



**THE TRIUMPH OF MAGISTRATES' LIABILITY.
A HOLISTIC APPROACH**

PhD Candidate Oana Andra NIȚĂ

The Bucharest University of Economic Studies, Bucharest, Romania

oana.nita2000@gmail.com

Abstract

In the context of Romania's integration into the European Union, the implementation of an independent material liability law of magistrates proves to be necessary for a state that is constantly undertaking steps to reach the standards imposed by the Union. Abusive judgments based on legal grounds that violate the European Convention of Human Rights classify Romania among the most complained states in ECHR.

The present paper was realized by quantitative methods, as well as demonstrative methods. Consequently, the streamlining of the Romanian legal system requires the promulgation of a law on the liability of magistrates regarding ways of control and sanctioning, without interfering with the independence of justice in the state of law.

Keywords: *magistrates' liability, control, sanction, independence of justice, state of law.*

Introduction

The legal regulation of disciplinary liability of judges is designed to take into account the balance of public interests, which implies both a strict and eminent accountability of judges based on a ground-based writing and ensuring the guarantees of independence and inviolability by giving to a person certain rights and protection.

The state and society assume the presence of certain moral qualities required for the given function and in case of violation, the state and the society have enough grounds to deprive that person of those rights. The responsibility of judges must fulfill the functions of

preventing deviations and removal of unworthy persons, thus ensuring the moral right of the judge to achieve the justice act.

For the judges to ensure the rule of law, they need a status and special guarantees, such as independence and impartiality. There is an international judicial *corpus iuris* concerning various interests in strengthening the role of the judge. I will just mention some of them: Universal Declaration of Human Rights (UN, Paris, 1948), the International Covenant on Civil and Politics (UN, 1966), European Convention of Human Rights (Council of Europe, Rome, 1950), Basic Principles of Independence Justice (UN General Assembly, 1985), European Charter on the Statute of Judges (Council of Europe, Strasbourg, 1998), The EU Charter on Fundamental Rights (European Council, Nice, 2000), The European Judges' Charter (European Magistrates' Association, 1987), Universal Statute of Judges (International Union of Magistrates, 1999), Bangalore Principles on Judicial Deontology (UNODC, Judicial Group for the Enhance Integrity, 2001) etc. Therefore, the judge is the constitutionally appointed person for the execution of justice, which he executes under the law. Judges of the courts are independent, impartial and irremovable and they are subject only to the law.

Judges make decisions in an independent and impartial manner and act without any direct or indirect limitations, influences, pressures, threats or interventions, from any authority, including judicial. Justice, as a system, but also individual judges, must be able to exert their powers without being influenced by legislative power, executive power or by various groups of interests and people. In applying the law, the independence of judges excludes the notion of subordination and hierarchy. The international principles explicitly state that judges must make decisions and exercise freedom and act without restriction and without being subjected to influences, incitements, pressures, threats or unlawful, direct or indirect interference, regardless of whose side they come.

The holder of the judicial authority must function in full independence with respect to all social, economic and political constraints or forces. This is why the independence of judges is not a benefit of them, it is a benefit of citizens.

The quality of magistrate is not a given of nature or a right conferred by the rank you occupy in a society, it represents one cumulation of principles, social and moral values that society confers upon the invested, which must be respected and improved, so that the time factor does not alter their significance.

By his achievement of justice balance in the application and interpretation of legal norms, the magistrate must observe the social, moral and legal principles and in the exercise of his duties

he must show good faith. So, in Romanian judiciary, inspired mostly from the French one, the accountability of the magistrate requires identification of the activities performed by him (judge or prosecutor) for the execution of the act of justice and the criteria in relation to which it defines its criminal, civil, administrative or moral responsibility.

The need of the magistrate's liability can be explained by the fact that in the exercise of the duties of his office, which give him exorbitant power, without equivalents in society, must be the representation of control. This control without which he would be transformed into an absolute monarch, does not have to affect its independence.

The magistrate's responsibility was also admitted by the European judicial institutions, which appreciated that it requires caution, determined by the need to preserve independence and freedom against any kind of pressure. The magistrate's responsibility should not be regarded as a breach of the independence of the judge and the prosecutor, because such an interpretation would make independence stand out with irresponsibility.

In reality, the two notions have the role of ensuring the transparency and fairness of the act of justice. Even if it seems a contradiction between the terms (*independence* and *responsibility*), the first one assures the magistrate independence from other powers in the state and influence of any kind and the second one assures the balance of this separation.

Analysis of the liability of judges must, however, start from the responsibility of all persons who carry out a public service. Justice is also a public service and those who are exercising the act of justice cannot remain outside the democratic principles of accountability and responsibility.

The forms of liability of magistrates cannot differ from other forms of legal responsibility. What is specific to the magistrate is the responsibility he carries with the decision he takes. This decision has repercussions on people's lives (Deaconu, 2012). So, before answering for the judgments issued, the magistrates must be accountable for the importance of their role in society. They must understand that the objective of justice must be the desire of people not to have to resort to its services.

Speaking of the independence of the judiciary and of the judge, all the legal guarantees services offered in the support of the judges' independence must be doubled by their behavior of devotion and respect for the law. It is not enough for a judge to judge well in an independent manner. Judges must possess an inner balance, courage, understanding of society, and judgment. To be able to divide justice, they must first of all, be fair and honest.

No national judicial system can override the citizens' questions about the quality of the judiciary, the judges and their decisions, especially since the level of exigency of the citizens towards the judicial institutions is increasing. The magistrate, through all of his conduct, must remain responsible in the eyes of the justices and be aware that he is continuously subject to the critical public examination. The responsibility lies not only with the system but also with each of the system's constituents.

A law of magistrates' liability can act for the responsibility of each magistrate and implicitly increase the trust of citizens in the members of this professional body. But it must be accompanied by an increase in the accountability of each magistrate, a rethinking of the judicial inspection system, a unification of practice and a transparency of the judicial activity, so that any person has access to the motivation of a court decision.

1. Brief Presentation of the Judiciary System in Romania

The public service of justice in Romania is given through the Ministry of Justice, under the responsibility of the Minister of Justice and the guarantor of the independence of justice - according to the fundamental provisions of Article 133 paragraph (1) of the Constitution of Romania- is the Superior Council of Magistracy (for more information visit <http://www.csm1909.ro>).

Since 1990, the Romanian state is organized and operates on the principle of the three power authorities, such as: legislative, executive and judicial. All these three authorities represent public powers, with distinct attributions which must function in a steady equilibrium. The importance of the judicial power is given, as we have previously mentioned, by the Constitution, which also highlights in the content of the provisions of Art. 126 that "justice is channeled through the High Court of Cassation and Justice and through the other established courts of law". From the content of this constitutional text, it follows in *stricto sensu* that justice is done through a judicial system which, as we will see in the following, is composed of several courts with jurisdiction. Prosecutors who work in addition to them have attributions regarding the defense of the general public interest of the civil and the rule of law.

Thus, we can say that the activity of the public service of justice (Law no. 247/2005) or the judicial system in Romania - without going too far into the broad scope of the powers of these authorities - is composed of:

A) Judicial system, which has attributions of judgment and includes the following categories of courts:

- a) High Court of Cassation and Justice - the supreme court of substantive jurisdiction;
- b) Courts of Appeal (16 of which one military) that comprise within their territorial area 2 or more counties;
- c) Tribunals (42 in number), one for each county (with the tribunal of Ilfov County - recently established), plus 5 specialized courts: the Braşov Minor and Family Tribunal, the Cluj Commercial Court, the Vrancea Commercial Court, the Court of First Instance Commercial Mureş and the Argeş Commercial Court and 4 military tribunals: the Bucharest Military Tribunal, the Cluj Military Tribunal, the Timişoara Military Tribunal and Iaşi Military Tribunal;
- d) courts (188 in number)

B) Prosecutors' offices attached to courts:

In addition to each court of appeal, tribunal, court for minors and family, court and military courts operate a prosecutors' office. The headquarters of the prosecutors' offices are in the cities which cover the courts in which they operate and have the same territorial jurisdiction (Cochinescu, 1997). The military prosecutors' offices are based on the same principles, besides the military courts presented.

C) Superior Council of Magistracy:

After its role, recognized by fundamental provisions, Article 1 paragraph (2) of Law 304/2004 on judicial organization in Romania, basically takes over the fundamental text and emphasizes its importance by stating that this council is the guarantor of the independence of justice. The Council's attributions are mentioned by Art. 134 of the Romanian Constitution, but wider provisions on organization and functioning are laid down in the provisions of the Law 317/2004 on the Superior Council of Magistracy.

D) Public ministry:

In the judicial activity, the Public Ministry represents the general interests of the society and defends the order of law, as well as the rights and freedoms of the citizens. The Public Ministry exercises its powers through prosecutors constituted in prosecutor's offices, in the conditions of the law. The prosecutors' offices operate, conduct and supervise the criminal investigation activity of the judicial police under the conditions of Art. 131 of the Constitution and Article 1 of the Law no. 304/2004 on the judicial organization in Romania.

E) Ministry of Justice:

The Ministry is the specialized body of the central public administration, with legal personality, subordinated to the Government, which ensures the elaboration, coordination and applying of the strategy and governance program for a good functioning of justice as a public service and ensures strict application of the law, in accordance with the democratic principles of the rule of law. In the content of Government decision no. 83/2005 on the organization and functioning of the Ministry of Justice, several incidents are attributed to the activity of the courts, but also to the activity of the prosecutors. Thus, with regard to the activity of the courts, it has to:

- put at the disposal of the courts and of the units subordinated to the ministry their own apparatus and the necessary funds for carrying out the activity
- coordinate and guide the economic, investment and administrative activity of the courts
- ensure the printing and distribution of the judicial stamp, according to the legal provisions

Regarding the activity of the prosecutors, the Ministry of Justice carries out the appropriate activity according to the principles of legality, impartiality and hierarchical control.

The correct application of the principle of separation of powers in the state makes relations between the other functions (legislative, executive and court), in order not to create divergences of constitutional order. We refer to the correct application of this principle of separation of powers because it is closely related to the independence of the three functions, but also to their total activities. For these reasons, in turn, each function or power of the state in the structure of the component activities, must *a fortiori* implement this principle of separation between all authority having legal personality and not a report of subordination to them.

Therefore, the independence of a public activity that is part of a state function, must comply with certain clear principles of responsibility, which have in the face of civil society, the recipient of those services. The functions of justice have always coincided with the activity designed to defend the general interests and the rule of law of a society, and private interests were often defended by the social position of the individual. This activity is the most important function of justice and represents, as we have already mentioned, the judicial activity. Moreover, we can firmly affirm that the contemporary demands of the function of justice in a rule of law are identified with the fair judicial activity that independent and impartial judicial bodies must fulfill, for the benefit of society. The process of realizing justice in a democratic society is the attribute and the strict power of the judiciary and any

other influence (legislative or executive) would affect the principle of separation of powers in a rule of law.

2. Superior Council of Magistracy. Statute of Judges and Prosecutors

The independence and impartiality of judges are achieved *inter alia* by reducing as much as possible the influence of the political factor. *Per a contrario*, the more easily this influence can be exercised, simply by applying the existing rules, the lower the role of the courts in the overall state powers is. With the occasion of the 2003 constitutional review, the need to remedy the deficiencies of the regulation in the field made significant changes in the role and structure of the Superior Council of Magistracy, as the guarantor of the independence of the judiciary. This function is accomplished on the one hand, by the way of training and organization and on the other hand, due to the competence of this body. The American model, where judges from the lower courts are directly elected by citizens, is not, by far, exempt from the interference of politics, obviously due to factors related to the electoral campaign and the financial component thereof. In addition, the appointment of Supreme Court judges is ultimately decided by the involvement of the executive and legislative powers.

Finally, according to the model that starts from the premise that judges represent a special category of civil servants, a more prominent role is given to the Minister of Justice as part of the executive power. Of course, none of these two models should be viewed in the abstract. Most of the time, the constitutional norms relating to the judiciary are a combination of these. Turning to the constitutional amendments in the field of justice in 2003, it is worth mentioning the principle of enforcing the norm that guarantees the impartiality of the judiciary, giving the Superior Council of Magistracy competence for the nomination proposals, as well as the promotion, transfer and sanctioning of judges, under the conditions of organic law. In Romania, the legal norms guaranteeing the independence of the magistrates have been frequently in the attention of the other state authorities in the last period.

In order to ensure the independence of judges and consequently of courts, the 1991 Constitution interposed the Superior Council of Magistracy between the executive power and the judiciary, represented by the Minister of Justice, (Leș, 2004). The old regulation of the Superior Council of Magistracy by the law of 1909 stipulated that it was an administrative body, presented as such by the doctrine (Herovanu, 1997) under the title "administrative

organization of justice", together with the Minister of Justice. In the current organization and functioning, superior to the previous one, the Superior Council of Magistracy can no longer be considered an administrative body, but one of the judicial authorities, having administrative and disciplinary jurisdiction. This body is governed by the Constitution of Romania in the title referring to the "Judicial Authority", about which Art. 134 paragraph (1) provides that "the Superior Council of Magistracy is the guarantor of the independence of the judiciary". According to the provisions of Art. 133-134 of the Romanian Constitution and Art. 1 paragraph (2) of the Law no. 304/2004 on judicial organization, the Superior Council of Magistracy was conceived as a body set up to ensure the independence of the judiciary, assigning attributions in connection with the appointment of magistrates (judges and prosecutors), their advancement, transfer and termination work. Having the role of discipline council for judges, CSM has important attributions regarding the good functioning of the courts, ensuring the irremovability of the judges appointed by the president of Romania and the stability of the prosecutors.

And from the point of view of the European Court of Justice in Strasbourg, the judge must be independent (E.C.H.R. Delcourt of 17 January 1970 and Sramek of 22 October 1984), first of all against the executive and the parties, but also the legislative. The position of the Council of Europe in this regard is very firm, which is why Recommendation no. (94) 12 of the Committee of Ministers on the independence, efficiency and role of judges (adopted by the Committee of Ministers on 13 October 1994) states that "in the decision-making process judges must be independent and able to act without any restriction, direct subjective influence, pressures, threats or interferences; the law must provide for clear sanctions against persons who attempt to influence judges' judgments in any way, so that the judges must decide impartially, in accordance with the interpretation of the facts; judges should not be required to report on how they have dealt with a case of anyone outside the judicial system" (Principle I, point 2, letter d).

Impartiality and independence are defining features of the established act of justice and jurisprudence (E.C.H.R. De Wilde and Others v Belgium of 18 June 1971), but as we have already mentioned in national law, the Constitution of Romania by Art. 124 states that "justice is impartial" and "judges are independent and obey only the law". Therefore, it cannot be adequately substantiated that justice must be included (E.C.H.R. Campbell and Fell v. The United Kingdom, of 28 June 1984) in the executive structures of the state. These features of the judiciary, which are in close correlation with each other, only highlight the

autonomy of the judicial function (Voicu, 1996) and, implicitly, of the judiciary system because the law does not *expressis verbis* use this notion.

"From the judge's point of view, it is his scrupulous attention to respecting the principle of contradictory, supervising if each of the parties has the same chances of making use of their claims by taking an equal balance in the search for evidence" (Cornu, Foyer, 1996). The impartiality of the judge must not be confused with his independence. The judge may be independent of all powers in a rule of law as well as of the parties, but for example the latter may be subjectively prejudiced in a dispute if it is not impartial. In conclusion, the impartiality of the judge is the way in which he respects the equality of chances of the parties on the basis of the evidence administered on the occasion of the judicial activity and which is the basis for the solution of the dispute between them without any external interference.

The independence of the judge is a prerequisite in ensuring his irremovability and the legislative power must ensure this framework by creating a statute that guarantees his resilience to possible external pressures. It is worth noting that, according to Art. 58 of Law no. 303/2004 "the Superior Council of Magistracy may have the secondment of judges with their written consent to other courts or prosecutors' offices, the Superior Council of Magistracy, the National Institute of Magistracy, the Ministry of Justice or its subordinate units, or other public authorities, in all positions, including those of public dignity appointed, at the request of such institutions, as well as in the institutions of the European Union or international organizations". Both the independence, impartiality and irremovability of judges, while they are protected by the state, will represent the fundamental safeguards for the fulfillment of good justice.

3. Organization and Functioning of the Superior Council of Magistracy

The Superior Council of Magistracy consists of 19 members, of which:

- a) 9 judges and 5 prosecutors, elected in the general assemblies of judges and prosecutors, comprising the two sections of the Council, one for judges and one for prosecutors;
- b) 2 representatives of civil society, specialists in the field of law, who enjoy high professional and moral reputation, elected by the Senate;
- c) the President of the High Court of Cassation and Justice, representative of the judiciary, the Minister of Justice and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

The judges section of the Superior Council of Magistracy consists of:

- a) 2 judges from the High Court of Cassation and Justice;
- b) 3 judges from the courts of appeal;
- c) 2 judges from the courts;
- d) 2 judges from the judges.

The Prosecutor's Section of the Superior Council of Magistracy consists of:

- a) 1 prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice or from the National Anticorruption Directorate;
- b) 1 prosecutor from the prosecutor's offices attached to the courts of appeal;
- c) 2 prosecutors from the prosecutor's offices attached to the courts;
- d) 1 prosecutor from the prosecutor's offices attached to the judges.

Judges and prosecutors, members of the Superior Council of Magistracy, are elected in the general assemblies of the judges or, as the case may be, of the prosecutors, among the judges and prosecutors appointed by the President of Romania.

4. Civil Liability

The Constitution of Romania, in Art. 52 (3), regulates that the state responds squarely patrimonial for damages caused by judicial errors. State liability is determined under the law and eliminates the liability of magistrates who have exercised their function with evil belief.

Constitution and Law 303/2004 lay down general conditions for the liability of the state and magistrates for judicial errors. Thus, we speak of two different institutions: state patrimonial liability for judicial errors and patrimonial liability to the public. Magistrates, according to the constitutional text, only respond if it is proved that they acted with bad faith or serious negligence. Magistrates answer civil only if by a final court decision (Deaconu, 2012).

5. Criminal Liability

Along with civil liability, magistrates also have a criminal responsibility. Criminal liability concerns the situation in which a magistrate commits criminal offenses in connection with the cause he has to deal with. The incidence of criminal liability of the magistrate in Romania is regulated through the Law 303/2004, which provides the suspension from office of judges against whom there is a criminal action put in motion or the release of a definitive convict for an offense. The analysis of the rules that implies the magistrates' criminal responsibility imposes a certainty on the situation that could entail effective responsibility. In general, in all European law systems, the criminal responsibility of the magistrate does not have a regime

derogating from ordinary criminal law, precisely to ensure the transparency of the act of justice.

The idea of criminal responsibility of the magistrate is not new, it was also included in the criminal code of 1810, where the acts of the civil servant were incriminated in general and some texts made express references to magistrates. It is not excluded the cumulation of the criminal responsibility of the magistrate with civil liability. Civil and criminal liability involve the commission of an unlawful act, touching social values. Criminal and civil liability are based on the guilt of the person who committed an illicit deed, being irrelevant if the guilt form is intention or only of negligence (Stătescu, Bîrsan, 1994).

6. Disciplinary Liability

Art. 134 (2) of the Constitution stipulates that SCM shall act as a court of law, through its sections, in the disciplinary responsibility of judges and prosecutors. In these cases, the right to vote in the two sections of the SCM (judges section and prosecutors section) belongs only to the elected CSM members and not to the law-abiding ones (the Minister of Justice, the President of the High Court of Cassation and Justice and the General Prosecutor of the Prosecutor's Office from the High Court of Cassation and Justice).

SCM decisions in disciplinary matters can be appealed to the High Court of Cassation and Justice. The cases that constitute disciplinary misconduct of the magistrates are expressly provided by Art. 99 of Law 303/2004.

Analyzing the distinctions between ethics and professional deontology, we find that ethics, representing the moral component, is the culture and civilization of a collectivist, whose violation is sanctioned by public opinion and professional ethics is a component of ethics that includes moral norms applicable at the level of professions, including the magistrates', which is distinguished by the circumstances in which it is exercised, such as the public and private level. For this reason the development of a deontological code is absolutely necessary. Norms of the Master's Code of Ethics must be concise, clear, simple and must include some basic principles to allow a distinction between disciplinary and moral responsibility of the magistrate because between the two forms of liability there is a certain confusion.

In magistrate activity, the need for conducting rules can be explained based on the principle of freedom that applies to each man, so the judge and prosecutor have the right to act freely, as long as they don't violate the freedom of action of another man. The need for

deontological norms in the case of magistrates also arises from the duty of a magistrate to ensure the prestige of justice through his entire activity.

7. The Correlation Between Criminal Liability and Disciplinary Liability

More frequently, the cumulus of legal liability occurs when, through a single offense, committed with guilt or without guilt, there have been violated both criminal and disciplinary rules and at the same time there is a violation of the conduct rules imposed by the Code of Ethics. Although, the criminal rules, the disciplinary deviations and the rules established by the Code of Ethics concern the same definition of the magistrates' activity: independence, impartiality, integrity, decency, equal treatment of all citizens before the law and competence.

In case of criminal liability cumulated with disciplinary and moral responsibility, disciplinary and moral responsibility are conditioned by the fact that the act does not constitute an offense. Consequently, if a magistrate is investigated for committing a criminal offense which renders him incompatible with the exercise of his position or disciplinary research has begun upon him, he is suspended until the final prosecution of the criminal proceedings.

In the framework of criminal liability and disciplinary liability, the form and degree of guilt is an essential element both for characterization as a crime or disciplinary deviation of the magistrate's offense and for the application of criminal punishment or disciplinary sanction, whereas in the case of moral responsibility is essential the curse of the magistrate in relation to the ethical and social principles imposed by the magistrate statute and its community.

The cumulation of the three forms of accountability of the magistrate is also justified under the assumptions that can be applied. Thus, the commission investigating a criminal act attracts the administration of a criminal punishment; the commission of a disciplinary offense attracts the application of the sanctions provided by Art. 100 of Law no. 303/2004, which may reach up to excluding from magistracy.

8. Duties of the Superior Council of Magistracy in the Field of Disciplinary Liability of Magistrates

Through its sections, the Superior Council of Magistracy fulfills the role of a court in the field of disciplinary liability of judges and prosecutors, for the acts provided by Law 303/2004 on the status of judges and prosecutors. The judges section also acts as a disciplinary court for the magistrates-assistants of the High Court of Cassation and Justice.

Disciplinary actions in case of deviations committed by a judge are exercised by the Judicial Inspection, by the judicial inspector, by the Minister of Justice or by the President of the High Court of Cassation and Justice. The disciplinary action in case of deviations committed by prosecutors is exercised by the Judicial Inspection, by the judicial inspector, by the Minister of Justice or the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

The disciplinary action in case of deviations committed by an assistant magistrate is exercised by the president of the High Court of Cassation and Justice or the Judicial Inspection through the judicial inspector. Any referral about the inappropriate activity of judges and prosecutors, wrongly directed at courts or prosecutors' offices, will be submitted to the Judicial Inspection within 5 days of registration. In order to carry out the disciplinary action, it is mandatory to carry out the preliminary investigation by the Judicial Inspection.

During the disciplinary proceedings, the appropriate section of the Superior Council of Magistracy, *ex officio* or at the suggestion of the judicial inspector, may order the suspension of the magistrate until the final settlement of the disciplinary action if the continued exercise of the position could affect the unfettered conduct of disciplinary proceedings or if the disciplinary procedure is likely to seriously undermine the prestige of justice.

During the course of the disciplinary proceedings, the settlement of the application for the granting of the service pension is suspended until the final settlement of the disciplinary action. The preliminary investigation is carried out by the inspectors of the Judicial Inspection Service for judges, respectively within the Judicial Inspection Service for prosecutors. On the occasion of the preliminary investigation there can be established the facts and their consequences, the circumstances in which they were committed, as well as any other conclusive data from which to judge the existence or non-existence of the guilt. The judge or prosecutor and, as the case may be, his representative or lawyer shall be entitled to acquaint themselves with all the documents of the case and may request the taking of evidence in the defense.

The sections of the Superior Council of Magistracy shall, if it finds that the referral is well founded, apply one of the disciplinary sanctions provided by the law in relation to the seriousness of the disciplinary offense committed by the judge or prosecutor and his/her personal circumstances. The sections of the Superior Council of Magistracy resolve the disciplinary action by a decision that mainly includes the following:

a) a description of the act constituting a disciplinary offense and its legal framing;

- b) the legal basis for applying the sanction;
- c) the reasons for which the defense formulated by the judge or prosecutor has been removed;
- d) the sanction applied and the reasons for its application;
- e) the appeal and the period within which the decision may be appealed;
- f) the competent court for judging the appeal.

The provisions related to the content of this judgment shall be supplemented by the provisions of the Code of Civil Procedure on the content of the judgment. Decisions of the sections of the Superior Council of Magistracy, through which the disciplinary action has been resolved, shall be compulsorily drafted no later than 20 days after the pronouncement and immediately communicate in writing to the judge or prosecutor concerned, but also to the Judicial Inspection and, as the case may be, to the holder of the disciplinary action which he has exercised. Communication of decisions is provided by the General Secretaryship of the Superior Council of Magistracy.

The member of the Superior Council of Magistracy against whom a disciplinary action is exercised does not take part in the work of the section in which this action will be judged. An appeal may be brought against these judgments within 15 days of the notification by the sanctioned judge or prosecutor or, as the case may be, by the Judicial Inspection or by the person who exercised the disciplinary actions. The competence of resolving the appeal belongs to the Chamber of 5 judges of the High Court of Cassation and Justice. The Superior Council of Magistracy shall not include the members of CSM or the Disciplinary Judge in the procedure of appeal. The appeal suspends the execution of the decision. The decision by which the appeal is resolved is irrevocable. If the exclusion of a judge or a prosecutor has been ordered, the irrevocable decision is sent to the President of Romania, for the issuance of the dismissal decree.

Until the amendment of the Law 317/2004, by Law 24/2012, within the plenum of SCM functioned the Judicial Inspection, led by a Chief Inspector. Currently this structure enjoys legal personality and functions within the Superior Council of Magistracy, based in Bucharest. The Judicial Inspection is headed by a Chief Inspector, assisted by a Deputy Chief Inspector, appointed through a competition organized by the Superior Council of Magistracy. This structure acts according to the principle of operational independence, fulfilling, through judicial inspectors appointed under the terms of the law, attributions of analysis, verification and control in the specific fields of activity.

In order to accomplish its tasks, the Judicial Inspection shall have its own apparatus, organized in directions, services and offices. Inside its own Judicial Inspectorate there are judicial inspectors, legal specialists assimilated to magistrates, civil servants and contract staff. The organization and functioning of the Judicial Inspection, the organizational structure and the attributions of the compartments shall be established by a regulation approved by order of the chief inspector, which shall be published in the Official Gazette of Romania, Part I. The Judicial Inspection shall operate with a maximum number of 70 positions. The maximum number of positions for the Judicial Inspectorate may be modified by Government decision, at the suggestion of the Chief Inspector, with the approval of the Superior Council of Magistracy. The financing of the current and capital expenditures of the Judicial Inspection is fully ensured from the state budget, the funds for the Judicial Inspection being separately identified in the budget of the Superior Council of Magistracy.

The duties of the inspector are as follows:

- a) to exercise the leading and organizing function of the Judicial Inspection;
- b) to represent the Judicial Inspection in the relations with the Superior Council of Magistracy or with other domestic or international institutions;
- c) to exercise his/her legal attributions as authorizing officer;
- d) to take measures for the random distribution of the files within the Judicial Inspection;
- e) to establish annually control or whenever the specific fields of activity for which the control is exercised, after consulting the judicial inspectors or at the proposal of any of the holders of the disciplinary action;
- f) to establish the control teams, in the areas stipulated by law;
- g) to appoint, according to law, the judicial inspectors and the other categories of personnel within the Judicial Inspection and to order the modification, suspension and termination of their work or service relations;
- h) to establish the duties and the individual tasks of the subordinated personnel, approving its job descriptions;
- i) to assess, in accordance with the law, the subordinate staff;
- j) to fulfill any other attributions provided by law.

The Chief Inspector of the Judicial Inspection does not request or receive instructions from any authority, institution or person in the performance of its duties related to the triggering, carrying out and utilization of the controls, except for the situations stipulated by the law. The

Chief Inspector of the Judicial Inspection is the authorizing officer, according to law. The Deputy Chief Inspector performs the following tasks:

- a) coordinates the activity of the Judicial Inspection staff, other than the judicial inspectors;
- b) assists the chief inspector in verifying and approving the acts and resolutions drawn up by the judicial inspectors;
- c) coordinates the activity of work safety and security;
- d) coordinates the professional training of judicial inspectors and the practice of unifying the practice at the level of the Judicial Inspection;
- e) is the chief substitute of the chief inspector;
- f) exercise any other duties delegated by the chief inspector.

The judicial inspectors, including the leaders of the courts or prosecutors' offices may request, under the law, any information, data, documents or any checks they may deem necessary for carrying out the disciplinary investigation or the exercise of the other duties provided by law or regulations. Documents or any other information under the jurisdiction of the Judicial Inspection are confidential, with the exception of those which, according to the law, constitute information of public interest.

Judicial inspectors have the following attributions:

- a) in disciplinary matters, they dispose and carry out disciplinary research in order to exercise disciplinary action against judges, prosecutors, including those who are members of the Superior Council of Magistracy, as well as the magistrates-assistants from The High Court of Cassation and Justice, under the present law;
- b) to carry out checks at the courts regarding the observance of the procedural rules in relation to the receipt of applications, the random assignment of the files, the setting of the deadlines, the continuation of the court panel, the pronouncement, the drafting and the communication of the decisions, the filing of the files to the competent courts, the execution of the criminal decisions and civilians and to inform the Judges Section of the Superior Council of Magistracy, formulating appropriate proposals;
- c) to carry out checks at the prosecutor's offices regarding the observance of the procedural norms of the reception and registration of the works, the distribution of the files on objective criteria, the continuity in the assigned works and the independence of the prosecutors, the observance of the deadlines, the drafting and communication of the procedural acts, and inform the Prosecutor's Section of the Superior Council of Magistracy, formulating appropriate proposals;

- d) verifies the managerial efficiency and the way of fulfilling the attributions deriving from the laws and regulations for ensuring the proper functioning of the court and the prosecutor's office, the proper quality of the service; he signals the deficiencies found and formulates appropriate proposals for their removal, which he presents to the corresponding department;
- e) verifies the notifications addressed to the Judicial Inspection or makes an *ex officio* referral regarding the inappropriate activity or conduct of the judges and prosecutors and violation of their professional obligations, including those who are members of the Superior Council of Magistracy and the magistrates-assistants of the High Court of Cassation and Justice;
- f) to carry out checks on the condition of good reputation for the judges and prosecutors in office, at the request of the Superior Council of Magistracy;
- g) performs the verifications ordered by the Plenum of the Superior Council of Magistracy for solving the claims regarding the protection of the professional reputation and the independence of the judges; presents to the Plenum of the Superior Council of Magistracy the report containing the result of the verifications;
- h) to carry out any other checks or inspections ordered by the Plenum of the Superior Council of Magistracy, the Chambers of the Superior Council of Magistracy or the Chief Inspector of the Judicial Inspection, in accordance with the law.

Part of these tasks shall be performed *ex officio* or at the request of the Plenum of the Superior Council of Magistracy or of the Chambers of the Superior Council of Magistracy. In the exercise of their duties provided by the law, with the exception of those related to the conduct of the disciplinary investigation, the judicial inspectors shall draw up inspection reports, which will be communicated to the courts/prosecutor's offices, for the purpose of formulating objections. This inspection report, together with the objections formulated, shall be forwarded to the appropriate section of the Superior Council of Magistracy, which sets out the necessary measures to remedy the situation. If the court considers that the objections are well founded, the Superior Council of Magistracy may order, in writing and in due course, the resubmission of the report in order to complete the verifications, expressly indicating the issues to be filled in.

During the exercise of the Chief Inspector, Deputy Chief Inspector and Judicial Inspector, judges and prosecutors are legally suspended from their duties in the courts and prosecutors' offices. Judges and prosecutors with leading positions are obliged to choose between the management and the judicial inspector, within 30 days from the date of obtaining the right to

continue to be a judicial inspector. After 30 days, the post or judicial inspector for whom the option has not been made becomes vacant by law.

The provisions on disciplinary sanctions and misconduct, as well as the disciplinary procedure, apply accordingly to judicial inspectors. Inspectors of the Judicial Inspection are dismissed from office if they have been disciplined or have not received an appropriate rating. Upon termination of the judicial inspector's function, the judges and prosecutors shall return to the courts or prosecutor's offices where they have previously worked or, with their consent, to other courts or prosecutors' offices where they have the right to operate according to the law.

Judicial inspectors carry out their work independently and impartially. Judicial inspectors may not conduct disciplinary research or any other work involving judges or prosecutors in the courts or prosecutor's offices where the inspector has been operating. In this case, the action is assigned to another judicial inspector, in a random manner, in compliance with the provisions of the law.

9. Verification Of Liability Procedure

Article 99 of the Law 303/2004 provides the following discipline misconducts for magistrates:

- a) manifestations which affect the honor or professional probity or the prestige of justice, committed in or outside the exercise of his/her duties;
- b) violation of legal provisions on incompatibilities and prohibitions on judges and prosecutors;
- c) unwilling attitudes in the exercise of service duties towards colleagues, the other personnel of the court or prosecutor's office in which they operate, judicial inspectors, lawyers, experts, witnesses, judges or representatives of other institutions;
- d) carrying out public activities of political nature or manifesting political beliefs in the exercise of their duties;
- e) unjustified refusal to receive requests, conclusions, memos or acts filed by the parties to the case;
- f) unjustified refusal to perform a duty of service;
- g) failure by the prosecutor to comply with the provisions of the hierarchically superior prosecutor, in accordance with the law;

h) repeatedly and for imputable reasons not complying with the legal provisions regarding the speedy settlement of cases or repeated delays in the performance of the works, for imputable reasons;

i) non-observance of the duty to refrain when the judge or prosecutor knows that there is one of the causes provided by the law for his or her abdication, as well as repeated and unjustified requests for abstention in the same case, which has the effect of delaying the trial;

j) non-observance of the secrecy of the deliberations or the confidentiality of the works that have this character, as well as of other information of the same nature, which has become known in the exercise of the function, except for those of public interest, according to the law;

k) absent from service, repeatedly or directly affecting the activity of the court or the prosecutor's office;

l) the interference in the activity of another judge or prosecutor;

m) unjustified non-compliance with the administrative provisions or decisions ordered in accordance with the law by the head of the court or the prosecutor's office or other administrative obligations stipulated by law or regulations;

n) use of the function held to obtain favorable treatment by the authorities or interventions for solving certain claims, accepting or claiming the resolution of personal interests or of family members or other persons, other than within the legal framework regulated for all citizens;

o) serious or repeated failure to comply with the provisions on random distribution of cases;

p) obstruction of inspection activity of judicial inspectors by any means;

q) direct participation or interpenetration of pyramid games, gambling or investment systems for which transparency of funds is not ensured;

r) the complete lack of motivation of court decisions or judicial acts of the prosecutor, according to the law;

s) the use of inappropriate expressions in court judgments or judicial acts of the prosecutor, or the obviously contradictory reasoning of the legal reasoning, such as to affect the prestige of the judiciary or the dignity of the magistrate; failure to comply with the decisions of the Constitutional Court or the decisions of the High Court of Cassation and Justice in resolving appeals in the interest of the law;

t) exercise of the position in bad faith or serious negligence.

Actions committed by the magistrate with bad faith or negligence may also constitute disciplinary misconduct. For instance, there is bad faith when the judge or prosecutor violates

the material or procedural rules of the law, pursuing or accepting the injury of a person. There is serious negligence when the judge or prosecutor disregards, in a gravely, unreasonable and inexcusable manner, the rules of substantive or procedural law.

Verification of complaints about the good reputation of judges and prosecutors in office is done by the Judicial Inspection, *ex officio* or at the request of any interested person. The inspection report drawn up as a result of the checks on good repute shall be communicated to the magistrate subject to the notification and to the person who submitted the complaint, within 15 days from the drawing up, for the objection. This inspection report, along with the objections formulated, shall be forwarded to the appropriate section of the Superior Council of Magistracy. On the basis of the report and the objections formulated, the corresponding department adopts the decision regarding the fulfillment or non-fulfillment by the magistrate of the good reputation condition, or, if it considers that the objections are well founded, disposes, in written and reasoned manner, the resending of the report in order to complete the verifications, expressly indicating the issues to be filled in.

During the procedure of verification and verification of the fulfillment of the good reputation condition, the corresponding department of the Superior Council of Magistracy, *ex officio* or at the proposal of the judicial inspector, may order the suspension of the magistrate, until the procedure is completed, unless his/her activity does not affect the impartial conduct of verification procedures or if these procedures aren't likely to seriously undermine the prestige of justice. The decision of the Section may be challenged with appeal to the Plenum of the Superior Council of Magistracy within 15 days of the communication and the decision of the Plenum may be appealed with appeal to the High Court of Cassation and Justice Administrative Appeal Division within the same term. The court's decision is irrevocable. The irrevocable decision, which establishes the non-fulfillment of the good reputation condition, is communicated to the Romanian Presidency, in order to issue the decree of dismissal.

Judges and prosecutors answer civil, disciplinary and criminal under the law. Any person may directly refer to the Superior Council of Magistrates or through the heads of courts or prosecutor's offices regarding the inappropriate activity or conduct of judges or prosecutors, violations of professional obligations in relation to legal persons or the commission of disciplinary misconduct. The exercise of this right cannot call into question the solutions made by the court decisions, which are subject to legal remedies.

Judges, prosecutors and assistant magistrates can be searched, detained or preventively arrested only with the approval of the sections of the Superior Council of Magistracy. In the case of a flagrant offense, judges, prosecutors and assistant-magistrates may be detained and subject to search by law, the Superior Council of Magistrates being immediately informed by the body that ordered detention or search.

The state is patrimonial liable for damages caused by judicial errors. State liability is established under the law and does not remove the liability of judges and prosecutors who have exercised their office in bad faith or serious negligence.

The cases in which the injured person is entitled to compensation for damages caused by judicial errors committed in criminal proceedings are set out in the Criminal Procedure Code. The right of the person injured to claim the material damages caused by the judicial errors committed in lawsuits, other than the criminal ones, shall not be exercised unless a preliminary ruling has been established in advance by the criminal or disciplinary liability of the judge or the prosecutor for an act committed in the course of the trial and whether such an act is likely to cause a judicial error.

In order to compensate for the damage, the injured party can only take action against the state, represented by the Ministry of Public Finance. The person who, in the course of the trial, has in any way contributed to the judicial error by the judge or prosecutor is not entitled to compensation. The state may seek redress against the judge or prosecutor who, in bad faith or gross negligence, committed the injurious judicial error after the damage was covered by the state under the irrevocable judgment. The limitation period for the right to action in all these cases is one year. Judges and prosecutors respond disciplinary to deviations from service duties, as well as for facts that affect the prestige of justice.

The disciplinary sanctions applicable to judges and prosecutors, in proportion to the seriousness of the deviations, are:

- a) warning;
- b) reduction of the gross monthly indemnity allowance by up to 20% for a period of up to 6 months;
- c) disciplinary move for a period of up to one year to another court or to another prosecutor's office located in the district of another court of appeal or in the district of another prosecutor's office attached to a court of appeal;
- d) suspension from office for up to 6 months;
- e) exclusion from the magistracy.

10. Deontological Rules on Magistrates

The Code of Ethics for judges and prosecutors sets their standards of conduct in accordance with the honor and dignity of the profession (see the Superior Council of Magistracy: Decision no. 328/2005 for the approval of the Code of Ethics of Judges and Prosecutors, published in the Official Gazette, Part I no. 815 of 08.09.2005; Decision no. 607/2005 amending and supplementing the Regulation on the organization of the competition or examination for the appointment in the leading positions of judges and prosecutors, published in the Official Gazette, Part I no. 61 of 23.01.2006; see also the Regulation on Capacity Examination of Legal Specialized Staff Assimilated to Judges and Prosecutors of the Ministry of Justice and the National Institute of Criminology, published in the Official Gazette, Part I no. 122 of 08.02.2006, as well as the Order of the Minister of Justice no. 410/2006 approving the Regulation on the Capacity Examination of Legal Specialized Staff Assimilated to Judges and Prosecutors within the Ministry of Justice and the National Institute of Criminology, published in the Official Gazette, Part I no. 122 of 08.02.2006).

Compliance with the norms contained in the Code of Ethics is a criterion for assessing the effectiveness of the quality of the activity and integrity of judges and prosecutors. The following principles have been retained as rules of judicial deontology:

1. Judges and prosecutors must promote the supremacy of the law, the rule of law and defend the fundamental rights and freedoms of citizens.
2. Judges and prosecutors must defend the independence of the judiciary.
3. Judges and prosecutors must exercise his/her office with objectivity and impartiality, having as the sole law the law, without complying with pressures and influences of any kind. Judges and prosecutors must refrain from any conduct, act or manifestation that could alter confidence in their impartiality. In case of incompatibility, judges and prosecutors are obliged to abstain, according to the law. They may address the Superior Council of Magistracy for any act likely to affect their independence, impartiality or professional reputation.
4. Judges and prosecutors cannot militate for the admission of others to a political formation, cannot participate in the collection of funds for political parties and cannot afford the use of their prestige or image for such purposes.
5. They cannot give any support to a candidate for a public office of a political nature.
6. They cannot serve the acts they perform in the exercise of their service duties in order to express or manifest their political convictions. Judges and prosecutors may not attend public meetings of any political nature.

7. Judges and prosecutors are permitted to provide legal assistance, under the conditions provided by law, only in their personal circumstances, their ascendants, their descendants or their spouses, as well as in those of their guardians. In such situations, they are not allowed to use the capacity of judge or prosecutor to influence the court or prosecutor's decision or to create the appearance of such influence.
8. Family and social relationships of judges and prosecutors should not influence the solutions they take in the performance of their duties; they are forbidden to intervene to settle claims, to claim or to accept the resolution of personal interests or of family members or other persons, other than within the legal framework.
9. Intimidation in the work of other judges and prosecutors is forbidden.
10. Judges and prosecutors are obliged to perform their professional duties with competence and fairness, to observe the administrative duties established by laws, regulations and orders.
11. Judges and prosecutors must impose order and solemnity during the settlement of cases and adopt a dignified and civilized attitude towards the parties, lawyers, witnesses, experts, interpreters or other persons and ask them for appropriate behavior.
12. Judges and prosecutors are under the obligation of not disclosing or using for purposes the information they have obtained in that capacity other than those directly related to the exercise of their profession. If, according to the law, the works are of a confidential nature, judges and prosecutors are obliged to keep the respective materials inside the court or the prosecutor's office and to allow them to be consulted only within the framework provided by law and regulation.
13. In the exercise of their leading functions, judges and prosecutors must be concerned with initiative and responsibility regarding the organization of the work of the staff. In making his decisions, he must give priority to the interests of the courts and prosecutor's offices, as well as to the good administration of justice. Judges and prosecutors with leading positions cannot use their prerogatives to influence the conduct of proceedings and the settlement of cases.
14. They are obliged to refrain from any acts or deeds that might compromise their dignity in office and in society. The relationships of judges and prosecutors in their collectives must be based on respect and good faith, regardless of seniority in their profession and function. Judges and prosecutors cannot express their views on the professional and moral probity of their colleagues.

15. They cannot carry out actions which, by their nature or manner of financing or enforcement, may in any way impede the performance of professional obligations, impartially, justice and legality.
16. They are obliged to abstain, according to the law, from any activity related to the act of justice in cases involving the existence of a conflict between their interests and the public interest in the performance of justice or defense of the general interests of society.
17. They may be members of committees for the examination or drafting of normative acts, internal or international documents.
18. They may be members of civilian or academic societies, as well as any private legal entity without patrimonial purpose.
19. They must defend citizens' equality before the law and promote impartiality by ensuring non-discriminatory legal treatment, respecting and defending the dignity, physical and moral integrity of all persons who participate in any capacity in judicial proceedings.
20. They must promote the proportionality of coercive, deprivation or restrictive measures taken by virtue of law and the speedy procedures for the speedy restoration of the breach of law. Judges and prosecutors are obliged to exercise due diligence in order to carry out their assigned work, in compliance with legal deadlines, and, if the law does not provide, within reasonable terms.
21. They may participate in the elaboration of publications, may produce articles, specialized studies, literary or scientific works, and may participate in audiovisual programs, except those of a political nature or of those that may affect the image of justice.

Conclusion

The magistrates' material responsibility is highly demanded and expected in Romanian legislation and the population wants to be established such a responsibility. We will point out some personal considerations about the changes that need to be brought into the law.

The assumption of material responsibility of the magistrate is set forth in the Constitution itself, where it states that "the state is patrimonial responsible for damages caused by judicial errors. State liability is established under the law and does not remove the liability of magistrates who have performed their duties in bad faith or serious negligence" (Article 52 paragraph 3). Therefore, in order for the magistrate to answer material for the damage he caused to the state through the judicial error, for which the state has compensated the injured citizen, it is necessary to have cumulatively two conditions:

1. Judicial error has caused state damage. In order for the damage to have occurred, the state must have paid damages for error, the state's patrimonial liability for judicial errors being established under the law. It is only from the moment of payment of compensation to the injured person that we are talking about a "damage" to the state budget, this being the first necessary condition for the state to regress against the magistrate who caused the damage. Without the damage covered by the state, there is no material responsibility for the magistrate.

2. Judicial error was committed by the magistrate in bad faith or serious negligence.

Therefore, in order for the state to act in a regressive manner against the magistrate, the judicial error must have caused the damage by bad or serious negligence. If any of these conditions are not met, the state may not, through action in regression, appeal against the magistrate in order to recover the damage.

Before discussing the amendments that we would propose to the law, it is important to know that in the present law there are provisions on the magistrates' material liability, understood as the state's action against the magistrate in order to recover the damage he caused through the judicial error caused by the bad faith or serious negligence.

However, the conditions imposed by law for the injured person to make a claim for damages against the state, as well as the time-limits for prescribing the right of the state to exercise the action against the magistrate, have made the current provisions of the action to be virtually inapplicable. Thus, in the current law, the right of a person who has been the victim of a judicial error in a civil trial is limited to the situation where the error was the result of the bad faith or negligent grave of the magistrate. As such, not every person who was the victim of a judicial error could claim damages to the state, but only the one who could prove the magistrate's fault, which restricted the constitutional right of the person in his relations with the state. Then, both the prescription of the right to action for the correction of the judicial error and the exercise of the right to regress are very short, making the provision inapplicable.

For these reasons, the current bill is totally inoperable, having to be modified. The changes we propose start from the constitutional principle of state responsibility towards persons who have suffered due to legal errors, which should be applied to all victims of such errors. In this sense, we recommend the abrogation of the provision that blocks the right of the citizen to ask the state for the reparation of the damage caused by a judicial error, preconditioning it by a decision of establishing the bad faith and serious negligence of the judge or the prosecutor.

We are referring to the abrogation of Art. 96 par. (4) of Law 303/2004, which still provides that "the right of the injured party to reparation for material damage caused by judicial errors committed in lawsuits other than criminal ones shall not be exercised unless he has, in advance, a final decision, criminal or disciplinary liability, as the case may be, of the judge or prosecutor for an act committed in the course of the trial and whether such an act is likely to cause a judicial error".

According to this article, the state recognizes the injured citizen, as a principle, to be compensated, but practically restricts the exercise of this right, conditioning it upon the pre-existence of a court decision that concerns the judge or prosecutor. There are situations in which a person, although victim of a judicial error, cannot be compensated because the magistrate did not act in bad faith or in serious negligence. The state is the guarantor of fundamental rights and the way its institutions work and therefore, from the point of view of state-citizen relations, the reason that led to a judicial error is irrelevant. Then, both the prescription of the right to action for the correction of the judicial error and the exercise of the right to regress is very short (1 year) according to Art. 96 Law 303/2004), making the provision inapplicable. This law, which limits the exercise of the right to compensation, should be abolished, by allowing any citizen who has been injured as a result of a judicial error, to claim the damages from the state, whether the error was or not caused by the judge's fault or the prosecutor's.

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