Notes and proposals regarding the changes and ammendments to the Romanian Constitution – 2013

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Foreword.

The following proposals are but a small part of those that were made in several stages during the year 2013, first in the Forum[1] coordinated by the Association ProDemocrația (NGO) then on the text proposed / adopted as amendments by the parliamentary committee established to review Romania's Constitution in the spring of 2013, including the proposals and comments made by the Romanian Ministry of Justice.

The texts capitalize largely on the case law of the Constitutional Court, the European Court of Human Rights, the European Court of Justice and legal doctrine, especially the recent constitutional doctrine of Romania and other European countries. Also, we the authors have used the relevant jurisprudence of the courts in Romania, proving also their personal toll by professional experience in the legal field and by academic experience. The team of authors consists of a larger group based at the Faculty of Law, part of the University of Transylvania from Braşov.

A short history of our present Constitution.

First of all, we believe it is important to give a clear definition of a constitution. A constitution is a set of fundamental principles or established precedents according to which a state or other organization is governed.

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[1] More information about the forum and all the texts and proposals presented in a report can be found at the following address http://forumconstitutional2013.ro/

We can concur that these rules together make up, i.e. constitute, what the entity is. When these principles are written down into a single document or set of legal documents, those documents may be said to embody a written constitution; if they are written down in a single comprehensive document, it is said to embody a codified constitution.

It is a known fact that within states, whether sovereign or federated, a constitution defines the principles upon which the state is based, the procedure in which laws are made and by whom. Some constitutions, especially codified constitutions, also act as limiters of state power, by establishing lines which a state's rulers cannot cross, such as fundamental rights.

Constitutions usually explicitly divide power between various branches of government. The standard model, described by the *Baron de Montesquieu*[2], involves three branches of government: executive, legislative and judicial.

Most commonly, the term constitution refers to a set of rules and principles that define the nature and extent of government. During our research we have noticed that most constitutions seek to regulate the relationship between institutions of the state, in a basic sense the relationship between the executive, legislature and the judiciary, but also the relationship of institutions within those branches. For example, executive branches can be divided into a head of government, government departments/ministries, executive agencies and a civil service/administration. Also we have noted that most constitutions attempt to define the relationship between individuals and the state, and to establish the broad rights of individual citizens. It is thus the most basic law of a territory from which all the other laws and rules are hierarchically derived; in some territories it is in fact called "Basic Law".

The 1991 Constitution of Romania was adopted on 21 November 1991. It was approved in a referendum on 8 December and introduced on the same day. It remains the current fundamental law that establishes the structure of the government of Romania, the rights and obligations of the country's citizens, and its mode of passing laws. It stands as the basis of the legitimacy of the Romanian government.

The constitution was most recently revised by a referendum on 18 October 2003. The revised text took effect on 29 October 2003.

The 1991 Constitution enshrined the return to democracy after the fall of the Communist regime. The draft was composed by a committee of parliamentarians and constitutional law specialists; was approved by Parliament, meeting as a Constituent Assembly, by a vote of 414 to 95 on 21 November 1991, being published in *Monitorul Oficial*[3] the same day; and was approved by referendum on 8 December 1991, with 77.3% voting in favour. The 1991 Constitution contained 7 titles and 152 articles. Romania is defined as a *“national, sovereign,*

[2] We recommend further reading on the Spirit of Laws, the first work to mention the separation of powers http://en.wikipedia.org/wiki/Montesquieu

[3] The equivalent of the Official Journal of the UE, it is the national publication in which all laws, regulations and other important documents are printed to be made known and put into effect by the general population.

independent, unitary and indivisible state". The form of government is the republic, the president having up to two four-year terms. He represents the Romanian state in domestic and foreign relations, ensures obedience to the constitution and the proper functioning of state institutions, and is the guarantor of the state's independence, unity and integrity.

The Parliament is *"the supreme representative organ of the Romanian people and the sole lawmaking authority";* it is bicameral (Chamber of Deputies and Senate) and elected for four years. After the prime minister is named by the president, Parliament validates the composition and programme of the Government and can dismiss it following a motion of censure. The constitution provides for fundamental civic rights and freedoms, and creates the office of Romanian Ombudsman[4] to ensure these are respected

The 1991 Constitution has been amended one time, in 2003.[5] Articles were introduced on "Integration into the European Union" and "NATO Accession", bringing the total to 156 in 8 titles. These specified that both could take place by parliamentary vote alone, and that EU citizens living in Romania can vote and run in local elections.

The Constitution after the revision in 2003 grants minorities the right to use their native language when dealing with local administration and the courts, improves the functioning of the legislative chambers (better specifying their attributes) and restricts the privilege of parliamentary immunity to political declarations, extends the president's term to five years, explicitly "guarantees" rather than "protects" the right to private property and removes the constitutional obligation for conscription (which ended in 2006).

The revised document was adopted by referendum on 18–19 October 2003; turnout was slightly above the 50%+1 threshold needed for it to be valid, with 55.7% of 17,842,103 eligible voters showing up. The opposition and NGOs alleged serious irregularities. 89.70% voted yes and 8.81%, no. It came into force ten days later.

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[4] An ombudsman usually appointed by the government or by parliament but with a significant degree of independence, who is charged with representing the interests of the public by investigating and addressing complaints of maladministration or violation of rights. The Romanian Ombudsman (Avocatul Poporului in Romanian, literally meaning "People's Advocate") is an independent institution of the Government of Romania, responsible for investigating and addressing complaints made by citizens against other government institutions. The Romanian Ombudsman was established in 1991 after the ratification of the country's first post-communist constitution. Initially, the ombudsman was appointed by the Senate for a four-year term. After the Constitutional Amendment of 2003, the ombudsman is appointed for a term of five years, by both chambers of parliament (the Chamber of Deputies and Senate), to which it reports every year or at their request. The ombudsman is not allowed to hold any other public or private function, aside from teaching in a tertiary education institution. The ombudsman is aided by a number of assistants (adjuncți) specialised in legal domains such as women's rights, minority rights, children's rights, police issues, property, industrial relations and taxation.

[5] The Constitution of Romania of 1991 was amended and completed by the Law No. 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, No. 758 of 29 October 2003, republished by the Legislative Council on the grounds of article 152 of the Constitution, with the updated denominations and the renumbered texts (Article 152 became, in the republished form, Article 156).

Some desired new amendments.

The main amendments to the Constitution as presented by the Parliamentary committee in the spring of 2013 are as follows:

1. Romania acknowledges the historic role in the establishment of the Romanian state of the Royal Family, the Orthodox Church and of the other religious cults,

2. The mandate of a Deputy or Senator shall cease on the date of his/her resignation from the political party or political entity that got him elected or upon joining another party,

3. The Constitutional Court judges will be entitled to rule on the parliament's decisions or on matters concerning our position within the European Union,

4. The legal representatives of national minorities may set up their own decision making and executive bodies with competencies regarding the right to preserve, develop and express their identity. National minorities can freely use in their public or private spaces national symbols representing their ethnic, cultural, linguistic and religious identity,

5. The Government appoints in the territorial - administrative units prefects[6] and sub-prefects, under the law,

6. Romania's flag is the tricolor flag with the coat of arms on the yellow background, the colors are arranged vertically in the following order from the flagpole: blue, yellow, red,[7]

7. No means of mass communication can be suspended or suppressed,

8. Mass media communications have an obligation to publicly declare their sources of funding and their ownership structure. The declaration procedure shall be provided by the law,

9. The family is based on the freely consented marriage between a man and a woman, on their equality and the right and duty of parents to ensure the upbringing, education and training of children,

[6] Following the Romanian Revolution of 1989, a 1990 law brought back the prefecture as an "organ of state administration with general competences", composed of one prefect, two deputy prefects, one secretary and seven members. The law specified how the institution should be organised as well as its attributes. The office—one that represented the Government locally and headed devolved public services of ministries and other agencies—was enshrined in the constitution passed by referendum in December 1991, as well as by a law that year and in 2001. Further legislative reform began with the 2004 Law on the Prefect.

[7] The national flag of Romania (Romanian: *Drapelul României*) is a tricolour with vertical stripes: beginning from the flagpole, blue, yellow and red. It has a width-length ratio of 2:3. The Constitution of Romania currently provides that "The flag of Romania is tricolour; the colors are arranged vertically in the following order from the flagpole: blue, yellow, red". The proportions, shades of color as well as the flag protocol were established by law in 1994 and extended in 2001

Our proposals.

Firstly we consider it necessary to introduce human dignity as one of the provisions of the Constitution (this is one of the amendments proposed in the parliamentary group), in art. 1 paragraph. 1, the following text should be introduced: *the source of all human dignity and fundamental rights is inviolable*. All forms of public authority must respect and protect human dignity.[8]

Human dignity is expressly mentioned in several fundamental laws established democracies such as Spain (Article 10 paragraph 1), Germany (Article 1, paragraph 1), Japan (Article 13), Italy (art. 3). The use of this term is very useful, it is not superfluous and will add more content Constitution, meaning the explicit protection of fundamental values inherent to human beings.

We also proposes to amend paragraph. 4 of article 21, such as: special administrative jurisdictions are free. Under the current text *"special administrative jurisdictions are optional and free of charge."* According to the Decision no. 148/2003 on the constitutionality of the legislative proposal to revise the Constitution stipulates that *"access to justice, according to art. 21 can not be subject to a voluntary or compulsory administrative jurisdiction, meaning on which the Constitutional Court ruled in several decisions."*[9]

We believe, however, that giving up the term "voluntary" leads, in fact, to major obstacles to access to justice, blocking / stopping the settlement of disputes, as a rule, to the administrative jurisdiction in situations (many, thinking through the text proposed by the committee) in which the legislator will opt for arbitration rule. In all international regulations and in the overwhelming majority of constitutions, it talks about "the entitlement to judge" or "right of access to justice" as the essence of the essence of constitutional democracy and separation of powers. The current text of the constitution is superior and provides many more guarantees for citizens.

We appreciate to have to drop the amendment, with obvious negative consequences for the right to access to justice.

Regarding Article 23 on Individual freedom we propose the existence of a third Paragraph: *Detention may not exceed 24 hours.*[10]

The proposed wording: *Detention ordered by a judicial body with powers of criminal investigation may not exceed 24 hours.*

[8] We recommend further reading on this matter new to our Constitution in the paper “The Concept of Human Dignity in Human Rights Discourse” published by David Kretzmer,Eckart Klein at Kluwer Law International, Hague

[9] For further information on this matter we believe one should addres the work of Marian Năstase Georgescu, Simona Theodora Livia Mihăilescu, Drept Constituțional şi instituții politice, Curs Universitar, Bucureşti 2011, Universul Juridic

[10] Muraru Ioan, Elena Simina Tănăsescu – Drept constituțional și instutuții politice – Ediția 13- Volumul I – Editura C.H. Beck București 2008, p.158, p.165

Prosecutors may order provisional deprivation of liberty of a person suspected or accused for a period not exceeding 72 hours, for good reasons, and only in cases specifically provided by law. Against this measure taken by the prosecutor, the defendant may file a complaint with the court. Emergency complaints will be judged by the court judge empowered to hear the case in the first instance.

Arguments. Maintaining the maximum duration of detention to 24 hours is a normal recognition of the historical efforts to conquer strong safeguards to protect individual liberty against the abuses of executive power. The criminal investigation, police first, is the armed force of the Executive, and can be assimilated in critical situations, with an effective and brutal repression. For practical reasons, for a period of 24 hours of detention we give the power of criminal investigation without the supervision of the prosecutor, that can ensure the guarantees necessary for the legality of the measure. But a greater deprivation of liberty during prosecution can be accepted only if it is placed directly under the responsibility of the prosecutor, for whose independence there are several constitutional guarantees. To meet the requirements of Article 5 of the ECHR and the case law of the European Court, it is necessary to establish a mechanism of judicial control, that must operate and be controlled, in fact, to be able to censure an arrest made in the case ordered by the police but not approved by a prosecutor.

Objectives. Dynamics during criminal proceedings, adapting to the realities of contemporary criminological theories, should provide stronger state reactions to crime that is more organized terrorism, but should be balancend due to the respect to individual freedom as a fundamental right. The prosecution and the court in a criminal trial, are required to ensure that the suspected or accused person receives effective defense, and he is appointed a lawyer to provide legal assistance. Thru such a Constitutional warranty beyond the formal character of the right to defense in criminal cases, switching to a pragmatic approach we ensure the active involvement of the competent judicial authority in the protection of the right of defense of the accused. This is in full compliance with the ECHR jurisprudence in this matter. Often in practice the judiciary process is exercised or formally devoid of content, so defending suspected or accused persons might seem an illusory activity, only formal. An explicit constitutional guarantee will compel the judiciary to be more careful, more cautious regarding the management of criminal cases.

In Article 25[11] we propose a new third paragraph:

In urgent cases, the prosecutor may limit the free movement of people on its own motion or at the request of an interested party, by resolution with a reason. Through such a constitutional guarantee we go beyond the formal character of protecting the right to free movement, ensuring judicial review of measures that restrict this right (freedom)

[11] (1) The right of free movement within the national territory and abroad is guaranteed. The law shall lay down the conditions for the exercise of this right.

(2) Every citizen is guaranteed the right to establish his domicile or residence anywhere in the country, to emigrate, and to return to his country.

fundamental. Ensuring effective protection of the right to freedom of movement, and judicial review of any interference and its limitations imposed by the representatives of the executive authorities of the state. Another solution for improved drafting of Article 25 on freedom of movement would be to adapt the provisions contained in Article 27. 2 the specific exceptions to inviolability of the home, noting, however, that only a judge may limit the free movement through reasoned decision, as provided by law.

For article 26[12] we propose new paragraphs

The introduction of new paragraphs with effective protection safeguards against inviolability

Paragraph 3) Measures to limit the interference with intimate, family and private dealings of individuals by public authorities will be subject to the court within three days from the date they were taken.

Paragraph 4) Any interference with private life, family and private dealings which are used in a criminal trial can be made by judge and ordered by a motivated decions and as exceptional emergency measurse it may be ordered by a prosecutor thru a reasoned resolution.

Paragraph 5) The State shall take measures to protect the privacy, family and private dealing of a person against arbitrary and unlawful action of any other natural or legal persons.

Through such a constitutional guarantee we ensure greater protection than the formal character of the right to privacy, family and private dealings, ensuring judicial review of measures taken by public authorities, both in criminal cases and beyond. Such constitutional guarantee is likely to drastically reduce arbitrariness in the taking of any measures of interfere in privacy, family and private life of the person.[13] The state must ensure appropriate conditions for the normal development of relations within the family, the community, to protect people against all forms of abuse and interference exerted by third parties, to provide necessary and effective guardianship whenever the security, or the life is in danger or the health of a person, including the factors of aggression are performed by other natural or legal entities. We want to create better constitutional mechanisms to protect persons, intimate and private life, including family life, protection of vulnerable persons from other individuals. Constitutional guarantees are very diffuse, unclear in the current regulation in force.

For Article 28[14] we envision the Introduction of new paragraphs with effective protection safeguards for inviolability of correspondence

[12] (1) The public authorities shall respect and protect the intimate, family and private life.
(2) Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.

[13] Muraru Ioan, Elena Simina Tănăsescu, op cit., p.168

[14] Secrecy of the letters, telegrams and other postal communications, of telephone conversations, and of any other legal means of communication is inviolable.

Paragraph 3) Measures to limit or interfere with the secrecy of correspondence of people must have a court reasoned ruling.

Paragraph 4) In urgent cases, the secrecy of correspondence can be taken by a resolution issued by the prosecutor reasoned, for a period longer than 3 days.

Paragraph 5) The interception, letters, telegrams and other postal transmissions and by any other means of communication may be imposed for a maximum period of 30 days and be extended for good reasons, the closing date of the court, without total extensions exceeding 180 days.

Paragraph 6) The maximum violation of judicial measures the correspondence can be more than 12 months in the case of prosecution for offenses relating to national security and international terrorism.

Paragraph 7) The violation made by judicial bodies that requested the correspondence must, be given a solution to proceed to judgment, to notify the person whose correspondence was intercepted on the extent to which the correlation between the order and the result to return all correspondence withheld.

Paragraph 8) All public employment agencies, the prosecutors and judges who become aware of the content of the intercepted correspondence have an obligation of professional secrecy.

Through such a constitutional guarantee of protection we go beyond the perfunctory secrecy of correspondence, ensuring judicial control over the interference measures ordered by the court, both in criminal cases and beyond, even in the preliminary stages. Such constitutional guarantee is likely to require the legislature to adopt procedural rules that are very precise and rigorous in this area, thus ending some possible abuses of public labor agencies.[15] The creation of an effective constitutional mechanism to protect the secrecy of correspondence persons, will practically have now a clear constitutional guarantee different than the regulation in force.

On Chapter VI JUDICIAL AUTHORITY we have made many proposals but some of more importance are as follows:

The proposed wording

Section 1 - The judiciary

Paradoxically, in Title III, Chapter VI, Section 1, although it is obviously dedicated to the Judiciary, this expression is not found. However, in article 1 the constituent used explicitly in paragraph 4, the name of the judiciary. For symmetry, we want to use these expressions in the title of Section 1, as long as this section contains the constitutional rules governing the organization and functioning of the judiciary. Also, the planning reasons for a correct and

[15] Marian Năstase Georgescu, Simona Theodora Livia Mihăilescu, op.cit, p.163

appropriate use of constitutional legal language, seeing that we have a similar marginal title in **Courts of law, article 126, Section 1** this last section would be useful to bear another name, a generic name for the material they cover, namely the judiciary.

Providing an explicit constitutional language and illuminating, clearly defining the judicial power to the judiciary and to other public authorities.[16]

Article 130 Judicial police/Police in the courts[17]

We believe we should insert a new paragraph:

Paragraph 2) The Minister of Justice organizes the judicial police.

Constitutional rule of article 130 has not been, in fact, put in practice, in order to ensure specialized police authorities for court activity with specificity to the proceedings in court. Clear constitutional mechanisms have to be enacted for administrative and police component of hearings necessary to ensure peace and order in the administration of justice, crime, administer fines to the audience and measures to restore public order operatively and effectively. Finally, the current form of organization, security forces courts is provided by gendarmes, whose functional subordination is outside the judiciary, so that the heads of courts are unable or do not have legal means to implement concrete measures to improve the flow and rules of security and public order in the court premises as the concrete situation of the court that everyone leads, but implementing standardized plans imposed by the National Gendarmerie, often are inarticulated as ground realities.[18]

Article 131 Introduction of a new paragraph[19]

Paragraph 4) The Minister of Justice, with the Minister of Internal Affairs, after consultation with the General Prosecutor's Office attached to the High Court of Cassation and Justice, organises Marshals. This organization will have directly subordinated a judicial police and prosecutors will be cleared with the concernes on the agenda of many public debates on the proper functioning of judicial activities. As long as the Minister of Justice is the highest public office under the authority which operates with prosecutors, according to **Article 132** paragraph 1 of the Constitution (the text should remain unchanged, as prosecutors can not be irremovable, and their independence stops hierarchical control is evident that all the Minister of Justice is the one who must ensure the organization of the judicial police, at least the necessary judicial police to carry out the criminal prosecutors orders, or for cases of

[16] Marian Năstase Georgescu, Simona Theodora Livia Mihăilescu, op.cit, p.304

[17] The current wording of the article is: Courts of law shall have police forces at their disposal.

[18] The special law is Decision no. 593 of 2 November 1993 of the Romanian Government on measures to ensure police courts and prosecutor's offices, the security of their premises, and the protection of magistrates

[19] The present article consists of only the following 3 paragraphs: (1) Within the judicial activity, the Public Ministry shall represent the general interests of the society, and defend legal order, as well as the citizens' rights and freedoms. (2) The Public Ministry shall discharge its powers through public prosecutors, constituted into public prosecutor's offices, in accordance with the law. (3) The public prosecutor's offices attached to courts of law shall direct and supervise the criminal investigation activity of the police, according to the law.

great difficulty, like organized crime, complex cases corruption, other complex cases where the prosecutor's role in coordinating the work of criminal investigation, prosecution direct management is more pronounced.

The Minister of Justice shall, through tutelage overview of the aforementioned Police of the Courts, should provide equidistant treatment to the professional status of these categories of officers, so their progress is assessed objectively, free from all forms of interpersonal or group baffling arising from the interaction direct daily between prosecutors and police. On the other hand, the anchoring duties of the Minister of Justice in the management of this organization and its functioning judicial police, ensure a better interconnection of the two categories of professional bodies - police, prosecutors, without any of them to be led with partisanship as its representative at the highest peak, the justice minister will be neither a policeman active, nor the prosecutor in the activity. Unlike the profile of the Interior minister, as history has shown in recent years in Romanian politics is usually predominantly political rather than tehnical, the profile of the persons appointed Minister of Justice was every on tehnical legal terms, the selection being made out of former judges, lawyers, professors of legal education, lawyers with extensive professional experience in the judiciary and connected with it. As such, these best practices, a shift of the center of gravity of Criminal Police organization subordinated to the Minister of Justice would ensure more professionalism in the management of macro ministerial organization and functioning of the judicial structures.

Organization of the Police of the Courts serving only the the prosecutor, the entire apparatus for carrying out activities related to judicial (forensic investigation, criminal investigation itself, its own system of witness protection, protection of other parties in criminal proceedings, with specializations in the key areas of crime within the jurisdiction of the prosecutor's own criminal - offenses against life, coruption crimes, organized crime, the vast economic and financial crime, forensic department and special operations typical for these types of investigations. Existence of the police for organized crime in the Romanian Police is not excluded, on the contrary it would be the best organization to cover all levels and areas of Romanian society, from everyday crime, lower gravity in principle, up to crime in its most complex form, more serious. Police of the Courts in the Interior Ministry still finds important role especially since the majority of offenses under the Penal Code and special penal laws, respectively Before other legislation (like Forest Code, road, customs code, tax code, tax procedure code, etc.) is not the direct responsibility of the prosecutor for prosecution.

It should be noted that, in terms of the theory of constitutional law, the Public Ministry can not be raised to the fourth power in the state, because this model is typical of the communist system and the repressive state apparatus, which provides, in essence, conducting investigations and prosecution in criminal proceedings, shall be under the authority of one of the three traditional powers - executive, legislative or judicial, and Romanian Constituent chosen operation in 1991, mixed legal - executive and judiciary - is

the best solution that responds the more demanding theoretical / doctrinal and practical, and requirements arising from the ECHR.

The Council of Magistrates

Section Title 3 - The Council of Magistrates - must be changed in the event there will be the option for separate supreme judicial council for judges and prosecutors, similar to the French model.[20]

The new name of Section 3:

High Judicial Council.

Section title for the High Council of Judges shall be consistent with the new normative content of this section.

Ensuring a fair constitutional language, adapted to the legal rules are presented in section concerned.

Article 133 - Role and structure of the current formulation of the Supreme Council of Judges

Reformulating the entire article with the new name, the Superior Council of Judges, Changing the composition of the High Council of Judges and term of office of its members.

The proposed wording

Paragraph 1) High Judicial council shall guarantee the independence of the judiciary.

Paragraph 2) High Judicial Council consists of 17 members, of which:

a) nine judges elected by the general meeting of the court, the degrees of jurisdiction of the courts, as follows:

2 judges from High Court of Cassation and Justice, the judges should have at least 2 years experience in this instance;

3 judges representing the courts of appeal, with at least 3 years old to those courts;

3 judges from the lower courts and specialized courts with experience of at least 3 years in these courts;

One judge of the judges with at least 8 years of age in the magistracy;

[20] For more information on Judicial Councils please consult the following work "CONSILIILE JUDICIARE ÎN EUROPA, coauthored with Alexandru Goga, in the scientific volum „Justitie, stat de drept si cultura juridica" from the 13th of May 2011 presented at the Institute of Juridical Research „Acad. Andrei Rădulescu" of the Romanian Academy , ISBN 978-973-127-618-2

b) 1 prosecutor of at least 15 years of experience in magistracy elected by the general meeting of prosecutors from the Prosecutor of the High Court of Cassation and Justice and prosecutors' offices attached to courts of appeal

c) 1 senior lawyer of at least 15 years of experience in the legal field and minimum 5 years in the profession, elected by the Senate from among the candidates proposed by United Associated of Lawyers Bars;

d) 1 notary of at least 15 years of experience in the legal field and minimum 5 years in the profession of notary, elected by the Senate from among the candidates proposed by National Union of Public Notaries;

e) one legal counsel selected by the Order of the Legal Counsel with at least 15 years of experience in the legal field and at least 5 years as a Legal Council;

f) 2 legal science teachers legal of at least 15 years of experience of legal and academic rank of associate (*conferențiar*) get elected and another one nominated by the Minister of education from the candidates proposed by the Councils of Law faculties accredited by law.

g) The Minister of Justice and President of HCCJ are members by right of the Council

2) The members of the High Judicial Council have a 4 years mandate except as members of the Council, other members can not perform two consecutive elected terms.

3) The President of the High Judicial Council is elected for a term of one year which may be renewed by the general meetings of elected judges of the courts.

4) The Superior Council of Judges vote shall be taken, usually by secret ballot.

5) The President of Romania and the Prime Minister can participate in the High Judicial Council, in order to address messages without the right to vote in its proceedings.

6) The Superior Council of Judges decisions are final, except in disciplinary matters.

7) The provisions of Article 126 paragraph 6) of the Constitution shall apply accordingly to acts of the Council, regarding the relations with Parliament.

Justification

We are rethinking the structure of the SCM[21] transformation in two separate judicial councils, one for judges and one for prosecutors, with central roles in the proper functioning of the judiciary and career of judges - Supreme Council of Judges, and the proper functioning of the Public Ministry and prosecutors career with the Council Superior Prosecutors. The term of office of a member of the CSM to date of 6 years is too long and at some point de-

[21] On more information about the current state of affairs at SCM one can consult its website http://www.csm1909.ro/csm/index.php?lb=en

motivating, bringing numerous accumulations of prejudices and perceptions, which can hijack the original intentions of the candidates which is less beneficial for judiciary. On the other hand, by symmetry with legislative power[22], where mandates are elected for 4 years, it would be necessary that the representatives of the judiciary in the administrative supreme forums have warrants with the same duration. The establishment of a judicial council exclusively for the Judiciary, which is concerned only with proper organization and functioning of the judiciary, judges career with a rational component and judiciously balanced in line with the decisions of the Constitutional Court, with a majority of that body Judges represented in this forum, to ensure effectively the Superior Council of Judges of the independence of the judiciary. On the other hand, in a large and active presence of other legal professionals and civil society representatives recruited from among the most valuable professionals and theorists of law, ensure the presence of credible and professional voices in the Council which will generate the necessary pressure on the justice system so that it is properly connected to the socio-historical and legal realities of Romania, in the context of supranational justice operated in Romania.

Article 134 The wording of the current constitutional text

It is necessary to replace the old name proposed SCM with the Superior Council of Judges

The proposed wording

Paragraph 1 par 1) High Judicial Council holds records for career judges, validates exams, the senior appointment of judges, takes action, together with the Ministry of Justice to ensure, if necessary, the protection of judges, makes requests to the authorities competent to provide the resources necessary for the proper functioning of the courts and the public service of justice, ensures respect for the independence and security of judges.

Paragraph 1 par 2) The Superior Council of Judges handles the transfer requests of prosecutors and judges and approves such requests of prosecutors to be promoted in the office of judge.

Paragraph 1 par 3) The Supreme Council of Judges supervises the promotion of judges from other courts, approves request for judges to aid other public authorities, including public offices, under the law, approves requests for suspension of office. In the second Paragraph , the last sentence should be deleted, the text that prevents vote as members of the Superior Council of Judges.

Paragraph 3 reads: The Superior Council of Judges in disciplinary matters and all decisions relating directly or indirectly career of judges may be appealed to the High Court of Cassation and Justice. The other Board decisions are subject to administrative law laid down by special law. Paragraph 6 of Article 126 of the Constitution shall apply accordingly.

[22] Muraru Ioan, Elena Simina Tănăsescu, op cit., vol.2, p.274

Justification

We should consider the suggestions we recently received from the members of the Venice Commission, which stressed that a worsening of magistrates liability for anything other than serious forms of error and bad faith would lead to legal norms (constitutional) leaving of the rules, the regulations governing the performance of judges and prosecutors, that would lead to exaggerated ***shyness*** of the exercise of functions by judges and prosecutors. Moreover, a more aggressive approach on magistrate liability, as noted in some of the proposals would mean that for any judgment that would be changed in remedies, the judge or judges of the lower courts should be punished both disciplinary and asked to answer with material means, which is absurd! Nowhere in any civilized democratic state that happens! Similarly, if prosecutors would mean that for an acquittal, it is presumed that the prosecutor is guilty and on a disciplinary point of view he or she should answer also materialy. It is also absurd. A judge is usually very careful on a case. Now we have a very functional Judicial Inspection that has a comprehensive mechanism that has all the legal and operational instruments to professionaly solve such questions, and we can use the current constitutional safeguards without worsening the liability magistrates to an absurd level.

Judges, prosecutors, courts and prosecutors' offices do not want any other authority, institution or individual, to have at hand a means to direct public perception and influence reactions to the solutions given by the judicial bodies. Institutional discretion is one of the rules of justice throughout the democratic world.

Therefore, the existence of serious constitutional guarantees for the protection of the judicial authority is required in order to promote genuine democracy, not a force of chaos and arbitrariness. Justice television is an example of pressure on magistrates called to cases involving large impact on media or public persons with power over media.

Objectives

Outlining accurate representation of a sistem exclusively designed for the judiciary to perfect its growth and the constitutional guarantees for the independence of judges and the judiciary.

Assuming the solution with two councils with the election of prosecutors and judges separately, ie prosecutors, it is necessary to separate the regulation of the Superior Council of Prosecutors, while the High Council of Judges would function independently.

Therefore, by symmetry, the regulations of the Superior Council of Prosecutors is governed essentially like the Superior Council of Judges.

Article 134 par 2 - Powers of the Superior Council of Prosecutors.

Paragraph 1) The Superior Council of Prosecutors proposes to the President of Romania the appointment of prosecutors, except for the trainees, under the law.

Paragraph 2) The Superior Council of Prosecutors holds records for career prosecutors validates exam appointments of senior prosecutors, takes action, together with the Ministry of Justice, to ensure and meet the need to protect prosecutors made steps to the competent authorities provide the resources necessary for proper functioning of the Public Ministry and prosecutors, ensure that the independence of prosecutors and the correct application of the principle of hierarchical subordination. Paragraph 3) The Superior Council of Prosecutors decide on applications for transfer of functions of judge and prosecutors to approve requests for transfer of judges to prosecutors.

Paragraph 4) The Superior Council of Prosecutors has prosecutors posting to other prosecutors, the approved applications for deployment to other public prosecutors, including public offices, according to the law approved requests from prosecutors for personal suspension from the applicant.

Paragraph 5) The Superior Council of Prosecutors court acts as the disciplinary liability of prosecutors, according to the procedure established by the organic law.

Paragraph 6) The Superior Council of disciplinary matters and all decisions relating directly or indirectly career prosecutors may be appealed to the High Court of Cassation and Justice.

The other Board decisions are subject to administrative law[23] laid down by law. Paragraph 6 of Article 126 of the Constitution shall apply accordingly.

Justification

We propose the introduction of new regulations on the Superior Council of Prosecutors to accentuate already established and generally accepted principles of organization and functioning of the prosecution, namely independence, impartiality and hierarchical control without building a fourth estate. Constitutional democracy works in the system ofseparation of the three powers in balance: legislative, executive and judiciary. Our system is mixed according to the constitutional tradition that is enshrined in Romania and other states with genuine democracy models, the largely French-inspired, where both judges and prosecutors have the magistrate quality, quality that is required to be kept for both professions and new regulations resulting from the current revision of the Constitution by initiative.

Objectives

Improving the functioning of the Superior Council of Magistracy, sharing its two judicial councils for each of the two professions of judge, eliminate failures caused by prejudice and other such causes.

The French model is the best known on the operation of two judicial councils, one for prosecutors and other judges.

[23] Law no. 303/2004 regarding judges and prosecutors, republished is currently the administrative law that governates the activity of this offices

Article 134 par. 1 Role and structure

Paragraph 1) Superior council of Prosecutors shall guarantee the independence, impartiality and hierarchical control of legality in the work of prosecutors

Paragraph 2) The Superior Council of Prosecutors consists of 13 members, of which:

a) 7 prosecutors elected by the prosecutor general, from all the levels of jurisdiction, as follows:

Two prosecutors from the Prosecutor's Office of the HCCJ among prosecutors with at least 2 years experience;

2 prosecutors' offices attached to courts of appeal, with at least 3 years experience in these courts;

2 prosecutors' offices attached to courts and specialized courts with at least 3 years experience at this;

1 prosecutor to prosecutor's offices attached to courts with at least 8 years of age in the magistracy;

b) one judge with at least 15 years of experience in the judiciary, judges elected by the general meeting of the HCCJ and courts of appeal;

c) 1 senior lawyer with at least 15 years of legal experience and minimum 5 years in the profession, elected by the Senate from among the candidates proposed by UNBR;

d) 2 legal science teachers with at least 15 years of legal experience and academic rank of associate(conferențiar).

e) the Minister of Justice and Attorney General's Office of the HCCJ are members of the Council.

Paragraph 2) The members of the High Judicial Council is 4 years except as members of the Council, other members can not perform two consecutive elected terms.

Paragraph 3) The President of the Superior Council of Prosecutors shall be elected for a term of one year which may be renewed, the prosecutors are elected by the general meeting of prosecutors.

Paragraph 4) The votes for the Superior Council of Prosecutors are taken usually by secret ballot.

Paragraph 5) The President of Romania and the Prime Minister can participate in the Superior Council of Prosecutors Council to address messages without the right to vote in its proceedings.

Paragraph 6) The decisions of the Superior Council of Prosecutors are final, except in disciplinary and professional career fields.

Paragraph 7) The provisions of Article 126 paragraph 6) of the Constitution shall apply accordingly acts of the Council, regarding the relations with Parliament.

See the arguments and considerations mentioned above.

Article 146 e) and i)

We propose to remove the text that provides Constitutional Court's jurisdiction to resolve disputes between government and Parliament, as experience from 2003 to the present shows that the conflicting authorities have abused this power of the Court beyond the original reason this new text with rules the competence of the Constitutional Court giving a strong political role, nonspecific constitutional democracy. On the other hand, the Court itself has abused this power, arrogating additional skills that they have provided in the Constitution, although its powers are listed exhaustively in 146 letter k).[24]

Conflicts should be settled through dialogue between institutional authority and which is set in justice, be brought before the ordinary courts, the contentious issues that need to adjust judiciary. Eventually, the Constitutional Court could retain jurisdiction to decide only constitutional legal conflict between the judiciary and the other traditional powers - the executive and legislative-based on the premise that the Judiciary has no legitimacy to resolve disputes with the other two branches itself is a party.

Letter i) of Article 146, on the other powers of the Court under its organic law must be eliminated also because the contrary, in the absence of express limitations, the legislature or the Court itself can give the Court jurisdiction other than the powers-powers to be considered in drafting constiutțional, arbitrarily extending the jurisdiction of the Constitutional Court. It is clear that the text of Article 146 letter l) refers to non-judicial functions of the Court, such as internal administrative, management institution on the Court itself. However, through an extensive interpretation, validated, political pressure, to accept that the constitutional court might have and other judicial powers in violation obviously, the game rules, the rule of law, and decisions giving too much jurisdiction Parliament's political, not subject to any censorship genuine parliamentary democracies.

We believe that Article 30 par. (4) - No means of mass communication can not be suspended or withdrawn as proposed by the parliamentary committee should not be included in the Constitution. This amendment is excessive and unsynchronized with other constitutional texts, including other paragraphs of Article 30.[25] Also, this amendment puts beyond the law the means of the press allowing them to be unsanctioned making them when they perform activities prohibited by law (race hatred, anti-Semitism, discrimination, sustaining current

[24] Muraru Ioan., Vlădoiu Nasty Marian, Muraru Andrei, Barbu Silviu Gabriel, Contencios Constituțional, Edit. Hamangiu, Bucureşti 2009

[25] Muraru Ioan, Elena Simina Tănăsescu, op cit., vol.1, p.181

ideological and political democracy explicitly admitted etc)[26]. Art.16 of the Constitution enshrines the principle of equality before the law, while this amendment empties of content the principles set out in Article 16, setting up the press above all forms of legal liability.[27]

We consider Article 36 par. (1) - *"Citizens have the right and duty to vote at 18 years of age by election day"* can not be an instrument for fostering citizen participation in voting. Although abstention from voting is increasingly a problem in Romania, however such norm too forceful, compelling citizens to vote, is excessive and rare in other democratic constitutional system.[28]

Conclusions.

Within the current public endeavor for reviewing the Romanian Constitution and considering the initiatives undertaken in this direction by the policymakers, we humbly tried to give our honest and experienced word in order to present these proposals.

All the notes and proposals are part of a bigger study we have made, following not only the principal lines of the amendments desired by the political parties, but also all the amendments we felt were necessary to review our Constitution and in essence make it modern, contemporary, and useful in everyday social interactions.

Summarising on our proposals we can see a simple line following upon them, that of ECHR and CCR precedents and case law that have made us aware of some need to change in certaing areas. We were especially preoccupied with the judiciary, because most of the authors have a strong relation to this field, and have simply felt the inadequacy of certain regulations now in force, and the absurdity of certain provision desired by certain parties that probably desire chaos to be installed in the system.

In conclusion, all of our observations, accompanied by all our comments, justifications and argumentations must withstand not only the test of time, but the test of the population, should it come that some of them be included in the final draft proposed via referendum to the people to ratify this year or the next.

[26] Marian Năstase Georgescu, Simona Theodora Livia Mihăilescu, op.cit, Freedom of speech, p.164
[27] The right to private life – Case law study on Law no.298/2008, Alexandru Goga, Universitatea Româno Americană, 12 noiembrie 2010
[28] Muraru Ioan., Vlădoiu Nasty Marian, Muraru Andrei, Barbu Silviu Gabriel, op.cit, p.

References:

1. Andreescu Marius – Principiul proporționalității în dreptul constituțional - Editura C.H. Beck București 2007;
2. Banciu A., Istoria constituțională a României, deziderate naționale şi realități sociale, Edit.Lumina Lex, Bucureşti 2001.
3. Barbu Silviu Gabriel, Dimensiunea constituțională a libertății individuale, Hamangiu Bucureşti, 2011
4. Chiriță Radu, „Dreptul la un proces echitabil", Editura Univesrul Juridic, București, 2008;
5. Chiriță Radu, Convenția europeană a drepturilor omului – comentarii şi explicații, vol.I, Edit. C.H. Beck, Bucureşti, 2007.
6. Chiriță Radu, Dreptul la un proces echitabil, Edit. Universul Juridic, Bucureşti 2008.
7. Cochinescu N., Organizarea Puterii Judecătoreşti în România- Instanțele Judecătoreşti. Ministerul Public. Jurisdicțiile Speciale, Edit. Lumina Lex, Bucureşti, 1997;
8. Constantinescu M., Muraru I., Deleanu I., Vasilescu F., Iorgovan A., Vida I., Constituția României comentată şi adnotată, RA M.Of., Bucureşti, 1992.
9. Constantinescu Mihai, Iorgovan Antonie, Muraru Ioan, Elena Simina Tănăsescu, „Constituția României revizuită/comentarii și explicații", editura All Beck, București, 2004;
10. Corlățean Titus, Protecția europeană şi internațională a Drepturilor Omului, Universul Juridic, Bucureşti 2012
11. Deaconu Ștefan – Drept Constituțional, Editura C.H.Beck București 2011,2012, 2 volume;
12. Deleanu Ion – Instituții și proceduri constituționale – în dreptul comparat și în dreptul român – tratat – Editura Servo-Sat Arad 2003;
13. Deleanu Ion, Instituții şi proceduri constituționale în dreptul comparat şi în dreptul român, Edit.Servo-Sat, Arad 2003.
14. Dissescu Constantin, Dreptul Constituțional, Ediție a treia, Bucureşti, Edit. librăriei SOCEC CO, Societate anonimă, 1915.
15. Duculescu Victor, et al., Constituția României – comentată şi adnotată – Edit. Lumina Lex, Bucureşti, 1997.
16. Duculescu Victor, et al., Drept constituțional comparat, tratat, vol. I, Edit. Lumina Lex, Bucureşti, 2002.
17. Geneza Constituției României 1991. Lucrările Adunării Constituante, Edit. Monitorul Oficial 1998.
18. Hauriou Andre, Droit constitutionnele et institutions politiques, Edit. Montchrestien, Paris, 1967.
19. Iancu Gheorghe – Drept Constituțional și Instituțiile Politice – Ediția a IV- a revizuită și completată - Editura Lumina Lex București 2007;
20. Iancu Gheorghe, Drept constituțional şi instituții politice, Edit. Lumina Lex, Bucureşti 2007, ediție IV.
21. Iancu Gheorghe, Instituții de drept constituțional al Uniunii Europene, Lumina Lex, Bucureşti, 2007.
22. Ionescu Cristian, Drept constituțional comparat, Edit. C.H.Beck, Bucureşti, 2008.
23. Ionescu Cristian, Drept constituțional şi instituții politice. Tratat, Ediție revăzută şi adăugită, Edit. CH Beck, Bucureşti, 2008.
24. Muraru Ioan, Constantinescu Mihai, Curtea Constituțională a României, Edit. Lumina Lex, Bucureşti, 1997.

25. Muraru Ioan, Constantinescu Mihai, Iorgovan Antonie, Revizuirea Constituției României. Explicații şi comentarii, Edit. Rosetti, Bucureşti, 2003.
26. Muraru Ioan, Constantinescu Mihai, Ordonanța guvernamentală. Doctrină şi jurisprudență, ediția a II-a revăzută şi completată, Edit. Lumina Lex, Bucureşti 2002.
27. Muraru Ioan, Constantinescu Mihai, Studii Constituționale, Edit. Actami, Bucureşti, 1997.
28. Muraru Ioan, Elena Simina Tănăsescu – Constituția României – Comentariu pe articole - Editura C.H. Beck București 2008;
29. Muraru Ioan, Elena Simina Tănăsescu – Drept constituțional și instutuții politice – Ediția 13- Volumul I – Editura C.H. Beck București 2008;
30. Muraru Ioan, et al., Interpretarea Constituției. Doctrină şi practică, Edit. Lumina Lex, Bucureşti 2002.
31. Muraru Ioan, Iancu Gheorghe., Constituțiile României. Texte. Note. Prezentare comparativă., Edit. Actami, Bucureşti, 1999.
32. Muraru Ioan, Mihai Constantinescu, Simina Tănăsescu, Maria Enache, Gheorghe Iancu – Interpretarea Constituției – Doctrina și Practică – Editura Lumina Lex București 2002;
33. Muraru Ioan, Tănăsescu Elena Simina, Drept Constituțional şi Instituții Politice, ediția a 13, Edit. CH Beck, Bucureşti, 2008.
34. Muraru Ioan, Tănăsescu Elena Simina, et al., Constituția României revizuită-comentarii şi explicații, Edit. All Beck, Bucureşti, 2004.
35. Muraru Ioan, Tănăsescu Elena Simina. şi colectiv, Constituția României Comentariu pe articole, Edit. CH Beck, Bucureşti, 2008.
36. Muraru Ioan., Vlădoiu Nasty Marian, Muraru Andrei, Barbu Silviu Gabriel, Contencios Constituțional, Edit. Hamangiu, Bucureşti 2009.
37. Popescu Corneliu Liviu., Diminuarea garanțiilor constituționale privind independența şi imparțialitatea instanțelor judecătoreşti, în urma revizuirii constituționale, Pandectele Române nr.6 din 2003.
38. Radu Chiriță, „Convenția europeană a drepturilor omului. Comentarii și explicații. Volumul I", Editura C. H. Beck, București, 2007;
39. Selejan-Guțan, Bianca – Excepția de neconstituționalitate- Ediția II - Editura C.H. Beck București 2010;
40. Selejan-Guțan Bianca, Drept constituțional şi instituții politice, Edit. Hamangiu 2008.
41. Selejan-Guțan Bianca, Spațiul european al drepturilor omului. Reforme. Practici. Provocări, Edit. C.H.Beck, Bucureşti 2008.
42. Sudre Frederic, Jean-Pierre Marguenaud, Joel Andriantsimbazovina, Adeline, Michel Levinet, „Marile hotărâri ale Curții Europenea Drepturilor Omului", Editura Rosetti International, București, 2011;
43. Sudre Frederic., Drept european şi internațional al drepturilor omului, Traducere de R.Bercea şi colectic, Edit.Polirom, Iaşi, 2006.
44. Tănăsescu Elena Simina., Principiul egalității în dreptul românesc, Edit. All Beck, Bucureşti 1999.
45. Tănăsescu, Elena Simina – Principiul egalității în dreptul romanesc - Editura All Beack Bucuresti 1999;
46. Tudorel Toader– Constituția României – reflectată în jurisprudența constituțională-Editura Hamangiu București 2011;
47. Udroiu Mihail et al., Protecția europeană a drepturilor omului şi procesul penal român- tratat, Edit. C.H.Beck, Bucureşti 2008.