Observations regarding the decision no.53 of the 25th of January 2011 of the Constitutional Court respective to the Senate's decision to validate magistrates elected as members of the Superior Council of Magistrates

LECTOR.UNIV.DR. OANA ŞARAMET
LECTOR UNIV.DR. SILVIU-GABRIEL BARBU
Faculty of Law
University of Transilvania Braşov
Eroilor Blvd.no.25
ROMANIA
oana_saramet_2005@yahoo.com, silbarg@hotmail.com

Abstract: In this paper we present the decision no.53/25th of January 2011 of the Constitutional Court of Romania decision regarding the Senate decision no.43 of the 22nd of December 2010 to validate magistrates elected as members of the Superior Council of Magistrates.The analysis is centered both on the majority's opinion and the separate opinion formulated in the case. Both opinions have views we believe to be pertinent and compatible to legal doctrine and precedents of the constitutional court. The absolute originality and freshness resides in the analysis of the recent modification of the organisation law of the court, with no concrete points of view so far to argument exhaustively on the matter of interpreting and solving this type of complaint to the Constitutional Court.

*Key-words:*control, majority, separate, complaint, magistrates, validation, provision, constitutionality, Senate, court

1.Introduction

With the decision no.53/25th of January 2011 [1], the Constitutional Court admitted the complaint filed by a group of thirty senators regarding the exception of unconstitutionality of the Senate's Decision of the general assembly no.43/22nd of December 2010 to validate magistrates elected as members of the Superior Council of Magistrates, mentioning that this decision of the higher chamber of Parliament is unconstitutional. One of the judges of the constitutional court expressed a agreeing view, there was a separate view expressed in the cause, views we will detail in the present study. Romanian legal doctrine [2] and precedent of the constitutional court have established the interpretation according to which any complaint adressed to the Court has to regard the requirements for admission that are mentioned in the articles 146 to 147 of the Constitution, and from the whole of Law no.47 of the year 1992 republished and modified. Alongside with this requirement we acknowledge that of conformity of the subject of the complaint with the powers of the Court to judge regarding the constitutional limitations presented above. In it's modified form as of 2010, the Law no.47/1992 contains both general acting provisions regarding the court's powers, in articles 2 and 3, where it practically copies the constitutional provisions of article 146 of the Constitution, and more detailed provisions, in the second half of the law, where the abilities of the constitutional court are detailed. Thus, according to article 2 of the law, "(1) The Constitutional Court ensures the constitutional control of laws, international treaties, Parliament Regulations, and Government Ordonances. (2) As to a norm of the acts mentioned in the (1) paragraph to be declared unconstitutional it has to be against the norms or principles of the Constitution. (3) The Constitutional Court can only pronounce the unconstitutionality of acts regarding which it has received complaints, without being able to modify or add norms to be controlled." Also article 3 states that the general rules to interpret the powers of the constitutional control court are: "(1) The powers of the Constitutional Court are those established as such by the Constitution and the present law. (2) In its exercise of powers the Constitutional Court is the only one able to acknowledge or not it's ability to judge. (3) The

ability to judge of the Constitutional Court, established by paragraph (2) cannot be questioned by any public authority."

2.The majority opinion

The argumentation of the decision (the majority opinion), as well as the separate opinion contain ample juridical explanations, well built logical reasoning which evidentiates the equivocal nature of the present constitutional provisions regarding the powers and abilities to judge of the constitutional court, especially the lack of clarity in article 146 paragraph l, text according to which the Court fulfills other duties established by it's organic law. In the decision published by the Monitorul Oficial there is an agreeing opinion, that agrees with the background of the case the same with the majority opinion. The agreeing opinion mentions things that are not substantially linked with the constitutional role of the Constitutional Court, it's powers and abilities to judge, generating a false problem in the present constitutional order, that of the structure of the Superior Council of Magistrates. The modification enacted in 2010 by the Law no.47/1992 brought on new powers in the ability to judge of the constitutional court, on the basis of article 146 paragraph 1 of the Constitution, in it's new shape article 27 paragraph 1 of the Law introduced to the control of constitutionality the Decision of the Chamber of Deputies' general assembly, the Decision of the Senate's general assembly, and the Decision of the Chambers reunited general assembly. In the court's decision we are analysing, the majority opinion has made a constitutional control regarding this new power of the court, only in the part of the decision regarding the arguments, without mentioning it in the part regarding the sentence, actually posing many problems generated by the recent modification of the law. Thus, the majority opinion mentioned that the Parliament, as per article 146 paragraph l) of the Constitution, can enlarge the powers of the court, in such manner to extend the control of constitutionality to other categories of legal acts and facts considered as such by the lawmaker. According to this hypothesis, we must observe that every new power of the Court has to abide to some conditions to respect the positive law constitutional requirements: The new control of constitutionality has to regard legal acts of facts of a constitutional nature, limited to the legislative power, relative to constitutional values, rules and principles or to the organisation and function of authorities and institutions of a constitutional level, on the basis of express constitutional powers of the Parliament or its Chambers (for example, the validation of magistrates elected by the general assemblies to make up the Superior Council of Magistrates [CSM], the election of the representatives of the civil society in CSM – according to article 133, 2nd paragraph of the Constitution; other powers, such as those mentioned by article 65, coroborated with other constitutional provisions regarding appointments in public office (Ombudsman, the directors of secret services etc.); The control of constitutionality could in this hypothesis, in theory, relate to acts of other public authorities and constitutional institutions of the state (regulated in a direct fashion by the fundamental law), legal acts and facts for which the literal constitutional control, operates as causes for not standing in front of a court (for example, the acts of the Supreme Defense Council of the Country (CSAT), according to article 119 of the Constitution, the different powers of the President of Romania, explicitly established by the fundamental law, including the powers set forth by article 94, the control of constitutionality of motions – articles 112-113, the accountability of the Government, legislative delegation to the Government, the activity of the Court of Accounts – article 140 etc.) The new powers of the constitutional court must not double the powers already established by the other constitutional provisions. For any other new powers, the Constitutional Court has to exclusively control and especially check and in decisive proportion do so with the accordance of the acts and facts with the Constitution, thus avoiding a control for legality that enters under the jurisdiction of the judicial power according to article 126 of the Constitution.

2.1.The ex post facto effect

In the argumented decision, the constitutional court has elaborated, as per the majority's opinion, a legal reasoning in which it explained the 2005 modification is not an ex post facto law, relative to the limitation to one the number of terms a magistrate can sit as a member elected by the general assemblies in the Superior Council of

Magistrates, and that there are no rights of magistrates that were in office in 2005 that are being trespassed, these magistrates only having the possibility to be re-elected for a new term. The Court acknowledges the possibility of a new application, after the termination of the present term, is an element outside the present seat, and it can be modified for the future, through law, as it actually happened. The change of article 51 paragraph 1 from the republished Law no.317 of 2004 does not bring on changes regarding the content of the seat, the mode in which it is exercised, or it's duration, but it institutes the prohibition to run for another term. The Court noticed that this interdiction does not influence the running term of members of the CSM, thus the newest provisions of article 51 paragraph 1, are of immediate enactment. At the moment of the beginning of elections for the new CSM, the law expressedly mentioned thru the provisions of article 51 paragraph 1, still enacted, what are the conditions, the interdictions, the incompatibilities which a candidate must respect.

Regarding the ex post facto character of the law, the Court acknowledged that in precedent it has been mentioned (decision no. 330 of 27th of November 2001) that a law has no illegal effects for the past when it modifies for the future a state of rights existing beforehand, or when it suppresses the existence in the future of juridical situations created under the rule of the old law. Thus, in such situations, the new law, has to limit itself into regulating the mode of action during the time after it's enactment, evidently it's own time of rule. The ulterior law cannot modify the right born during the rule of the anterior law, as per an older precedent of the Court (decision no.3 of the 2nd of February 1993, because this would be equivalent to the retroactive aplication of the new law, contrary to the provisions of article 15 paragraph 2 of the Constitution, with an ill effect over the stability of juridical situations. The new law can modify the juridical regime of the anterior right, it can suppress this right or it can replace it with another right born in this manner. Thus, the constitutional court concludes that the ex post facto effect of the law regards the modification of a situation for the past, and under no circumstances the different regulation of juridical situation for the future. The majority's opinion is upheld as long as the proposal to validate the CSM members, alongside with the validation of the general assembly of the Senate has to be based on the beforehand verification of procedures of election, compliance with legal requirement to ocupy that certain public office, also the interdictions and incompatibilities that can arise from a personal status, or other legal provisions. The Constitutional Court has concluded that thru the decision that is the object of the complaint, the Senate, ignoring the fact that three new elected members of the CSM were in their second term, violated the provisions of article 1 paragraph 5 of the Constitution[3], which represents the principle of the supremacy of the Constitution and the constitutional principle of equality facing the law mentioned by article 16 paragraph 2 of the Constitution[4].

2.2 The solution

The Constitutional Court decided the solution the General Assembly of the Senate has to follow with the goal to conform to the decision. It expressedly indicated that the Senate must proceed in validating the other new members of the CSM elected with the compliance with the law, thus ending all other interpretations regarding the notion of a list that operates regarding the 2005 modification of the Law no.317 of 2004 already mentioned, legal text which could have falsely implied that a partial validation, of only certain elected members, would not be legal. We can observe that in this aspect the constitutional court made a control of the provision of article 18 of Law 317 of 2004 in a discrete and incomplete manner, establishing that the Senate must not validate the entire list, but each and every member in part, not validating those that do not meet the legal requirement, and validanting only those that have a legal standing compliant with the law. Thus, the Court interpreted that the legal provision that reduces the number of possible terms to one complies with the fundamental law, whilst that which imposes the Senate to validate an enitre list is contrary to the provisions of article 133 of the Constitution[5]. This reasoning is correct, because article 133 paragraph 2 letter a refers to the fourteen members of the CSM being elected in the general assemblies of the magistrates and validated by the Senate, validation which, like the election procedude, regards them as individuals, without any mention of the notion of a list. [6]

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3.The separate opinion

The separate opinion disagrees with the majority's opinion and upholds the impossibilty of admission of the complaint formulated by the thirty senators, with the following arguments:

3.1.Modification of law

Before the modification enacted by the Law no.177/2010 article 27 paragraph 1 relative to the republished Law no.47 of 1992 the Constitutional Court was limited to the constitutional control of Parliament Regulations, without any mention regarding other categories of acts of Parliament, the text of the law being the exact copy of article 146 letter c of the Constitution. The Lawmaker, on the basis of article 146 letter l) of the Constitution, extended the category of acts of Parliament that can be subject to a constitutional control, including here all the decisions of the general assemblies of both Chambers, or the general assembly of both Chambers reunited. The separate opinion mentions that the new legal provision of article 27 paragraph 1 is poor, thus incomplete, because it does not contain any procedural provisions regarding the new powers. As long as the new legal text makes no distinction regarding the types of acts which the Court has to control, and the fact that the procedural provisions regarding the Parliament Regulations should apply to all decisions, the new text itself has problems of constitutionality, to the extent that any decision of general assemblies of Chambers of Parliament regardless of it's individual or normative character could be controled. Also, it is shown that the procedural rules have not been accordingly adapted for the new powers awarded to the court, and the sistematisation of the republished Law no.47 of 1992, as it was modified by the Law no.177 of 2010, is poor. The constitutionality control of the decisions of Parliament and the general assemblies of each Chamber should be regulated in a distinct subsection, including the according special procedural provisions. Regarding this situation, there is no constitutional text that was violated by the lack of sistematisation and normative content of the legal provision. Regarding the decisions of the Parlament and the two Chambers, in the separate opinion it is shown that according to articles 67 and 76 paragraph 2 of the Constitution, the Chambers of Parliament can adopt two kinds of decisions, with individual or normative character. The supporters of the separate opinion define the decision as being the legal act specific to the autonomy of the Chambers, as per articles 64, 67, 76, paragraphs 1 and 2, that produce effects, which are always internal, but, secondarly, the decision can also have external effects. Regarding the extension of the powers of the Constitutional Court to decide over the decisions of the Chambers of the Parliament and their reunited assemblies, the Court becomes a sort of SuperParliament, as the separate opinion states. It is said that only normative decisions can be controlled, not those with individual effects. Regarding the normative decisions, alongside Parliament Regulations and decisions enacted in the realisation of constitutional provisions, minding their consequences (article 90, 92, 93, 95, 96 and Title III of the Constitution regarding public authorities, those decisions that refer to the juridical regime of fundamental institutions of the state. The separate opinion considers the individual decisions those regarding appointments and elections for office, and even those regarding validation, all of these not being able to be made subject to a control of constitutionality, thus the complaint of the group of senators cannot be admitted, and has to be rejected by the Court. Also, it is mentioned that the posibility of constitutional control of any decision of the general assemblies of Chambers can lead to legal accountability in certain cases, which would be in violation of article 72 of the Constitution that mentions that all members of the Parliament cannot be held accountable for their votes and opinions expressed during their term in office. We can deduce from the separate opinion that article 146 letter l) from the fundamental law cannot be interpreted in such a manner to award by law new powers of control to the Court, more than those expressedly and limitedly awarded by article 146 of the Constitution [7]

3.2.Adding to the law

The control of legality exercised by the special committee of the Senate, and before this, by the Superior Council of Magistrates, regarding the procedures for election for the CSM, did not reach the conclusion that the procedures used had been illegal in such a manner to invalidate them..Another question arises in the separate opinion regarding the

2005 modification of the republished Law no.317 of 2004, that of article 51 paragraph 1, the introduction of the provision "without possibility of re-instatement", in the conditions in which the constitutional text of article 133 paragraph 4 does not mention any such limitation: "The length of time of a term of a member of the CSM is 6 years." In the separate opinion it is shown that by law, even organic law, you cannot add to the Constitution; by modifying the law the constitutional criterion regarding terms, by changing the objective criterion and the spirit of unity of Constitution, with a subjective criterion regarding persons, and not terms. It is shown, correctly, that the provision "without possibility of re-instatement" refers to persons in term, and not the term mentioned by the Constitution, which means that the addition to the constitutional text, made by the law, has been done on criteria linked to the persons in office.

The problem of laws succeding in time, in our case the question if the 2005 modification of the law is applicable starting with the terms in office in 2005 or only with the terms following these, has been discussed by the general assemblies of Judges from the Higher Court of Cassation and Justice and the Court of Appeals of Bucharest, having adopted the second thesis, in the sense that the modified text is applicable from the next term on. Regarding this interpretation, a control of legality can be done by the court of justice, notified in a legal manner, not the Senate, through a special committee. The Senate has not been awarded in its control of validation with the control of solutions given to problems of law, and the complaint of the senators adressed to the Court excedes the legal limits regarding the control of legality, which makes the complaint not admissable. It is upheld in the separate opinion, in a fair way, that the election of members of the CSM cannot be challenged by other persons than magistrates on their respective categories of courts, and public prosecutors' office, with the solution being given by the CSM, thus in this hypothesis the Senate has only the ability to validate the final result of elections. By examining article 126 paragraph 6 of the Constitution, the validation of elections of members of the CSM by the Senate is an act that constitutes direct relationships between the general assemblies of the magistrates and the Parliament of Romania, thus these relationships are excepted from the judicial control by way of administrative litigation. In the separate opinion questions have arisen regarding the efects of the decision of the Court and the mode in which it enacts it, not declaring unconstitutional certain text, but validating the election in office of certain persons, not being able to use the provision of article 147 paragraph 1 of the Constitution in respect to the suspension or cease of juridical effects of certain unconstitutional texts.[8]

4.Conclusion

Both in the major opinion and in the separate one we can identify pertinent legal reasoning, that obligates us to think, to identify the most correct solution about legal issues linked to the provisions of article 146 letter l) of the Constitution, the control of constitutionality exercised over categories of decisions of the Chambers of Parliament or the General Assembly of Parliament, the procedure of election of members of the CSM and the validation of the result of elections by the Senate. In essence, if we are to admit that it is constitutional to add to the law, on the basis of article 146 letter l of the Constitution, add to the powers of the Court regarding the control of constitutionality, then we must admit that any legal act, any decision passed by the Chambers of Parliament, separate or in reunited general assembly can be censored by way of control. This, even if that legal act has an individual or normative character, it is constitutional, or if the subject of the act or decision regards issues pertaining to constitutional law. Through this view, the solution of the major opinion is correct, even if not all the legal reasoning contained there is complete, some critiques of unconstitutionality mainly being subtext, with effects on the arguments on which the decision was based. In equal measure, thus, we have to acknowledge some of the ideas, theories contained in the separate opinion, to paint a complete picture, a picture of the constitutional issues of this problem, not so much about the acces to justice, the legal efects of the decisions issued by the Court and the problems that have arisen by the introduction in article 51 paragraph 1 of Law no.317/2004 of the text "without possibility of reinstatement". It is true, that the Law regarding the function of the Court should develop on the procedure of control exercised on the decisions of the Chambers of

Parliament and the General Assembly of Parliament, with the mentioning that this type of control resembles a whole deal, by way of presentation and content, with the legal conflicts of constitutional nature between public authorities. All this controversy makes more apparent the necesity to adopt a new law, a modern one, regarding the organisation and function of the Constitutional Court, and the eventual review of the Constitution. It is necessary to impose a redefining of the constitutional identity, the powers and position of the Constitutional Court amongst the other public authorities, with the goal to ensure the right place for the Court in the constitutional framework, and the correct functioning of constitutional democracy.

References:

[1] Published in Monitorul Oficial nr.90 of 3rd of February 2011

[2] I.Muraru and others, "Contencios Constituțional", Hamangiu, Bucureşti 2009, pp.145-151;I.Muraru, E.S.Tănăsescu, „Constituția României.Comentariu pe articole" C.H.Beck, Bucureşti 2008, pp.1389-1418

[3] In Romania, abiding the Constitution, it's supremacy and the law is mandatory.

[4] No one is above the law.

[5] Article 133 paragraph 2: The Superior Council of the Magistrates is composed of 19 members, of which:a) 14 are chosen in the general assemblies of the magistrates and validated by the Senate; these are part of two sections, one for judges and one for prosecutors; the first section is made up out of 9 judges, and the second out of 5 prosecutors;b) 2 representatives of the civil society, specialists in law, which are known for a high professional and moral reputation, chosen by the Senate; these participate only in the assembly;c) the Ministry of Justice, the president of the High Court of Cassation and Justice, and the General Prosecutor of the Prosecutors Office of the High Court of Cassation and Justice

[6] I.Muraru, E.S.Tănăsescu, Constituția României revizuită – comentarii şi explicații, All Beck, Bucureşti 2004, pp.278-279; Constituția României.Comentariu pe articole, Hamangiu, Bucureşti 2008, pp.1262-1269

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[8]I.Muraru, E.S.Tanasescu Drept constitutional si institutii politice, CH Beck, Bucureşti, 13th edition, 2008