The Institution of Juridical Assistants in the Current Romanian Legislation. The Necessity Of Reform in Accordance with Examples Offered by Comparative Law

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Abstract: The paper analyzes the institution of judicial assistants in the context of the current Romanian legislation and the specialty legal literature. The presentation of doctrinal views on the need for reform of this institution, the examples from comparative law systems (German, English, French), the conclusions of our own study carried out by means of sociological inquiry, whose subjects were specialists actually involved in the process of solving individual labor conflicts, represented the necessary support for the formulation of suggestions of a *ferenda law* meant to improve and streamline its operation. The formulated proposals may provide the legislator support in the course of perfecting, at the level of regulation, of the process of specialization of labor jurisdiction in the Romanian legal system.

Keyword: judicial assistants; deliberative vote; advisory vote; panel composition; systems of compared law

1. Introduction

In solving individual labor conflicts, in the Romanian legal system, *courts have had exclusive jurisdiction*, since 1992, being eliminated the special powers of different bodies, which were given up subsequently: trial commissions, the superior hierarchically administrative organ, the collective management organ etc. (Țiclea, 2012, p. 958)

In this regard, the provisions of Art. 208 of Law. 62/2011 of social dialogue expressly provide that, in regard to the settlement of labor disputes, the general competence belongs to jurisdiction courts.

The composition of panels for solving individual labor disputes shall be determined by the provisions of article 55 of Law no. 304/2004 on judicial organization, republished, as amended by Law no. 202/2010, according to which the first

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instance tribunal for the settlement of labor and social security disputes shall consist of *one judge and two judicial assistants.*

To address the appeal, ordinary way of attack since the adoption of NCPC[1], the panel consists of two judges, according to the law[2] (Ursuța, 2013, pp. 255-263).

Judicial assistants [3]enter the composition of the panel that deals in the first instance with the cases of labor and social security disputes, participates in the deliberations with advisory vote and signs the pronounces decision, their opinion being registered at the judgment, and the separate one motivating itself. When the judges who enter the composition of the panel do not reach agreement on the decision that will be pronounced, the process is judged again in a panel of divergence[4].

Lack of judicial assistants' signature is "a cause for revocation of the judgment, because only this confirms that the decision was taken with their advisory vote" (Barbu & Lozneanu, 2004, p. 46).

In practice the question arose whether judicial assistants have only the right to motivate a separate opinion, such a restriction not being prescribed by law. Moreover, the Rules of Procedure of courts make no distinction in Article 37, forcing judicial assistants to motivate all pronounced judgments (no longer states as in Law no. 304/2004 that it is just a separate opinion) and to study thoroughly the files to whose solution they are involved.

The legal specialty literature believes that the consultative nature of judicial assistants' vote is "the most blatant and serious error of regulating Law no. 304/2004 ", because both the European Court of Human Rights and the regulations issued by the Council of Europe and the very fundamental Romanian act after review, creates the possibility of participation in specialized instances of people

[1]NCPC, the new Code of Civil Procedure, was adopted by Law no. 134/2010, republished in the Official Gazette, Part I, no. 545 of 3 August 2012.

[2]Regarding the application of the provisions NCPC in all processes started before the entry into force of the new Code, the procedural provisions applicable shall be those provided on 31 January 2013 in the current civil procedure code and the new code will be applicable only to disputes triggered after 1 February 2013. On the other hand, even if in the future NCPC provisions will be modified, it is to be noted that the principle of the immediate application of new civil procedure law, enshrined in the Romanian civil procedure has been replaced with the principle: *"the law of procedure according to which the process starts is the law of procedure under which the process is completed, "*and the article. 24 of the NCPC provides that, *'procedural provisions of the new law apply only to processes and foreclosures initiated after its entry into force."* and Article 27 that, *decisions remain subject to appeal, grounds and deadlines set by the law under which the process started. "*.

[3]Article 17 paragraph 1 index 1. of Law 92/1992, introduced by Article I section 6 of GEO. 179/1999, approved and amended by Law no. 118/2001 referred to the composition of the panel for the settlement of labor disputes of one judge and two judicial assistants; following the approval of Government Emergency Ordinance no. 20/2002 amending and supplementing Law no. 92/1992, Article 17 of the mentioned normative act provided the composition of the panel for settlement of labor disputes of 2 judges assisted by two consultant magistrates.

[4]Article 55 para. 3 of Law no. 304/2004 on judicial organization.

outside the judiciary that can "perform themselves, similarly, along judges the justice act." (Țiclea, 2012, p. 977)

Also the doctrine appreciated that "there is a contradiction *in terminis* between the quality of membership of the judge panel and the deliberative vote for some and consultative for others, since the judgment is delivered by all members, the one who is part of a deliberative structure, as the panel, may not have only advisory vote" (Beligrădeanu, 2004, p. 17). In essence, therefore, logically and legally, everyone is entitled by law to be part of a panel of judges of a court, even if he is not a career judge, he must "pronounce his right" and not to express a simple opinion, which in fact anyone can do (Corsiuc, 2004, p. 82).

In a more recent doctrine, it was even proposed to renounce the participation of judicial assistants in panels that solve individual labor conflicts, their keeping being regarded as "manifestly objectionable" and "both unnecessary, harmful and unnatural" and their presence created the impression that judges are actually "pseudo-judges", who must consult with judicial assistants mandatorily in order to perform their mission (Beligrădeanu, 2009, pp. 16-18).

The view was also expressed that judicial assistants' investiture only with advisory vote represents *de lege lata* the current correct solution, the future granting to judicial assistants the right to vote deliberatively would be desirable only to make the specialized jurisdiction more effective but it will be possible only on the basis of corresponding changes to the Constitution (Athanasiu, Volonciu, Dima & Cazan, 2011, p. 315).

Judicial assistants are appointed by the Minister of Justice, at the Economic and Social Council's proposal for a period of 5 years, they enjoy tenure stability (art. 111 par. 1 of Law no. 304/2004), they are subject only to law and the statutory provisions on the obligations, prohibitions and incompatibilities of magistrates also apply to them (Article 111, paragraph 2, article 112, article 113 of Law no. 304/2004).

According to the provisions of article 110 of Law no. 304/2004, the persons who meet the following conditions may be appointed judicial assistants:

- Romanian citizens, residing in Romania and having full legal capacity;
- are licensed in law and prove an appropriate theoretical training;
- have experience in legal positions for at least 5 years;
- have no criminal record, no tax record and a good reputation;
- speak Romanian;
- are capable medically and psychologically to hold office.

Regarding the legal status of judicial assistants, it has been the subject of many controversies. Thus, the entry into force and maintenance of Law no. 304/2004 of the advisory vote of judicial assistants displeased unions and employers alike,

"both claiming lack of practical utility" under the circumstances, of the presence in panel of representatives of the social partners (Dimitriu, 2007, p. 208).

The doctrine also argues that *Law no. 304/2004 on judicial organization* does not expressly involve, as it would be normal, the impartiality and independence of judicial assistants, despite the legal procedure of their appointment (Athanasiu & Dima, 2005, pp. 360-363).

Another issue discussed extensively in the reference literature on the institution of judicial assistants concerns their quality of law graduates. Thus, in an opinion the idea was upheld that, the condition contained in article 110 b of Law no. 304/2004, namely that judicial assistants should be licensed in law, "may generate dispute" as the purpose of their presence in the panel "is not to extend the legal knowledge of judges, but those relating to production and the relations of practice between employers and trade unions "(Dimitriu, 2007, p. 208).

The model which inspired the Romanian legislator was once again the German one, but in the latter system, the judge is assisted by representatives of employers and trade unions, not only with advisory vote, as in the Romanian law, but with deliberate vote, without the condition of a law degree, their usefulness in panels adjudicating labor disputes resulting therefore from the quality of people having the necessary experience to extend the judge's perception regarding the case. In another opinion, which we share, the idea is supported that along with "the vocation of the real," i. e. the knowledge of production, of labor in various sectors, it must be rationally imposed, based on the current complexity of the labor and social security legislation, the need for those who are part of a panel of judges, even if only in an advisory capacity, "to have a legal expert training" (Stefănescu, 2012, p. 904).

In the European Union, one distinguishes between academic recognition and professional recognition. In situations when the profession is regulated in the host country, the application for obtaining professional certification in the member state is required. (Nechita, 2010, pp. 92-93)

2. The Regulation of the Institution of Judicial Assistants in Compared Law

The analysis of the legal provisions governing the institution of judicial assistants in the Romanian legal system and especially in the reference literature in which many controversies are emerging related to the their legal status in general, highlights the need to appeal to comparative law, which is able to provide examples of regulation to the Romanian legislator.

Thus a brief foray into comparative law emphasizes that a typology of labor jurisdiction are specialized courts, either as autonomous labor bodies of jurisdiction, found for example in Germany or England, or as bodies of work jurisdiction included in the system of courts of common law, such as the example of the French legal system.

Although in comparative law, specialized courts function, composed exclusively of professional judges, as in the case of Spain, these still often have a tripartite composition, consisting of representatives of trade unions and employers, in their role of parts of the employment relationship.

Thus, in the German legal system, in the competent court in labor jurisdiction, professional judges are included (or career judges) and judicial assistants (also called in the doctrine "honorary judges" or "assessors") (Călinoiu, 1998, p. 45).

Judicial assistants within the labor courts of first instance and the Court of Appeal in labor are appointed for 4 years by the Ministry of Labor and Social Affairs of the land, on the basis of lists submitted by the unions, some labor organizations and employers' associations within that legal district. In current practice, judicial assistants nominated by unions are almost always people in the union leadership and the employers may be represented by people in the management of organizations, members of management companies, individual owners or other trusted persons (Weiss, 2004, p. 99). The selection procedure for judicial assistants for the Federal Labor Court follows the same pattern, with the only difference that in this case, the last word belongs to the Federal Ministry of Economics and Labor.

Judicial assistants have the same powers as professional judges, benefiting from the same independence. They are obliged to keep secret the deliberations of the Court, they have the right to study the files and can ask questions during the hearing of the parties, their representatives, witnesses and experts, in order to clarify the facts. In terms of their status, it is interesting to notice that judicial assistants may be required to perform duties, in the event of refusal they can be fined administratively. They can be revoked, but only at the request of supreme authorities in matters of employment, in the case of serious breach of their duties. Called by the doctrine "honorary judges" because the function performed is without pay, they have the right to be provided by the institutions in which they are employed, the time required for the exercise of functions, including time for training and information. The law of rewarding honorary judges (judicial assistants) "is meant to regulate a system of covering travel expenses and other expenses incurred by authorities" (Călinoiu, 1998, p. 45).

In the system of law in England, courts have a tripartite structure. Their President is a professional lawyer (barrister or solicitor) who has been qualified for at least 7 years and is appointed by the Lord Chancellor, assisted by two assessors appointed by the Secretary of State in matters of employment, at the trade unions and

employers' proposal[1]. Although the president's role is to control the conduct of the procedure, the assessors can intervene and their vote is equal to the President's one, in all situations. Also, their position during the case is independent; they are not acting as representatives of their organizations. In practice, most decisions are taken with unanimity (Deakin & Morris, 2005).

Before 1993, the presidents of courts could solve cases without the participation of assessors only under limited circumstances such as temporary problems. After 1993, TURERA[2] has extended the jurisdiction of the President, including for example the cases of unauthorized payment deductions, employer's rights etc. Even if dealing with cases just by the Chairman determines savings, his using deprives the system from the experience of the other members, which in many circumstances is significant.

The Court of Appeal for labor issues (Employment Appeal Tribunal), in the English legal system also has a tripartite structure, consisting of a judge and members who are not lawyers with special knowledge or experience in industrial relations, but representatives of employers and workers. Members are appointed by the Queen at the recommendation of the Secretary of State in matters of employment and of the Lord Chancellor. An appeal is normally heard by a judge and two appointed members who, despite pronouncing on questions of law, may vote even against the judge. The judge can hear the case alone when it comes to provisional issues and can, normally, hear the appeal alone, if it's about the original decision that was taken by the president of the court, in the absence of appointed members.

One of the original features of *Councils de Prud'hommes* in the French legal system is that they are composed exclusively of elected judges. A presiding professional judge is eliminated and those interested, employers and employees are judged by their peers because the law has not given rise to the suggestion that these should be designated by the employers.

Voters asked to choose counselors are very diverse, workers, from the age of 16, even the unemployed and foreign workers having the right to participate in elections (Călinoiu, 1998, p. 58). For a person to be elected in these councils, he must be aged 21 years and have French nationality, as it is about judging on behalf of "the French people". The retired also have the capacity to be elected for a period of 10 years since the withdrawal from activity. Electoral rolls are made taking into account the documents submitted by the mayor or businesses. Voting takes place in sections, during work-hours, without loss of salary, being carried out in a place

[1]In cases of sexual discrimination efforts are made to include in the court structure at least one woman and in those of racial discrimination of a member with experience and training in race problems; in practice T. U. C. (Trade Union Congress) and C. B. I. (Confederation British Industry) function.
[2] TURERA 1993 represents *Trade Union Reform and Employment Rights Act*.

close to the workplace, with proportional representation, based on lists of candidates generally presented by confederations and organizations of employees.

Complaints related to the electorate, to eligibility, to regularity and the receiving of lists of candidates are, according to law, of the competence of the first instance court (art. L 513-3, N and L 513-11, 513-108 R and S in C. trav.). Councils are fully renewed from 5 to 5 years. The judge has a "judicial mandate", distinct from the political mandate (as in the case of MPs) or from the professional mandate (as in the case of the elected delegate of staff) (Mazeaud, 2004, p. 160).

Another feature of this organism is its parity; Prud'hommes Councils are composed of equal numbers of employees and employers (art. 512 L -1). This general principle of parity attracts the obligation of presiding the council alternately, and the obligation to resort, in the case of split vote, to the presence of a court judge, who intervenes as a third party (art. 513-3). He also has as effect removing any possibility of resorting to a single judge, including when it is about the competent structure that solves appeals. However, parity is attenuated when the board sends the proceedings of a case to one or two reporting counselors (art. L 516-2).

Counselors prud'hommes have the status of magistrates, ensuring justice and their remuneration comes, since 1979, from the state budget. This regulation resulted in an improvement of the councilors' status, in their payment plan, in their protection and training. (Articles L 514 t- 1. 2 and 3). The state of advisors differs, in some respects, according to the college to which they belong, the employers or employees. Thus, its essential elements refer to (Mazeaud, 2004, p. 160):

- The amount of money that is allocated to employee councilors must be equal to the amount they ought to earn at the workplace for the period in which they work as advisers. It is advanced by the employer, then it is reimbursed by the state.

- Participation of an employee, elected prudommal councilor, in the work of justice should not be a cause for the termination of their employment, their dismissal can only take place following a decision of the labor inspector.

Counselors are therefore a protected category of employees (Art. L 514-2, sending to art. L 412-18, relative to the union delegates). They must have the free time necessary to complete their duties (Art. L 514-1). Absences from work of college counselors do not imply any diminution of their compensation or benefits and this time is considered a job duration for determining the rights they are entitled to.

- Also, during their term of five years, they must benefit from 6 weeks off for training, the expenses being paid by the state (art. L 514-3 şi D 514-1s).

Employee or employer, the prudominal advisor is a magistrate and not a representative of an organization or a representative of his electoral body. Incompatibilities and specific requirements arising from here, connected with the parity nature of the institution and the possibility of appeal, provide "ipro jure", the

respect of the impartiality requirement imposed specifically by art. 6-1 conv. EDH. Accordingly, the status of the prud'hommes council secretary improved, who was integrated in the clerk category, becoming a civil servant (art. L 512-14).

3. Proposals of Reforming the Institution of Judicial Assistants in the Romanian Law System

The starting point in the formulation of this legislative proposal is, as previously mentioned, the current statutory provisions governing the institution of judicial assistants, namely Article 55 of Law no. 304/2004 on judicial organization, republished, amended by Law nr. 202/2010, Article 54. para. 2 thesis II of Law no. 304/2004 on judicial organization, republished.

Thus, we believe that, invoking the arguments in the doctrinal ideas of jurisprudence and especially of comparative law presented in our scientific approach, for continuing or completing the process of specialization of labor jurisdiction in the Romanian legal system the following are necessary:

- Panels for settling labor disputes and social insurance should be formed both by career judges and by two judicial assistants, similar to the court configuration which solves background cases (panels of ordinary law court, which, according to legislative proposals will be replaced by courts specialized in labor) (Onica Chipea, 2012, p. 347);

- Judicial assistants that make up the panels of judges should express a deliberative vote.

a. Regarding the establishment of appeal court panels with the participation of judicial assistants, brings as argument, in addition to the examples from comparative law, the points of view expressed by the experts surveyed by means of the sociological method of focus group, whose conclusions were comprised in a study (Onica Chipea, 2010, p. 9). Judicial assistants, in their capacity of representatives of the parties in the employment relation, namely employee and employer, participate in solving individual labor conflicts, completing the deliberative structure by the fact that along with their absolutely necessary legal knowledge, they have "the vocation of the real," i. e. the knowledge of production, of labor in various sectors. Moreover, their presence in work panels is supported by the spirit of labor jurisdiction in the Romanian legal system, a jurisdiction designed to intervene in the settlement of conflicts with specific tools, arising from the particular nature of the employment relationship. The judicial assistants' participation in work panels represents one of the principles specific to labor jurisdiction in the Romanian law system.

b. Regarding the support of the need of attributing judicial assistants the deliberative vote, we mention as arguments, the ideas expressed in doctrine and judicial practice, to which we rally, as well as the many examples offered by comparative law.

One of the conclusions of our own, previously cited study is that it is absolutely necessary to attribute deliberative role to judicial assistants in order to justify their presence in labor panels. Otherwise, as existing laws regulate, judicial assistants have only an advisory role and may even be absent from the trial (Chipea, 2010, p. 10). Some of the interviewed specialists supported the idea that it would be necessary to establish specialized courts in labor disputes, consisting only of representatives of employers and trade unions, namely judicial assistants, involving career judges only in exceptional cases of dispute or appeal, idea consistent with the existing regulation in comparative law, specifically in the French legal system, where, as we have developed in this paper, Prud'homme Councils are composed only of representatives of the parties of the employment relationship, career judges being called only in cases of parity, as third parties.

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