

Decision No 522 of 9 November 2022 on the objection of unconstitutionality of the Law on judicial organisation as a whole and of the provisions of Articles 13, 15 (1), 21 (6), 28, 30 (1), (3) and (5), the second sentence of Article 31 (4), Article 34 (3), Article 36 (3) and (8), Article 45 (1), (2) and (4), Articles 54 (2) and (5), 57, 58 (4) and (5), 68 (3) and (4), 70, 82 (2) and (3), 90 (2) and (3), second sentence, 93, 97 (2) and (3), second sentence, 107 (2), 115 (1), 150, 159 and thereof, published in Official Gazette of Romania, Part I, No 1101 of 15 November 2022.

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that Article 21 (6) of the Law on judicial organisation affects the independence of judges, since, in the case of temporary assignment of judges from one section to another, there is no clear objective criterion laid down by law according to which the President of the High Court of Cassation and Justice (HCCJ) can make the proposal for assignment, apart from the subjective criterion of his preference.

With regard to the provisions of Articles 30 (3), 54 (2), 82 (2), 90 (2), 97 (2), and 107 (2) of the law, the authors of the objection criticised the fact that the automatic inclusion of the president, vice-presidents, section presidents in the Governing College and the election of a very small number of other magistrates to the General Assembly were such as to transform the governing colleges into the support team of the court presidents, in breach of Articles 1 (3) and 124 (3) of the Constitution. The decision-making component should lie with all judges and be capable of being exercised by democratically elected representatives. The same criticisms also concern the governing colleges of the public prosecutor's offices.

Article 30 (5) of the law is criticised for the possibility for the Governing Council of the HCCJ to operate without the legal number of members for an indefinite period, being argued that the provisions cited are unclear, unpredictable and create instability, since the extension of the period of operation without the legal number of members could take place indefinitely, which could affect the act of delivering justice at the highest level.

With regard to the second sentence of Article 31 (4), the second sentence of Article 54 (5), the second sentence of Article 82 (3), the second sentence of Article 90 (3) and the second sentence of Article 97 (3) of the law, it was argued that the independence of judges is affected by the legal provisions which make the vote of the president of the courts, the Prosecutor General of the Prosecutor attached to the High Court and the chief prosecutors of the National Anti-Corruption Directorate and the Directorate for Investigating Organised Crime and Terrorism within the governing colleges decisive in the event of parity of votes. It was indicated that the president was a member of the governing college who should not have more rights than the other members in relation to the weighting of the vote.

With regard to Articles 34 (3) and 57 of the law, the authors of the objections criticised the lack of clear and objective criteria for changing the members of the panels to the HCCJ and the other courts. The criteria on the basis of which the members of the panels may be changed should be indicated in the law and not in a legislative act with lower legal force. The concept of modification of the panel must be very clearly regulated and the situations in which members of a panel may be changed must be restrictive, since the measure of replacing a judge constitutes an impairment of his or her independence.

With regard to the provisions of Article 58 (4) and (5) of the contested law, it was criticised that the random assignment system would be audited externally only from a technical point of view and not from the point of view of possible circumvention of the system through human intervention, which means that this audit cannot achieve the objective expressed in paragraph (5), i.e. identifying and remedying the system's vulnerabilities, including in terms of defects or influence of random assignment.

It was further argued that Articles 70 and 159 of the law, concerning the secondment of judicial police officers and agents to prosecution offices, were contrary to Article 1 (3) and (5) of the Constitution, since they referred to a special law which did not even exist as a draft.

The authors of the objection also argued that Article 93 of the law affected the activity of the National Anti-Corruption Directorate, as it removed the provision in the legislation in force concerning its independence.

II. Having examined the objection of unconstitutionality, the Court found that Article 21 (6) of the contested law was not such as to affect the independence and impartiality of judges, since no external pressure or influence is exerted on them that would undermine these constitutional values. The assignment from one section to another is justified by the need to ensure that cases are dealt with expeditiously, given that there is a high volume of activity at the level of one section, the duration of which is strictly determined, for a maximum of one year, and is also carried out only with the consent of the judge.

With regard to the provisions of Articles 30 (3), 54 (2), 82 (2), 90 (2), 97 (2), and 107 (2) of the law, the Court found that the reference to the alleged infringement of the independence of judges, a constitutional attribute which means their full ability to carry out the judicial act in the absence of any external influence that distorts the fairness of the trial, could not be accepted. The claims of the authors of the referral to the effect that the inclusion of the presidents or chief prosecutors in the governing council of the courts or of the prosecutor's offices would transform the governing council into a cover for its president represent nothing but than their personal assessments, which do not find support in the legal texts complained of.

The Court found that the complaint of unconstitutionality made with regard to Article 30 (5) cannot be upheld. In the event that, for objective reasons, the governing council of the HCCJ cannot be formed with the legally elected number of members, the text introduces a temporary remedy enabling that body to function, which is essential to ensure the efficiency of the court in administrative and organisational terms. Thus, the composition of the governing council will be supplemented by that judge who has the longest seniority in the position of judge of the section. The period during which he or she will be a member of the governing college is unequivocally apparent from the express reference made in the text of the contested law to the provisions of Article 30 (3) and (4), according to which the members of the governing college are elected for a period of 3 years at the general assembly of judges, and in the event of a vacancy of an elected member, elections shall be held to appoint a new member no later than 30 days after the vacancy. It is therefore not an indefinite period, as the authors of the referral claim. Therefore, there is no question of breaching the quality standards of the law or of the provisions of Article 124 of the Constitution concerning the administration of justice.

The Court established that the second sentence of Article 31 (4), the second sentence of Article 54 (5), the second sentence of Article 82 (3), the second sentence of Article 90 (3) and the second sentence of Article 97 (3) of the law are intended to provide a solution to unblock situations which could lead to serious malfunctions in the activities of the courts and public prosecutor's offices, taking into account that it is the president of the court/chief prosecutor of the prosecutor's office who also has managerial duties, with the best knowledge of the institution's realities and needs.

The Court held that Articles 34 (3) and 57 of the contested law are not liable to lead to the abusive change of judges from the composition of the panel. That is because both articles concerned state that this is done only exceptionally and on the basis of objective criteria, and those objective criteria will be such as to exclude the arbitrary replacement of judges from the panel. Such a firm clarification at the level of the law leads to the conclusion that the contested provisions do not undermine the independence of judges, since the change is not discretionary but based on objective reasons. The failure to list those objective grounds in the law cannot lead to the unconstitutionality of the legal text complained of, since the legislator could not have provided for them exhaustively either. Therefore, the assumption that the composition of the panel was changed in order to influence the outcome of the case in the judicial decision cannot be considered.

Referring to the specific method of appointing the members of the panel, the Court stated that whenever a law does not regulate a particular procedure for the implementation of a measure/purpose laid down by law, it is for the regulatory administrative act to regulate it, without such a procedure being equated with an addition to the law. The competence to change the composition of the panels lies with the Governing College, which will take into account the existence of objective criteria laid down in the Regulation on the administrative organisation and functioning of the HCCJ, and they do not need to be laid down in law as a primary regulatory act.

The Court found that the complaint of unconstitutionality concerning Article 58 cannot be upheld. By means of the audit of a technical nature, the legal provisions criticised do not preclude the finding of deficiencies in the information system enabling the system to be circumvented by human

intervention, and any specific and specific deviations from the random assignment rule will be subject to review by the Judicial Inspection, to which the law confers explicit powers in this regard.

The Court held that the complaint of unconstitutionality concerning the secondment of judicial police officers and agents to the public prosecutor's offices was unfounded, since the authors of the referral start from an incorrect premiss, focusing their claims on the unconstitutionality of the organisation of the judicial police by joint order of the Prosecutor General and the Minister for the Interior. However, the provisions of the law complained of concern only the regulation of cooperation measures between the Ministry of the Interior and the Prosecutor's Office attached to the HCCJ for the appointment of judicial police officers and agents to carry out criminal investigation activities. There is therefore no question of the actual organisation of the judicial police, which must be established by law adopted by the Parliament. In this context, the Court noted that Law No 364/2004 on the organisation and functioning of the judicial police is currently in force, as republished in the Official Gazette of Romania, Part I, No 305 of 24 April 2014, and details the way in which the judicial police are set up, the conditions under which judicial police officers and agents may be appointed to the judicial police and the way in which they operate

With regard to the independence of the National Anti-Corruption Directorate, the Court noted that the law criticised explicitly states, in Article 66 (4), that the public prosecutor's offices are independent in relations with the courts and other public authorities. This provision is clearly also valid for the National Anti-Corruption Directorate. Furthermore, the second sentence of Article 93 (1) states that the National Anti-Corruption Directorate shall enjoy operational and functional independence. In relation to the status of prosecutors, the Court pointed out that they cannot rely on a position of independence, like judges, since their work is carried out under hierarchical control and under the authority of the Minister for Justice. Therefore, given that the public prosecutor is not independent in the structure of the Public Prosecutor's Office, but is hierarchically subordinate, the Court held that it was not possible to regulate guarantees relating to objective impartiality which would affect in its substance the constitutional concept of hierarchical control.

III. For all these reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the Law on the judicial organisation as a whole, as well as the provisions of Articles 13, 15 (1), 21 (6), 28, 30 (1), (3) and (5), 31 (4), second sentence, 34 (3), 36 (3) and (8), Articles 45 (1), (2) and (4), 54 (2) and (5), 57, 58 (4) and (5), 68 (3) and (4), 70, 82 (2) and (3), second sentence, 90 (2) and (3), second sentence, 93, 97 (2) and (3), second sentence, 107 (2), 115 (1), 150, 159 and thereof were constitutional in relation to the criticisms made.