Abstract

Judicial councils are State institutions created to ensure the independence of judicial systems from political influence, while providing a reasonable level of magistrates’ accountability as a professional body. A common feature of judicial councils is that they decide upon the selection and promotion of magistrates, and enforce (disciplinary) sanctions for magistrates. In order to guarantee their independence from potential influences of political nature, the majority of States decided to grant judicial councils constitutional status, thus hoping to secure both their role and the performance of functions assigned to them. Judicial councils are deemed necessary for the proper functioning of judicial systems, but one might as well infer their uselessness or even damaging influence on the quality of justice administration. The composition and attributions of the Romanian Judicial Council (CSM) illustrate the acknowledgement of a higher degree of isolation of the judicial system from the other two powers in the State, feature which can explain the lack of accountability of CSM to both State powers and citizens. Consequently, it is necessary to revise the regulatory framework underpinning the CSM operations and composition.

Keywords: judicial council, accountability, judicial system, independence, transparency, quality of justice, control, composition and functioning of judicial council.

ROMANIAN HIGH JUDICIAL COUNCIL – BETWEEN ANALOGY OF LAW AND ETHICAL TRIFLES

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1. Introduction

A rich and impressive legal literature (Capeletti, 1990; Ciobanu, 1996, 1997; Shapiro and Sweet, 2002; Chiuzbaian, 2002; Alexe, 2008) has established the idea that the independence of judges is the keystone of every modern state and an inherent concept of the very act of meting out justice. At a theoretical level, the concept of ‘rule of law’ builds on the principle of judicial independence, while at a political level this has been illustrated by including the aspiration for judicial independence amongst the political criteria for accession to the EU and as part of numerous documents issued by the Council of Europe or other international bodies. However, in present-day democratic states, judicial independence cannot be separated from its responsibility; in fact, in its capacity as a public service, the judicial system must be held responsible towards those whom it is called to serve (Boar, 1998, p. 25; Larkins, 1996, p. 605; Russell and O’Brien, 2001; Alexe, 2004, p. 215; Ivanovici and Dănilaț, 2006, pp. 71-72). It is mainly after the Second World War, and particularly after the events in the early ‘90s in Eastern Europe, that many states have chosen to make use of an institutional instrument enabling them to maintain the necessary balance between the independence and the inherent responsibility of the judiciary body.

2. An assessment of the institution of judicial councils

2.1. Composition and duties

Judicial councils are State institutions created in order to ensure the independence of the judicial system from any political influence, while providing a reasonable level of responsibility from the magistrates, as a professional (elite) body. Nowadays, their composition usually mirrors corporate-type criteria\(^1\), although neither their establishment, nor the selection of the members complies with uniform or even similar criteria worldwide. Allowing for the approximation which accompanies any generalization, their main duties can be classified in three categories: (1) management of the (material, including financial and human) resources available to the judicial system; (2) recruitment and promotion of magistrates; and (3) assessment of their professional performance. However, in the light of a few decades’ experience, irrespective of their composition and somewhat independent of the duties assigned to them, the impact that judicial councils have had on the working of judicial systems has been

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\(^1\) France is the first country in the world to have established a Judicial Council through its 1946 Constitution; however, nowadays it is barely remembered that the Conseil Supérieur de la Magistrature was for its most part composed of representatives of other (political) State authorities, while only a small part of its members were judges elected directly by their peers. It was only when similar institutions were established in Italy (1958) and later in Spain and Portugal – as post-totalitarian countries – that the Judicial Councils started to become corporatist from the point of view of their composition. One can note the same development towards a deep corporatism in respect to their duties. Further, Judicial Councils became common worldwide, and the corporative trait was deemed to be inherent in the institution, without examining in detail how it actually helps reaching the goals of the institution.
questioned² (Garoupa and Ginsburg, 2009, p. 203), although – as a general rule – where established, judicial councils provide a useful space for the confrontation of ideas among various interest groups in the field of justice and can constitute a locus even for institutional reforms under its scope.

The common feature of all these judicial councils is the fact that they take on a decision-making competence in the field of selecting, promoting and enforcing (disciplinary) sanctions for all magistrates in the system. Their competences with regard to human resource management (as a whole) can vary, but the above-mentioned elements are the shared hardcore in most of the cases. Equally, they take part in establishing the salaries within the system but, in this particular field, the agreement of the Ministry of Finance is also necessary, as the latter remains – after all – responsible for preparing the state budget. They are, therefore, the main managers of the material and financial resources owned by the judicial system of a State.

An analysis of the costs (not only financial) and relative efficiency of the transfer of decision-making competences from political to corporate-type authorities (established within the scope of justice) has yet to be carried out; for the moment, let us focus on how such judicial councils fully accomplish their assigned mission.

2.2. Functions and dangers

The choice of an institutional design which includes judicial councils in the broader framework of a State’s jurisdictional system has been generally explained by the need to provide the judicial system with functional independence, i.e. guaranteeing its independence from potential influences of a political nature³. In order to reach this goal, the vast majority of States decided to grant councils constitutional status, thus hoping to secure both their role and performance of the functions assigned to them. Yet, there

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² A survey carried out by two renowned authors, focusing rather on the (North and South) American experience in this field, concluded that one cannot establish a relation of causality between the existence of judicial councils and the quality of either the act of justice or the management of the judicial system in a particular country. For a comprehensive picture of the potential role and influence which judicial councils may have on the functioning of judicial systems, the two authors created a small database with information on 121 states worldwide. Thus, about 60% of the world states nowadays have a structure similar to a judicial council, whereas only 10% had such an institutional instrument in the middle ’70s; yet, the analysis of the degree of independence of the judicial system and that of the degree of satisfaction of those using the public justice service does not seem to follow the same time and space ascending trend, considering that there are no universally accepted standards worldwide to assess both the independence of the judicial systems and the quality of the act of justice making.

³ The independence of the judicial system is an important feature, inherent in act of meting out justice. For democratic states, this entails identifying and maintaining a balance between independence and accountability of magistrates. Unfortunately, the paradox of the vast majority of contemporary analyses consists in the fact that the focus is mainly on the former aspect, while the latter is neglected, even forgotten.
seems to be a certain distance between the mere mentioning of a State authority in the Constitution and ensuring that it would fulfill its duties. Judicial independence does not depend on the presence – or absence – of a new public authority, be it corporate and/or enshrined in the Constitution. The independence of a judicial system is a complex phenomenon, depending not only – extrinsically – on the possibility of preventing any external influence, but also – intrinsically – on values and functional elements proper to the system. Even though judges are independent from any form of interference or political control, they can become dependent on other factors or forces, such as their fellow judges making decisions on the future of the entire system or their own hierarchy, which can convey as much negative influence on the independent functioning of the system as political influence does. Not least, by obsessively emphasizing the need (deemed to be ontological) for an independent judicial system, one risks to overlook the equally crucial necessity of its counterweight, i.e. the responsibility which the judicial system has towards the community it was designed to serve.

Nevertheless, a complete isolation of the judicial system from political influence can have another detrimental side effect, known in the legal doctrine as ‘the government of judges’ (Lambert, 2005). Thus, although institutional engineering can contribute to the independence of the judicial system from political influence, it is not sufficient to protect the system itself from the temptation of exceeding its own competences and itself step out onto the political arena. Lambert noted that when judges have broad competences, unrestrained in the political field, the ‘judicialization’ of public policies is imminent, and the interference of judges in matters where the decision-making process carries an important element of discretion in the choice amongst various possible options has not, historically, turned out to be the best solution. In such cases, judicial councils – which are not only insulated from political influences, but also have the role of ensuring the political isolation of the rest of the judicial system – risk to become actual ad-hoc political institutions; this would not be noteworthy in itself, had these judicial councils not lacked the democratic legitimacy which is specific to political authorities, which – theoretically – should make it impossible for them to take part in the political game characterized by the separation and balance of powers.

Every political system and institutional set-up which includes such judicial councils is exposed to a broader complex of dangers, but two are worth mentioning in the context of the Romanian institutional system.

On one hand, it is generally acknowledged that the creation of judicial councils inevitably generated a significant reduction of the managerial and decision-making competences of the political system and/or of the magistrates occupying high positions in the judicial system. The diminished influence of the political system on the judicial one is a goal worth pursuing; in Romania it has largely been met. More difficult is to rate the reduced influence of the upper tiers of the judicial system itself, caused by the fact that such councils have seats reserved for lower tier magistrates as well. Insofar as the influence of the ‘senior’ members might have had a positive role as well (by providing behavioral standards, passing on customs and traditional procedures
to future generations, or by imposing benchmarks of professional competence or integrity), this aim might deserve some reconsideration. From the perspective of a potential gap created or induced within the judicial system, the outcome definitely is worth re-assessing.

On the other hand, due to the transfer of decision-making competences from the realm of politics to that of the judiciary (in the field of managing the human and material resources belonging to the judicial system), the management of the judicial system has become more transparent for the system itself, but has remained just as opaque for the society as a whole. In addition, in the shadow of this opacity, it is not very clear whether or not, in isolation from potential influences coming from the political sphere, the judicial system has become much more vulnerable to other possible, more occult, types of influences as they are more difficult to notice and more dangerous, so that the system itself can no longer be held responsible towards the traditional power factors. The induced possibility of an inner gap emerging in the judicial system itself, threatens not only fragility, but other types of influences as well, ranging from informal, but obscurely institutionalized to personal, less easy to identify or stop.

2.3. The influence of judicial councils on the quality of justice

Such factual observations could lead to rather unfavorable conclusions with regard to judicial councils. Moreover, it is equally important and worrying that empirical data of the few quantitative studies conducted worldwide and concerning judicial councils so far do not seem to confirm the (still) rather widespread working assumption that judicial councils contribute to an increased quality or independence of the judicial system. Given the complex role of a judicial council both within the system of state authorities and in relation to the judicial system, a more nuanced approach of its functions is required. It is difficult to state with certainty that the mere importation or institutional transplant of a certain type of judicial council may massively impact on the quality of the judicial system (Garoupa and Ginsburg, 2009). On the grounds of the empirical observations made so far, it is equally likely to state that the presence of judicial councils is necessary for a proper functioning of court systems, but one might as well infer the uselessness or even their damaging influence on the quality of the act of justice making. However, the transition from the factual to the normative cannot be very easy, which is why the analysis should go even deeper.

If we add to the above the fact that magistrates are nowadays a predominant or majority part of such councils, we reach yet another conclusion that contradicts the trite clichés regarding the decision-making autonomy of such councils: contrary to the expectations, where judicial councils consist of more representatives of public justice system beneficiaries than of representatives of justice providers, a higher degree of society satisfaction about the functioning of the judicial system as a whole has been noted. Far from being an advantage for themselves and for the rest of the community, the complete isolation of such councils from any possible links to the external world proves to be a constraint both in councils and for councils themselves.
2.4. Arguments in favor of judicial councils

What are, then, the reasons for which a majority of the states chose to make use of this institutional instrument? A first argument in favor of judicial councils is that, by their very existence, judicial councils remind of the concern for the balance between judicial independence and its accountability towards political power. Be it for this sole reason, judicial councils are a place where quite a lot of political (and other) energies and passions converge; thus they manage to be the main arena where positions of various actors with an interest in the (proper) functioning of the legal system are presented, as well as a platform for the encounter of voices rising from providers and beneficiaries of the public service of justice. At the same time, by virtue of their structure, judicial councils include actors from different social spheres, which guarantee that no institution or power could exert a dominant influence on the judicial system. At the same time, due to the manner in which they are established, judicial councils (sometimes) manage to shed light on the main sources of influence on the judicial system; the direct and open confrontation of these sources of potential influence can only be beneficial for the State and democracy in the broadest sense.

Nevertheless, State practice in this matter tends to prove that judicial councils cannot, by themselves, ensure an effective guarantee of the independence and quality of justice. Moreover, it is precisely because some of their functions largely depend on their composition that judicial councils risk becoming a target of frequent institutional reforms, as the experience of countries such as Italy, Brazil or Romania seems to indicate (Parău, forthcoming).

3. The Romanian High Judicial Council

Indeed, Romania has been extremely open to external influences and prone to adopt any reform initiated from the inside. Thus, it is not just institutional transplant or judicial imports that systematically affect the operation of the state apparatus (Guțan, 2010, p. 43), but also various recommendations and conditionalities imposed by international bodies, typically translated into hastily and frequently applied reforms and novelties on a legislative and institutional level, that place the good operation of the State itself at risk. The High Judicial Council (hereafter, CSM) is, to a significant extent, the composite outcome of such forces. Its base model was the similar French institution, compounded by contributions coming from various directions, including from within the judicial system. If the CSM version provided for in the 1991 Constitution proved to be an inoffensive institution, without much impact on the judicial system, after the Constitution was amended in 2003 and the relevant legislation was inherently adapted in 2004, CSM practically became the fully autonomous node of the Romanian judicial system.

The main function and purpose of the CSM is to ensure the independence of the court system from political influence, by taking on the duties of selecting, promoting

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4 In Romanian, CSM is the abbreviation for the Romanian Judicial Council.
and disciplining the magistrates over the course of their entire professional career. As a rule, judicial councils can provide a locus for the initiation or even coordination of institutional reforms of justice. However, despite the expectations, CSM proved to be one of the main factors stopping – or even reversing – successive waves of reforms that were initiated but seldom completed. In this respect, even some of the staunchest advocates of a fully autonomous CSM in the Romanian institutional setup had to admit their failure (Parău, forthcoming). Thus, reports presented by the European Commission under the Mechanism for Cooperation and Verification include assessments which are at least interesting, if not also instructive, with regard to the CSM: ‘[…] despite the pivotal role which the CSM should play in promoting a reform of the judicial system that should be as effective and transparent as possible, it has yet to succeed in taking responsibility for its own integrity and accountability’ (2008) or ‘[…] although currently benefiting from sufficient resources to function efficiently, the difficulties in acting on its own responsibility and implementing professional ethical standards for its own members are a source of concern’ (2009) and again: ‘[there is] a certain reluctance of the decision makers in the judicial system to cooperate and take on their responsibility for the benefit of reform […]’ (2010)\(^5\).

3.1. The accountability of the CSM – a chimera?

The CSM is not accountable to any political authority, be it directly or indirectly democratically designated. The 1991 Constitution aimed at establishing a ‘true Parliament of the magistrates’, with the (desired and consciously assumed) effect of drastically reducing, or even completely eliminating the influence of the legislative and the executive powers over the judiciary. The constitutional and legislative reform of 2003-2004 continued this institutional setup while further limiting the competence of the Parliament to decide on matters related to the CSM: only the Senate can still decide on the election of two civil society representatives and validate the entire election process. Just like any autonomous administrative authority\(^6\) the CSM is also subject to patronage control, but this is doubly limited: on one hand, it only covers the election process and on the other, it can only be exercised with regard to certain legality issues likely to affect the final outcome of the elections\(^7\). This leaves a (much too) broad margin of discretion for the CSM in its activity. Given that the CSM currently has 19 members and that both the Minister of Justice and the State Prosecutor (through whom the influence of the executive is realized) are de jure members of the CSM, the 2 + 2 votes of the members

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\(^5\) Reports presented by the European Commission under the Mechanism for Cooperation and Verification.

\(^6\) Though difficult to accept by CSM itself, its legal nature, basically an administrative one pertains not only to the institutional setup of any democratic state, but also to a normative state of affairs. This legal nature is established through positive law and confirmed by the case-law of the Romanian Constitutional Court (CCR). Also, see CCR’s judgment no. 148/2003.

designated other than by elections organized within the judicial system are always outnumbered by the other 15, which represent the judicial system itself.

Consequently, the composition of the CSM illustrates not just a clear bias in favor of strong corporatism, but also the acknowledgement of a higher degree of isolation of the judicial system from the other two powers of the state. This can explain the unaccountability of the CSM both to powers established in the State and to citizens. The fact that the overwhelming majority of the CSM members are elected by and from their peers and further officially validated (in fact, highly formalistically, as illustrated by the 2010 elections) by the Senate causes that any connection between them and the citizens is broken.

As for the potential accountability of the CSM to the judicial system itself, Romania seems to have replicated the mechanism of lack of transparency and responsibility also noticeable in the relation between the political class and its own voters. Thus, from a starting point justified by a traumatizing previous experience, where political power had too much leverage in interfering with judicial activity, after 1989, institutional engineering took it to the opposite extreme. Like any extreme, this proved to be damaging as well. The fact that, as an aspiration, it was one of the firm requests of some international bodies (the Council of Europe and especially the European Commission, throughout the difficult negotiations for the EU accession) does not make it less problematic (Parău, forthcoming); the absolute independence of the judicial system from the whole of the Romanian State structure, including from its citizens, now raises serious issues and contributes to an even greater fragmentation of the social cohesion in Romania. Somehow paradoxically, this is also constantly pointed out in the EC reports developed under the Mechanism for Cooperation and Verification.

3.2. The duties of the CSM – a difficulty?

It is not only the composition and the complete political isolation of CSM, but also its attributions that have contributed to this situation. If, prior to the 2004 legislative changes Romanian judges were appointed by the President as proposed by the Senate and endorsed by the CSM, the selection and promotion of magistrates has since become a quasi-exclusive prerogative of the CSM, that the Head of State can only assent to by a formal gesture of investiture. The previous subordination of the CSM to the Ministry of Justice has been currently replaced by total independence from any influence from outside the judicial system. Contrary to the expectations, this development has neither contributed to an improvement of the quality of the act of justice, nor spared the judicial system some spirited and vocal complaints about the recruitment and promotion of magistrates; on the contrary, it brought an entire system of internal battles specific to the political arena into an institutional system that should have been separated from the typical controversies of authorities that are legitimated by this very internal competition, conducted in front of the voters. Full independence from the rest of the political system did not help identify another way in which the judicial system could operate but, through a hardly explicable process of replication, took over all the shortcomings of a political system often contested for its instability.
3.3. Influencing the CSM – a possibility?

Moreover, the isolation from political influence has not meant isolation from any other influence. The ‘media’ scandals, stemming from a self-claimed maximum transparency of the CSM all the while continuing to include a stage of deliberation to which media and public access is forbidden, are well-known. In the absence of any other form of control, citizen control remains the sole and the ultimate way of holding the CSM accountable, but it is precisely the one which is denied at the essential moment of decision-making. This detail increases the vulnerability of the CSM to other types of influences and makes it possible for the institution to be exposed to some scathing criticism of the way it functions, without providing it with means to defend itself. The influences within the judicial system are often assumed, but can be neither proved nor denied, thus contributing to the tarnishing of the public image of an institution which, anyway, stands little chance of becoming popular with the general public due to its strong corporatist nature. This is also compounded by the internal rules of organization and operation, which do not arouse or increase the interest of the general public for the workings of the plenary sessions, insofar as the majority of actual decision-making competences are assigned to the two departments (prosecutors and judges).

4. Reforming the CSM – a necessity. Conclusions

The lack of transparency and accountability, including the incomplete publicity of certain actions which are on the CSM agenda, as well as of decisions adopted in respect to these – particularly regarding its disciplinary competences – have turned the CSM into an institution to which magistrates themselves can no longer relate coherently and have even made some of them initiate revocation procedures against their own representatives on the corporate management body. In reply, members of the CSM decided to become more vocal in expressing some claims of the judicial system, not surprisingly, however, having nothing to do with the requests for internal (including moral) cleaning. As a confirmation of a dangerous spiral, the more the CSM saw its autonomy from the political system of the State strengthened the more it claimed for greater autonomy, in parallel with giving way to other types of potential influence.

From a desire for functional independence of the Romanian judicial system, we face the reality of a gradual but certain withdrawal of the magistrates from the community and of the CSM from any other social system, sometimes even from its own base. We thus witness a separation of reality from both normativity and from its goals, without any possibility to correct the situation other than by revising the regulatory framework underpinning the CSM operations, accompanied by a necessary moral and ethical purging of its members.

Beyond the solutions proposed in the numerous drafts for the amendment of the Constitution, circulating within the government authorities or the civil society, there are at least three elements which deserve special attention:

- The composition of the CSM – Judicial councils became corporatist in post-totalitarian countries right after the change of political regime, but evolved into management
and professional assessment authorities as the democratic political regime was consolidating. Romania has exhibited an evolution in the opposite direction, which needs to be overthrown. On one hand, this can be done by reviewing the composition formula of the CSM and, on the other hand, by ensuring an effective control over compliance with this regulatory framework, including control of professional ethical standards. From a legal point of view, the CSM is a (very/too) independent administrative authority, which does not, however, escape the patronage control of the Romanian Parliament via the Senate. The control duties of the guardian authority include validation of the nominal composition of the CSM, including legality check of election procedures. This internal check of the election process can be doubled, if necessary, by an ex post verification performed by jurisdictional authorities, but the latter is neither necessary, nor beneficial. The fact that the CSM elections held in late 2010 did not pass through any internal filter (although the law provided one within the CSM and another within the Romanian Senate) and were appealed against in front of judicial (Bucharest Court of Appeal) or jurisdictional authorities (Romanian Constitutional Court) can only damage the public image of the entire judicial system. Beside the need to change the very composition of the CSM, the procedure of member appointment might also be worth considering, as well as more effective forms of control over the entire institutional process. A thorough and democratic control of the CSM specific election process, exercised while in progress, would allow the – even moral – healing of the judicial system and would avoid the unfortunate situation of a potential ex post judicial control, with real chances of unveiling some irregularities. Moreover, although it seems difficult for legal norms to cover all the types of transitional situations related to the mission and composition of the CSM, the settling of which is more in keeping with good faith and personal morals than to a deficient regulatory framework, in the current context, an effort of normative inflation might contribute to a more stable and predictable behavior and thus to the strengthening of the rule of law in Romania;

The internal organization of the CSM – as a collective body, the CSM is chaired by a person elected for a non-renewable one year term and it is structured into departments established as per corporatist – professional criteria. In practice, this form of organization has been supplemented by working committees consisting of CSM members and technical specialist staff, who prepare the proceedings in the departments and in plenary sessions. This internal organization does not seem to entail too many correlations or correspondence with the structure of the courts whose resources the CSM manages, whereas when there is a need for consultation with the professional body of the magistrates, this is done in their general assemblies or meetings of the management boards of the courts. A clearer correspondence between the structure and functions of the CSM, on one hand, and between the latter and the internal structure of the judicial system which it manages on the other hand, is desirable. Equally, more detailed provisions regarding the position of the CSM Chairperson, including in regard to the term in office and duties seem to be
not only useful but also necessary, even though they can give the impression of an excess of regulations.

– The functioning of the CSM – the frequent syncopes noted in the functioning of the CSM, especially over the course of the latest term, revealed malfunctioning originating both in the normative framework and in the institutional practice. On a normative level, the manner of distributing decision-making competences between the plenary of the CSM and other entities that are part of its internal organization has favored a lack of transparency. The isolation of the CSM from any political factor but also from any form of accountability, in parallel with the fragmentation of its activity, doubled by the false impression of a collective accountability (supposed to result from secret ballot), yet disproved by the practice of extending, continuing or renewing of individual terms in office resulted in the CSM coming across as an institution that does nothing but maintain its own existence, without having the resources required to carry out other activities. Not least, decision-making consistency and institutional cohesion are issues that go beyond the normative framework and have more to do with the CSM practice, as they depend more on the human factor than on anything else.

Justice is one of the many mirrors in which a particular human society can reflect itself and its ethical standards are typically representative of that community as a whole. The Romanian Judicial Council achieved the performance – far from enviable – of triggering ethical and professional complaints even from within the magistrate community, which it is supposed to represent, and this outstrips any regulation, reform or legal strategy. Be it solely from this perspective, otherwise minor at an institutional scale but with incalculable consequences at social level, the CSM deserves an in depth reform.

References:


