

REFLECTIONS ON THE PRINCIPLE OF THE INDEPENDENCE OF JUSTICE

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Abstract

The independence of justice is no longer just a wish of the Constitution editors, it represents a reality, has a practical applicability and it is not at all just a state of mind. Moreover, the judicial independence is regulated by a number of international documentation which completes the whole picture of the national legislation.

Does the civil society represent only a pressure agent likely to influence the independence of law? So here is a question we will try to answer in this study, and we will present theoretical but also practical aspects on the principle of the independence of justice.

Keywords: *Constitution, law, the principle of the independence of justice, magistrates' liability, the European Court of Human Rights.*

Introduction

The social political changes but also the globalization of law has been focused on the concepts of the state, law, of society in general. By examining from the legal point of view the activity of the state, it was found that its strength of will and commandment, which is sovereignty, is accomplished through three powers: the legislative, the executive or administrative and the judicial power¹.

Can we still talk nowadays about a classic separation of the three powers² or can we identify their collaboration? Originally, the Romanian Constitution had not been expressly governed by the theory of the separation of powers, this thing being accomplished by the European level events that have led to its revision in 2003. The form in which we find the separation of powers is provided in art. 1, (4), as follows: "the state is organized according to the principle of separation and to the balance of powers – legislative, executive and judicial power, within the constitutional democracy".

As shown in the dogma, the reason of the insertion of this paragraph was mainly the contribution to a better delineation of the relationship between the powers, representing the advantage that an express norm always represents towards that resulting from the interpretation, which is said the certainty, strictly, the undoubtedly predictability.³ Basically, currently expressions such as "state of law", "rule of law", "separation of powers", "supremacy of the law", are concepts closely related with "human and citizen rights", so that we have a rich European law in terms of human and citizen rights.

We therefore do not propose to analyze the theory of separation of powers in relation to the political system, and neither to render the way how this theory is regulated in the Constitution of the world states, but the approach we propose aims to capture a single component, namely the law, analyzed in terms of its independence.

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¹ C. G. Rarincescu, "Contenciosul administrativ român", (*The Romanian Administrative Disputed Claims Office*), Universal Publishing Alcalay & Co, Bucharest, 1937, p. 18, quoted by Rodica N. Petrescu, "Drept administrativ", (*Administrative Law*), Hamangiu Publishing House, Bucharest, 2009, p. 3.

² See extensively A. Iorgovan, "Drept constituțional și instituții politice" (*Constitutional Law and Political Institutions*), Jean Louis Calderon Publishing House, Bucharest, 1994, p. 147.

³ M. Constantinescu, A. Iorgovan, I. Muraru, S. Tănăsescu, "Constituția României revizuită, comentarii și explicații", (*The Revised Romanian Constitution, Comments and Explanations*), All Beck Publishing House, 2004, p. 2-3.

1. The legal frame of the independence of law

The analysis of the judiciary in our country includes undoubtedly the issue of magistrates' liability. This topic is extremely sensitive and for a real approach it has to be considered many aspects, such as: the legal and constitutional regulating of the system of liability of this socio-professional category, but also of the vulnerabilities resulting from daily activities of a magistrate related to the organization and functioning system of the courts and prosecutors' offices, the pace of solving the cases and other matters.

In our opinion, in order to talk about the independence of justice, we have to consider the independence of the magistrate, the two concepts being closely related.

The revised Romanian Constitution expressly regulates the principle of the independence of the judicial power in relation to the executive and the legislative power, as previously mentioned in the introduction to this study. The constitutional provisions related to the independence of justice are contained in Chapter VI entitled "Judicial Authority", art. 124-134. So that, according to art. 124, (3): "Judges shall be independent and subject only to the law" and related to art. 125, (1): "The judges appointed by the President of Romania shall be irremovable, according to the law". We also mention that the institution called "the Superior Council of Magistracy" is the guarantee of the independence of law, according to art. 133 and. 134 from the Constitution. Moreover, the organic law on the status of the magistrates⁴, as amended and supplemented, has provided the principle of the independence of the judges and their obedience only to the law and the principle of the independence of the prosecutors. Another article refers to the fact that the justice is carried out in the name of the law, it is unique, equal and impartial for everyone. To these provisions, we can state that in our country, the independence of justice is constitutionally established.

Considering art. 6 of the European Convention on Human Rights, the fundamental principles of the United Nations Organization on the independence of the magistrates, approved by the United Nations General Assembly in November 1985, The Council of Europe (...) indicates that: "the governments of the Member States should adopt or reinforce all necessary measures to promote the role of the judges, individually, and also of the judiciary as a whole and should improve their independence and effectiveness (...)"⁵

On the European level, there is the Recommendation 94 (12) of the Committee of Ministers⁶ to the Member States on the independence, efficiency and role of the judges, adopted on October 13th 1994, that wishing to promote the independence of the judiciary, has developed several rules having the value of principles.

The same Recommendation under the Principle IV entitled "The Legal Responsibilities", in paragraph 3 b) states that "the judges should have the following specific responsibilities: to solve cases in an impartial manner in accordance with the evidences presented and the interpretation of law, to ensure that a fair hearing is given to all parties in the process and the procedural rights of the parties are being complied with in accordance to the provisions of the Convention".⁷

⁴ Law no. 303/2004 on the status of the magistrates, published in the Official Gazette 576/2004.

⁵ Florentina Dragomir, "Răspunderea penală a magistratului", (*The Criminal Liability of the Magistrate*), C. H. Beck Publishing House, Bucharest, 2011, p.19.

⁶ Recommendation 94 (12) of the Committee of Ministers, adopted by the Committee of Minister son October 13th 1994 within the 156th meeting of the State Secretaries, taken from *Consiliul Superior al Magistraturii, Apărarea independenței, imparțialității și reputației profesionale ale judecătorilor și procurorilor. Hotărâri ale Plenului Consiliului Superior al Magistraturii 2006-2009, the Superior Council of Magistracy,(The Defence of the Independence, Impartiality and Professional Reputation of the Judges and Prosecutors. Decisions of the Superior Council of Magistracy 2006-2009)*, C.H. Beck Publishing House, Bucharest 2010, pp. 185-202.

⁷ *The Superior Council of Magistracy, The Defence of the independence, impartiality and professional reputation of the judges and prosecutors. Decisions of the Superior Council of Magistracy, 2006-2009, work cited, p. 189.*

This is how, according to the above mentioned, the independence of justice is both nationally and internationally regulated.

2. The criteria for assessing the independence of a Court in the Jurisprudence of the European Court of Human Rights.

Closely related to the analysis of the concept of independence of the magistrates, in our opinion, is the concept of independence of the court. In order to identify what practical significance was given to it, we bring to mind that the European Court of Human Rights has a rich jurisprudence on establishing the compliance with the principle of independence.

Thus, in a case the European Court of Human Rights has stated the criteria for assessing the independence of a court, as follows: the independence of the executive as a party; the designation; the term of office; the warranties against pressure; the appearance of independence.⁸ Also the Court notes that in terms of art. 6 and 8, the impartiality must be assessed according to a subjective approach, trying to determine the personal conviction of a judge in a particular occasion, and also, according to an objective approach, reaching to ensure that there were enough warranties to exclude any legitimate doubt in this respect.

In another case, the Court in *case Maszni versus Romania* easily reaffirms that that in order to establish whether a court may be considered “independent” within the meaning of article 6 § 1, should be taken into account, in particular, the designation and term of office of its members, the existence of a protection against outside pressure and the fact of knowing whether or not there is an appearance of independence.⁹

If in relation to the judges, in the practice of the European Court of Human Rights, things are solved in terms of the signification of the warranties of independence, in the sense that we have already raised with regard to the prosecutors, things are slightly different. For example, in the *case Pantea v. Romania*¹⁰, the Court stated that the Romanian prosecutor, acting as a representative of the Public Ministry, subordinated in accordance to the law to the General Attorney but also to the Ministry of Justice, does not meet the condition of independence in relation to the executive, as required by art. 5, paragraph 3 of the Convention.

Also in case *Vasilescu v. Romania*¹¹ case, starting from the practice of the Court, Corneliu Bârsan stressed the idea that the text of art. 5, (3) of the Convention, lets the contracting states to choose between two types of authorities that cannot be confused, which is said judge or another magistrate.¹²

Also in terms of impartiality, the European Court of Human Rights in its jurisprudence defines it as “the absence of any prejudice or preconceived idea about the solution of a process and it reflects an important element of the rule of law, namely the sentence of the court is binding, unless it is invalidated by a higher court...”¹³

⁸ Popescu Nasta v. Romania case (Application no. 33355/96), Strasbourg Judgement, 7th January 2003, par. 44, <http://www.scj.ro/strasbourg/%5CPOPESCU%20NASTA-Romania%20RO.htm>, accessed on August 9th 2012.

⁹ Maszni v. Romania case (application no. 59892/00), Strasbourg Judgement, September 21st 2006, <http://www.scj.ro/strasbourg/maszni%20romania%20RO.html>, accessed on August 9th 2012.

¹⁰ Pantea v. Romania case on June 3rd 2003, <http://www.scj.ro>, accessed on August 9th 2012.

¹¹ Vasilescu v. Romania case on May 22nd 1998, <http://www.scj.ro>, accessed on August 9th 2012.

¹² C. Bârsan, *Convenția europeană a drepturilor omului, comentariu pe articole*, Vol. I, „Drepturi și libertăți”, (*European Convention on Human Rights, Comment on Articles, Vol. I, Rights and Freedoms*), All Beck Publishing House, Bucharest, 2005, p. 349, quoted by Silviu Gabriel Barbu *Funcțiile procurorului în protecția libertății individuale-analiză din perspectivă constituțională*, (*The Prosecutor's functions in protecting individual freedoms – analysis from the constitutional perspective*), in Liber Amicorum Ioan Muraru „Despre Constituție și constituționalism”, (*On Constitution and Constitutionalism*), Hamangiu Publishing House, Bucharest, 2006, p. 88.

¹³ De Cubber v. Belgium, judgement on October 26th 1984 and September 14th 1987, www.echr.coe.int, as quoted, Florentina Dragomir, *work quoted*, p. 37.

3. The Civil Society and the independence of justice

As expressly provided in the text of the Recommendation 94 (12) of the Committee of Ministers to Member States, on the independence, efficiency and role of the judges, the independence of judges is firstly and foremost linked to the maintenance of the separation of powers, namely, the executive and legislative bodies must refrain from taking any measures that could undetermined the independence of the judges. Moreover, the Recommendation states that “the pressure groups or other interest groups should not be allowed to undetermine this independence”. The question regarding this provision is the following: “Does the Civil Society represent a pressure factor likely to influence the independence of justice?”

In our opinion, a warning sign is the excessive media coverage of the cases pending in courts, situation in which we consider the defense claims of professional reputation by magistrates to be extremely justifiable. The practice of the Superior Council of Magistracy has plenty of these applications of magistrates.

The report¹⁴ on the Superior Council of Magistracy activity in 2012 states that: “according to the provisions of Law no. 303/2004 on the status of the judges and prosecutors, republished, with subsequent amendments and completions, the Superior Council of the Magistracy defends the judges and prosecutors against any act that could affect their independence or impartiality or would create suspicions about them”.

Thus, in a case¹⁵, it was noted that: “in a newspaper article published in a central daily, there were made assessments on the fact that the prosecutor, although he was in the possession of conclusive evidence in a case that he was prosecuting, he did not want to find the truth because of the political and money power, being <<sponsored>> together with a police officer by an investigated defendant. Towards those exposed the Superior Council of Magistracy Plenary estimated that the demand for professional reputation defense by the prosecutor P.D. is justified, as the articles published in the central daily in the period in which the research were about to come to an end, were likely to affect the professional reputation of the prosecutor.” Essentially, concludes the Superior Council of Magistracy Plenary “the professional reputation is closely linked to the independence, impartiality and integrity that must be shown by every prosecutor in his work”, this representing “the opinion that the magistrate creates in the collective consciousness about how he carries his profession” etc.

”To the extent that the trust of the society in the existence of these features is affected, and the public opinion becomes unfavorable, the lack of credibility of the magistrate results in the impairing of the professional reputation of the magistrate.¹⁶ Also, “the debate within a TV show of an evidence given in a civil case that is still pending in court, in appeals, and only the presentation of the opinion of the losing party, are likely to affect the professional reputation of the judge, doubly so as the program moderator made allegations about his professional training and moral probity.”¹⁷

Moreover, in another case, it was noted that: “the specific act of law accomplishment cannot be subject of public debate, motivated by the fact that it is the exclusive attribute of the judge and

¹⁴ The Report on the Superior Council of Magistracy activity in 2012, <http://www.csm1909.ro/csm/index.php?cmd=24>, accessed on February 16th 2013.

¹⁵ The judgement of the Superior Council of Magistracy Plenary no. 188 on March 6th 2008, *The Superior Council of Magistracy, The defense of the independence, impartiality and professional reputation of the judges and magistrates*, work quoted, pp. 53-55.

¹⁶ The judgement of the Superior Council of Magistracy Plenary no. 295 on March 27th 2008, *The Superior Council of Magistracy, The defense of the independence, impartiality and professional reputation of the judges and magistrates*, work quoted, pp. 64-66.

¹⁷ The judgement of the Superior Council of Magistracy Plenary no. 479 on May 29th 2008, *The Superior Council of Magistracy, The defense of the independence, impartiality and professional reputation of the judges and magistrates*, work quoted, pp. 73-75.

prosecutor, as stated in the constitutional principle of separation of powers, and in the provisions of the organic laws on the administration of law.”¹⁸

Not in all cases where the parties of a process make use of the right of petition provided by the Constitution whereby notify the Superior Council of Magistracy on the committing of a disciplinary offense by a magistrate does not mean the prejudice of the professional reputation of the magistrate. Thus, it was considered by the Superior Council of Magistracy Plenary that “the assessments of the petitioner M made in the statement addressed to the Superior Council of Magistracy and the prosecution requests submitted in the file, on the validity of the measures taken by the panel of judges and the compliance of the judges with the obligation of impartiality, is a manifestation of the freedom of expression as enshrined in art. 30 of the Constitution, of the exertion of the procedural law and of the right of petition.” “To the extent that the limits of the freedom of expression and the exertion of subjective civil rights have not been violated, and the assessments of professional activity of the judges have not been publicly exposed in a manner which is likely to create a negative image on the way of exertion of profession, it has been noted that the professional reputation of the judges C and S has not been prejudiced.

As shown in the Report on the Superior Council of Magistracy activity in 2012, during the year, within the Judicial Inspections Department, there were recorded 21 papers seeking the defense of the independence, impartiality and professional reputation of the judges, or, as the case, the defense of the independence and impartiality of the judiciary. As it concerns the prosecutors, the same report shows that, between 01.01.2004-14.11.2012, at the Judicial Inspections Department were recorded 20 papers seeking the defense of the independence, impartiality and professional reputation of the prosecutors, or, as the case, the defense of the independence and impartiality of the judiciary.

Conclusions

Through this study, we tried to capture in a personal manner, the peculiarities of the principle of the independence of law, starting with the legislative regulations and ending with the jurisprudence. That the law is independent is stated by the Constitution itself and by the international regulations. That the law is functioning emerges from the consultation of the jurisprudence. Moreover, as we have shown, the European Court of Human Rights, within its jurisprudence, has stated that the criteria for assessing the independence of a court, as presented. In conclusion, in our opinion, the independence of justice is functioning at the moment, it is not just a wish of the editors of the Constitution.

We believe that we have answered the question in the preamble of this study, namely if the Civil Society represents a pressure agent likely to influence the independence of law. From our perspective, it is not recommended and the Civil Society should not become a pressure agent on the principle of the independence of law, but at the most a balance agent. The excessive coverage of some topics has created the false impression that the law is influenced by the media pressure, which otherwise would be very dangerous if it happens in a democratic society in which each institution should operate according to well established rules on legislative.

Henceforth we anticipate a decrease of the demands for the defense of the professional reputation of the magistrates as long as there will not be a real liability of the media. Thus, in our opinion it is imperative to be established the law of the media so that the principal of the independence of law functions effectively.

¹⁸ The judgement of the Superior Council of Magistracy Plenary no. 618 on June 26th 2008, *The Superior Council of Magistracy, The defense of the independence, impartiality and professional reputation of the judges and magistrates*, work quoted, pp. 80-82.

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