CONSTITUTIONAL ANALYSIS ON AMENDMENTS TO LAW No.317/2004

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Abstract

This study seeks to analyze the amendments made to Law no.317/2004 on the Superior Council of Magistracy, which has let to extensive debates in the Romanian public and legal space. The analysis is based on the jurisprudence of the Constitutional Court of Romania, which claims several important constitutional principles for the organization and functioning of the Superior Council of Magistracy, the independence of the justice being the focus of the Constitutional Court.

Keywords: *Constitutional Court, the principle of the independence of justice, Superior Council of Magistracy, the Judicial Power.*

1. Introduction

This study seeks to emphasize the importance of the one of the most important principles enshrined both in the Romanian Constitution and in international and regional legal instruments (such as Pacts, Statements and Conventions), namely the principle of the independence of justice, clearly regarded as Judicial Power, within the principle of separation and the balance of the three powers in the state, as they are expressly and univocally mentioned in article 1 paragraph 4 of the Romanian Constitution.

This principle of the independence of justice is well established in the purpose and the main role of the Superior Council of Magistracy, namely in article 133 paragraph 1 of the Constitution, according to which "the Superior Council of Magistracy is the guarantor of the independence of Justice". From the systematic interpretation of the rules governing Title III (Public Authorities), Chapter VI (Judicial Authority) of the fundamental law, it is concluded that this is indeed the main role of the Superior Council of Magistracy, i.e. guaranteeing the independence of justice and all the other attributions of the Superior Council of Magistracy is subsuming this purpose, namely it has the role to enslaving and protecting the independence of justice. A similar constitutional norm is found in article 134 paragraph 4, which emphasizes that a corollary purpose and the essential and primordial role of the Superior Council of Magistracy, namely the "guarantor of the independence of justice".

2. Content

What is the meaning of "Justice" in the Romanian Constitution and in general in the legal language of international public law? The answer is simple and it is consecrated in an ample and precise way. Thus, from the corroboration of article 124 with article 126 paragraph 1 of the Constitution, it can be concluded without any doubt that the justice, i.e. the exercise of the Judicial Power, is only realized by the courts and the judges belonging to these courts, on the basis of procedural regulations that are explicitly and unambiguous established by the procedural law (procedural codes of any kind based on which the courts and, implicitly, the other judicial entities – the criminal investigations bodies of the police, the Public Ministry etc. - are being adopted by law according to article 126 paragraph 2 of the Constitution). In all important international regulations (pacts, conventions and declarations of rights), the term "Justice" has exactly the same meaning as in the Romanian Constitution, namely the courts who have the role of interpreting and applying the law to the concrete cases deducted on the basis of substantive law and procedural regulations governed by the procedural law (civil procedure, criminal procedure, commercial procedure, administrative procedure).

In this respect, we consider that the (very correctly identified) provisions of article 126 paragraph 1 (Justice is made by the Supreme Court of Cassation and Justice and by the other courts established by the law) corroborated with the provisions of article 133 paragraph 1 and article 134 paragraph 4 of the Constitution, which expressly enshrines the role of the SCM (the Superior Council of Magistracy is the guarantor of the independence of justice) the law amending Law no. 317/2004 amends article 24 paragraph 1 of the Law no. 317/2004 establishing that the Superior Council of Magistracy is headed by a president – judge, assisted by a vice-president – prosecutor, who can come only from the judges, or prosecutors elected by the general assemblies of the

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courts, or the prosecutor's offices. This clarification of the legislator is welcome in order to make clearer this essential role of the Superior Council of Magistracy to defend the independence of justice in the meaning offered by the Constitution on the question of justice as mentioned above.

Therefore, the essential role of the Superior Council of Magistracy is to guarantee the independence of the judiciary – of the Judicial Power listed in article 1 paragraph 4 of the Constitution. It is also noted that article 131 and 132 of the Constitution established the role of the Public Ministry and the status of prosecutors, without any reference to the independence of justice, but to the general interests of the society, the rule of law and the right and freedoms of citizens.

Somehow indirectly, the fundamental law further establishes in article 23 (individual freedom) and article 24 (the right to defense) that, contrary to the activity of prosecutors, there is and is constitutionally constituted the activity of lawyers, i.e. specialized persons who give consistency and effectiveness to the right to defense and the presumption of innocence. Also, taking into account the numerous law cases of the European Court of Human Rights, the prosecutor and the lawyer have equal roles in the courts, in the light of the principle of equality of arms and the right to a fair trial as a whole. It should be noted that the imperative of the equitable process as a constitutional principle is found in the Romanian Constitution in article 21 paragraph 3 (the parties have right to a fair trial…).

As such, if the law would expressly allow for the independence of the justice to be ensured with a presiding Superior Council of Magistracy elected amongst the prosecutors, then, by symmetry within the meaning of article 6 of the European Convention on Human Rights and article 21 paragraph 3 of the Romanian Constitution, it should be possible the election of a president of Superior Council of Magistracy among lawyers in the field, in order to equalize the two professions with an essential role in the conduct of judicial proceedings before the courts, in order to ensure a fair trial, as stipulated by the provisions of article 6 of the European Convention on Human Rights, especially the law cases of the European Court of Human Rights, as well as article 21 of the Constitution and the jurisprudence of the Constitutional Court on article 21 paragraph 3.

Of courts, in several states within the European Union, where these are judicial councils for administering courts and prosecutors' offices, and for the management of judges' and prosecutors' careers, we can find various solutions, for example with a much wider presence of representatives of civil society in those judicial councils (in France, for example, their number exceeds practically the number of judges and prosecutors elected in the two professions), but regardless of the concrete normative solution, the basic law established by the Supreme Council of Magistracy, namely the independence of justice, the other part nowhere is allowed any form of monopoly or interference of the other professional entity in the magistracy – namely prosecutors – over the entire constitutional scaffolding dedicated to the judges' career and the functioning of the courts of law.

For example, in the French or Belgian legislation in this area, the large number of representatives of civil society (i.e. remarkable lawyers from other professions) can determine the leadership of the representative judicial councils from this professional segment outside the magistrates, i.e. it is possible to implement an arbitration function within the Judicial Power and separately within the Public Ministry on administrative and career issued. But a major interference from one magistrate profession to the other is not possible. In the current version of Law no. 317/2004, this interference appears unfortunately to be possible and obviously does not correspond to the purpose and role of the Superior Council of Magistracy as a guarantor of the independence of justice ("*ratio legis*").

Obviously, article 133 paragraph 3 of the Constitution would allow the Superior Council of Magistracy's president to be elected by the Superior Council of Magistracy's Plenum of the elected prosecutors in accordance with article 133 paragraph 2 letter a, but the consequence is clearly removed from the purpose and role of the Superior Council of Magistracy (guarantor of the independence of justice) interpreted in a natural connection with article 21 paragraph 3 and article 124, article 126 paragraph 1 and article 1 paragraph 4 on the separation of powers in the state.

By Decision no. 61 of February 31, 2018 regarding the object of unconstitutionality of the Law for amending the Law no. 317/2004 on the organization and functioning of the Superior Council of Magistracy as a whole and, in particular, the provisions of article I item 4, 5, 7, 15, 19, 20, 34, 46 and 62 thereof, the Court held, with reference to article 1 item 19 and 20 of the law examined, that the new way of choosing the Superior Council of Magistracy's leadership – the president of the section for judges is the president of the Superior Council of Magistracy and the president of the section of prosecutors is the vice-president of the Superior Council of Magistracy, therefore *ope legis* the president of the Superior Council of Magistracy is a judge and the vice-president a prosecutor, violate the provisions of article 133 paragraph 3 of the Constitution, in that it makes the difference that the Constitution does not stipulate, regarding the vocation to be elected president of the Superior Council of Magistracy, among the elected members of the Superior Council of Magistracy.

The Court notes that the current Law no. 317/2204 stipulates, in article 24 paragraph 1, the fact that the president and the vice-president of the Superior Council of Magistracy are elected from the judges and prosecutors elected as members of the Superior Council of Magistracy and who are part of different section (it is the expression of the law), but the meaning of this

text is to ensure at Superior Council of Magistracy management level representation equal to both judges and prosecutors, but without determining which of the two categories of magistrates an be elected as president of the Superior Council of Magistracy and who as vice-president of the Superior Council of Magistracy.

A modification similar to that under the law examined was introduced on the occasion of the Legislative Initiative of May 23, 2012 on the revision of the Romanian Constitution, the draft of the constitutional revision saying, in relation to article 133 paragraph 3 of the Constitution, that the president of the Superior Council of Magistracy is elected among the 9 judges of the corresponding section. In the opinion sent to the Romanian authorities on that occasion, the Commission for Democracy though Law (Venice Commission) expressed the reservation and the difficulty of accepting such a proposal, since the Superior Council of Magistracy is maintained in its constitutional structure, as a single entity, representative of both branches of the magistracy, but in which the vocation to be elected president must equally belong to any of the judges or prosecutors without distinction. According to the Venice Commission, if there is to be a single council whose mission is to represent the two branches of the magistracy, it would not be right that the president can not be elected from the members of the two branches.

At the same time, the Court notes that following the new organic legislator's philosophy, prosecutors are excluded from the right to vote for the election of the Superior Council of Magistracy's president as a leader and a representative of the Council, as they are not part of the elective assembly for the election of the president of the section of judges, which is the president of the Superior Council of Magistracy, and the judges are excluded from the election procedure, by vote, of the Superior Council of Magistracy's vice-president. However, the Superior Council of Magistracy's president and vice-president represent the joint governing bodies that target the Superior Council of Magistracy as a unitary and unique entity, representing both judges and prosecutors.

However, we note that regardless of the role of the Public Ministry and its constitutional tasks, it is legally impossible for the Public Ministry and prosecutors to be considered part of the Judicial Power (they are part of the judicial authority, including the Judicial Power and the Public Ministry, as well as the Superior Council of Magistracy, but obviously it does not confuse with the courts, having different constitutional roles and legal statutes different from one point away).

The idea that the Public Ministry represents a fourth power in the state is also unacceptable because there is no constitutional text for such an interpretation, but also because there are only three powers in the constitutional democracy – Legislative, Executive and Judicial – to which some public authorities benefiting from a distinct constitutional consecration, stand alone, as is the case with the Public Ministry.

In this context, allowing the interpretation of article 133 paragraph 3 of the Constitution in order that a prosecutor of the elected may be president of the Superior Council of Magistracy means to allow as a matter of plan, one of the parties to the process in the sense delineated by the European Court of Human Rights' cases – that is the prosecutor – become the symbol of the independence of justice, clearly debasing the principle of the fair trial in article 21 paragraph 3 of the Constitution and article 6 of the European Convention on Human Rights.

The role and functions of the Public Ministry and, implicitly, of the prosecutors, therefore have in their turn, distinct, special regulations and, as we have seen above, no text in articles 131-132 (Section 2 – Public Ministry) to the independence of justice has an express, explicit, constitutional attribution of the Public Ministry. Moreover, in a very simple logic, since the Public Ministry, through its prosecuting offices, investigates criminal cases and sends the suspects to trial, the courts will decide whether or not there is guilt or justice within the meaning of article 126 paragraph 1 and to the contrary, attorneys ensure sui generis the protection of the persons brought to justice mean that it is absolutely natural for the Public Ministry to fight in such a way that the results of its activity are strengthened by condemning those sent in law, while lawyers, as a rule, try to convince courts of law to the contrary to the reasoning proposed by prosecutors.

So, who has here the essential role to ensure organically the independence of justice? Obviously and logically only the courts and the judges.

The simple question arises: Do prosecutors and judges have the same representation about the notion of the independence of justice? Are all the intrinsic and extrinsic signs of believing that article 6 (right to a fair trial) in the European Convention on Human Rights and article 21 paragraph 3 of the Constitution are properly respected when the president of the judicial council guaranteeing the independence of justice is a prosecutor? Obviously NOT because it is also illogical, not only contrary to the purpose for which the Superior Council of Magistracy is so regulated in the fundamental law.

Besides, it is difficult to answer affirmatively to the above mentioned question, because there are no solid arguments, as in the cases of the European Court of Human Rights and the Constitutional Court of Romania many principles and regulations are enshrined, one of these principles being to ensure credible and consistent public appearance of the impartiality and independence of the Judicial Power and the judges, the public trust that could be created through the entire functioning mechanism of the Council of Magistracy, the functioning of the courts considered separately, the behavior of judges as groups or individually.

It is clear that the Superior Council of Magistracy can unduly influence the judge's evolution in his career and, obviously, the decisions in the cases he solves. a judge may be marked by various forms of distraction or visible influence (i.e. dismissal from the profession as a disciplinary sanction) or diffused, especially in the concrete case where at the top of the hierarchy of the Council of Magistracy is a member chosen from the other profession belonging to magistrates, that is, a prosecutor whose statute is known from European Convention on Human Right cases as "part of the criminal trial."

In this reasoning one can at least observe that the appearance of impartiality that must first exist for justice has maximum deficiencies when the Superior Council of Magistracy president is a prosecutor because the expectations of the management that he can achieve with the greatest good faith may depart from the pattern of the basic profession of that president, namely the prosecutor, to whom other constitutional rules apply than for the Judicial Power and judges.

As such, at the level of abstract perception, in terms of independence, effectively enshrined in the fundamental laws, the necessary independence of the Judicial Power for the proper functioning of constitutional democracy, as specifically stipulated in the Romanian Constitution, the role of the Superior Council of Magistracy, it is absolutely natural that the explicit normative solution adopted the legislator in the law amending Law no. 317/2004, namely that the Superior Council of Magistracy president is always a judge of those elected by the general assemblies, especially since the position of Superior Council of Magistracy president is mostly symbolic, the decisions being made in the overwhelming majority of situations within the collective at either the Plenum or the Sections.

It should be noted that in the case law of the Constitutional Court there are situations in which, despite some seemingly clear constitutional texts regarding the functioning of the Superior Council of Magistracy and the jurisdictional competences of the Constitutional Court, the Constitutional Court rightly appreciated some principles constitutional defining for the rule of law, such as free access to justice and the supremacy of the Constitution (article 1 paragraph 5 and article 21 paragraph 3), when it had two constitutional problems. Thus, although article 133 paragraph 7 of the Constitution explicitly provides that the Superior Council of Magistracy judgments are final and irrevocable, except for those in disciplinary matters, however, by Decisions no. 143/2003 (regarding the constitutionality of the draft revision of the Constitution) and no. 433/2004, the Constitutional Court expressly states that, in principle, the Superior Council of Magistracy judgments may be appealed to the courts, that is to say, in justice as a reflection of the principle of free access to justice. Also, by Decision no. 799/2011 (on the Draft Constitutional Revision) the Constitutional Court resumed arguments from the Decision no. 143/2003 regarding the free access to justice and the possibility of the persons interested in attacking the Superior Council of Magistracy's decisions, this time being more transgressive, namely in the sense of abandoning the categorical expression of article 133 paragraph 7 of the Constitution and the replacement to the other paragraph, which expressly provides that judgments of the Superior Council of Magistracy as administrative acts may be challenged in the courts.

Therefore, the principle of free access to justice prevailed in the rationale and interpretation given by the Court in the above judgments, so that some constitutional texts that seemed to receive, *de plano*, a one-way interpretation (at first sight/reading), these were interpreted much more deeply, namely in correlation with the essential principles defining the rule of law and the constitutional democracy, reporting the way of interpretation to the basic rule of free access to justice.

Similarly (mutatis mutandis) we consider that it is necessary to regard the independence of justice as an end in itself for the existence and functioning of the Superior Council of Magistracy so that the organization and functioning of the Superior Council of Magistracy effectively guarantees this independence of the Judicial Power, the courts and, implicitly, the judges, in order to effectively promote the principle of the separation of powers in the state under article 1 paragraph 4, as well as the entire set of rules for the performance of justice (the principle of lawfulness of judicial procedures, the fulfillment of the law in the name of the law and not in the name of any entity institutional or unipersonal character, the unique, impartial and equal character of justice, the independence of judges and their obedience to the law only) explicitly provided for in article 124 of the Constitution.

Obviously, in this whole institutional picture created by Chapter VI on the Judicial Authority, there is no speculation about the superiority of any of the forensic professions – judge, prosecutor, lawyer – because such speculation of things would be unrealistic and childish.

In our opinion, it is exclusive to the constitutionally determined role assigned to each of these professions, in order to clarify how much and how it is permissible to interfere with each of these judicial professions in safeguarding and guaranteeing the independence of the judiciary as the essential purpose of the existence and functioning of the Superior Council of Magistracy.

We believe that the observation is that the functional independence of the Public Ministry must exist in real terms, and that the method of investigating criminal cases is not at all subjected to any form of interference outside the Judicial Authority and outside the express and clearly regulated criminal procedural framework. In this respect, it is desirable to devote an express legal provision on the functional and full

decision-making independence of prosecutors, obviously within the limits provided by the constitutional norms in force, regarding the way of investigating and solving the files that the Public Ministry has in their work , in such a way that the political factor can never interfere, whether we are talking about the Executive or the Legislative, as well as any other foreign entity of the Public Ministry.

In essence, it can be noticed that there are no notable differences between the status of the judge and the prosecutor, but only some rather declarative by the Constitution. However, with regard to the legal content of the functional independence for the two categories of magistrates, there is practically much similarity, except for the legal instrument of hierarchical control within the parquet units, where there are differences specific to this profession in the magistracy. In this respect, there is no solid argument that would lead to a possible reduction of the notion of magistrate/magistracy only to the judge/court.

On the contrary, the terminology of magistrate/magistracy itself would no longer be useful if it referred only to a professional category, that is to say the judge, as sometimes speculated. In reality, magistrates are related to the context of law enforcement by constitutional institutions (i.e. very important in the entire state building), i.e. circumscribed to the Judicial Authority and covering the two regulated professions there – judge and prosecutor. We have mentioned above that they have different constitutional and legal competences and must remain within the limits of these competences each and the interference between the two professions in the administrative and career development plan must be reduced to the minimum to guarantee the purpose and the essence of the Superior Council of Magistracy - the independence of justice – but also to ensure a proper consecration and functionality of the essential principle of the separation of powers in the state (where we only speak of judges and courts).

It is also widely recognized that the roles of the two components of the magistrate (judges and prosecutors) are different in the fundamental law of any state with real democratic standards, as well as in all international and regional legal instruments, the European Convention on Human Rights being the most eloquent example.

As a result, in the letter and spirit of the Romanian Constitution, as set out above, the Superior Council of Magistracy's president must always be a judge of those who are the result of the elections organized in the courts; and, logically, the vice-president elected only among the prosecutors resulting from the electoral process within the professional body of the prosecutors, the two elected persons thus becoming the right presidents of the Superior Council of Magistracy.

The solution proposed by the legislator that the president of the Judges Section is also the president of the Superior Council of Magistracy, namely the president of the Prosecutor's Section, to be vice-president of the Superior Council of Magistracy, based on the arguments set out above, we think is the most appropriate normative solution, since the aim of the fundamental law, and guarantee the independence of justice, it is much safer in this way.

4. Conclusions

In conclusion, let us make some observations on possible unconstitutional rules in the Law amending Law 317/2004, as follows:

I. Misunderstanding emerges from the reading of article 30, where some attributions are attributed either to the Plenum, or to the departments for the protection of justice, and especially to the defense of the independence, impartiality and reputation of judges and prosecutors. From the analysis of article 30 paragraphs 2 and 3 of the new law, it is not explicitly and predictably that the result of the inspections carried out by the Judicial Inspection is subject to the analysis of the sections and then the sections are pronounced by judgment.

The normative void left in the new law in this respect would lead to the abnormal situation that through internal regulations the Superior Council of Magistracy will legally legislate a segment that actually matters to the legislature. It is the legislator who must take steps to foresee and enforce the legal norm in the newly adopted law.

It is only understood from paragraph 6 that the corresponding section is pronounced by decision, but above, in paragraph 3 is used too categorical terminology, namely "in the situation where independence is affected ..." but there are no extra minimal explanations to make the text clear and precise (as the normative technique, the laws must be clear, precise, predictable, to be clear what their recipients are in the overall view, because the Nemo principle censuses ignoring the law to be able to produce effects in objectively and rationally).

Therefore, we believe that it is necessary to supplement or rephrase paragraph 3 where it is expressly stated that the report with the conclusions of the Judicial Inspection is submitted to the vote in the Plenum or, as the case may be, the appropriate section of the Superior Council of Magistracy.

II. Another set of questionable legal norms can be found in article 41 paragraph 2 of the new law, where it is given the competence of both sections to establish the territorial division for the courts (Judges section) and for the prosecutor's offices (Prosecutor's Section). These provisions of the new law are believed to conflict with article 131 paragraph 3 - the prosecutor's offices operate in the courts of law ... - since it is possible to decide different territorial districts in the two departments. The correct solution is that these territorial branches should be further established by the Ministry of Justice with the approval of the Superior Council of Magistracy – i.e. the Plenum

to have a unitary picture of the entire judicial system, given the provisions of article 131 paragraph 3 of the Constitution, which correlates the organization and functioning in administrative aspect of the courts and prosecutor's offices in the same territorial district and as a degree of jurisdiction.

The correct solution we believe is to give this task to the Plenum, with the consultation of each statement, i.e. the endorsement of the proposals and separate from the statements.

III. A text that we believe to have unconstitutionality is Article 41 letter c of the new law, as this text delegates practically to the Superior Council of Magistracy – the Section of Judges – attributions of the Parliament, namely to establish by law the competences of the courts – article 126 paragraph 2 of the Constitution. It is true that the text is somehow found in the law in vigor, but it does not cover the flaw of non-compliance with some provisions of the Constitution. Even Parliament cannot delegate its legislative powers to public authorities, in the absence of an express constitutional text that allows something. There is only one constitutional provision that establishes an exception to the rule of parliamentary monopoly on the law-making process, namely the legislative delegation granted to the Government under article 115 of the Constitution.

As such, the text of article 41 letter c) should be redrafted in such a way that the Superior Council of Magistracy acquires an advisory role for a draft law modifying or establishing such procedural powers in order to comply with the provisions of article 126 paragraph 2 – the jurisdiction of the judiciary and the court proceedings are provided only by law – the constitutional text being categorical in this regard.

IV. On the technical argumentation of drafting normative acts, the assignment of a normative symmetry where there is the same juridical decision on the substance and procedural rules (*Ubieadem est ratio, idem solutionessedebet*), it is worth mentioning a potential constitutionality of article 69 paragraph 4 of the new law, where there is no explicit separation of the Judicial Inspection on two sections – one for judges and another for prosecutors, just as the Superior Council of Magistracy is constantly working in the new law. Moreover, as the texts relating to the functions of president and vice-president are written, respectively covering the holiday situations of these functions, the confusion persists and basically the new law allows an inadmissible interference between the two professions in this sensitive area of disciplinary responsibility and defense of the independence and reputation of the two categories of magistrates.

Therefore, we believe that the law here is unclear, it generates confusions that will not help to apply judicious and compatible with the Constitution, on the contrary will probably generate chaos and confusion, leading very likely to inapplicable solutions and blockages in activity.

Starting from the model of regulation of the two sections of the Superior Council of Magistracy, introduced in the new law with clear boundaries of competences and much better correlated with the constitutional norms in force (and much closer to the letter and spirit of articles 5-6 of European Convention on Human Rights), in similarly, the Judicial Inspection matter should be regulated, with a clear separation between two sections, one for judges and another for prosecutors, as explicitly stated in article 134 paragraph 2 of the Constitution, where it is expressly stipulated that in disciplinary matters the units have attributions for each category of magistrates to which each section refers.

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