

Community Influences on the Material Liability of Magistrates for Prejudices Caused by Material Errors

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Abstract: The paper's main issue is the fact that in the last years Romania is on top of the list of the states paying the highest damages further to the convictions in front of ECHR, fact that determines an increasing dissatisfaction of legal experts but also of the population. This controversial situation generated the reconsideration of the material liability of magistrates, for the judicial errors and the prejudices consequently created, established not only before international courts but also before domestic courts. Tacking into consideration that, at present, numerous proposals for settling this issue come from more and more subjects, with or without a legislative initiative right, among which the Ministry of Economy and Finances, the Ministry of Justice or The Superior Council of Magistrature the paper tries to capture a perspective view of the material liability of magistrates, for the judicial errors in our legal system but also in other systems of law, which can be seen as a source of inspiration. According to the legislation in force, the only one liable before an injured party that suffered a prejudice through a judicial error is the state, whose right and possibility to recover the counter value granted to the prejudiced person through the filing of recourse action against the judge to whom the judicial error is imputable, are acknowledged. The magistrate may be held liable only when the judicial error is caused by the exercise of the function in bad faith or with serious negligence. The application of such concepts as "bad faith" and "serious negligence" is, however, difficult, due to insufficient criteria for their interpretation, considering all the nuances, and quantification, included by law. Also, please note that, through the creation of the possibility that each individual holds the magistrate liable for alleged prejudices caused by the latter, the magistrate's liability and the good functioning of justice would be seriously injured. Also, the fact that numerous convictions obtained by Romania before ECHR were due to the incoherent or abusive legislation, which the magistrates were and are compelled to observe, must not be neglected. From this point of view, the magistrates could be held materially liable, based on grounded reasons, only in the context of a fair, coherent and concise legislation meeting the justice and celerity need of the litigant parties in the settlement of disputes. Therefore, the avoidance of the convictions based on judicial errors causing material and moral prejudices, before ECHR, but also before national courts, supposes the application of coherent measures both in terms of amending the internal legislation and its adaptation and harmonization according to European standards, and in terms of establishing a group of magistrates corresponding to the current optimum magistrate profile, a desiderate which needs to be achieved to meet the current needs of Romanian justice.

Keywords: magistrates; liability; prejudice

1. Introduction

The fact that Romania has been lately ahead of the States that pay the highest damages further to convictions by ECHR causes a more and more pronounced dissatisfaction of legal experts, but also of the population.

On the background of an economic, social and political recession which seems endless, the fact that – notwithstanding the causes for convictions- tens of millions of Euros are borne from the less and less consistent possessions of common citizens has generated in the last years a rethinking of the magistrates' material liability for their judicial errors and for the prejudices created as a consequence of the said errors, which were ascertained not only before international courts of law, but also before domestic courts of law.

Currently, according to the legislation in force, the only one that is called to be liable in front of an injured party who suffered a prejudice by means of a judicial error is the State, which is also acknowledged the right and possibility to recover the equivalent value granted to the prejudiced party, filing a claim for recovery against the judge to whom the judicial error can be imputed. Emphasis should be placed upon the fact that a magistrate's liability can only be entailed when the judicial error is caused by the exercise in bad faith or with gross neglect of its office.

Most of the times, however, the State's right to recovery against culpable magistrates failed to materialize for objective or subjective reasons. The civil society no longer accepts this situation, which fact is also reflected in the numerous proposals to solve these issues, which proposals come also from several subjects, with or without the right to legislative initiative, including the Ministry of Public Finance, the Ministry of Justice or the High Council of Magistrates.

2. Problem Statement

The regulation of judges' material liability for judicial errors seems to be, however, extremely delicate.

In order to have the possibility to appreciate more precisely to which extent a judge should be liable for the prejudices caused through its activity, the primary directions of this activity should be underlined. In this way, the activity of judgment is certainly the most significant of a judge's professional activities. For this activity to be conducted under optimum conditions, it is required that numerous previous conditions should be met concomitantly and subsequent to the act of judgment.

In this respect, the primary purpose of recruitment, retraining, evaluation and promotion of judges should be the issue of legal and grounded court decisions, for the achievement of justice. (Alexe, 1/2004, p. 217)

However, a judge's activity is not limited to the activity of judgment. According to its duties, a judge will carry out also activities related to the court session; the role of these activities is to aid the proper proceedings of the judgment of causes, through the distribution of causes, establishment of hearings, drafting, issue and services of court decisions, administrative activities, such as the supervision of the clerk's and registrar's activity, or extra-judicial activities, such as those involving the participation of a judge in the election process. Nevertheless, as we mentioned previously, the activity of judgment represents the sap of this noble profession. To appreciate the qualitative level of the manner in which a judge carries out its professional activity, regarded from this perspective, primarily, in the course of time, practitioners –in a n effort corroborated with the civil society- outlined a profile of the magistrate.

This magistrate profile is not the same in any system of law, because each judge should correspond to the system "served" by him/her. The magistrate's profile should result from the identification of the

main issues facing the juridical system where s/he is classified.¹ Nonetheless, international authorities regulating and evaluating judges' activity deem that, notwithstanding the juridical system where s/he is classified, a judge should be independent in the realization of the act of justice. The statement "An efficient justice is an independent justice" seems to enjoy a wide acceptance, at a general level, among democratic systems.² A judge's independence is a necessary, but not sufficient requirement for the correct and fair solution of particular cases.

To have independent judges and, consequently, an independent justice, it is necessary that the legislation should make sure that the separation of powers in the State is preserved, that actions are taken to strengthen judges' capacity to remain incorruptible as well as to strengthen magistrates' liability for the quality of the act of justice. The realization and maintenance of a permanent balance between a magistrate's independence and his/her liability is absolutely necessary, because a judge is a servant of the law, s/he is subject to the law and no person may legally place himself/herself outside the law.

The desiderata of independent justice can only be achieved by hiring, maintaining and promoting in the system those persons that are apt and determined to realize acts of justice at the highest standards of competence.

The State and the society are equally responsible for the manner in which a magistrate's profile is outlined. The State should firstly create a solid and competent system to ensure an appropriate training and education of future magistrates, as well as the evaluation of those magistrates that hold offices. This system should allow only those persons having an appropriate mental profile to reach this maximum responsibility office. The intellectual and mental skills that meet the requirements of the magistrate profession, deriving from the necessities of the juridical system are: an independent and critical thinking, cognitive and moral integrity, awareness of the social environment served by it and commitment to serve such environment, a predisposition for hard work and a continuous professional learning, authenticity (identification with the values of the magistrate profession) and the intrinsic motivation for one's professional activity, thoroughness, diligence as well as the ability to communicate in a clear and logical manner³.

A judge's independence and impartiality largely depend on the accuracy and applicability of his/her juridical knowledge, which gives him/her the security to rely on his/her thinking and allows him/her to make judgments that are legally correct.

Also, in order to make an impartial juridical act, a judge must acknowledge, become aware of any internal source that may affect his/her judgment and strive to preserve his/her impartiality.⁴ Therefore, a judge must not recognize only the external circumstances that may influence his/her judgment, circumstances based on which such judge may be excepted, but also the personal circumstances that may affect his/her judgment.

An appropriate act of justice may only derive from a judge's knowledge of the society where s/he lives, of the ideals, conditions and necessities of this society. To serve society, a judge must maintain the supremacy of the law and, by this way, maintain or re-establish, where applicable, citizens' trust in justice. These desiderata assume that the office of a judge should be exerted by persons having a particular moral integrity, with a strong desire to improve the social and organizational environment

¹http://www.mpublic.ro/formare_materiale/profil_magistrat.pdf (accessed on april 10)

² *Ibidem.*

³ *Ibidem.*

⁴ *Ibidem.*

where such persons are conducting their professional activity; also, these persons should act with professionalism and correctness, should be receptive to the information that may improve their activity and should be efficient in the management of their own duties, contributing to the improvement of the administrative activities of the court where they are practicing.

Therefore, magistrates' recruitment, its performance manner, constitutes the main warranty for their independence. The concern for recruiting and forming a body of competent and independent magistrates represents a desiderate of the highest institutional authorities worldwide. UN's General Meeting, taking into consideration the necessity to pay a particular attention to a judge's role within the system of justice and to the importance of judges' selection, training and professional conduct, approved under Resolutions Nos. 40/32 of November 29, 1985 and December 13, 1985 The Basic Principles on the Independence of Judiciary Entities, enacted by the VIIth Congress of UN.¹

According to these principles, "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory." (item 10). "Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience" (item 13).

Recommendation No. 94 (12) made by the Committee of Ministers to Member States with respect to judges' independence, efficiency and role (enacted on October 13, 1994), guides the governments of Member States to enact or re-strengthen all measures necessary to promote the role of judges as individuals and that of the judicial system on the whole and, in particular, to state their independence and efficiency through the implementation of certain principles.² Among these principles, the most important is that of observing, promoting and protecting judges' independence. The recommendation provides the fact that "in order to ensure adequate labor conditions, which allow judges to working an effective manner, it is absolutely necessary that a sufficient number of judges be recruited and permitted to acquire the necessary professional training (for example practical stages within courts of law) before their appointment and during their career. Such training must be free of price for the judge and pace an emphasis especially on recent legislation and on jurisprudence."

Opinion No.1/2001 issued by the Consultative Council of European Judges, on standards concerning the independence of the judiciary power and the irrevocability of judiciary entities, indicates that magistrates' independence is not a prerogative or privilege in their own interest, but in the interest of the rule of law and of those who seek and desire the achievement of justice. The same Council, under its Opinion No.10 of November 23, 2007 on the Council of Magistrates, indicates that, in order to maintain the independence of the judiciary system, it is essential that judges be independently selected and promoted, preferably by the Council of Magistrates, with the exclusion of the competence of legislative or executive power.

Taking into account these specifications, which highlight the particular role of the State, by its competent institutions, in the recruitment of judges, we can find an explanation for the manner in which the Romanian lawmaker decided to regulate material liability for judicial errors.

¹ Roxana Maria Lăcătușu, Angelica Cruceanu, *Recruitment of Magistrates – Primary Warranty for Their Independence*, <http://www.forumuljudecătorilor.ro/revista/285> (accessed on April 11)

² R. M. Lăcătușu, A. Cruceanu, *op.cit.*

According to Article 52 paragraph (3) of the Constitution, the State is the only one who is called to be directly liable to the injured and prejudiced party. Such an idea is based on the fact that, in case of judicial errors, the judge and the prosecutor should be protected by means of the institution of the State's patrimonial liability, as they cannot be directly liable to the victim in any situation whatsoever.¹ This liability of the State for judicial errors is substantiated precisely upon the essential role of the State in the recruitment, training and provision of all the essential requirements for the achievement of justice.

On the other hand, by this solution chosen by the lawmaker, they consider that the victim of the prejudice is also ensured an enhanced protection, and that such victim is provided with a more favorable position, as it is sufficient to prove the fact that s/he was the victim of a judicial error which caused material damages to him/her. Therefore, the person in question must not produce any evidence of the judge's guilt, as the State is liable in the name of such judge, on the grounds of an objective liability assumed by it, grounded on the idea of warranty and risk related to the judiciary activity. The judge's patrimonial liability is a manifestation of offense-related civil liability.

The State's liability for judicial errors may be pleaded either on the grounds of Articles 504-506 of the Criminal Procedure Code or on the grounds of Article 96 of Law 303/2004, when judicial errors were perpetrated in lawsuits other than criminal lawsuits. On the strength of the same regulatory acts, the State has a right to recover its prejudice from those culpable magistrates who caused the prejudice. According to Article 12 of Government Ordinance 94/1999 on Romania's participation in the proceedings before ECHR, the State has a right to recover its prejudice from the persons that, by their activity, guiltily determined that the State be compelled to pay the amounts set under the Court's decision or under an amicable settlement convention. According to paragraph 3 of the same article, the civil liability of magistrates shall be established under the conditions regulated by the Law on judicial organization.

The judicial error must be demonstrated during the judgment of the statement of claims filed by the injured party against the State. In this situation, the lawmaker does not establish the meaning of a judicial error, as it will be established by jurisprudence.

The limitation term for the person filing a claim against the State is 1 year.

If the injured party had any contribution whatsoever to the perpetration of the judicial error by the magistrate (judge or prosecutor), then such party shall not be entitled to damage repair. This aspect will be established during the judgment of the action for damages submitted against the State by the party injured through the production of the judicial error. (Ivanovici & Danileț, 1/2006, p. 77)

Judges shall be liable only secondarily for any damages caused by judicial errors, the State, through the intermediary of the Ministry of Public Finance, will be the one entitled to recover its prejudice from judges, for the recuperation of the equivalent value of the damages granted to the person who suffered because of a judicial error. The patrimonial liability of judges shall be entailed only if they acted in bad faith or with gross neglect, in which case the State may seek compensation from the guilty parties by means of an action for damages. The fact that the lawmaker gave no explanation to the terms "bad faith" or "gross neglect" is to be remarked, which leaves their interpretation and appreciation to the court of law.

¹ Decision No.633 of November, 24 2005, regarding the non-constitutionality exception of the provisions of Article 96 paragraph (6), of Law No. 303/2004, published in The Official Gazette No. 1138 of 15 December 2005.

Entailment of the liability of a culpable judge is -in current legislation- one of the State's options, and not an obligation, which aroused numerous controversies and can give birth to arbitrariness on the State's part. *Lege ferenda* is imposed, particularly in the current economic context, to remove the optional character of entailment of the material liability of the magistrate at fault, in the sense that the State should be bound to seek compensation from the guilty parties for prejudice recovery purposes. The State, even if it considered this as the fair solution, can no longer afford to materially bear the damages caused by judicial errors.

The law does not specify the amount of the prejudice that the magistrate is to incur, in case the State would, however, exert its right to recover its prejudice from the respective magistrate. Such a specification by the lawmaker would be useful, because the coverage of the entire prejudice by the magistrate might generate negative effects not only on such magistrate, but upon justice itself. The unlimited exposure of the magistrate's assets might generate reticence with respect to the choice of the magistrate profession by future graduates of the Law School; but, on the other hand, it would also have a significant influence on the magistrate's decision-making.¹

Since the realization time of these regulations, economic and social realities suffered fundamental transformations. As a State, we are in full recession, and this fact can be felt both at economic, and at political and social levels. The viability of the State's institutions and legislation under the new conditions generated by recession are put to a hard task, going through multiple transformations. In this context, an attempt is made at the engagement of a higher patrimonial liability of magistrates for prejudices caused by judicial errors.

Taking into account the fact that most of the times the State's right to recover its prejudice from the culpable magistrates failed to materialize, for objective or subjective reasons, civil society started to manifest its dissatisfaction more and more emphatically, which is also reflected in the numerous proposals for solving these issues; such proposals come from more and more subjects, with or without a right to legislative initiative, including the Ministry of Economy and Finance, the Ministry of Justice or the High Council of Magistrates.

In this way, in 2008, the Ministry of Economy and Finance posted on its website a draft emergency ordinance for the amendment and supplement of Law 303/2004 on the status of judges and prosecutors. This draft provided the fact that the right of the injured party to the remedy of material prejudices caused by the judicial errors perpetrated in lawsuits other than criminal lawsuits was to be exerted only in case a final decision would have previously established the criminal liability of the judge or prosecutor for a misdemeanor committed during the judgment and if such misdemeanor had a causality relation with the judicial error that caused prejudices.

In case the State were sentenced to pay damages as a result of the production of a judicial error within criminal lawsuits, the sentencing decision was to be served to the High Council of Magistrates by the court where it remained irrevocable, within 30 days from motivation, in view of establishing the existence of bad faith or gross neglect. If their existence were ascertained, HCM was to apply disciplinary penalties and to inform the Ministry of Economy and Finance of such fact. Further to communication, MEF should have notified the competent criminal prosecution body and to become a civil party to the case, with the amount paid to remedy the prejudice.

However, MEF's draft had no notable effects.

¹ <http://jurefani.wordpress.com/2009/10/25/despre-raspunderea-patrimoniala-a-magistratilor/> (accesed on April 10).

Also in 2009, the Ministry of Justice tried -by means of proposing another draft EGO- to establish direct relationships between the victim of the judicial error and the magistrate culpable for perpetration of the error. HCM, which had received the draft for endorsement purposes, uncompromisingly opposed to it. At that time, HCM drew the attention of the Ministry of Justice to the fact that the regulation of such a relation between the magistrate and the injured party was to contravene constitutional provisions, *i.e.* Article 52 of the Constitution.

According to the justice minister in office at that time, “The draft received an adverse endorsement from the High Council of Magistrates (HCM), as it presupposed the implication of this institution in the procedure to establish the material liability of judges and prosecutors.”¹

Subsequently, in 2009, HCM came with an alternative to the draft initiated by the Ministry of Justice, in the context of priority directions of action for 2009, set on the basis of findings, criticism and recommendations made to Romania under the Intermediary Report of the European Commission dated February 12, 2009. Nonetheless, since HCM has no right to legislative initiative, it will be seen to which extent its proposals will be found in the changes to be made to the relevant legislation, within the “great reform” of justice which was announced by competent authorities.

3. Conclusions

In the realization of justice reform, competent authorities should take into account the fact that, if public interest requires magistrates to be liable for the damages caused through their mistakes, the same interest also imposes that such magistrates “should not be deprived of any dignity, as it would be the case if parties, according to their resentment and various passions, were entitled to compel them to descend into the *praetorium* to justify their conduct.” (Garsonnet, 1998, p. 234)²

The law in force protects judges from the more or less grounded attacks of injured parties in case of perpetration of judicial errors, providing them with two lawsuit guarantees, which are: inadmissibility of any direct action filed by the party injured through the error perpetration and inadmissibility of the action for impleader filed by the State, as a titular of the claim for recovery against the magistrate, during the judgment of the action for damages submitted by the injured party. (Ivanovici & Danileț, 1/2006, pp. 78-79)

The following fact should not be overlooked: through the creation of a possibility for any individual to entail a magistrate’s liability for alleged prejudices caused by the latter, the magistrate’s independence and, at the same time, the proper course of justice would be severely damaged.

Also, the following fact should not be treated with neglect: numerous convictions got by Romania before ECHR were due to incoherent or abusive legislation, which the magistrates were and are compelled to apply. From this perspective, magistrates’ material liability could be substantially engaged only in the context of a fair, coherent and concise legislation, which should meet the need for justice and celerity in the litigation settlement expressed by the subjects of law.

Therefore, avoidance of convictions based on judicial errors causing material and moral prejudices, before ECHR as well as before national courts of law, implies the application of coherent measures,

¹ http://www.avocatnet.ro/content/articles/id_18617/Justiția-greșește-iar_statul-plătește-42-de-milioane-de-lei-din-buget-se-duc-pentru-proceșele-pierdute-la-CEDO.html (accessed on April 11)

² Bigot de Premeneau, *Exposure of Reasons to the Civil Procedure Code*.

both with respect to the modification of internal legislation and its adaptation and harmonization according to European standards, and with respect to the formation of a body of magistrates which should correspond to the magistrate's current and optimum profile, the latter being a desiderate whose achievement is necessary to comply with the current needs of Romanian justice.

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