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COMMENTS

ON THE TWO DRAFT LAWS AMENDING LAW NO. 47/1992 ON THE ORGANISATION AND FUNCTIONING OF THE CONSTITUTIONAL COURT OF ROMANIA

by

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Table of contents

General remarks

This opinion contains the basic assessment of the Draft of the Amendment to the Romanian Law No. 47 of the 18 May 1992 on the Organisation and Operation of the Constitutional Court. If I am right the sense of this amendment rests in the strengthening the independence and impartiality of the constitutional court judges changing the rules pertaining the position of candidates, the criteria that must be met by candidates and the rules on voting process within the Court. I have studied the Draft submitted to me in French version and I would like to express some reflections regarding my comprehension of the content of the Draft. Unfortunately, I did not get any explanatory notes of the Draft so that I had to think sometimes for the purpose of a particular proposal.

I. Securing the independence and impartiality of the constitutional court judges

1. According to the new wording of Art. 5 par 4 (1):*"Candidates shall not be members of any political party, nor be relatives in the first degree of a direct line, the second degree of a side line, nor spouses, sons in law or daughters in law who are or were at last five years the members of leadership of political parties."*

I fully agree that one of the most important demands concerning the composition of constitutional courts is the safety of the independence of constitutional judges already during the process of their selection or nomination or election within the national parliaments. This approach does not mean that the process of the selection of the constitutional court judges should have been absolutely free from political influences. It would have been an unrealistic idea contradicting to the normal course of life.

So I think that the new wording of Art. 5 par 4 (1) firstly is a too hard imperative for the candidates, secondly it might have been perceived as breaching of political rights of relatives of possible candidates, and finally it might lead to hypocritical steps taken by relatives of future constitutional judges who would be incumbent leading politicians.

II. Putting more precise the criteria for candidates for the position of a constitutional court judge

2. Art 143 of the Constitution states: Judges of the Constitutional Court must be graduate in law, and enjoy high professional eminence and at least 18 years' experience in the legal field or academic professorial activity.

According to Art. 5 par 5 as amended "*Candidature may be put forward to the Legal Committee by any of the Parliamentary Groups, Deputies and Senators (deleted text). Each candidate shall present curriculum vitae and the pertaining documents to prove that he or she meets the requirements stipulated by the Constitution* and this law (added text). *The candidates shall be heard by the Legal Committee and by the Plenary Chamber. The report of the Legal Committee shall give a reasoned statement with reference to all candidates".*

Article 61 par (3) as proposed: *"Judges of the Constitutional Court must have a degree in Law, high professional competence and at least eighteen-years of experience in the legal area or in academic activities in Law, and at least twelve-years out of this the practice as a judge or a prosecutor".*

3. The proposed wording of Art 61 par (3) of the draft could be considered as an attempt to improve the level of qualification of constitutional court judges stressing the necessity of being a judge or a prosecutor. I would like to raise the question whether the amendment of the Law on the Organisation and Operation of the Constitutional Court takes sufficiently into consideration Art. 146 of the Constitution (The Powers of the Constitutional Court).

According to cited Article of the Constitution it is obvious that the proper exercise of the powers of the Court requires more than practising lawyers including judges and prosecutors, scholars or professors perhaps even those lawyers who are experienced in the field of international public law. For this reason I would recommend to retain the current wording of Article in a question and the practice as a judge or a prosecutor could be taken into account within the term: "*...high professional competence...".*

III. On the decision making process and the challenge of judges

4. The current **Article 55** says**:**

Once legally vested with a case, the Court shall proceed to reviewing the constitutionality; provisions of the Code of Civil Procedure related to the suspension, interruption or premature termination of the proceedings, or to the challenge of Judges shall not be applicable.

Pursuant to the amended text of Art. 55 there should not be the rule ***or to the challenge of Judges.***

It seems to me as the improvement of the present wording of Art. 55. It requires a small clarification. In terms of the content of the competences of the Constitutional Court (Art. 146 of the Constitution) I consider appropriate solution for the Court to exclude the possibility of participants to challenge the judges of the Court at all, not only after the momentum when it cannot be allowed to suspend, interrupt or terminate prematurely the proceedings.

There is no reason for admitting the objections pertaining impartiality of constitutional judges since they can act only in accordance with the Constitution and the Law on the Organisation and Operation of the Constitutional Court. The judges have no power to decide on individual complaints which are, in my personal view, the only proceedings where would have been legitimate to raise an objection regarding the constitutional court judge and his or her lack of impartiality.

5. This statement pertains also to the proposed new Art. 52 par 1^1 that relates to the application of the Code of Civil Procedure. Appropriate application of the Code of Civil Procedure in proceedings before the Constitutional Court is the usual method used by legislators to regulate steps and acts in those proceedings but to make allowance for the nature of proceedings before the Constitutional Court, it seems to me more appropriate to leave the room for the Court to decide alone acting up to the specific circumstances of the case.

To put it simpler there is no specific need for using procedural rules from a particular civil procedural code. Deciding on such a case should have been the domain of the Constitutional court applying the only main principle resting on the fundamental role of it to be the guarantor for the supremacy of the Constitution.

6. **Pursuant to amended Article 51 (1**): The Constitutional Court works, subject to the law, in the presence of two-thirds of the Judges, **except the cases in which it is impossible according to Art. 52 paragraph 1** *(It states: "All Judges of the Court shall participate in the sessions, except where any of them may have been impeded by a justified reason").*

The Plenum decides by a majority vote of the Judges, unless otherwise stipulated by law.

I can understand the reason for amending the present wording of Art. 51 (1) but the question remains what the Court will do if it looses in a particular case more than four judges (The Plenum decides by a majority vote of the Judges...). It might be also seen in connection with the speculative approach of certain participants in proceedings before the Court who could preserve the Court from the further proceedings and resolving the case in reasonable time. There could be a possibility of creating the rule preserving the participants of the case from submitting ill-founded objections against the judges and at the same time to exclude the reduction of number of judges under absolute majority of the judges otherwise the case would be proceeded, for instance, to the Parliamentary Committee for Constitutional Affairs.

Conclusions

I am of the opinion that every step striving on the reinforcement of independence and impartiality of constitutional judges should be welcomed. It is valid also for the Draft of the Amendment to the Law No. 47 of the 18 May 1992 on the Organisation and Operation of the Constitutional Court. Nevertheless there are some doubts upon the manner of doing so in the draft concerned. Probably it should have left some space for reconsidering some of the changes proposed in the light of this opinion.