

Decision No 27 of 22 January 2020 on the request for resolution of the legal dispute of a constitutional nature between the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice, on the other, published in Official Gazette, Part I, No 166 of 28 February 2020

Summary

I. As grounds for the request for resolution of the dispute, the President of the Senate argued that the High Court of Cassation and Justice, through the Governing Board, had arrogated the power to legislate in the matter of the organic law with regard to the way in which 3-Judge Panels of the Criminal Chamber were to be formed, in breach of Parliament's constitutional competence.

It was pointed out that Articles 19 (a¹) and 32 (1) of the Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice, a unilateral administrative act of a normative nature, provide that the composition of 3-Judge Panels shall be approved by the Governing Board, and the presidents of sections shall determine the judges comprising the panels of the chambers. However, Law No 304/2004 does not contain any power for the Governing Board to approve the composition of the 3-Judge Panels of the Chambers of the High Court of Cassation and Justice, nor does it regulate the specific method of composition of those panels. Therefore, the aforementioned provisions of the regulation do not correspond to Law No 304/2004, adding to it, which leads to an infringement of Articles 1 (3) and (5), 73 (3) (1) and 126 (4) of the Constitution.

A situation has thus been reached where the composition of the panels is governed by an administrative act, issued by the management of the court itself. Rules for the composition of courts should enjoy accessibility, foreseeability and stability. The delegation of the power to lay down these rules to the Governing Board of the High Court of Cassation and Justice gives rise to a state of legal uncertainty, as infralegal acts are subject to frequent changes over time.

The composition of the panels, consisting of the nominal appointment of the judges to form a panel, is a question of judicial nature which relates to the actual administration of justice and must therefore be carried out by means of a legal procedure designed to ensure the independence and impartiality of judges. By Decision No 685 of 7 November 2018, the Constitutional Court held, with regard to the 5-Judge Panels, that the presumption of impartiality of the court is rebutted if it is found that the members of the panel were not appointed by drawing lots, but at random in open court.

Moreover, it was argued that these provisions of the regulation establish a differentiated and discriminatory regime as regards the composition of the 3-Judge Panels compared to the 5-Judge Panels, in the sense that within the latter the judges of which they are composed are drawn by lot, whereas in the case of the 3-Judge Panels, the presidents of the chambers determine their composition and the Governing Board approves it.

II. Having examined the request for a settlement of the dispute, the Court held that, in cases where the legislator intended the composition of a panel to be determined according to a particular procedure, it had expressly regulated it. Thus, for example, with regard to the 3-Judge Panels of the supreme court, in a particular case, Article 31 (3) of Law No 303/2004 established that "if the number of judges required to form the panel of judges cannot be ensured, it shall be constituted from amongst judges from the other chambers, appointed by drawing lots by the President or one of the 2 Vice-Presidents of the High Court of Cassation and Justice". As regards the 5-Judge Panels of the supreme court, Article 32 (4) of Law No 303/2004 established that "the judges forming part of these panels shall be appointed by drawing lots, in

open court, by the President or, in his absence, by one of the 2 Vice-Presidents of the High Court of Cassation and Justice”.

Therefore, if the law does not lay down any procedure to be followed in order to determine the composition of the panels, it is for the governing bodies of the High Court of Cassation and Justice to regulate a procedure for the actual enforcement of the law.

The author of the case took the view that the Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice could not establish a regulatory solution for the appointment of the members of the panel, on the one hand, because the issuer of the regulation did not have that power and therefore added to the law, and, on the other hand, because the requirements laid down by law for the composition of panels of judges and their objective independence and impartiality are thus infringed.

The Court found that the High Court of Cassation and Justice is a legal person governed by public law which, in addition to the judicial functions of its activity, also has an administrative function, which concerns its organisation and its actual operation. The two functions — judicial and administrative — must remain separate. None may take over the object of the other. Thus, the administrative acts issued cannot determine or influence the composition of the panels or the proceedings before the High Court of Cassation and Justice, just as judicial decisions cannot replace administrative acts, but rather review their legality.

Decisions of the Governing Board of the High Court of Cassation and Justice are unilateral administrative acts of a normative nature, issued for the purpose of enforcing the law. They cannot, therefore, govern social relations in primary terms.

Therefore, whenever a law does not regulate a particular procedure for carrying out a measure or purpose provided for by law, the regulatory administrative act must regulate it, without such a process constituting an addition to the law. Therefore, the regulation of the designation of the members of the 3-Judge Panels of the High Court of Cassation and Justice by a subsequent administrative act of a normative nature is not contrary to Law No 304/2004, since the law in question did not lay down just one method of designation.

The legislator considered that the determination of the procedure relating to the composition of panels is a matter for the administration of justice falling within the jurisdiction of the High Court of Cassation and Justice. It is only where the legislator has expressly regulated a particular designation procedure that the High Court of Cassation and Justice cannot establish another procedure.

The Court found that the method of designation of members of 3-Judge Panels by means of an administrative act of a normative nature did not infringe the constitutional requirements of Article 126 (4), since the administrative act merely organises the enforcement of the law. Therefore, the requirement for the composition of panels to be regulated by law is not affected.

In determining whether the court is independent, the appearance plays a particular role, since the trust which the courts must inspire to the public in a democratic society is at issue. It is also apparent that the independence of the court is assessed on the basis of how its members are appointed, the length of their term of office and guarantees against external pressures.

The Court found that the solution chosen by the normative administrative act is not such as to affect the requirement of independence and objective impartiality of the 3-Judge Panels. The designation by drawing lots of the members of the panels is not the only way to ensure their objective impartiality. The current procedure, which involves double filtering by both the President of the Chamber and the Governing Board of the High Court of Cassation and Justice, in principle, ensures the necessary transparency. The proposals of the president of the chamber cannot be arbitrary, since they must also take account of objective criteria in order to ensure the quality of justice.

III. For all these reasons, the Court unanimously found that there was no legal dispute of a constitutional nature between the Romanian Parliament and the High Court of Cassation and Justice arising from the composition of the 3-Judge Panels of the Criminal Chamber of the High Court of Cassation and Justice.