

THE JUDICIAL SYSTEM IN ROMANIA: STRUCTURE AND FUNCTION

PhD Candidate Oana Andra NIȚĂ

The Bucharest University of Economic Studies, Bucharest, Romania

oana.nita2000@gmail.com

Abstract

The modern organization of the courts is the result of an interesting historical development. Judicial power has gained an independent organization only in the modern age, respectively with the stronger assertion of the principle of the separation of powers in the state, in England, France and then in other Western states. Previously, justice coincided with executive practice and was often carried out by the same organs. The current organization of the courts is governed by Law no. 304/2004. Currently, according to Article 2, paragraph 2 of Law 304/2004, justice is done through different level of courts.

Keywords: *Constitution, judiciary system, independence, impartiality.*

1. Brief Presentation of the Judiciary System in Romania

The public service of justice in Romania is given through the Ministry of Justice, under the responsibility of the Minister of Justice and the guarantor of the independence of justice - according to the fundamental provisions of Article 133 paragraph (1) of the Constitution of Romania- is the Superior Council of Magistracy.

Since 1990, the Romanian state is organized and operates on the principle of the three power authorities, such as: legislative, executive and judicial. All these three authorities represent public powers, with distinct attributions which must function in a steady equilibrium. The importance of the judicial power is given, as we have previously mentioned, by the Constitution, which also highlights in the content of the provisions of Art. 126 that "justice is channeled through the High Court of Cassation and Justice and through the other established

courts of law". From the content of this constitutional text, it follows in *stricto sensu* that justice is done through a judicial system which, as we will see in the following, is composed of several courts with jurisdiction. Prosecutors who work in addition to them have attributions regarding the defense of the general public interest of the civil and the rule of law.

Thus, we can say that the activity of the public service of justice (Law no. 247/2005) or the judicial system in Romania - without going too far into the broad scope of the powers of these authorities - is composed of:

- Judicial system, which has attributions of judgment and includes the following categories of courts:
 - a) High Court of Cassation and Justice;
 - b) Courts of Appeal (16 of which one military);
 - c) Tribunals (42 in number);
 - d) Courts (188 in number);
- Prosecutors' offices attached to courts, in addition to each court of appeal, tribunal, court for minors and family, court and military courts operate a prosecutors' office. The headquarters of the prosecutors' offices are in the cities which cover the courts in which they operate and have the same territorial jurisdiction (Cochinescu, 1997). The military prosecutors' offices are based on the same principles, besides the military courts presented.
- Superior Council of Magistracy, that, accordingly its role, recognized by fundamental provisions and Article 1 paragraph (2) of Law 304/2004 on judicial organization in Romania, basically takes over the fundamental text and emphasizes its importance by stating that this council is the guarantor of the independence of justice. The Council's attributions are mentioned by Art. 134 of the Romanian Constitution, but wider provisions on organization and functioning are laid down in the provisions of the Law 317/2004 on the Superior Council of Magistracy.
- Public Ministry, representing in the judicial activity the general interests of the society, defends the order of law, as well as the rights and freedoms of the citizens. The Public Ministry exercises its powers through prosecutors constituted in prosecutor's offices, in the conditions of the law. The prosecutors' offices operate, conduct and supervise the criminal investigation activity of the judicial police under the conditions of Art. 131 of the Constitution and Article 1 of the Law no. 304/2004 on the judicial organization in Romania.

- Ministry of Justice, the specialized body of the central public administration, with legal personality, subordinated to the Government, ensures the elaboration, coordination and applying of the strategy and governance program for a good functioning of justice as a public service and ensures strict application of the law, in accordance with the democratic principles of the rule of law. In the content of Government decision no. 83/2005 on the organization and functioning of the Ministry of Justice, several incidents are attributed to the activity of the courts, but also to the activity of the prosecutors. Regarding the activity of the prosecutors, the Ministry of Justice carries out the appropriate activity according to the principles of legality, impartiality and hierarchical control.

The correct application of the principle of separation of powers in the state makes relations between the other functions (legislative, executive and court), in order not to create divergences of constitutional order. We refer to the correct application of this principle of separation of powers because it is closely related to the independence of the three functions, but also to their total activities. For these reasons, in turn, each function or power of the state in the structure of the component activities, must *a fortiori* implement this principle of separation between all authority having legal personality and not a report of subordination to them.

Therefore, the independence of a public activity that is part of a state function, must comply with certain clear principles of responsibility, which have in the face of civil society, the recipient of those services. The functions of justice have always coincided with the activity designed to defend the general interests and the rule of law of a society, and private interests were often defended by the social position of the individual. This activity is the most important function of justice and represents, as we have already mentioned, the judicial activity.

Also, we can firmly affirm that the contemporary demands of the function of justice in a rule of law are identified with the fair judicial activity that independent and impartial judicial bodies must fulfill, for the benefit of society. The process of realizing justice in a democratic society is the attribute and the strict power of the judiciary and any other influence (legislative or executive) would affect the principle of separation of powers in a rule of law.

2. Superior Council of Magistracy. Statute of Judges and Prosecutors

The independence and impartiality of judges are achieved *inter alia* by reducing as much as possible the influence of the political factor. *Per a contrario*, the more easily this influence can be exercised, simply by applying the existing rules, the lower the role of the courts in the overall

state powers is. With the occasion of the 2003 constitutional review, the need to remedy the deficiencies of the regulation in the field made significant changes in the role and structure of the Superior Council of Magistracy, as the guarantor of the independence of the judiciary. This function is accomplished on the one hand, by the way of training and organization and on the other hand, due to the competence of this body. The American model, where judges from the lower courts are directly elected by citizens, is not, by far, exempt from the interference of politics, obviously due to factors related to the electoral campaign and the financial component thereof. In addition, the appointment of Supreme Court judges is ultimately decided by the involvement of the executive and legislative powers.

Finally, according to the model that starts from the premise that judges represent a special category of civil servants, a more prominent role is given to the Minister of Justice as part of the executive power. Of course, none of these two models should be viewed in the abstract. Most of the time, the constitutional norms relating to the judiciary are a combination of these. Turning to the constitutional amendments in the field of justice in 2003, it is worth mentioning the principle of enforcing the norm that guarantees the impartiality of the judiciary, giving the Superior Council of Magistracy competence for the nomination proposals, as well as the promotion, transfer and sanctioning of judges, under the conditions of organic law. In Romania, the legal norms guaranteeing the independence of the magistrates have been frequently in the attention of the other state authorities in the last period.

In order to ensure the independence of judges and consequently of courts, the 1991 Constitution interposed the Superior Council of Magistracy between the executive power and the judiciary, represented by the Minister of Justice, (Leş, 2004). The old regulation of the Superior Council of Magistracy by the law of 1909 stipulated that it was an administrative body, presented as such by the doctrine (Herovanu, 1997) under the title "administrative organization of justice", together with the Minister of Justice. In the current organization and functioning, superior to the previous one, the Superior Council of Magistracy can no longer be considered an administrative body, but one of judicial authority, having administrative and disciplinary jurisdiction. This body is governed by the Constitution of Romania in the title referring to the "Judicial Authority", about which Art. 134 paragraph (1) provides that "the Superior Council of Magistracy is the guarantor of the independence of the judiciary". According to the provisions of Art. 133-134 of the Romanian Constitution and Art. 1 paragraph (2) of the Law no. 304/2004 on judicial organization, the Superior Council of Magistracy was conceived as a body set up to ensure the independence of the judiciary, assigning attributions in connection

with the appointment of magistrates (judges and prosecutors), their advancement, transfer and termination work. Having the role of discipline council for judges, CSM has important attributions regarding the good functioning of the courts, ensuring the irremovability of the judges appointed by the president of Romania and the stability of the prosecutors.

And from the point of view of the European Court of Justice in Strasbourg, the judge must be independent (E.C.H.R. Delcourt of 17 January 1970 and Sramek of 22 October 1984), first of all against the executive and the parties, but also the legislative. The position of the Council of Europe in this regard is very firm, which is why Recommendation no. (94) 12 of the Committee of Ministers on the independence, efficiency and role of judges (adopted by the Committee of Ministers on 13 October 1994) states that "in the decision-making process judges must be independent and able to act without any restriction, direct subjective influence, pressures, threats or interferences; the law must provide for clear sanctions against persons who attempt to influence judges' judgments in any way, so that the judges must decide impartially, in accordance with the interpretation of the facts; judges should not be required to report on how they have dealt with a case of anyone outside the judicial system" (Principle I, point 2, letter d).

Impartiality and independence are defining features of the established act of justice and jurisprudence (E.C.H.R. De Wilde and Others v Belgium of 18 June 1971), but as we have already mentioned in national law, the Constitution of Romania by Art. 124 states that "justice is impartial" and "judges are independent and obey only the law". Therefore, it cannot be adequately substantiated that justice must be included (E.C.H.R. Campbell and Fell v. The United Kingdom, of 28 June 1984) in the executive structures of the state. These features of the judiciary, which are in close correlation with each other, only highlight the autonomy of the judicial function (Voicu, 1996) and, implicitly, of the judiciary system because the law does not *expressis verbis* use this notion.

"From the judge's point of view, it is his scrupulous attention to respecting the principle of contradictory, supervising if each of the parties has the same chances of making use of their claims by taking an equal balance in the search for evidence" (Cornu, Foyer, 1996). The impartiality of the judge must not be confused with his independence. The judge may be independent of all powers in a rule of law as well as of the parties, but for example the latter may be subjectively prejudiced in a dispute if it is not impartial. In conclusion, the impartiality of the judge is the way in which he respects the equality of chances of the parties on the basis

of the evidence administered on the occasion of the judicial activity and which is the basis for the solution of the dispute between them without any external interference.

The independence of the judge is a prerequisite in ensuring his irremovability and the legislative power must ensure this framework by creating a statute that guarantees his resilience to possible external pressures. It is worth noting that, according to Art. 58 of Law no. 303/2004 "the Superior Council of Magistracy may have the secondment of judges with their written consent to other courts or prosecutors' offices, the Superior Council of Magistracy, the National Institute of Magistracy, the Ministry of Justice or its subordinate units, or other public authorities, in all positions, including those of public dignity appointed, at the request of such institutions, as well as in the institutions of the European Union or international organizations". Both the independence, impartiality and irremovability of judges, while they are protected by the state, will represent the fundamental safeguards for the fulfillment of good justice.

3. Organization and Functioning of the Superior Council of Magistracy

The Superior Council of Magistracy consists of 19 members, of which:

- a) 9 judges and 5 prosecutors;
- b) 2 representatives of civil society;
- c) the President of the High Court of Cassation and Justice, representative of the judiciary, the Minister of Justice and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Judges and prosecutors, members of the Superior Council of Magistracy, are elected in the general assemblies of the judges or, as the case may be, of the prosecutors, among the judges and prosecutors appointed by the President of Romania.

4. Duties of the Superior Council of Magistracy in the Field of Disciplinary Liability of Magistrates

Through its sections, the Superior Council of Magistracy fulfills the role of a court in the field of disciplinary liability of judges and prosecutors, for the acts provided by Law 303/2004 on the status of judges and prosecutors. The judges section also acts as a disciplinary court for the magistrates-assistants of the High Court of Cassation and Justice.

Disciplinary actions in case of deviations committed by a judge are exercised by the Judicial Inspection, by the judicial inspector, by the Minister of Justice or by the President of the High Court of Cassation and Justice. The disciplinary action in case of deviations committed by

prosecutors is exercised by the Judicial Inspection, by the judicial inspector, by the Minister of Justice or the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

The disciplinary action in case of deviations committed by an assistant magistrate is exercised by the president of the High Court of Cassation and Justice or the Judicial Inspection through the judicial inspector.

Any referral about the inappropriate activity of judges and prosecutors, wrongly directed at courts or prosecutors' offices, will be submitted to the Judicial Inspection within 5 days of registration. In order to carry out the disciplinary action, it is mandatory to carry out the preliminary investigation by the Judicial Inspection. During the disciplinary proceedings, the appropriate section of the Superior Council of Magistracy, *ex officio* or at the suggestion of the judicial inspector, may order the suspension of the magistrate until the final settlement of the disciplinary action if the continued exercise of the position could affect the unfettered conduct of disciplinary proceedings or if the disciplinary procedure is likely to seriously undermine the prestige of justice. Also, during the course of the disciplinary proceedings, the settlement of the application for the granting of the service pension is suspended until the final settlement of the disciplinary action. The preliminary investigation is carried out by the inspectors of the Judicial Inspection Service for judges, respectively within the Judicial Inspection Service for prosecutors. On the occasion of the preliminary investigation there can be established the facts and their consequences, the circumstances in which they were committed, as well as any other conclusive data from which to judge the existence or non-existence of the guilt.

The judge or prosecutor and, as the case may be, his representative or lawyer shall be entitled to acquaint themselves with all the documents of the case and may request the taking of evidence in the defense.

The sections of the Superior Council of Magistracy shall, if it finds that the referral is well founded, apply one of the disciplinary sanctions provided by the law in relation to the seriousness of the disciplinary offense committed by the judge or prosecutor and his/her personal circumstances.

The member of the Superior Council of Magistracy against whom a disciplinary action is exercised does not take part in the work of the section in which this action will be judged. An appeal may be brought against these judgments within 15 days of the notification by the sanctioned judge or prosecutor or, as the case may be, by the Judicial Inspection or by the person who exercised the disciplinary actions. The competence of resolving the appeal belongs

to the Chamber of 5 judges of the High Court of Cassation and Justice. The Superior Council of Magistracy shall not include the members of CSM or the Disciplinary Judge in the procedure of appeal. The appeal suspends the execution of the decision. The decision by which the appeal is resolved is irrevocable. If the exclusion of a judge or a prosecutor has been ordered, the irrevocable decision is sent to the President of Romania, for the issuance of the dismissal decree.

Until the amendment of the Law 317/2004, by Law 24/2012, within the plenum of SCM functioned the Judicial Inspection, led by a Chief Inspector. Currently this structure enjoys legal personality and functions within the Superior Council of Magistracy, based in Bucharest. The Judicial Inspection is headed by a Chief Inspector, assisted by a Deputy Chief Inspector, appointed through a competition organized by the Superior Council of Magistracy. This structure acts according to the principle of operational independence, fulfilling, through judicial inspectors appointed under the terms of the law, attributions of analysis, verification and control in the specific fields of activity.

The judicial inspectors, including the leaders of the courts or prosecutors' offices may request, under the law, any information, data, documents or any checks they may deem necessary for carrying out the disciplinary investigation or the exercise of the other duties provided by law or regulations. Documents or any other information under the jurisdiction of the Judicial Inspection are confidential, with the exception of those which, according to the law, constitute information of public interest.

In the exercise of their duties provided by the law, with the exception of those related to the conduct of the disciplinary investigation, the judicial inspectors shall draw up inspection reports, which will be communicated to the courts/prosecutor's offices, for the purpose of formulating objections. This inspection report, together with the objections formulated, shall be forwarded to the appropriate section of the Superior Council of Magistracy, which sets out the necessary measures to remedy the situation. If the court considers that the objections are well founded, the Superior Council of Magistracy may order, in writing and in due course, the resubmission of the report in order to complete the verifications, expressly indicating the issues to be filled in.

During the exercise of the Chief Inspector, Deputy Chief Inspector and Judicial Inspector, judges and prosecutors are legally suspended from their duties in the courts and prosecutors' offices. Judges and prosecutors with leading positions are obliged to choose between the management and the judicial inspector, within 30 days from the date of obtaining the right to

continue to be a judicial inspector. After 30 days, the post or judicial inspector for whom the option has not been made becomes vacant by law.

The provisions on disciplinary sanctions and misconduct, as well as the disciplinary procedure, apply accordingly to judicial inspectors. Inspectors of the Judicial Inspection are dismissed from office if they have been disciplined or have not received an appropriate rating. Upon termination of the judicial inspector's function, the judges and prosecutors shall return to the courts or prosecutor's offices where they have previously worked or, with their consent, to other courts or prosecutors' offices where they have the right to operate according to the law.

Judicial inspectors carry out their work independently and impartially. Judicial inspectors may not conduct disciplinary research or any other work involving judges or prosecutors in the courts or prosecutor's offices where the inspector has been operating. In this case, the action is assigned to another judicial inspector, in a random manner, in compliance with the provisions of the law.

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