Decision No 524 of 9 November 2022 on the objection of unconstitutionality of the Law on the Superior Council of Magistracy as a whole and of the provisions of Articles 8 (3), 14 (3) and (4), 22 (3), 27 (2), 29 (1), 31 (1), 40, 41, 49 (5) and (7) to (9), 51 (3), 53 (2), 57 (4) and (6) and 59 (3) thereof, published in Official Gazette of Romania, Part I, No 1101 of 15 November 2022.

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral raised complaints of extrinsic unconstitutionality and of intrinsic unconstitutionality in relation to Law on the Superior Council of Magistracy (SCM).

Thus, a first complaint of intrinsic unconstitutionality relates to the failure to comply with the time limit of at least 3 days between the date of circulation of the report and the date set for the discussion of the draft law or legislative proposal in the plenary session of the Chamber of Parliament, which is laid down both in the Rules of Procedure of the Chamber of Deputies and in the Senate's Rules of Procedure. The application of the procedure for discussion in the Senate with regard to the Law on the Superior Council of Magistracy on the same day as it was approved by report of the special committee constitutes an infringement of the Constitution. It was also argued that the Parliament would not have awaited an opinion from the Venice Commission and proceeded with the adoption of the law.

As regards the complaints of intrinsic unconstitutionality, it was argued that the provisions on the procedure for the election of members of the SCM, Articles 8 to 18 of the law, were in breach of Article 133 (2) (a) of the Constitution, according to which 14 members of the SCM are elected to the general assemblies of magistrates.

It was further argued that the provisions of Article 22 (3) of the law were contrary to Article 134 (4) of the Constitution, since the powers of the SCM could only be established by law and by the Constitution. The too general wording of the text creates the prerequisites for the assignment of duties and, in particular, for the exclusion of certain members from taking certain decisions.

In accordance with Article 27 (2) of the law criticised, the meeting quorum may be reduced from 15 members to a majority of members, the authors arguing that the difference between the two thresholds is unjustifiably high in relation to the importance of the decisions discussed.

Another criticism concerned the provisions of Article 29 (1), the authors of the referral arguing that the members of the SCM Plenary/Sections decide the cases when the meetings are not public, although it should be the law that establishes the criteria.

As regards the complaint that the functions of the plenum of the SCM are taken over by the sections of the SCM, it was argued that the provisions of Article 31 (1), Article 40 (the duties of the sections relating to the career of judges and prosecutors) and 41 (the functions of the sections relating to the organisation and functioning of courts and prosecutor's offices) of the law criticised infringed Articles 133 (1) and 134 (4) of the Constitution, in relation to the division of competences by section and the absence of an appeal to the plenum of the SCM.

With regard to the provisions of Article 49 (5) of the law, which provide that in disciplinary proceedings before the sections of the SCM it is not permissible to submit applications for ancillary intervention, it was argued that these lead to procedural aberrations before the competent court of review, namely the HCCJ, which hears the disciplinary action under the ordinary law, and they are therefore in breach of Articles 1 (3), 20 (2), 21 (2) and 124 (3) of the Constitution, since, for example, professional associations of judges or prosecutors whose members are subject to disciplinary proceedings before the sections of the SCM justify a legitimate interest in making such requests for ancillary intervention.

It was also argued that the provisions of Article 49 (7) of the law, according to which the request for recusal of members of the sections of the SCM shall be dealt with by the appropriate disciplinary section, in the same composition, were unclear, since it was not apparent whether also the recused magistrate rules on the request for recusal, in which case the text complained of violated the principle of fairness.

It was further argued that Article 49 (8), which provides that all grounds for nullity of disciplinary action shall be invoked, failing which they will be time-barred, at the first hearing with the full proceedings, leaded to procedural aberrations before the competent court of review – the HCCJ,

which rules under ordinary law on the appeal, in breach of the rules applicable to the two categories of nullity laid down in Article 178 of the Code of Civil Procedure.

It was also argued that the possibility of changing the legal classification of disciplinary offences by magistrates (Article 49 (9) of the Law) is unclear and is liable to restrict the procedural rights of the magistrate concerned, in particular the right of defence.

It was also pointed out that Article 51 (3) of the law regulates the possibility for the Judicial Inspection to appeal against the SCM's decision rejecting disciplinary action, which constitutes a form of pressure on magistrates.

It was argued that the special limitation period for disciplinary liability of 5 (4 + 1) years laid down in Article 53 (2) of the law is excessive, being identical to the limitation period for criminal liability for offences punishable by penalties of up to 5 years, constituting a potential tool for pressure on magistrates.

It was further argued that, according to Article 57 (4) of the law, the removal from office of members of the SCM for failure to comply with their duties is regulated so narrowly that it becomes illusory. It was also argued that regulating the possibility for plenary to dismiss members of the SCM elected by the Senate (Article 57 (6) of the Law) is a contradictory provision liable to give rise to abuse.

It was further argued that, according to Article 59 (3) of the law, no elections are held if a seat in the SCM remains vacant less than one year before the end of the term of office, the one-year deadline being unjustifiably very long, which may lead to situations of absolute lack of representativeness of members who actually exercise the functions of the SCM.

II. Having examined the objection of unconstitutionality, in relation to the first complaint of extrinsic unconstitutionality, in its case-law, the Court has established that the time limits laid down in the Regulation, in the form of minimum or maximum time limits, are a characteristic element of the procedure for the adoption of laws under the general/common procedure (Article 75 of the Constitution), and whenever these deadlines are intended to be compressed, recourse must be had to the urgent procedure for the adoption of laws (Article 76 (3) of the Constitution). . The Court found that, in the case at hand, what is raised is a matter for the application of parliamentary regulations in the event of the adoption of a law under the urgency procedure. However, it is not for the Constitutional Court to verify the way in which the regulation provisions have been applied. As regards the complaint relating to the adoption of the law without the opinion requested from the Venice Commission, the Court found that the adoption of a law without waiting for that opinion is not a question of constitutionality of the legislative act thus adopted, but of the opportunity to adopt the law criticised, since the recommendations made by the international forum may be of use to the legislator, in the parliamentary procedure for drafting or amending the legislative framework, the Constitutional Court being empowered to review the conformity of the legislative act adopted by Parliament with the Basic Law, and not to verify the appropriateness of a legislative solution or another, matters which fall within the legislator's discretion.

As regards the criticisms of Articles 8 to 18 of the law, the Court held, taking into account the constitutional provisions according to which 14 members of the SCM are elected to the general assemblies of magistrates, that the only constitutional requirement relating to the procedure for electing members of the SCM is that they be elected to general assemblies of magistrates, the rationale being to ensure representativeness. Concerning the procedure for nominating candidates and the procedure for the election of members of the SCM, Parliament, by virtue of its constitutional role as the legislative authority of the country, is free to assess the appropriateness of the system of election and voting at the general assemblies of judges or prosecutors, without thereby undermining constitutional provisions. Similarly, the legislative solution whereby the magistrate holding the highest number of votes (and not the majority vote) is elected, as well as the legislative solution according to which, if fewer or more people have been voted, the vote is null and void, thus obliging magistrates to vote precisely on the number of members of the SCM, are choices of the legislator, which fall within its discretion, without contravening constitutional provisions or principles. Given that, according to the provisions of the law criticised, judges or prosecutors who are members of the SCM are elected at general assemblies of judges or, as the case may be, prosecutors, and that, in accordance with Article 14 (1) of the law criticised, in the procedure for appointing candidates and electing members of the SCM, as a rule, general assemblies are legally constituted in the presence of a majority of judges or, where applicable,

prosecutors in office, the Court found that the constitutional requirement for the election of members of the SCM was complied with.

With regard to Article 22 (3) of the law criticised, the Court noted that the legislative solution contained in that article is also found in Article 22 (3) of Law No 317/2004 on the Superior Council of Magistracy, the novelty provided by the contested law being the extension of the deadline from 15 days to 60 days from the meeting establishing the SCM. The Court therefore found that the text of the law complained of was clear and precise, providing that, within a reasonable period of time after the meeting during which the SCM is set up, the powers and responsibilities of each permanent member are to be determined by field of activity, it being clear that the text refers to the powers of the SCM as laid down in the Constitution and its Organic Law. As regards the criticism of the possibility of excluding members from certain decisions, the Court found that this was not a question of the constitutionality of the contested text, but a question of application of the law.

As regards the provisions of Article 27 (2) of the law criticised, the Court found, on the one hand, that the Basic Law does not lay down a certain quorum condition for the activity of the SCM, and, on the other hand, that the legislator kept the rule that the work of the SCM's plenary session should be carried out in the presence of at least 15 members, but also introduced a remedy for possible institutional blockage, without thereby undermining the constitutional role of the SCM as guarantor of judicial independence.

As regards the criticism of Article 29 (1) of the law, the Court found that the rule is to publicise the sessions of the SCM. At the same time, the legislator also allowed for sessions not to be public, but the members of the plenum or sections of the SCM decide, by majority vote, when the sessions are not public. The legislator could not have provided, exhaustively, for all the situations requiring sessions not to be public, with the result that it conferred on the plenum or sections of the SCM the power to decide when their sessions are not public, without thereby infringing the requirements relating to the quality of the legislative act, namely the clarity and foreseeability of the rule.

As regards the complaint that the functions of the plenum of the SCM are taken over by the sections of the SCM, the Court has held, in its case-law, that the plenum of the SCM has competence to defend the independence of the judicial authority as a whole, since it engages when both the courts and the Public Ministry, on the one hand, or the SCM, on the other, are affected. On the other hand, when the courts or the Public Ministry are affected, jurisdiction will naturally lie with the appropriate sections. Such a legislative solution also constitutes a legislative technique correlation operation, since it implements the legal principle that the career of a judge is separate from the career of the prosecutor, since judges cannot interfere in the career of prosecutors or prosecutors with that of the judge. The Court found that the separation of decision-making powers relating to the career of magistrates does not affect the constitutional role of the SCM as guarantor of judicial independence. Furthermore, the fact that the constitutional text expressly provides that, in disciplinary matters, the SCM fulfils the role of court, through its sections, does not exclude the possibility for the organic legislator to determine the powers of the sections of the SCM, whereas Article 134 (4) of the Constitution provides that the SCM also performs other tasks laid down by its organic law in carrying out its role as guarantor of the independence of the judiciary. As regards the lack of an appeal against the decisions of the sections of the SCM to the before the plenum, the Court found that this claim was also unfounded, since Article 29 (6) of the Law complained of expressly provided for free access to justice for the person concerned, regulating the possibility of challenging decisions of the sections concerning the career and rights of judges and prosecutors before the Administrative and Fiscal Litigation Section of the HCCJ.

With regard to the criticism of Article 49 (5) of the law on the competence of certain professional bodies to hear disciplinary actions, the Court, in its case-law, referred to the practice of the ECHR, which has shown that, in many States of the Council of Europe, disciplinary offences fall within the competence of those bodies, and such conferral of competence is not contrary to the provisions of the Convention, which nevertheless requires one of the following systems: either the jurisdictions of professional bodies meet the requirements of Article 6 (1) of the Convention or do not comply with them, and then national law must allow access to a court offering all guarantees of the right to a fair trial and to the resolution of the case by an independent and impartial court. The Court held that the appeal governed by Article 51 (3) of Law No 317/2004 is the only means of access to a court of law, in disciplinary matters, for judges and prosecutors, that appeal against decisions of the sections of the SCM must be effective, devolutive, ensuring all guarantees of the right of access to the court and of a

fair trial, by taking into account all aspects and verifying both the legality of the procedure and the validity of the disciplinary court's decision, as provided also in Article 134 (3) of the Constitution. In so far as this 'appeal', provided for by Article 51 (3) of Law No 317/2004, is classified as the extraordinary remedy provided for by the Code of Civil Procedure, these provisions are unconstitutional, since they do not provide an effective remedy, available to a judge subject to a disciplinary sanction, before a court, as required by Article 134 (3) of the Constitution, the settled case-law of the Constitutional Court and that of the ECHR. In the light of this case-law and of all the rules on disciplinary proceedings before the sections of the SCM, which are contained in the contested law, the Court found that the legislative solution of the inadmissibility of applications for ancillary intervention before the sections of the SCM did not infringe either the free access to justice, the right to a fair trial or the principle that justice is unique, impartial and equal for all, as long as, under Article 51 (4) of the law criticised, an appeal against decisions of the sections of the SCM in disciplinary matters is a devolutive remedy. As regards the complaint concerning the infringement of the role of professional associations of magistrates, which justifies a legitimate interest in the submission of applications for ancillary intervention in disciplinary proceedings before the sections of the SCM, the Court found that the legislative solution complained of did not preclude the submission of applications for ancillary intervention in the context of the resolution of the appeal brought against the decisions of the sections of the SCM delivered in disciplinary matters, an appeal decided by the 5 Judges Panel of the HCCJ, in compliance with all the procedural safeguards of the right to a fair trial.

With regard to the criticism of Article 49 (7) of the law, the Court held that, in accordance with Article 49 (6) of the law criticised, the situations in which the recusal of members of the sections in disciplinary matters was admissible were expressly set forth. The fact that the request for recusal is dealt with by the relevant disciplinary section, in the same composition, takes into account the different situation of disciplinary proceedings before the sections of the SCM, as compared with situations of ordinary law in which procedural incidents relating to the recusal of one or more members of the panel of judges are heard by another panel of judges or by a higher court, in accordance with the general rules of procedural law. However, given that the number of members of the disciplinary sections of the SCM is determined by Article 133 (2) (a) of the Constitution, there is no possibility of replacing some members, so that the request for recusal could not be dealt with by the section in another composition.

As regards the criticism of Article 49 (8) of the law, the Court noted that, in accordance with Article 49 (14) of the law criticised, the provisions of this law governing the procedure for resolving disciplinary proceedings are supplemented by the provisions of the Code of Civil Procedure, in so far as they are not incompatible with it. The Court found that the text of the law criticised gives expression to the provisions of Article 126 (2) of the Constitution, according to which the legislator is empowered to regulate the jurisdiction and the judicial procedure by establishing the organisational and functional framework within which free access to justice is achieved. At the same time, the Court held that the legislative solution complained of did not preclude any ground for invalidity from being relied on in the context of the resolution of the appeal brought against decisions of the sections of the SCM in disciplinary matters, an appeal decided by the 5-judge panel of the HCCJ, in compliance with all the procedural safeguards of the right to a fair trial.

As regards the criticism of Article 49 (9) of the law, the Court found that, since the text complained of clearly establishes both the conditions under which the parties may discuss the change in the legal classification of the disciplinary offences in respect of which disciplinary proceedings have been ordered (the disciplinary section, of its own motion or at the request of the parties, may change the legal classification of disciplinary offences) and the procedure in which the sections rule on the change of the legal classification (the disciplinary court is obliged to discuss the change of classification with the parties; may, at their request, set a time limit within which the latter can submit written submissions; on the change of classification, the sections shall decide by reasoned decision), the provisions of Article 1 (5) of the Constitution on the principle of legality in the quality of the law component were not infringed. As regards the complaint concerning the infringement of the right of defence, the Court found that this was unfounded, since, according to Article 49 (1) of the law criticised, in disciplinary proceedings before the SCM sections, the judge or prosecutor may be represented by another judge or prosecutor or be assisted or represented by a lawyer. Furthermore, according to Article 49 (11) of the law criticised, throughout the disciplinary proceedings before the SCM sections, the

parties have the right to acquaint themselves with all the documents in the case and may request the taking of evidence

As regards the criticism of Article 51 (3) of the law, the Court held that this legislative solution gives expression to the right of the parties to bring an action, which is now governed by Article 51 (3) of Law No 317/2004. In its case-law, the Court has held that an appeal on a point of law against the judgement of the SCM in disciplinary matters may be brought, on the one hand, by the judge/prosecutor penalised and, on the other, by the Judicial Inspection or by the other holders of disciplinary proceedings who carried it out. As parties to the disciplinary proceedings before the sections of the SCM, which are compulsorily summoned as such, the Judicial Inspection or, as the case may be, other members of the disciplinary proceedings, justify the interest in being able to appeal against the decision of the relevant section of the SCM which dealt with the disciplinary action.

As regards the criticism of Article 53 (2), the Court held that the provisions at issue establish both a limitation period for the disciplinary liability of magistrates (4 years from the date on which the disciplinary offence was committed) and a special limitation period (5 years from the date on which the disciplinary offence was committed, regardless of how many suspensions may occur), which is a matter for the legislator to choose, without thereby infringing constitutional provisions or principles, As regards the duration of that period, the Court found that this was the choice of the legislator, without being a question of constitutionality of the contested text.

With regard to the criticism of Article 57 (4) of the law, the Court held that the SCM can be the guarantor of the independence of the judiciary, a role enshrined in Article 133 (1) of the Constitution, only if, in exercising that competence, it performs independently and impartially the tasks laid down by law. And the means of ensuring the independence and impartiality of this judicial body are the way in which its members are appointed, the term of office and irremovability of members during their term of office, and the existence of adequate protection against external pressure. The Court found that the allegations concerning the establishment of a cumbersome procedure for the dismissal of members of the SCM were unfounded, since the exercise of the duties arising from membership of the SCM fell within its constitutional role as guarantor of the independence of the judiciary and the procedure for the dismissal of members of the SCM had to be clearly and foreseeably detailed in the law in order to ensure adequate protection against external pressure

As regards the criticism of Article 57 (6) of the law, the Court found that the dismissal was a ground for terminating the mandate of elected member of the SCM, whether members elected in general assemblies of magistrates or the 2 representatives of civil society elected by the Senate. The legislative solution according to which the grounds and the regulated dismissal procedure for members elected to the general assemblies of magistrates apply accordingly to the 2 civil society representatives elected by the Senate constitutes a factor providing adequate protection against possible interference in the work of the SCM.

As regards the criticism of Article 59 (3) of the law, the Court found that the regulation by the legislator of a rule providing for a legislative solution to the particular situation in which the vacancy of member of the SCM occurred during the last year of the mandate was natural, given that the rationale behind the establishment of such a rule was to ensure the functioning of the SCM. With regard to the legislator's choice of the one-year period laid down in the contested text, the Court found that this was not a question of constitutionality, but was the choice of the legislator, taking into account the complexity of the procedure for the election of members of the SCM and the length of that procedure.

III. For all these reasons, by a majority vote in respect of the provisions of Article 27 (2), final sentence, and unanimously with regard to the Law on the Superior Council of Magistracy as a whole, as well as the other provisions thereof, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law on the Superior Council of Magistracy as a whole and the provisions of Articles 8 (3), 14 (3) and (4) thereof, Articles 22 (3), 27 (2), 29 (1), 31 (1), 40, 41, 49 (5) and (7) to (9), 51 (3), 53 (2), 57 (4) and (6) and 59 (3) thereof were constitutional in relation to the criticisms made.