anticorruption reforms<sup>13</sup>. The profile of

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<sup>10</sup>For an interesting perspective on how public reaction against the governing party during the 2017 crisis prevented the emergence of populist authoritarianism in Romania see Bretter (2022, p. 189).

<sup>11</sup>Interesting enough and somewhat revealing for the co-dependent relationship between the executive and the public prosecution offices, the former president of SCM Oana Haineala, as well as the future Prosecutor General Gabriela Scutea, both delegated to work as government dignitaries within the Ministry of Justice, have been participating in the elaboration of the infamous Ordinance no. 13 (Bone, 2020).

<sup>12</sup>The Konrad Adenauer Foundation is politically affiliated with the Christian Democratic Union of Germany.

<sup>13</sup>In the introduction, Dan Tăpălagă, former counselor of justice minister Monica Macovei, doesn't shy away to name the most visible members of the two groups (Călin, 2020, p. XIV-

each of the two confronting camps could be approximated through a list of general traits that describe their observed attitudes, value statements and organizational dynamic (Table 1).

**Table 1. Two camps within the Romanian magistracy**

<b>Activist magistracy</b>	<b>Bureaucratic magistracy</b>
Maximalist approach with respect to the issue of combating corruption (corruption should be defeated by any means; judicial clemency, amnesty and pardon are not acceptable for criminal offenses assimilated to corruption)	Procedural-legalistic approach (all criminal cases should be considered evenhandedly according to the law, regardless the concerns about their harmfulness voiced by the public)
Focusing on criminal justice issues	Focusing on technical and regulation issues
Judicial and political activism	Proclaimed neutrality, valuing strict compliance with rigid professional rules of conduct
Networking	Official (unilateral) communication
Contentious, open to public protest	Passive, refraining from protest
Making use of media intensively, media campaigning	Discretion, lack of media visibility, secrecy
Self-legitimation through the transnational legal order	Self-legitimation through the national legal order
Concentration of power at the level of prosecutorial offices - prone to discretionary use of criminal investigations against judges	Concentration of power within the managerial hierarchy of the Courts - prone to discretionary use of disciplinary charges and sanctions against judges

Source: author's representation

In this context, the term “activist magistracy” refers to the groupings of magistrates that assume “judicial activism” (Kmiec, 2004) as a practice which embraces active civic participation, thus breaching the boundaries of the traditionally ascribed role of neutral adjudication and engaging in bringing about political change. By contrast, the term “bureaucratic magistracy” refers to groupings that exhibit traits similar to those assigned by Max Weber to modern state bureaucracies in general: fixed jurisdictional areas, rigid hierarchy, reliance on strict compliance to rules and precisely delimited “competencies” (Weber, 1946, pp. 196-198).

Far from being an all-encompassing taxonomy, this dual outline of “ideal types” does not account for every possible intermediary combination of these traits within the contours of different sub-groupings and organizational formations gravitating around the two poles. Nor does it imply that the “bureaucratic magistrates” are to a lesser extent subjected to political influence (or to a larger

XV), be they members of the SCM, leaders of professional associations or high-level managers.

degree immune to clientelism) than the “activist magistrates”, or the other way around. It just delineates two distinctive ways in which magistrates may articulate their “political entrepreneurship” profile, the basis of potential relations of cooperation or adversity with different political agents (political parties, NGOs, citizens groups *etc.*). Hence, it could be a useful analytical tool not just in explaining past and future conflicts surrounding the issue of judicial reform, but also the current state of affairs, characterized by the rise to prominence of the “bureaucratic magistracy” in the aftermath of the appeasement of the main opposing parties within the large governmental coalition which achieved the removal of CVM supervision.

#### **4. Media wars and administrative failures. Neglecting the administrative dimension of justice**

One systematically overlooked political issue regarding the reform of the judiciary concerns the courts capacity to fulfil their public service mission. It is not hard to understand how the administrative deficiencies can impede the functioning of courts as prominent public service providers. However, the political conflicts surrounding the “fight against corruption” and the inherent media traction of anticorruption populism contributed greatly to the narrowing of the public debate, with rare exceptions, the administrative dimension of judicial activities being reduced to their most contested issues: the length of criminal judicial proceedings and the arguably “privileged” pension system applying to magistrates (Urse, 2020), generally referred to as “special pensions” (*pensii speciale* in Romanian).

Not just by targeting some of the postsocialist oligarchs in great media spectacles of law enforcement, but also by intervening strategically in moments of turmoil and protest, NAD systematically assumed a role of popular political representation, being depicted by its partisan allies as part of an avenging battle between Good and Evil (Kiss & Székely, 2022, pp. 521-522; Dragoman, 2021). Conversely, the “media moguls” caught on the other side of the barricade spared no effort to discredit the popular rallies mobilized in support of the most intransigent criminal regulations and punishments (Barbaros, 2017).

The fact that media attention is obsessively focused on criminal proceedings could give the impression that the immense majority of the cases examined by the courts are of penal nature, though, in fact, the opposite is true. Accordingly, no large scale popular policy debates were engaged in relation with the part of the justice system impacted the most by administrative impediments coming directly from economic crises and major legislative reforms, by far the largest in terms of the number of litigants (Gherasim-Proca, 2014). On the other hand, the conflict-ridden and factionalized SCM was not in the best position to address the suboptimal functioning of the courts. Critics have shown that the recruitment and career development policy of the SCM remained inconsistent and plagued by clientelism to this day, and that the manipulations of the supposedly random system of case

assignment remain unaddressed, almost 20 years past the moment it was introduced (Cozmei & Pantazi, 2013; Parau, 2012, p. 652; Semeniuc & Tapalaga, 2022).

A topic largely ignored in the scholarly literature and systematically underrepresented during public debates concerning the reform of the judiciary is the chronic understaffing of the courts.

An interesting spillover of the most recent populist turn in Romanian politics, which determined the politicians to engage in a competition to reform “special pensions”, consists in the wave of retirement requests coming from magistrates in reaction to the newly proposed legislation that would diminish their service pension, inadvertently revealing (not for the first time) an overreliance on the willingness of magistrates to work beyond the retirement age (Bechir, 2023).

Only recently, facing the prospect of a drastic pension reform, the SCM reluctantly admitted the immense incongruence between the high efficiency of Romanian courts and the overwhelming staffing deficiency, something that the experts of the European Commission are still failing to notice<sup>14</sup>. During a memorable meeting of the SCM, judge Alin Ene argued for the need of a rational and reasonable system of distributing work assignments, pointing out that Romanian courts receive the first place in the statistic of the number of newly registered civil and commercial cases at EU level and the third place in the top of the countries with the most efficient process of adjudication (Superior Council of Magistracy, 2023).

The unprecedented openness of the Council to these complaints, part of an implicit call to political negotiation, encouraged court managers to rally in protest against the envisioned pension reform by approving the postponing of non-urgent court hearings until the end of the judicial vacation (The National Union of Romanian Bar Associations, 2023a), which prompted a cvasi-unanimous negative media reaction. However, the timing of the protest suggests that the leaders of the magistrates were less than eager to fight for the improvement of the working conditions. The irony of the situation that courts were ceasing usual public hearings exclusively during the judicial vacation, while continuing to hear urgent cases, to draft and to serve their rulings, went largely unnoticed, yet a subsequent protest of the lawyers against the management of the courts recorded the “unreasonable delays in the procedure for regularizing requests and in drafting and serving judgments, or

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<sup>14</sup>The experts who drafted the chapter on Romania of the 2023 Rule of Law Report state that “the increasing shortage of magistrates is generating serious concerns, as it could impact the quality and efficiency of the judiciary over time”, acknowledging the “unprecedented number of retirements requested by magistrates over the last year” and estimating a deficit of magistrates of around 2000 positions at the beginning of 2023 (European Commission, 2023c, p. 9), yet they applaud without questioning the fact that “the overall efficiency in civil and commercial cases has improved, with the length of proceedings decreasing in all instances”, despite an increase in the number of cases (p. 11). This discrepancy may be indicative not just of poor working conditions, but also of major quality deficiencies in the process of adjudication.

serving them during the judicial vacation (sic!), without respecting the lawyer's right to the recovery of their work capacity” (The National Union of Romanian Bar Associations, 2023b).

It is true that understaffing could have apparently positive effects in terms of efficiency, in accordance with the dominant neoliberal managerial prescription of lowering the expense of public services. Nonetheless, it would produce highly negative effects in terms of efficacy<sup>15</sup> - by introducing unduly delays in the judicial proceedings, for instance. In addition, it should be noted that the workplace pressure created by chronic understaffing makes the discretionary secondments of magistrates to bureaucratic positions and the long-term unavailability of judges due to maternity and parental leaves particularly problematic<sup>16</sup>. Because they are not properly outlined in the official statistic of vacancies, they should be considered “ghost vacancies”, that is long-term personnel unavailability not accounted for, an “invisible” source of judicial inefficacy.

In the same line of exemplification, reformers seem to have taken no notice of how inefficiency is promoted by the excessive use of overqualified personnel within the court system. With the exception of the highest level of jurisdiction, many of the magistrates whose qualification and wages are those established for courts of a higher level are effectively working in lower level courts, on lower complexity cases, while the sub-optimally staffed higher courts are struggling to resolve the higher complexity cases and the appeals without major delays.

According to official data provided by the SCM following public information requests filed in May and June 2022 by Romanian journalists (Busuioc, 2022), 1234 judges were working at jurisdiction levels inferior to their acquired qualification. Therefore, the practice of the so-called “promotion on the spot” (promotion without moving effectively to a higher court), which institutionalized the inability of the SCM to generate an evenly paced, predictable, career course for judges, is responsible not only for uncontrollable fluctuations in the number and distribution of effectively occupied posts, but also for the use of overqualified personnel in high proportion - not less than 30% of the total of 4098 occupied posts of judges

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<sup>15</sup>Achieving efficacy, in other words the degree to which the courts are fulfilling their mission (for instance by delivering high quality decisions within a reasonable timeframe), doesn't imply necessarily that the same court system will operate efficiently, that is maximizing the quality and quantity of the service offered while minimizing the costs. Conversely, efficiency doesn't guarantee efficacy.

<sup>16</sup>This issue needs attentive scrutiny from the point of view of the rights of women. For instance, given that more than 70% of Romanian judges are women (Superior Council of Magistracy, 2021, p. 87), poor organization, failing to provide for personnel unavailability and the further degradation of working conditions during periods of surging input (major increase in the number of requests) can provoke animosity or managerial abuse against women entering maternity and parental leave and whose tasks and stock of cases are being distributed to fellow coworkers, some of them already suffering from overworking.



publicized by SCM in September 2022 (Superior Council of Magistracy, 2022a). Moreover, at the end of the same year, SCM further increased the number of new posts of this kind to be occupied at the level of Tribunals and Courts of Appeal to a record high of 1155 compared to the previous years, proving beyond all doubt that the costly exception became the norm (Superior Council of Magistracy, 2022b).

Needless to say, this also proves an unfortunate disregard of the equality of treatment in relation with the quality of the public service provided to the litigants - supposing that the over-qualification of magistrates directly translates in higher quality decisions, as it should, not all litigants will benefit, knowing that not all magistrates are overqualified.

While this oxymoronic “promotion on the spot” was repeatedly criticized, for obvious reasons, the SCM does not take it into account in the estimation of the efficiency of the court system, nor does it make available quantitative indicators regarding its added costs - financial (in terms of wage efficiency) or organizational (in terms of workload distribution and planning)<sup>17</sup>.

Such hidden costs, induced by the lack of long-term managerial planning, reveal a layer of concealed sources of inefficacy and inefficiency that are lurking below the radars of internationally validated evaluation indicators and expert reports, thus remaining perpetually unaddressed. In fact, their “invisibility” guarantees that the poor organization of the public service provided by the court management system will continue to fuel the discontent of the public and to diffuse the lack of confidence in the Romanian justice system.

## Conclusions

It stands to reason that even when politicians - be they elected or not, be they in Bucharest or Brussels - claim their determination to enforce and guarantee the independence of the judiciary we can safely suppose they are still not ready to give up their most effective levers of control. The reform itself would not be possible in the absence of those checks and controls that make political decisions effective. This is perfectly exemplified by the case of Romanian judicial reform, which transformed the justice system in a veritable partisan battleground.

We have shown that the drive towards autonomization in a context dominated by intense political conflict and polarization fostered deep divisions within the judiciary and only diminished the chance that substantial judicial independence would develop. Furthermore, these divisions and institutional arrangements, favouring the prosecutor’s offices as primary agents of reform, offered to the

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<sup>17</sup> However difficult to defend, some legal scholars consider this practice a useful policy tool (Alistar, 2017) and it became so entrenched within the professional culture of the Romanian magistracy that any reformer who would want to replace it would probably meet stark opposition.

factions, involved plenty of incentives to search for allies among the partisan political actors, and to reproduce the polarizing alignments of the conflict between the Presidency and the Parliament, creating deadlocks with no possibility of resolve and leaving major administrative problems unaddressed.

In disagreement with opinions that credit the unchecked autonomy of the judiciary to be the “lesser evil” by contrasting it to the partisan political influence (Selejan-Guțan, 2018, p. 1740), our observations suggest that politicization never ceased, and that the general performance of the Romanian justice system depends to a large extent on the willingness of the main domestic political actors to compromise.

Taking into account past political developments, the scope of the observations summarized by this article extends towards present day events, considering that new legislation (Chirileasa, 2022) has been enacted as a prerequisite to the conclusion of the CVM, and that a new cycle of evaluation has just started under the European Rule of Law Mechanism. Our observations suggest that the expert opinions regarding the Romanian judicial system recorded so far by the Rule of Law Reports may be overly optimistic.

What would be the proper way to avoid the imbalances and policy failures induced by the tensions examined above? One course of action is to simply navigate against some of the policy directions that proved to be unproductive and erroneous without taking an entirely opposite way in reaction to them. For instance, while the increased autonomy failed to provide independence from partisan interference, it doesn't follow that abruptly reducing the level of autonomy of the judiciary would produce the opposite result. The current trend imposed by the new justice laws tends not only to curb judicial activism, but also to instate rigid hierarchical managerial “chains of command” which diminish further the deliberative self-governing capacity of the courts and could just amplify cronyism. Also, the new disciplinary framework offer insufficient guarantees that disciplinary proceedings will not be used as retaliatory or dissuasive expedients against uncompromising magistrates.

From a larger perspective, our study suggests that the relevant question is not how to make politics disappear from the judicial institutions, but how to avoid the pervasive Manichean approach that dominated the dynamic of reform in the past and facilitated its partisan appropriation. Justice reform should be less about “Good versus Evil” battles or media campaigns and more about steady, well-reasoned, policy-making. In hindsight, reformers should search for change not in terms of grandiose modernization projects and individual “success stories”, with astonishing quantitative “track records” in few particular institutions, but focusing on the elemental needs of the entire justice system, at the most basic level, on the mutually reinforcing building blocks of modernization through the rule of law: objective “fair trail” guaranties for the litigants, adequate training and recruitment of magistrates, career predictability, rational allocation of resources (in sufficient amount), organizational coherence, a sane meritocratic organizational culture, workplace democracy, managerial accountability, regulatory stability.

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