



FULL JOURNAL

Recent Controversy Regarding the Promotion of Judges in Romania: Searching for Meritocracy

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The appointment of judges to the High Court of Cassation and Justice or to leading positions in other higher courts is a milestone for any judicial system, especially for Romania's. Guarantees regarding merit-based selection and equal opportunity for each aspirant are essential as are transparent procedures, especially in light of the public image of the profession and the inherent requirements of a professional elite. The 2018 amendments to the "laws of judiciary" adversely affect the equity of judicial competition for those who aspire to these leading jurist positions. Pursuant to those amendments, the merit-based stages of judicial competition have been eliminated, effectively streamlining the selection process and placing responsibility for it with the Section for Judges of the Superior Council of Magistracy and the examiners appointed to special selection committees by Section members. In the absence of any constraints or term limits on the appointment of these examiners to these judicial selection committees, the same examiners are frequently reappointed to successive terms of service, essentially giving them extraordinary power in successive cycles of appointing new judges to Romania's highest courts. Moreover, the new normative Regulation which eliminates the requirement for the merit-based examination required for promotions to executive leadership positions in those courts disregards the judicial appointment standards set forth in the Cooperation and Verification Mechanism established by the European Commission. Its effect will result in the judicial selection process being governed by a subjective standard, one in which appointments are determined by college boards of judges seated on the higher court in the absence of any merit-based competition. This absence of any merit-based and objective selection standard is likely to dampen the incentive of professionally trained and experienced judges to pursue such executive leadership positions, particularly for those who are independently minded and who have indicated their support in various ways for key reforms oriented toward improving and enhancing the independence and competence of the Romanian judiciary.

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Keywords: judicial system; council of magistracy; status of judges; promotion of judges; Cooperation and Verification Mechanism; meritocracy; Romania

1. Introduction

During the era of communist rule in Romania, no objective criteria were specified under law for promotion either to membership or to leadership positions in the country's highest courts. Instead, demonstrated subservience to the dictates of the executive power was the primary qualification. This subservience extended to the organizational framework of the court system. Because the existing laws on courts did not provide for their institutional independence, court presidents and vice-presidents who served as chief administrative officers were placed in the position of achieving their goals and objectives by acceding to the interests and demands of political leaders on both the local and national levels. Judicial appointments to the higher courts were generally determined by the Minister of Justice on the basis of proposals from politically connected lower-court presidents and the concurrence of party officials. Aspirants to positions in the higher courts were obliged to first solicit the favour both of powerful court presidents and key political operatives in control of Romania in the first years after the 1989 Revolution.¹

On 1 January 2007, Romania officially joined the European Union (EU). Article 148 (2) of the Romanian Constitution acknowledges the priority of the application of European Union law². Romania also joined the Council of Europe on 7 October 1993 and, on 20 June 1994, became a party to the European Convention on Human Rights and Fundamental Freedoms and to the 14 additional Protocols.

European Commission Decision 2006/928/EC of 13 December 2006 established a mechanism for cooperation and monitoring Romanian progress toward achieving specific judicial reform and anticorruption benchmarks.³ The decision noted that European Commission reviewers had identified unresolved issues regarding the accountability and efficiency of Romania's judicial system.

Under the impetus of EU integration, Romania upgraded its judicial promotion framework to include merit-based competition, a factor also noted in the Reports of the European Commission. Rigorous examinations are a key element of a merit-based judicial selection and promotion process in countries emerging from a tradition of political control of the judicial power.

During 2017 and 2018, the Romanian Parliament adopted three new laws affecting the judiciary: (i) Law no. 242/2018 for amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors; (ii) Law no. 207/2018 for amending and supplementing Law no. 304/2004 on judicial organisation; and (iii) Law no. 234/2018 for amending and supplementing Law no. 317/2004 on the Superior Council of Magistracy (SCM), all republished. In response, the European Commission for Democracy through Law (Venice Commission), the Group of States against Corruption (*GRECO*) and the European Commission expressed strong reservations about the impact of numerous amendments to the new laws, criticizing them as extremely harmful and regressive for the magistracy.⁴

¹ See, for details, **Horațiu Dumbravă, Dragoș Călin**, "The Evolution of the Judicial System in Romania during the Past 60 Years", in *Revista Forumul Judecătorilor*, no.1/2009, pp. 123–129.

² See **Dragoș Călin**, "The Constitutional Court of Romania and European Union Law", in *International and Comparative Law Review*, 2015, tome 15, no. 1, pp. 59–86.

³ Published in the *Official Journal of the European Union*, L 354 of December 14th 2006.

⁴ See, for developments: Dragoș Călin, Ionuț Militaru, Claudiu Drăgușin, "Aktuelle Gefahren für die Justiz in Rumänien", in *Betrifft JUSTIZ* no. 132, Dezember 2017, pp. 217–219; Dragoș Călin, Ionuț Militaru, Claudiu

The amendments eliminated merit-based judicial qualification standards for appointments to the higher courts; under the new laws, decisions regarding such promotions are to be based on subjective criteria, i.e. “assessment of activity and conduct within the last three years”, at the High Court of Cassation and Justice (HCCJ). Under the new protocol, formal interviews conducted by the Plenary of the SCM replace the merit-based qualifying examinations and enforce a visible promotion control system.⁵

GRECO expressed its concern as follows: “31. The intended amendments still contain a proportion of subjectivity in the selection and decision process concerning promotions, which contemplates a two-phased promotion procedure, the latter phase consisting of an assessment of one’s past work and conduct. The amendments also provide for the SCM to develop and adopt rules on the procedure for organising such assessments including appointments to the responsible commission and the particular aspects to be assessed. The GET heard fears that this new system would leave more room for personal or political influences in career decisions, which could impact the neutrality and integrity of the justice system and it would thus be essential that the SCM develop appropriate rules to guard against such risks, including clear and objective criteria to guide the future decisions of the selection commission. 32. Because of the risks and uncertainties referred to above, GRECO recommends that: i) the impact of the changes on the future staff structure of the courts and prosecution services be properly assessed so that the necessary transitional measures can be taken and ii) the implementing rules to be adopted by the SCM for the future decisions on appointments of judges and prosecutors to a higher position provide for adequate, objective and clear criteria taking into account the actual merit and qualifications”.⁶

2. The legal framework

2.1. The initial version of Law no. 303/2004, amended in 2005

Appointment as a judge to the HCCJ was determined by the SCM selecting from applicants who had (i) served as judges during the previous two years in tribunals or courts of appeal; (ii) were rated “very well” in their most recent evaluation; (iii) had not been disciplinarily sanctioned; (iv) had demonstrated outstanding professional activity; and (v) had completed at least 12 years of service as judge or prosecutor. This competition consists of an interview before the Judges Section of the SCM (JSSCM).

The qualifications examination for applicants aspiring to positions in the district courts and courts of appeals comprised a series of theoretical and practical questions covering the following categories:

Drăgușin, “Romanian Judicial System. Organization, Current Issues and the Necessity to Evoid Regres”, in *Tsukuba Journal of Law and Politics*, 75/2018, pp. 1–14; Ingrid Heinlein, “Korruptionsbekämpfung in Rumänien am Ende? Was die Regierung Rumäniens unternimmt, um die Strafjustiz zu schwächen und von diesem Vorhaben abzulenken”, in *Betrifft JUSTIZ*, nr. 136 von Dezember 2018, pp. 189–192; Dragoș Călin, Anca Codreanu, “The Situation Regarding the Romanian Judicial System at the end of 2018”, in *Richterzeitung*, nr. 2/2019; Bianca Selezjan Guțan, “The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court”, accessible at <https://verfassungsblog.de/the-taming-of-the-court-when-politics-overcome-law-in-the-romanian-constitutional-court/> [last accessed on 15.09.2020]; Dragoș Călin, “The Recent ECtHR Judgment *Kövesi v. Romania*. Reactions of Romanian Authorities and Implications regarding the Rule of Law”, <https://strasbourgobservers.com/2020/06/16/the-recent-ecthr-judgment-kovesi-v-romania-reactions-of-romanian-authorities-and-implications-regarding-the-rule-of-law/> [last accessed on 15.09.2020]; Dragoș Călin, “The appointment of top prosecutors in Romania: minimizing the role of the judiciary”, <https://europeanlawblog.eu/2020/05/11/the-appointment-of-top-prosecutors-in-romania-minimizing-the-role-of-the-judiciary/> [last accessed on 15.09.2020].

⁵ The written examination was eliminated from the competition for promotion in the position of judge at the High Court of Cassation and Justice.

⁶ For details, see <https://rm.coe.int/ad-hoc-report-on-romania-rule-34-adopted-by-greco-at-its-79th-plenary-16807b7717> [last accessed on 15.09.2020].

- ◆ Depending on their field of specialisation, one of the following categories of law: civil, criminal, commercial, administrative, financial and fiscal, labour, family, and private international law;
- ◆ The jurisprudence of the HCCJ and of the Constitutional Court;
- ◆ The case law of the European Court of Human Rights and of the European Court of Justice; and
- ◆ Depending on the specialisation of the judge or prosecutor, either civil or criminal procedure.

Appointment as president or vice-president to a first-instance court, district court, specialised district court and court of appeal required completing a merit-based examination administered by the SCM through the National Institute of Magistracy. The exam comprised (i) an oral interview in which applicants present their views of how to perform the position's leadership duties, and (ii) a written examination testing candidates' understanding of management, communication, human resources, decision-making, exercising leadership responsibility, stress-management skills, and a psychological assessment. The examination board comprised two judges from the HCCJ, two judges from the courts of appeal and three specialists in management and institutional organisation appointed by the SCM on the proposal of the National Institute of Magistracy.

2.2. Amendments to the Law no. 303/2004 in 2011

In the *Report of 22 July 2009 on the progress made by Romania under the Cooperation and Verification Mechanism*, it was stated that: *"Appointment procedures and new competitions have been undertaken in line with the objectives set to provide for objectivity and high qualification"*.⁷ The 2011 version of this report concluded in its recommendation on judicial system accountability, that it was necessary *"to demonstrate a track record in transparent and objective management decisions within the judiciary, for example through appointments, disciplinary decisions, appraisals and the promotion system to the High Court of Cassation and Justice"*.⁸

In implementing these recommendations, Law no. 300/2011, which amended Law no. 303/2004 regarding the procedure for promotion to the HCCJ, stated in its explanatory memorandum that *"both the interview, as a procedure for promotion to the supreme court, and the absence of a proper procedure for verifying the professional competence of the candidates, do not provide the necessary transparency and objectivity requirements for promotion to the position of judge at the HCCJ. These matters have been the subject of constant criticism by judges and some of their professional associations, which have requested an amendment of the law in order to guarantee promotion to the position of judge at the supreme court based on competence criteria and transparently, and the need to remedy these deficiencies was also underlined by the European Commission."*⁹ The substance of that law introduced merit-based competition as a means of evaluating candidates' professional capacity for appointment to the supreme court. Elements of the competition included preparing draft judgments that would be evaluated for quality, logic and legal expertise; an interview by members of the SCM Plenum; and a written exam with both theoretical and practical components. The three new laws referenced above dismantled the use of these objective, merit-based means for assessing judicial competence and replaced them with essentially

⁷ See the web page <https://ec.europa.eu/transparency/regdoc/rep/1/2009/RO/1-2009-401-RO-F1-1.Pdf> [last accessed on 15.09.2020].

⁸ See the web page <https://ec.europa.eu/transparency/regdoc/rep/1/2011/RO/1-2011-460-RO-F2-1.Pdf> [last accessed on 15.09.2020].

⁹ See the web page <http://www.cdep.ro/proiecte/2011/700/60/6/em766.pdf> [last accessed on 15.09.2020].

subjective standards. Passage of those new laws represents a significant retreat in the effort to strengthen the quality and competence of the judges of Romania's court of final appeal, the ultimate guardian of the country's rule of law.

2.3. The new version of Law no. 303/2004 in 2018

2.3.1. Promotion in execution or leading positions to High Court of Cassation and Justice

Under Article 52 and 52¹ of Law no. 303/2004 on the statute of judges and prosecutors, republished, as amended and supplemented by Law no. 242/2018, the elevation judges in the lower courts to the position of judge at the HCCJ now rests on a much less rigorous assessment process conducted by the JSSCM, through the National Institute of Magistracy. Candidates must have (i) served as a court of appeals judge for a minimum of three years, (ii) obtained a "very good" rating in their three most-recent evaluations, (iii) be free of any disciplinary sanctions in the past three years, and (IV) accrued a minimum of 18 years of judicial service.

This new and substantially weakened assessment process comprises (i) an evaluative review of documents drafted by candidates reflecting their judicial work; and (ii) an interview before the JSSCM.

The evaluation and interview are assessed by competition committees appointed by the JSSCM and upon the proposal of the National Institute of Magistracy. For each competition, a committee comprising two judges from the High Court of Cassation and Justice and one university lecturer or professor from the law faculty of law of an advanced Romanian research and education university. Committee members may not (i) currently be members of political parties or (ii) be related to by blood or marriage up to the fourth degree to candidates they review.

On request by competition committee members, the JSSCM shall request through the relevant courts of appeal copies of judgments drafted by the candidates during their tenure, as well as the other data (i.e. statistical information on the periodic evaluation sheets) required for the evaluation according to this law.

Any person such as other applicants, other judges, lawyers, politicians, or media representatives may submit to the competition committees these types of documents prepared by a candidate. Such submissions will be reviewed along with the others submitted by the courts of appeal. The evaluation required under Article 52² includes (i) verification of the capacity for analysis and synthesis; (ii) verification of coherence in expression; (iii) verification of arguments in terms of clarity and logic; and (iv) verification of compliance with reasonable deadlines for solving cases and drafting judgments. In the evaluation procedure, the competition committees may ask the candidates to explain or elaborate on any subject under evaluation.

As part of the interview, the JSSCM evaluates candidates' integrity and personal views on key values such as judicial independence and impartiality, motivation for seeking the position, and their human and social skills.¹⁰ The formal interview meeting with JSSCM members will also be attended by a JSSCM-appointed psychologist in an advisory role to question each candidate to evaluate their motivation and human and social skills. The maximum score¹¹ candidates can achieve during the evaluation and interview processes is 100 points, 50 for each segment. The minimum passing score is 70 or 35 points for each segment.¹²

¹⁰ The members of the Section for Judges of the SCM have at their disposal the personal files, the evaluations of the judges, the reports of the Judicial Inspection.

¹¹ There are no rules on composing the score; it is arbitrary.

¹² Successful candidates are promoted within the number of places vacant for competition. There is no possibility for those who meet the score to remain on a reserve list and be subsequently promoted.

Within 15 days of communicating the competition results for appointment as a judge of the High Court of Cassation and Justice, the JSSCM shall order the promotion of all candidates declared admitted.

The president, vice-presidents and section presidents of the HCCJ shall be appointed by the JSSCM from among the sitting judges of the HCCJ who have a minimum of two years' service and have not been disciplinarily sanctioned in the past three years. Appointment to the positions shall be for a period of three years, with the possibility of re-appointment for one additional term. Judges of the HCCJ who fulfil the conditions provided by law can apply for the positions of president, vice-president or section president of the HCCJ to the JSSCM. They must do so within 30 days of the date when the position has become vacant.

2.3.2. Promotion in leading or execution positions to other Courts

According to Article 43, Section 1, Chapter 5 of Law no. 303/2004 as amended by Law no. 242/2018, the competition for the promotion of judges is conducted annually, unless otherwise required by the JSSCM through the National Institute of Magistracy.

In the new regulation, promotion to execution positions involves two consecutive stages: (i) promotion in the next higher professional rank (on-the-spot promotion), and (ii) effective promotion (the real promotion on execution position).

The promotion in the next higher professional rank (on-the-spot promotion) contest entails taking a written test. The competition procedure, including how to contest the results, will be set forth in the Regulation on the organization of the competition for the promotion of judges and prosecutors to be issued by SCM. The written exam comprises the same tests as presented in chapter 2.1.

Participation in the promotion competition for the next higher professional degree rank is open to judges who were rated "very good" in their last evaluation; have not been disciplinarily sanctioned in the past three years; and meet the following minimum conditions of seniority: (i) seven years' experience as a judge or prosecutor for promotion to the positions of judge in a general or specialized district court and prosecutor attached to a general or specialized district court; (ii) 10 years' experience as a judge or prosecutor, for promotion to court of appeal judge or prosecutor attached to an appeals court; or (iii) 10 years' experience for promotion as a judge to the HCCJ or as a prosecutor attached to that court.¹³

The effective promotion of judges (promotion on execution position) requires competing at national level for existing vacancies in the district courts and courts of appeal.¹⁴ The effective promotion contest consists in taking a test aimed at evaluating the activity and conduct of candidates in the past three years.

Qualifications for candidacy for effective promotion in the courts include a rating of "very good" in the most recent performance evaluation, not having been disciplinarily sanctioned in the past 3 years, and having acquired the professional degree corresponding to the court to which promotion is being sought (meaning that the candidates have passed on-the-spot promotion). For promotion to appellate court judge, candidates must have served a minimum of two years in the next lower court.

Appointment to president and vice-president in first-instances, general district courts, specialized district courts, and courts of appeal requires passing competitive examination administered, whenever necessary, by the Judges Section of the SCM through the National Institute

¹³ When calculating the minimum seniority condition to participate in the promotion contest, the period in which the judge had the quality of justice trainee at the National Institute of Magistracy is not taken into account.

¹⁴ Effective promotion is organized only when there are vacancies in the courts. On the spot promotion can be organized at any time, depending on the number of places considered necessary by the SCM.

of Magistracy. The competition tests and the examination committee are regulated by the same rules as presented in chapter 2.1.

3. The promotion of judges to the Romanian High Court of Cassation and Justice

3.1. Criticism regarding the legislative solution that has eliminated the written exam
Legislative action on Article 52¹ para. (2), section c) of Law no. 303/2004 eliminated the “written exam, of practical nature” retaining only the interview – Article 52¹ para. (2) letter b) – for promotion to the position of judge at the HCCJ. Thereby, the Parliament eliminated the sole objective and merit-based requirement for ensuring the promotion of highly qualified candidates to the supreme court.

When a country’s judicial promotion protocol abandons merit-based qualifications and relies solely on an interview process, the examination of professional qualifications is compromised and increases the risks of appointing less-than-qualified applicants to judicial positions. When this weakened protocol is deployed to assess the qualifications of candidates for appointment to a country’s highest court of final appeal, the risk is significantly enhanced. Appointing candidates to the highest court whose qualifications have not been subject to rigorous objective vetting risks having marginally qualified candidates survive the selection process. Judges sitting on the highest court are charged with sustaining and refining the country’s national jurisprudence, serving as guardians of the country’s commitment to the rule of law and setting the highest standards of interpreting and applying the law for all lower court judges to follow. When those selected have not been thoroughly vetted and may not be the best qualified to do so, the country’s jurisprudence, its enforcement of the rule of law, and the standard of justice all other judges follow are subject to deterioration. Moreover, where merit-based standards are abandoned, the role of subjective judgment in the assessment process increases, takes on greater significance, and threatens to comprise the selection process by attributing disproportionate value to political and other subjective inducements in the absence of objective criteria.

On the other hand, the object of the interview, as provided in Article 52⁴ para. (1) of Law no. 303/2004 as amended by Law no. 242/2018, is identical to that of the checks made by the Judicial Inspection in the procedure governed by the Regulation regarding the promotion to the positions of judge at the HCCJ.

In other words, all data forming the object of the interview are already included in the Report prepared by the judicial inspectors during the checks that have exactly this object: “the candidates’ integrity and how the candidates relate to values such as the independence of the judiciary and the impartiality of the judges, the motivation and their human and social skills”.

These weakened provisions also disregard the international conventions that establish the fundamental principles regarding the independence of judges. Those conventions set forth the importance of (i) judicial selection, training and professional conduct, and (ii) the necessity of complying with objective standards both on entry into the judicial profession of magistrate and on appointment to the higher courts.

The Committee of Ministers of the Council of Europe has consistently recommended that Member State governments adopt and enforce all measures necessary to ensure judicial independence, individually and institutionally, by applying the following principles: “... all decisions concerning the professional career of judges should be based on *objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency*”. (see Committee of Ministers of the Council of Europe, *Recommendation No. 94/12 of 13 October 1994, on the independence, efficiency and role of judges*).

Any “objective criteria” that seek to guarantee that the selection and career of judges are based on merit – having regard to qualifications, integrity, ability and efficiency – can only be defined in general terms. The aim is, first of all, to confer a content to general aspirations towards “merit-based appointment” and “objectivism”, aligning theory and reality. Objective standards are required not only to exclude political influences, but also to eliminate selection based on favouritism, conservatism, “nepotism” and other subjective factors. Doing so is rendered much more difficult when consideration of objective criteria is no longer required and decisions are based exclusively on the results of interviews conducted by JSSCM members. Although relevant professional experience is an important condition for promotion, seniority is no longer accepted as the primary consideration in selecting candidates for promotion.

The evaluations of judgments cannot be the sole basis for promotion to the higher court, but only an instrument to ensure improvement in the quality of the act of justice as a system, in relation to each court.¹⁵

During the process of establishing and fine-tuning the conditions for Romania’s accession to the EU, the European Commission’s recommendations, made over time in the CVM Reports, specified that the country strengthen its corps of magistrates by recruiting candidates based on competitively measured and objectively reviewed performance criteria. Its report of 8 February 2012 (drafted under the Cooperation and Verification Mechanism) stated:

“Appointments to positions in the High Court of Cassation and Justice in August were criticized for a lack of transparency and objectivity. However, Romania adopted a new law in December, which had been reintroduced by the Government to reform appointments to the High Court of Cassation and Justice. The law introduces substantial improvements to appointment procedures and can make an important contribution to the reform of the High Court. The impact of this law will depend on the commitment of the competent institutions to ensure its implementation. It should be followed by a swift filling of vacancies, in particular within the criminal section, through a transparent and merit-based recruitment process.”¹⁶

The subsequent report of July 18, 2012 (drafted under the Cooperation and Verification Mechanism) noted further that:

“In parallel, Parliament has also passed a number of other important legislative measures. The “Small Reform Law” which entered into force in 2010 brought concrete improvements to the consistency and efficiency of the judicial process. Legislation was also amended to strengthen the accountability of the judiciary and to reform appointments to the High Court of Cassation and Justice. Such measures provide the opportunity to address public concerns about the objectivity of judicial appointments and the disciplinary process in the judiciary: it will take a sequence of good examples to turn

¹⁵ “Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion (*therefore, they cannot serve as the main criterion for promotion, but only as a basis, for example access to the level of the written exam after obtaining the scores well or very well after the evaluation of the judgments is sufficient*). It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and, in particular, quantitative criteria such as number of reversals and acquittals should be avoided as standard basis for evaluation.” (CDL-AD (2011)012, *Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, adopted by the Venice Commission and OSCE/Office for Democratic Institutions and Human Rights, para. 55*).

¹⁶ See the web page <https://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-56-EN-F1-1.Pdf> [last accessed on 15.09.2020].

around the negative legacy of the past. ... Romania also improved the appointment procedures to the High Court of Cassation and Justice at the end of 2011 by adopting more transparent and objective procedures which allow for a more comprehensive and objective independent assessment of the merit of candidates. This represents an important step in improving the accountability of the High Court of Cassation and Justice.”¹⁷

Essentially, the Commission's Reports welcomed the new law on promotion to the Supreme Court, emphasizing that implementation must be followed up and that positive examples are needed.

As long as Romania continues to be monitored to ensure an independent judiciary, through the Mechanism of Cooperation and Verification (CVM), the criteria set forth in the amendment of Law no. 303/2004 in 2011, according to the recommendations of the European Commission and the requests of magistrates, should not be compromised. However, despite criticism in previous CVM reports, the Parliament approved in 2018 newer amendments confining the selection process to an interview conducted by JSSCM. Thus, the risk re-emerged that subjective decision-making for promotion as High Court judges would replace the objective criteria based on professional value.

3.2. Criticism of certain current practices

As things now stand, the appointment to leading positions at the HCCJ or even to the position of judge at the supreme court falls under the exclusive competence of the JSSCM. Likewise, the history of JSSCM appointments to the examination committees reveals the recurring reappointment of a limited number of judges. This is well known because the names of committee members are released by the SCM immediately after the competitions and reported by the mainstream media. Clearly, committee members are not appointed by drawing lots or by any other random-selection procedure. The repetitive election of these examination committee members virtually every year undermines further the element of merit-based judicial selection. To the extent that they function as a core group reflecting commonly shared positions and ideologies, they are in a position to favor former court colleagues similarly oriented and to support their appointment to the supreme court. Once seated on that court, they may be able to unite to steer development of the national jurisprudence in the pursuit of those shared ideologies.

For instance, a former Vice-President of the Bucharest Court of Appeal, appointed as a judge in HCCJ and then as President of the Criminal Section in 2018, was a substitute member to the commissions administering the competitive exam for candidates for appointment as judges and prosecutors to lower court leadership positions, and for promotion to the position of judge at the HCCJ. He also was a full member of two committees for appointing judges and prosecutors to leading positions in lower courts and of two other committees for selecting candidates for promotion to judge at the HCCJ during 2017–2019. The same judge also served in 2019 as a member of the competition commission to appoint prosecutors to executive positions in the Section for Investigating Criminal Offences in the Judiciary, and, from July – October 2018, on the commission preparing candidates for the entrance examination at the National Institute of Magistracy.

Another judge and president of the Ploiești Court of Appeal, subsequently appointed to the HCCJ in 2019, was nominated for full membership on two committees. The first appointed judges and prosecutors to leadership positions and the second supervised the competition

¹⁷ See the web page <https://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-410-EN-F1-1.Pdf> [last accessed on 15.09.2020].

for judicial positions on the HCCJ. He also was nominated to serve as a substitute member of the committee selecting candidate for appointment to judicial positions on the HCCJ during the period January 2017 – March 2018.

Still another case is that of an HCCJ judge and former president of the Alba Iulia Court of Appeal, who was nominated for membership on the 2018 committee for appointing judges and prosecutors to leadership positions on the courts of appeal, district courts and first instances and to leadership positions in the prosecutor's offices attached to them. He also served as member of the 2018 commission overseeing the interview examination for entry-level candidates to the National Institute of Magistracy and as a substitute member in the 2018 committee for appointing prosecutors to executive positions in the Section for Investigating Criminal Offences in the Judiciary, serving alongside his spouse, a full member. This judge's spouse, appointed as an HCCJ judge in 2018, was the former president of the Oradea Court of Appeal and vice-president of the Alba Iulia Court of Appeal; she also was nominated to membership on the committee charged with appointing prosecutors to positions in the Section for Investigating Criminal Offences in the judiciary and to membership on the 2018–2019 committee charged with selecting and appointing candidates for judicial positions on the HCCJ served as a substitute member of the 2019 body administering the competitive exam for candidates applying for court leadership positions.

In 2017, a HCCJ judge served on all of the committees handling various aspects of the competition for judicial and prosecutorial appointments to leadership positions, presiding over one and full membership in another.

Likewise, two HCCJ judges secured membership in the committee charged with selecting and appointing candidates to judicial positions on the HCCJ from 30 August 2017 – 14 March 2018. Both were also nominated for other committees, one to the committee overseeing the selection and appointment of candidates to execution positions in the Section for Investigating Criminal Offences in the Judiciary and the other as a member to the committee for overseeing the selection and appointment of candidates to judicial positions in the HCCJ in 2017 and as a substitute committee member in administering the competitive exam for judicial and prosecutorial candidates for leadership positions in 2018.

Two HCCJ judges were members of the competition panel for promotion to the position of judge at the High Court of Cassation and Justice during 2017 – 2018 and of the panel for promotion to a judicial position at the HCCJ organized during 2018 – 2019. One also served as a committee member overseeing the competitive exam for candidates applying for leadership positions. The second served as a member of the committee (i) overseeing the selection of candidates in 2017, and (ii) for appointing prosecutors to execution positions in the Section for Investigating Criminal Offences in the judiciary.

It must be emphasized that many committee members were appointed as judges on the High Court of Cassation and Justice by current members of the SCM, the same who appointed them *ante* and *post-factum* to various competitive selection and appointment committees.

Nine of the 30 judges appointed in 2017–2019 to the HCCJ, equivalent roughly to one-third, also served as committee members overseeing various competitive selection and appointment functions administered by the SCM and served in leadership positions in the courts of appeal.

Another group of competition committee members appointed by SCM during 2017–2019 has applied for appointment to the position of HCCJ judge. Moreover, judges who have been delegated but not yet officially appointed to leadership positions in courts have been appointed as members of committees charged with reviewing and vetting candidates for court leadership positions. These committee members include a judge who is president of The National Union of Romanian Judges, Mrs. Dana Gîrbovan of the Cluj Court of Appeal,

who was proposed on 23 August 2019 by the Prime Minister of the Social Democrat Party government, and Mrs. Viorica Dăncilă, to the position of Minister of Justice, a proposal rejected by the President of Romania, Mr. Klaus Iohannis.¹⁸

Consequently, it is worth noting that only approximately one-third of the judges serving on the HCCJ were appointed to terms as members of several appointment competition committees during the 2017–2019 timeframe. Our analysis shows a predilection for appointing judges from the courts of appeal serving in leadership positions to these committees, typically jurists of less experience accumulated expertise.

In that interest, various presidents and vice-presidents of courts of appeal and district courts have provided considerable cooperation and support for certain initiatives of the majority of members of the JSSCM.¹⁹ Some have signed public statements or letters in support for the new amendments to the laws of judiciary introduced in 2018. They served as members of committees charged with reviewing and selecting candidates for leadership positions in the judicial system; some were appointed to the Supreme Court during the 2017–2019 timeframe.

4. The promotion of Romanian judges serving in the first instance courts and district courts to judicial and leadership positions in the higher courts. Criticism regarding the legislative solution that has eliminated the primary guarantee of an impartial and merit-based competition in that promotion process

Elimination of the impartial and merit-based elements of the judicial promotion protocol risks undermining the credibility of the promotion framework. A framework based primarily on subjective interviews risks the possible growth of vested interest groups in the judiciary focused on promoting those who espouse a particular ideology or mindset.

According to article 36 of Regulation regarding the organization of promotion competition for judges adopted by Superior Council of Magistracy on September 17, 2019, the committees that have to evaluate the activity and conduct of candidates in the past three years of their judicial tenure – candidates who passed “on the spot promotion” and obtained the rank of the superior court – comprise court of appeal presidents and four court of appeals judges with specialties reflecting the sections where the vacancies exist, proposed by the college boards within courts of appeal. These committees are authorized to gather information about the candidates, to select which judgments to evaluate, to draft candidate assessment reports on the performance reviews of co-located colleagues or at the relevant court of appeals, and to conduct candidate interviews. Committee evaluation of candidates’ work and conduct is subjective and discretionary, leaving what aspects are scored, what issues raised are favorable

¹⁸ At the beginning of 2018, over 2000 magistrates delimited their position against the participation of professional associations in the Joint Parliamentary Special Committee for amending the “laws of judiciary”, implicitly of the National Union of Romanian Judges, which supported some amendments that were strongly criticized by the European Commission for Democracy through Law of the Council of Europe (Venice Commission), GRECO (The Group of States against Corruption) of the Council of Europe, the European Commission, the European Parliament, the vast majority of judges and prosecutors in Romania, the Superior Council of Magistracy of Romania, the High Court of Cassation and Justice, the Prosecutor’s Office attached to the High Court of Cassation and Justice, the relevant professional associations of Romanian judges and prosecutors. Through the legislative reforms adopted, all mentioned bodies have admitted that Romania is visibly departing from the requirements of the rule of law. The Report on Justice for 2018, published in May 2019 by the Superior Council of Magistracy, considers a vulnerability “*the intensification of attacks launched by politicians and the media against magistrates*”.

¹⁹ See, for details, the web pages <https://www.mediafax.ro/social/30-de-sefi-de-curti-de-apel-trimit-o-scrisoare-la-consiliul-superior-al-magistraturii-nu-sustinem-initiative-din-sfera-politica-17907488> and <https://www.g4media.ro/presedintii-celor-16-curti-de-apel-din-tara-cer-csm-sa-stabileasca-daca-protocoloale-secrete-dintre-sri-si-parchet-au-afectat-independenta-justitiei-miza-ar-fi-justificarea-unei-ordonante-pentru-revi.html> [last accessed on 15.09.2020].

or unfavorable, and how colleagues' opinions affect a candidate's final score. Court of appeal presidents and College boards exercise significant leverage in the selection of new appointees to the district courts and courts of appeal because no objective merit-based system exists to counter-balance their subjective input.

With appointments to executive positions, the rule is based on effective promotion. Judges employed in a first-level court or at a district court must engage in a meritocratic competition. Those who are selected acquire the professional status of the relevant higher court.

The substance of the amendment noted above does not take into account the case law of Romania's Constitutional Court. Decision no. 413 of 19 June 2018. Regarding the unconstitutionality of the final sentence of Article 45 of Law no. 303/2004 on the status of judges and prosecutors, the decision states that traditionally in Romania, "the promotion of judges in office is closely linked to the level of the court in which they operate". Thus, the hierarchical ranks in the Romanian judges' system relate to the "hierarchy of the courts", and judicial status may not be ascribed independent of it. When it comes to achieve a higher office degree, the rule is that of sitting effectively in the higher office, in a sense that a judge currently sitting in a first instance court or a district court has to take and successfully pass the exam granting him/her the right to sit in the next higher court, respectively the district court/the court of appeal. A legal exception has been established to this rule; it is known as the "*on-the-spot promotion*" which ensures filling in vacancies within a court. Once a judge has achieved the next higher judicial rank, the judge continues to occupy in his/her current office and rather than transferring to the higher court until a bona-fide judicial vacancy exists in that higher court.

This exception is justified by the need to create a supply of "magistrates on stock" whereby for vacancies that arise in the higher court, the time-consuming process of vetting a replacement judge has already been completed, allowing the higher court to promptly fill the vacancy. However, this exception cannot be generally extended, as it may reach a point of *ad absurdum*. Conceivably, this pre-selection process could be repeatedly invoked to a point at which most or all of the judges will have been vetted for immediate appointment to the higher court even though no vacancies exist to accommodate them. As a consequence, they all would remain positioned in the respective lower court, a situation that the promotion system was never intended to create. The judicial system would be left with excessive promotions only in rank, not in effective office. Such an excess of judges vetted and promoted in rank but not in level of court may gradually spawn attitudes of hierarchical subordination toward superior judges and colleagues in leadership positions.

As noted, for effective promotions, the 2019 Regulation adopted by JSSCM eliminates merit-based examinations, giving priority to subjective candidate assessments by committee members appointed on proposals by presidents of the appeal courts who give priority to advisory opinions from judges within the same courts of appeal. Their favourable opinions award an initial ten-point advantage to candidates without requiring any objective justification. Effective promotion is also based on the assessment of court judgments in the last three years of activity, from which the committee randomly chooses 10 judgments. A candidate may receive fewer points simply because the selected judgments are among the less complex and less important of those he or she has produced and thereby fail to reflect to full range of the candidate's legal skills, experience, and abilities. Candidate may neither challenge the manner in which judgments are chosen nor have any role in those that are selected.

Moreover, there are first-instance courts where the average workload is smaller compared to the median number of cases assigned to first-instance judges in a typical year – circa 900. Others in larger and busier courts may handle caseloads that exceed that median. An overloaded judge will allocate less time to drafting extensively researched and analysed verdicts

to remain current on his or her workload, but may be equally or more qualified than a less-burdened colleague in a smaller court who has more time to attend to the researching and developing the narrative of a ruling, creating the false impression that the length of a solution always represents higher capacity and increased professionalism.

The JSSCM's position is that the previous regulation merely prescribed a theoretical review of the candidates' background. In reality, that earlier regulation has been replaced with a two-step evaluation process; the first is identical to the previous examination, but it has been supplemented by a second and decisive step that involves judicial committees who select which candidates are eligible for promotion, out of those who in advance passed the written test.

Such an innovation was unproblematic for SCM members. On the amendments to the laws of judiciary, the SCM proposed adding the following text:

[U]pon expiry of the term of office, the judges and prosecutors elected as members of the Superior Council of Magistracy, who performed a term of six years, acquire the professional degree immediately higher than the one held and be able to choose to carry out the activity at a court or prosecutor's office corresponding to the degree (including the High Court of Cassation and Justice) and also be able to choose, at any moment, to enter the lawyer or notary profession, without an exam.

This proposal was vehemently rejected by court magistrates and prosecutors' offices at all levels.²⁰

A completely useless and unforeseeable concept is that of the *"evaluation of the magistrate conduct."* According to law, each judge, in his/her professional career, undergoes an appraisal every three years. The purposes are to assess as the quality of the reasoning set forth in judgments, delays in completing the reasoning, productivity, integrity, participation in workshops, trainings, etc. The amendments changed the timeframes in which such evaluation must be completed. Where a judge has accumulated over 20 years of seniority, appraisals are no longer required. Yet such evaluations are a mandatory component of the criteria for advancement to either a management position or appointment to a higher court. Only judges who have scored "very well" in such evaluations are scheduled for the advancement interview process. Judges who apply for the effective promotion competition are those who already have (i) earned superior court ranking, having passed on-the-spot promotion exam, but not yet seated in the relevant superior court and (ii) undergone at least two interview assessments of their activity and conduct and achieved a score of "very good." These assessments are completed by a committee joined by the president of the court in which the subject judge currently works and by fellow judges appointed by the College Board.

In this context, it is difficult to discern why a new evaluation regarding the "activity" and "conduct" of the judges was deemed necessary to include in the promotion procedure, taking into account the fact that there is no legal requirement specifying it.

It appears that the sole motivations for this additional evaluative stage are to (i) intimidate and discourage judges who have expressed opposition to "judicial reforms" from advancing to the higher courts, and (ii) favour the appointment of candidates preferred by each higher court's management. Magistrates who openly criticized proposed amendments to judiciary laws and who staged protests faced disciplinary proceedings, occasional public shaming in the media, discrediting accusations threats, and the delimitations issued by Bucharest Court

²⁰ See the Minutes of the meetings of Commission no. 1 of 26 September 2017 and 27 September 2017 (publication date: 28.09.2017), available on the web page <https://www.csm1909.ro/ViewFile.ashx?guid=41725f17-d58d-45d8-9d6d-1a2fb5f04ada> [InfoCSM [last accessed on 15.09.2020].

of Appeal management on the occasion of each protest staged on its steps being also of public knowledge.²¹

Evaluation of formal judgments should not comprise the basis for decisions on whether to promote candidates to positions in the higher courts; rather, they should serve as an instrument to ensure improvement in their quality and accuracy. However, the provisions in the Regulation adopted in 2019 lay down a double standard for the evaluation of the judges' activity: on the one hand, a candidate must have been rated "very good" in his/her most recent evaluation to qualify for on-the-spot competition. On the other hand, candidates are assessed on the basis of scores conferred by a different selection committee, thereby superseding any earlier ratings. A double standard may also arise in the interview conducted by a committee appointed by the court of appeal. Although the candidate has not been subject to disciplinary sanction in the past three years, his/her conduct is re-evaluated upon completion of the interview. If the committee does not award a passing score for the interview, the validity of the candidate's previous disciplinary status may be questioned.

In addition, the regulation of promotion procedures for judges by a normative act not prescribed in the law, which clearly supplement the provisions of the latter, violates the constitutional norms regarding the status of the profession. The procedure for determining whether candidates for higher judicial office meet the qualification requirements must be established by law and determined by the SCM, *lato sensu*. Moreover, the magistrate statute cannot be rendered inferior to the civil servant status, even in the absence of a separate regulation (see the Decision no. 818 of December 7, 2017, of the Constitutional Court of Romania).

5. Conclusions

The circumstances outlined above mandate a comprehensive review and meaningful reforms that must not be further delayed in light of the failure of the legislative amendments referenced earlier to comply with the European Commission's recommendations which Romania committed to adhere to when it was granted membership in the European Union, namely, to recruit and appoint candidates for its magistrates utilizing objective and merit-based performance criteria.

By viscerating the recruiting and appointment processes to include only the candidate interview examinations under the pretext of retaining professional standards is vacuous. On the other hand, the subject of the interview, as provided in Article 52⁴ para. (1) of Law no. 303/2004, is identical to the Judicial Inspection verifications set forth in the Regulation regarding the appointment of judicial candidates as judges on the HCCJ. In other words, all significant findings reviewed during the interview originate in the report prepared by the judicial.

²¹ On December 18, 2017, thousands of Romanian judges, prosecutors and judicial auditors held a silent protest in front of the institutions where they worked, holding in hands their robes or the Constitution and, most of them, displaying the oath they had taken early in their career. The protests were triggered by the Parliament having adopted certain major amendments to the three main laws concerning the magistrates' status and organisation, without taking into account the firm opposition of more than half the Romanian magistrates. Moreover, the silent protests targeted the changes on the Penal Code and the Criminal Procedure Code, proposed for adoption, which would have extensively limited the powers of the Police and the prosecutors, as well as their capacity to protect victims and identify criminals, regardless of the nature of the crime (murder, theft, rape, corruption, etc.). On inexplicable grounds, the president delegate of Bucharest Court of Appeal, E.R., advanced by SCM to HCCJ in 2019, separated herself, the same evening, from the magistrates' protest on the court steps. The highlighted matter was "the need to observe the legal provisions regulating the statute of magistrates, the separation of powers and the exclusive use of levers deemed the law and regulations adequate in expressing opinions". See the web page <https://www.hotnews.ro/stiri-esential-22184073-curtea-apel-bucuresti-spune-delimiteaza-protestul-magistratilor-din-fata-instanta.htm> [last accessed on 15.09.2020].

The deficiency in the revised regulations governing the selection of candidates for positions in the superior courts is that they do not ensure objective confirmation of the degree of professional excellence required for such appointments. Candidates' expertise and competence should be directly proportional to the professional demands of the court positions being sought. It is essential that the professional work of the Supreme Court and other superior courts be carried out by judges with demonstrated theoretical and practical knowledge and expertise in the specialization for which they apply.

Building on the analysis set forth above, we strongly urge the creation of enforceable regulatory control procedures as follows:

- ◆ Re-establish merit-based exams as a key element of the judicial recruitment and selection processes for promotion to the position of judge at the High Court of Cassation and Justice, courts of appeal and district courts. Such examinations should be administered and secured by the National Institute of Magistracy;
- ◆ Eliminate any role of the Romanian Superior Council of Magistracy officials in the selection and appointment of members of the competition committees;
- ◆ Restructure the process for selecting members of the competition committees to the random drawing of lots under the supervision of officials of the Romanian National Institute of Magistracy;
- ◆ Establish and enforce the standard that no judge shall be appointed to any judicial selection committee until a minimum of three years has elapsed from the date that judge was most recently appointed as a member of an equivalent committee;
- ◆ Establish and enforce the standard that no judge shall be appointed to any judicial selection committee who has (i) served on any committees separate from those officially affiliated with the National Institute of Magistracy, or (ii) carried out any type of political activity or activity that could be perceived by a rational person as political activity until a minimum of three years has elapsed since the such committee service or political activity;
- ◆ Establish and enforce clear regulatory criteria for avoiding conflicts of interest between and among members of competition committees;
- ◆ Modifying the requirements and elements of the competitive exam for promotion to leadership positions in the higher courts as follows:
 - Prepare and present a project regarding performance of the specific duties of the leadership position;
 - Complete a video-recorded oral exam, weighting 30% of the final average score, and written exams, weighting 70% of the final average score. Both oral and written exams should be tailored to measure each candidate's judicial and legal specialty weighing 60% of the final average score as well as his/her management, communication, human-resources, decision-making, and stress-management skills weighing 40% of the final average score. The battery of exams must also include a psychological assessment which will be appraised overall as admitted or rejected;
- ◆ Limit to a single term of office the appointment of any leadership position in any court on a particular level to avoid the unregulated dominance in perpetuity of any particular judge in any management position.

These proposals comprise the minimum requirements essential to any meaningful restoration of merit-based professionalism and rebuilding of public trust in Romania's judiciary. In a rule of law-based democratic society, citizens must have the certainty that judges are

selected/promoted according to objective criteria, professional training, technical expertise in the law, and experience that reflects compliance with judicial ethics. These elements comprise the essential guarantee for independent, impartial and competent administration of justice.

Competing Interests

The authors have no competing interests to declare.

How to cite this article: Dragoş Călin and Lucia Zaharia, 'Recent Controversy regarding the Promotion of Judges in Romania: Searching for Meritocracy' (2021) 12(1) *International Journal for Court Administration* 8. DOI: <https://doi.org/10.36745/ijca.350>

Published: 26 March 2021

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