

The Old and New Romanian Superior Council of Magistracy

On November 1st, 2010, the Romanian Superior Council of Magistracy (CSM) changed its composition. The judges and prosecutors from all over Romania elected their new representatives in the body constitutionally designed to protect the independence of the judiciary. The process has been an extremely long one, with two rounds of elections and many complicated steps to be fulfilled by candidates. The "electoral campaign" has also been a long and controversial one. Following decisions of the Romanian Senate and the Constitutional Court a full composition of the new CSM will probably be achieved only in June 2011.

The elections took up the attention of magistrates and civil society for more than half a year and are seen as an extremely important event for the Romanian judiciary. While there were many challenges on issues of legality, transparency and consistency of proceedings, the elections stirred the hope for an open-minded, forward-looking and efficient CSM.

CSM in brief

According to the Romanian Constitution, CSM guarantees the independence of justice, proposes the

appointment of judges and public prosecutors, and deals with the careers and disciplinary liability thereof. CSM is composed of 9 judges and 5 prosecutors elected by their peers, the Minister of Justice, the President of the High Court of Cassation and Justice, the General Public Prosecutors and two representatives of the civil society appointed by the superior Chamber of the Romanian Parliament (the Senate). After the Constitutional reshuffle in 2003 and the law regulating the functioning of CSM (Law 317/2004), the CSM started to be seen as the main body that would not only protect the independence of the judiciary, but also represent the magistrates in relation to other branches of state administration. Its activity is also monitored under the Mechanism for Cooperation and Verification set up by the European Commission after Romania's accession to the European Union in order to support and monitor the sustainability of reform in the field of justice.

Opinions of whether or to what extent the CSM managed to efficiently fulfill its attributions vary considerably. Civil society has followed its activity and brought up issues regarding its transparency, efficiency and fairness of procedures. More recently, even magistrates have voiced serious criticism as to the functioning of the

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

THORSTEN GEISSLER
CORINA REBEGEA

March 2011

www.kas.de/rspsoe
www.kas.de

CSM and the way in which it represents the body of magistrates.

Election procedures and controversies

The elections have eaten up part of the public attention in Romania, but the lengthy procedures made the final result somehow fade away. The European Commission has also mentioned the elections and CSM's responsibilities to ensure their legality and transparency in its summer report under the Cooperation and Verification Mechanism.

After a very complex process, the legal committee of the Romanian Senate, which has the legal attribution of checking the legality of the elections, decided that all the legal requirements have been met. The final decision regarding the validation of the elections belongs however to the plenum of the Senate¹, but their decision was not an easy one. The senators decided to validate the list of elected candidates as a whole, despite some interpretations that they should have looked at each candidate and see whether the legality conditions have been met. The senators also voted for the appointment of the two civil society representatives in the CSM: Victor Alistar, executive director of Transparency International Romania, and Corina Dumitrescu, university professor and wife of a Social-Democrat member of the Chamber of Deputies.

As there were conflicting interpretations as to whether the Senate has a formal role in validating the list of candidates or it should look at the particular circumstances in

¹ Article 18 of Law 317/2004 stipulates that it is the Senate which has the final say regarding the list of elected candidates and the legality of the electoral process submitted by the CSM.

which the elections took place, the decision-making was protracted. A group of liberal-democrat senators have even seized the Constitutional Court with a complaint against the validation procedure which was ruled unconstitutional by the Court on January 25, 2010.

The decision of the Senate was anxiously awaited by the magistrates and civil society alike due to several allegations of breaching the law that came up during the electoral campaign and election process. These allegations envisaged the candidacies of four members of the 2004-2010 CSM for a second mandate and the prolongation of the mandate of another three members. Both situations are very controversial because of the interpretation of the manner in which the Constitution regulates the basic aspects of the mandate.² Moreover, Law 317 has been modified in 2005 changing one important provision regarding the mandate: the modification envisages the impossibility to run for a second term as member of the CSM, an interdiction that did not form part of the first version of the law as of 2004.³

•

The former controversy has to do with the nature of the mandate. While both the Constitution and the law say that the mandate of the members is of six years, questions arose with respect to whether this mandate is an individual

² Article 133 (4) of the Romanian Constitution states: "the length of the term of office of the Superior Council of Magistracy members shall be six years".

³ Article 51 of Law 317 regarding the Superior Council of Magistracy states the following: "the duration of the elected members of the Superior Council of Magistracy is of six years, without the possibility of re-election."



**Konrad
Adenauer
Stiftung**

Impressum

Thorsten Geissler
Director

Rule of Law Program
South East Europe
Konrad Adenauer Stiftung e.V.
Strada Plantelor 50
RO – 023975 Bucharest
Romania

Tel.: +40 (0) 21 302 02 63

Fax: +40 (0) 21 326 04 07

thorsten.geissler@kas.de

www.kas.de/rspsoe

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

THORSTEN GEISSLER
CORINA REBEGEA

March 2011

www.kas.de/rspsoe

www.kas.de

one, or it regards the entire institution. Three of the current members of the CSM started their mandate at a later stage (not in 2004 as their colleagues) in order to fill in vacancies caused by retirement or withdrawal. This resulted in practice in a prolongation of their term beyond 2010, when general elections for the CSM have taken place.

This situation was contested by the professional associations of magistrates and other commentators for several reasons.

First of all, while the interpretation of the constitutional provision is not straightforward, one cannot separate the mandate of an individual member from the mandate of the entire institution which serves as a collegial body. A case in point is the election for the members of Parliament which takes place every four years irrespective of whether there have been partial elections in the meantime.

Second of all, in 2005 the CSM issued a regulation specifically mentioning the handling of this type of situations. According to Decision 327/2005 the mandate of a newly elected judge or prosecutor shall be exercised only throughout the remaining period of the mandate they are supposed to fill. This would therefore ensure that the renewal of the members of the CSM takes place at once. It is of course a good point to start a debate on whether the composition of the CSM should be completely renewed at the same time, or whether it might be a good thing to have partial renewals at certain time intervals.

The final argument is the precedent created by the Romanian Senate with respect to the appointment of the civil society representatives in the CSM. The procedure for their nomination has been launched despite the fact that they didn't enjoy a full six-year mandate.

This issue was resolved silently with the CSM avoiding taking a public stand on this and leaving things as they are. As a consequence, new elections will have to be organized in one or two years for the three members who will only finish their mandate then.

Despite its silence, the CSM made some very important decisions and did not open all 14 posts for elections, but only 11. This raised some unexpected issues, such as the annulment of one candidature after it was initially accepted by the CSM. A prosecutor from the Prosecutors' Office at the Bucharest Tribunal won the local elections and was validated to take part in the second round of general elections. However, since Bucharest Tribunal Prosecutors' Office had already one representative in the CSM who was continuing his mandate beyond the 6 year term of the Council, CSM decided to annul the new candidature. The respective candidate challenged the decision in court but did not receive a final decision to this date, nor did this lawsuit suspend in any way the elections.

•

Silence was also the solution for the second controversial aspect of CSM members' mandates. Four of the current members ran again and three of them actually won the elections, despite the interdiction imposed by the 2005 modification of the law on CSM. This mere modification was the bone of contention in many aspects dealing with the legality and constitutionality of the elections.

As the previous elections took place in 2004 and the modification of the law came up in 2005, the respective magistrates explained that this provision could not be applicable to them unless applied retroactively. This of course is prohibited by the Romanian constitution. Therefore, the respective magistrates argued, their



**Konrad
Adenauer
Stiftung**

Impressum

Thorsten Geissler
Director

Rule of Law Program
South East Europe
Konrad Adenauer Stiftung e.V.
Strada Plantelor 50
RO – 023975 Bucharest
Romania

Tel.: +40 (0) 21 302 02 63

Fax: +40 (0) 21 326 04 07

thorsten.geissler@kas.de

www.kas.de/rspsoe

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

THORSTEN GEISSLER
CORINA REBEGEA

March 2011

www.kas.de/rspsoe
www.kas.de

enjoyment of the right to run in the CSM elections can not be affected by the 2005 modification of the law.

This interpretation was not without repercussions, also because there has been no official stand on this issue from CSM or any other body. Some magistrates have even challenged these candidatures to the electoral committee of the CSM but to no avail. The main argument of these challenges was that the law is not retroactive if it modifies the circumstances of the right to run in the elections, and not the substance of this right. Therefore, the modifications of the law touching on the quality of the mandate are not to be confused with those affecting the substance of this right. The renewal of the mandate was thus considered illegal.

While the electoral committee did not uphold this argument, the Bucharest Tribunal admitted on December 3, 2010 the complaint by one of the other candidates (former president of the National Union of Romanian Judges) against the decision of the electoral committee. Therefore, the candidature of one of the judges who ran for a second mandate was declared illegal. The decision of the Bucharest Tribunal is not final, as it was appealed, but it was a breakthrough in the incertitude provoked by this situation. This however, did not influence the decision of the Senate to go on and validate the list of candidates, but was invoked in the petition submitted to the Constitutional Court.

Other candidatures with a negative track record are those of two magistrates currently on secondment at the Ministry of Justice, thus not exercising their function at the moment of their candidature.⁴ The two

⁴ Article 14 (5) of the Law on CSM mentions that judges and prosecutors delegated to

candidatures were not discarded by the CSM, not by its electoral committee when complaints were formulated against them by other candidates. None of the two delegated magistrates managed to secure a place in the new CSM.

Quick view over the candidates' projects

The elections were also an opportunity to have some insights into what sort of expectations judges and prosecutors have for their representatives in the Superior Council of Magistracy. Each candidate presented a project for their prospective election within the CSM to his/her peers during debates organized by civil society organizations⁵ or meetings in courts and prosecutors' offices.

Most projects addressed issues that are of maximum concern for the judiciary such as: the optimum work load for judges, career management, the status of judicial inspection, professional training and admissions to the profession of magistrate; independence of justice; unification of jurisprudence; financing of the judiciary and self-management of budgetary resources etc. Nonetheless, a rather common feature was the dissatisfaction of magistrates with the

other institutions than courts and prosecutors' offices, cannot take part in the elections.

⁵ Konrad-Adenauer-Stiftung, Friedrich-Ebert-Stiftung, Freedom House Romania and Romanian Academic Society carried out a project in support of the transparency of the elections for CSM. They organized regional debates for judges and prosecutors in order to raise awareness about the elections, candidates and projects, as well as facilitate dialogue between magistrates. More information on the project can be found at www.alegericsm.ro



**Konrad
Adenauer
Stiftung**

Impressum

Thorsten Geissler
Director

Rule of Law Program
South East Europe
Konrad Adenauer Stiftung e.V.
Strada Plantelor 50
RO – 023975 Bucharest
Romania

Tel.: +40 (0) 21 302 02 63
Fax: +40 (0) 21 326 04 07

thorsten.geissler@kas.de
www.kas.de/rspsoe

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

THORSTEN GEISSLER
CORINA REBEGEA

March 2011

www.kas.de/rspsoe
www.kas.de

way in which the Council had fulfilled its role of representative of the magistrates in relation with other state authorities.

Some of the proposals of candidates for the improvement of CSM's work also envisaged more sensitive issues, such as the transparency of the Council's work and regulations or the integrity of the members thereof. On the other hand, some candidates proposed that CSM should be given the possibility to propose legislation, along with the Government and Parliament.

Whether convincing or not, projects came only third in importance after the personality of the respective candidate and his/her public notoriety. However, publishing and defending a project was a good transparency and responsibility exercise for the candidates and voters alike. Moreover, written projects can also be a useful tool to follow the performance of CSM members after elections, as well as their responsiveness.

The new face of the CSM

Despite many controversies regarding the legality of some candidacies, the results of the vote brought some good news for the new generation of reform-oriented judges. Many of the new members promoted a new vision about CSM's activity, transparency and integrity, while some of them were also members of the magistrates associations very active in justice reform during the past years.

On the 7th of January 2011, the CSM in its new composition had a first meeting, also considered the moment in which it legally took office. Both the President of Romania, Traian Basescu, and the Minister of Justice, Catalin Predoiu, showed some skepticism with regard to this constitutive meeting and its legal future, since the Constitutional Court had still to decide upon the

questions raised by the senators who did not agree with the validation.

During this first meeting of the CSM, the new President and Vice-president of the institution were elected.⁶ Traditionally, the president position is held by a judge and the one of vice-president by a prosecutor. For both positions there was only one candidacy respectively: Horatiu Dumbrava (President of Mures Court of Appeals) for President and George Balan (prosecutor from Bucharest Tribunal) for Vice-president. They both received a comfortable majority and have already taken office. However, it will not be an easy mandate for the two, having in mind the decision of the Constitutional Court, the many problems the judiciary is still confronted with and the low level of confidence in the Romanian judiciary.

The new president and his team are already trying to make the activity of the CSM more transparent, by publicizing all decisions and broadcasting live on the internet the sessions of the plenum of the CSM. He also proposed a "code of integrity" for the members of the CSM, a non-binding instrument, but a powerful tool of individual accountability. The new CSM has also suspended the appointment of new High Court judges following harsh public criticism during last year and a new regulation on the matter was adopted. It remains to be seen how the new team of the CSM will manage to promote and pass the reforms they already announced.

Constitutional Court

On January 25th the Romanian Constitutional Court issued a press

⁶ Article 24 of the Law on CSM provides that the president and vice-president are elected for a non-renewable one year mandate and have to belong to different professions (one judge and one prosecutor).



**Konrad
Adenauer
Stiftung**

Impressum

Thorsten Geissler
Director

Rule of Law Program
South East Europe
Konrad Adenauer Stiftung e.V.
Strada Plantelor 50
RO – 023975 Bucharest
Romania

Tel.: +40 (0) 21 302 02 63
Fax: +40 (0) 21 326 04 07

thorsten.geissler@kas.de

www.kas.de/rspsoe

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

THORSTEN GEISSLER
CORINA REBEGEA

March 2011

www.kas.de/rspsoe
www.kas.de

release stating that it had declared the decision of the Senate to validate the list of candidates unconstitutional. Moreover, the appointment of one of the civil society representatives to the CSM, Victor Alistar, was also ruled unconstitutional.

The signatories of the unconstitutionality complaint claimed the Senate disregarded its constitutional attributions when it validated the list of candidates despite all the allegations of illegality. This issue envisaged both the candidates who ran for a second mandate and those who continued their mandate beyond the legal term. The complaint also targeted the appointment by the Senate of one civil society representative, who is allegedly in an incompatibility situation and can not hold any public office. Moreover, since the European Union is closely monitoring the Romanian justice system and the functioning of CSM in particular, the authors of the complaint stated that the validation decision is in breach of commitments undertaken when joining the European Union and safeguarded by the Romanian Constitution.

The Constitutional Court upheld the complaint and decided that the validation by the Senate of the list of elected magistrates was unconstitutional. The Court retained that the 2005 modification of the Law on CSM did not modify the substance of the right to run in the elections, but only affected for the future a certain legal situation. Moreover, the Court decided that the civil society representative, Victor Alistar, is incompatible with any public dignity due to an investigation run by the National Integrity Agency and therefore his validation is also unconstitutional.

Following the decision of the Constitutional Court the Senate voted once again on the list of magistrates

and invalidated the three magistrates with problems. Furthermore, the two representatives of civil society were not validated for reasons of incompatibility. As a result, the CSM is now incomplete and will organize new elections which will be finalized in June 2011. As for the civil society representatives the situation is still unclear. Corina Dumitrescu, who serves as rector of a private university, is also in an ambiguous legal situation and nobody seems to be willing to clarify whether she is incompatible with the position or not. New nominations for the civil society representatives must be presented to the Romanian Senate soon so as to ensure the functioning of the CSM in its legal quorum.

Some final reflections

The incomplete structure of the CSM is very likely to impede its activity especially since the council has to adopt a new strategy and enforce the measures announced early after its validation. Key aspects, such as the reorganization of the internal structure of the CSM, the management of human resources, the unification of case law, the problems regarding the career of magistrates as well as appointments to the High Court of Cassation and Justice would need a full composition of the Council in order to have credibility and be efficient.

The CSM is still one of the key institutions under monitoring by the European Commission and pressure is high both from within the judiciary and the public at large. After a long and troublesome election process concrete results are very important for the functioning of the judiciary and its public image.



**Konrad
Adenauer
Stiftung**

Impressum

Thorsten Geissler
Director

Rule of Law Program
South East Europe
Konrad Adenauer Stiftung e.V.
Strada Plantelor 50
RO – 023975 Bucharest
Romania

Tel.: +40 (0) 21 302 02 63

Fax: +40 (0) 21 326 04 07

thorsten.geissler@kas.de

www.kas.de/rspsoe