Decision No 520 of 9 November 2022 on objections of unconstitutionality concerning the Law on the status of judges and prosecutors as a whole and the provisions of Articles 17 (5), 21 (4), 22, 25, 26 (1), 33 (1), 43 (2), 45 (1), 59 (3) and (4), 63 (1), 75 (5), 89, 114, 115, 117 (6), 121 (4), 128, 132, 133, 135, 139-141, 143 (2), 145-149, 150, 160 (6), 167, 169 (8), 172 (8), 188 (4), 206, 228 (5)-(7), 234 (2), 235 (2), 269(16), 271, 273 (1) (c) and (d), 275 (1), (3) and (6), 277 (6), 278 (2), 279, 283, 284 (5), 289 (2), 290 thereof and annex no 1 point B Article 2 (b) thereto, published in Official Gazette of Romania, Part I, No 1100 of 15 November 2022

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the provisions of Article 22 of the Law on the statute of judges and prosecutors infringed Articles 1 (3) and (5) and 124 of the Constitution, since they did not regulate the possibility of access to justice in effective conditions for challenging the decisions of the Superior Council of Magistracy (SCM) concerning failure to comply with the condition of good repute of candidates for the competition for admission to the National Institute of Magistracy.

Furthermore, the training of judicial trainees in law firms, as provided for in Articles 26 (1) and 33 (1) of the law criticised, constitutes a vulnerability for the entire judicial system, given the uneven nature of legal training.

Waiving the written tests for promotion to the supreme court and waiving the assessment of judges of the High Court of Cassation and Justice (HCCJ), provided for in Articles 88 (2), 89, 114 and 150 of the law subject to review, infringes Articles 1 (3) and (5), 16 (1) and 124 of the Constitution. This infringes the principle that promotion to higher courts must be based on objective criteria. Waiving the periodic assessment of judges of the HCCJ is unjustified and discriminatory as these judges carry out the same activity as colleagues from other courts.

The provisions of Article 132 of the law criticised infringe Articles 1 (3) and (5) and 124 of the Constitution, since effective promotion to higher courts, up to the HCCJ, which is based on subjective criteria, removing the objective criterion of the written knowledge test, reduces the professional quality of judges at higher courts, impairs the quality of justice, reduces the prestige of justice and discourages candidates. These aspects must be read in conjunction with the fact that on-the-spot promotions will be blocked for a long period on the pretext of encouraging magistrates to register for actual promotion interviews.

Furthermore, the provisions of Articles 145-149 of the law criticised fail to regulate a central role of the SCM's Section for Prosecutors in the appointment of senior prosecutors to managerial positions. The authors of the referral stressed that the integrity of the procedures for the appointment of prosecutors to the highest positions in the Public Prosecutor's Office cannot be based solely on the good faith of some politicians.

The assent of the Minister for Defence for Military Magistrates, provided for in Article 188 (4) of the contested law, directly affects their functional independence, contrary to Articles 1 (3) and (4), 124 (3), 125 (2) and 131 of the Constitution. In this respect, the fact that a politician determines who becomes/does not become a military magistrate results in an unauthorised interference by the executive in the judiciary, a blatant violation of the principle of separation of powers. The status of military magistrates is seriously affected by maintaining, or even increasing, the possibility for the Minister for National Defence to influence indirectly the course of criminal investigations or even the trial.

In addition, Article 206 of the contested law grants judges and prosecutors the possibility of holding managerial positions within legal entities governed by private law, which is contrary to the strict regime of incompatibilities of judges and prosecutors laid down in Articles 125 (3) and 132 (2) of the Constitution.

It was further argued that the provisions of Article 228 (5), (6) and (7) of the Law infringe the essence of the right of free access to justice enshrined in Article 21 of the Constitution, in that they exclude from judicial review acts containing the result of checks carried out by the Supreme Council of National Defence (CSAT) as to the veracity of the statements showing that the persons referred to in paragraph (1) of the same article were not and are not operational agents, including undercover agents, informants or collaborators of any intelligence service.

Furthermore, the provisions of Article 271 of the law complained of are contrary to Articles 1 (5), 124 (3), 126 (3), 132 (1) and 147 (4) of the Constitution by failing to regulate the liability of judges and prosecutors for non-compliance with the decisions of the Constitutional Court and the HCCJ.

It was argued that the disciplinary penalty of downgrading to a professional grade, provided for by Article 273 (1) (d) of the Law, constituted a breach of the principle of the irremovability and independence of the judiciary.

In addition, the provisions of Article 290 of the Law, which provide for the possibility for judges of the HCCJ to opt for becoming lawyers and notaries, without examination or competition, infringe Article 16 (1) of the Constitution. The granting of such rewards is not explained and discriminates against other magistrates in the system.

II. Having examined the objection of unconstitutionality, the Court held that Article 22 of the contested law did not establish an appeal in the procedure for assessing the good repute of candidates for the competition for admission to the National Institute of Magistracy, given that it was part of the admission competition, a competition test. The assessment of the competition tests is an exclusive competence of the Examination Board or, as the case may be, of the SCM. The fact that the decision of the plenary assembly of the SCM to assess good repute cannot be subject to judicial review, which is an expression of the fact that it is adopted in the course of a competition procedure, is an option of the legislator, which has no constitutional relevance. However, it is clear that the SCM's decision validating the competition can be appealed before the courts.

With regard to the training of judicial trainees in law firms, the Court pointed out that lawyers are indispensable partners in justice. The possibility for judicial trainees to undertake internships at law firms is a stage of their training. Such an internship is a valuable professional experience that helps the judicial trainee to understand and appreciate the work of lawyers.

Next, the Court held that the legislative solution according to which judges of the HCCJ are not subject to professional evaluation is a legislative option justified by the institutional position of the HCCJ. It is for the legislator to determine whether or not they are subject to professional assessment, both solutions being equally constitutional. In view of the position of the HCCJ in the judicial system, the issue of the assessment of its judges cannot be compared with the assessment of judges of the lower courts, where the result of the assessment is both a condition of professional suitability and a condition of promotion to the higher courts. The Court also noted that no constitutional provision lays down the conditions under which judges promote to the HCCJ, so that the legislator is free to regulate them. The only requirement imposed by the Constitution for the promotion of judges is that it be ordered by the SCM.

In accordance with Article 114 of the law criticised, the promotion competition consists of a test to evaluate the court decisions drawn up and an interview before the Section for Judges of the SCM. The fact that the competition tests are different from those for promotion on the spot or effectively before specialised courts/tribunals/courts of appeal and does not consist of taking tests to verify practical and theoretical knowledge or assessing the activity and conduct of candidates over the last 3 years is explained by the unique and superordinate nature of the HCCJ in the judicial system. The legislator has a certain margin of discretion in this respect and may differentiate the way in which judges to specialised courts/tribunals/courts of appeal, on the one hand, and the HCCJ, on the other hand, are promoted.

With regard to the provisions of Article 132 of the law subject to review, the Court held that it did not have the power to determine whether or not access to on-the-spot or effective promotion was easier or not; nor is it competent to determine whether access to the two forms of promotion must be made under identical conditions. The Constitution does not lay down criteria on the basis of which promotion must be carried out, so it is for the legislator to determine them, which, acting within its discretion, has full legitimacy to regulate the entire system of promotions. Obviously, promotions are carried out by means of a competition in order to ensure that the persons concerned, judges and prosecutors, have access to the positions within the higher courts and prosecutor's offices in an equal and non-discriminatory manner, in accordance with Article 16 of the Constitution, but the specific regulation of the competition tests for the various categories of promotions is a task of the legislator. However, the complaint merely states that, in the case of actual promotion, the written test to verify knowledge had to be regulated as a competition test, which shows that it falls within the sphere of legislative choices and does not call into question issues of unconstitutionality.

The authors of the objection argued that promotions on the spot would be blocked for a long period on the pretext of encouraging magistrates to enrol in actual promotion interviews. Such an assertion is merely speculative and not an argument of unconstitutionality. Even if it were true what the authors of the objection claim, it may be noted that the point raised is not a matter of law and that the Court cannot rule on future issues of fact.

As regards the provisions of Articles 145 to 149 of the law criticised, the Constitution does not contain any special provisions relating to the procedure for appointing senior prosecutors to managerial positions. The legislature is free to regulate that procedure, provided that both the SCM and the Minister for Justice are involved in accordance with their constitutional role. The Constitution does not establish that the promotion of prosecutors is carried out exclusively by the SCM (unlike the express provision laid down for judges – Article 125 (2) of the Constitution), so the legislator has a wide margin of discretion in this respect. It decided that the promotion of prosecutors to the level of the prosecutor's offices attached to the courts of appeal should be made by the SCM, but appointments to the highest positions through a procedure under which the Minister of Justice, the SCM and the President of Romania must act together, each in accordance with the respective constitutional role. As regards the criticism that a system of political appointment of heads of section is maintained, it can be observed that this is a matter of legislative choice and opportunity, not constitutionality. The infringement of Article 133 (1) of the Constitution cannot therefore be upheld.

As regards Article 188 (4) of the contested law, the Court held that the judge, in order to become a military one, must logically also acquire the status of military officer, in this case an active officer. The status of military personnel is generally acquired by an act of the Ministry of National Defence. The SCM does not have the functional power to decide on its own whether to grant military status to a judge. If the deletion of the assent of the Minister of National Defence were to be accepted, this would lead to the abolition of the concept of military judge/prosecutor, as their specific competences would be taken over by civilian judges/prosecutors, who would deal with cases of military crimes. A possible advisory opinion of the Minister of Defence, as suggested by the authors of the objection, would mean that the SCM alone appoints an active officer, which is inadmissible. However, the status of active military personnel within the Ministry of National Defence does not mean a relationship of subordination in terms of the performance of their duties as judges.

It was argued that Article 206 of the law criticised gives judges and prosecutors the possibility to occupy positions that go beyond the task of delivering justice. The Court noted that Article 11 (3) of Law No 303/2004 on the status of judges and prosecutors, republished in the Official Gazette of Romania, Part I, No 826 of 13 September 2005, in force, provides that judges and prosecutors may be members of scientific or academic societies, as well as of any legal entities governed by private law which have no financial purpose. Similarly, Article 76 of that law provides that judges and prosecutors are free to organise or join local, national or international professional organisations in order to defend their professional rights and interests and those provided for in Article 11 (3), and may be part of their governing bodies.

The Court held that recognition as members of associations whose purpose is to protect the rights and professional interests of judges and prosecutors means that those persons sit in the general assembly of an association and therefore form part of their governing bodies. They are therefore also now part of the governing bodies of those associations. Only if the possibility for judges and prosecutors to set up associations were not recognised, then they could not be part of their governing bodies, but this would amount to their being unable to defend their professional rights and interests in an organised framework. Membership of an association therefore also implies membership of its governing body. The two aspects are inseparable as they are intrinsically linked. Those arguments also apply to foundations. Article 206 of the contested law does not alter the legislative solution in force.

With regard to the exclusion from judicial review of documents containing the result of the checks carried out by the CSAT, the Court found that the CSAT does not issue any document on the outcome of the verification if the declaration is true. If the declaration has been verified and is not truthful, the CSAT shall issue a written document on the result of the verification. In the case of the second situation, the result of the verification may be challenged (following what was established by Constitutional Court Decision No 45 of 30 January 2018), whereas, in the first situation, the result of the verification cannot be challenged, since no act has been issued. Therefore, Article 228 (5) to (7) of the law does not infringe Article 21 of the Constitution.

As regards the failure to regulate the liability of judges and prosecutors for failure to comply with the decisions of the Constitutional Court and the HCCJ, the Court has held that this does not mean that failure to comply with those decisions cannot trigger the disciplinary liability of the judge or prosecutor provided that it is demonstrated that he or she performed his or her duties in bad faith or gross negligence. It is true that the new rules no longer establish as a disciplinary offence any breach of the decisions of the Constitutional Court and the HCCJ, but only those which are effected in bad faith or gross negligence. As regards disciplinary offences, the liability of judges and prosecutors shall be subject to the conditions laid down in Article 52 (3) of the Constitution, which also entail the liability of the State for judicial errors. Therefore, Article 271 of the law does not affect the binding nature of decisions of the Constitutional Court or the HCCJ.

It was argued that the disciplinary sanction of downgrading in professional grade, provided for in Article 273 (1) (d) of the law criticised, constitutes a breach of the principle of irremovability and independence of the judge. The Court held that the limits of irremovability must always be related to the personal conduct of the judge. The principle of irremovability is the principle of the rule of law which, in guaranteeing the independence of judges, protects them from the risk of being dismissed, removed from office or downgraded from office without a legitimate basis or moved to other courts by delegation, secondment or even promotion, without their consent. It cannot be argued that that constitutional principle defends the magistrate by the disciplinary sanctions regime, which is applicable only in the event of a finding of disciplinary misconduct. The magistrate has the guarantee that these sanctions can be ordered and applied only in disciplinary proceedings, decided by the SCM, and not at random. If the magistrate has committed an act giving rise to disciplinary liability, the principle of irremovability cannot preclude the imposition of a proportionate and dissuasive penalty in relation to his or her conduct. The fact that downgrading is not a temporary sanction is a matter for the legislator's choice, which gave the SCM the possibility to apply such a penalty also in cases of serious disciplinary offences. The Court also noted that the prosecutor is not irremovable; the complaints relating to his status cannot therefore be examined from the point of view raised.

Having examined the criticisms of the unconstitutionality of the provisions of Article 290 of the law in the light of Article 16 (1) of the Constitution, the Court held that the authors of the objection of unconstitutionality assumed that all judges, regardless of the level of the court at which they operated, were in the same legal situation. However, it should be noted that judges at the HCCJ have completed all steps in their professional career. From that point of view, they find themselves in a different situation from the other judges of the lower courts, which means that the legislature may regulate different benefits in their favour. The criterion used by the legislator is therefore not arbitrary and justifies separate legal treatment of the judge of the HCCJ who is removed from office for reasons not attributable to him as opposed to that of the judge of a lower court.

III. For all these reasons, by a majority vote in respect of Article 88 (2), the final sentence of Article 206, Article 234 (2), Articles 271 and 290 of the Law on the statute of judges and prosecutors and by unanimity in respect of the Law on the statute of judges and prosecutors as a whole, as well as the provisions of Articles 17 (5), 21 (4), 22, 25, 26 (1), 33 (1), 43 (2), 45 (1), 59 (3) and (4), 63 (1), 75 (5), 89, 114, 115, 117 (6), 121 (4), 128, 132, 133, 135, 139-141, 143 (2), 145-149, 150, 160 (6), 167, 169 (8), 172 (8), 188 (4), 206, 228 (5)-(7), 235 (2), 269(16), 273 (1) (c) and (d), 275 (1), (3) and (6), 277 (6), 278 (2), 279, 283, 284 (5), 289 (2) thereof, the Court dismissed as unfounded the complaints of unconstitutionality and held that those provisions were constitutional in the light of the complaints made.