

JUDGE'S LIABILITY WHILE CARRYING OUT THEIR PROFESSIONAL DUTIES

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Abstract

Nowadays, the Romanian social and political context debates more and more on the patrimonial liability of judges for errors of law in cases settled by them. This work aims at presenting legal terms, based on which both the civil and criminal disciplinary liability can be generally enacted.

Keywords: judge, prosecutor, liability, status, disciplinary

1. Introduction

This is a matter of general interest as it is an element which strongly supports the people's confidence in the act of justice, impartial and equal for all of them. Therefore, the state has a series of judicial instruments, in order to guarantee the lawfulness of the prosecutors and judges activity, their interest in protecting the law supremacy, in observing the people's rights and freedoms, and also in protecting their equal judicial treatment within the judicial procedures. These instruments represent the main subject of our work study.

In other words, we want to present the enforce regulations for judges' professional liability.

It is an important aspect as Romanians are not properly informed about the possibility to have judges in such position and therefore, we consider that a short description of the regulations in this matter would be very useful.

The Romanian Constitution states the patrimonial liability of the State for the errors of law. This means that the victim which suffered damages of rights caused by a public institution by means of an administrative action or by absence of solution of a demand within the legal term, has the right to get recognition of the alleged right or legitimate interest, the annulment of the act and the legal remedy.

2. The judge's liability

According to art 52, paragraph (3) of the above mentioned Romanian constitution, the State is liable for the damages caused by judicial errors produced by

judges who proved mala fide or serious negligence in exercising their profession.

Article 94 of law no 303/2004¹ on the status of judges and prosecutors, classifies the liability as civil, disciplinary and criminal.

Also, the Criminal Procedure Code dedicates a whole chapter to the repair procedure of the compensation in case of error of law or illegal deprivation of freedom.

Judges liability is also regulated by: art 42 and art 44 - 50 of Law no 317/2004 on the Superior Council of Judges (CSM)², Internal Regulation of Courts³, Internal Regulations of Prosecutor's Offices⁴ and the Order no 94 of 30.08.1999 on Romanian participation to procedures within the European Court for Human Rights and the Committee of Ministers of the European Council and the acceptance of the State after the decisions and conventions for amicably solutions⁵.

2.1. Disciplinary liability

According to art 98 of Law no 303/2004, judges and prosecutors are disciplinarily liable for non compliance with the profession duties and for their actions affecting the justice prestige. Art 101 of the same law states that the disciplinary sanctions are to applied only by the departments of the Superior Council of Judges, pursuant to its organic law. Their application procedure is therefore regulated by Law no 317/2004.

Articles 12-16 on exercise of professional duties, part of the Deontological Code for judges and prosecutors, state that they:

- have the obligation to do their professional duties with competence and correctness, to comply with the

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¹ Law no 303/2004 was published in the Official Gazette, Part I, no 576 28th of June 2004; After amending by Law 247/2005 published in the Official Gazette, Part I, no 653 of 22nd July 2005, Law 303/2004 was republished in the Official Gazette, Part I n 826 of 13th September 2005.

² Law no 317/2004 was published in the Official Gazette, Part I no 599 of 2nd July 2005, after being amended by Law 247/2005 published in the Official Gazette, Part I, n 653 of 22nd July 2005, Law no 317/2004 republished in the Official Gazette, Part I no 827 of 13th September 2005.

³ Approved by CSM decision no 159/2004, published in the Official Gazette, Part I, no 881 of 27th September 2004, with subsequent amendments and completions.

⁴ Approved by Order of Minister of Justice no 2850/2004, published in the Official Gazette, Part I, no 1087 of 23rd of November 2004.

⁵ Order no 94 of 30th of August 1999 on Romanian participation to procedures of CEDO and Ministry Committee of European council and the regress of Romanian State after the decisions and amicably conventions, published in the Official Gazette, Part I, no 424 of 31st August 1999, approved and amended by Law no 87 of 20th March 2001 published in the Official Gazette, Part I, no 145 of 23 March 2001.

administrative tasks assigned by law, regulations and orders;

- have the obligation to do anything necessary in order to carry out their duties within the legal terms, and if the law doesn't stipulate it, within the reasonable terms;

- have to protect the order and the solemn atmosphere in the court room and to adopt a dignify and civilized attitude towards the parties, lawyers, witnesses, experts, interpreters or other persons and ask them to adopt an appropriate behavior;

- have the obligation not to disclose or use the information for other purposes than those directly related to their profession activity;

- have to carry out their managing tasks by organizing the activity of the employee, to have initiative and be responsible; in making decisions they have to give priority to the interests of courts and prosecutor's offices, and to good justice act;

- as managers, don't have to make use of their prerogatives to influence the trials and decisions.

For justice reputation, an obligation provided by art 98 of Law no 303/2004 together with articles 17-20 of the same Deontological Code of Judges state that:

- judges and prosecutors have to refrain from any actions capable to compromise their dignity during the exercise of their profession and in the society;

- the relationships of the judges and prosecutors with other members of the groups they belong to, must be based on respect and bona fide, no matter the length of service and position;

- judges and prosecutors cannot express their opinion about the professional or moral probity of their colleagues;

- judges and prosecutors can express publicly their opinion by exercising their right to answer in case there are slanderous media articles or broadcasts about them;

- judges and prosecutors cannot carry out actions that, by their nature, financing or application manner, could alter the impartial, correct and legal fulfillment of their professional duties.

According to art 99 of Law 303/2004 the following represent cases for disciplinary sanctions:

- actions affecting the honorability of professional probity or the justice prestige, during the exercise, or not, of their profession duties;

- violation of legal provisions related to impairment and interdictions ruled on the names of judges and prosecutors;

- inappropriate behavior, while exercising their profession, towards colleagues, court employees and prosecutor's office personnel such as judicial inspectors, lawyers, witnesses, justice seekers or other institutions representatives;

- public political actions while being at work;

- unjustified refusal to receive the requests, conclusions, reports or other papers lodged by the trial parties;

- unjustified refusal to fulfill a professional duty;

- prosecutor's non observance of the legal written decisions ruled by the hierarchically superior prosecutor;

- repeated and unfounded non compliance of the legal provisions regarding the prompt solution of causes and repeated delay in carrying out works, out of imputable reasons;

- non compliance of the obligation to abstain when they have to, according to law, and also lodging repeated and unjustified requests to abstain in the same case, leading to the case deferral;

- non compliance with the provisions on secret about debates or works, or other information of the same nature, disclosed during the exercise of the profession, except for those of public interest, within the limits of the law;

- unjustified, repeated absence from work, directly affecting the activity of court or the prosecutor's office;

- interfering with the activity of another judge or prosecutor;

- unjustified observance of the decisions or administrative ruling pronounced according to law by the head of the court of prosecutor's office or other administrative institutions provided by law or regulations;

- usage of the position in order to get a favorable treatment from authorities or interventions to solution certain requests, claim or acceptance of personal interests;

- serious and repeated non observance of the provisions regarding the random distribution of cases;

- occlusion of the control activity of judicial inspectors, by any means;

- direct or indirect participation to pyramid type games, gambling or investment systems with no funds transparency;

- total lack of motivation of the judge's ruling or of the prosecutor's judicial actions, pursuant to the law stipulations;

- usage of inappropriate expressions while ruling the decision or while drawing up the judicial papers, affecting the justice prestige or the judge position dignity;

- non observance of the decisions of the Constitutional Court or the decisions ruled by the High Court of Justice and Cassation in solving the appeals according to law;

- mala fide or negligent position disrespect.

The disciplinary sanctions applicable to judges or prosecutors, depending on the seriousness of their non compliance, are as it follows:

- warning ;

- up to 20% reduction of the monthly gross indemnity for a period up to 6 months;

- disciplinary moving for as period of up to 1 year to another court or another prosecutor's office upon a Court of Appeal;

- suspension for up to 6 months;

- elimination from the Judges Council.

Disciplinary sanctions for judges are applied by the special committees of the Superior Council of Judges, made up of one judge and 2 judicial inspectors, whereas for prosecutors, the committee is made up of one prosecutor and 2 judicial inspectors. Each year the Superior Council of Judges through its special departments for judges and prosecutors appoints the members of these committees.

For disciplinary sanctions it is necessary to have a previous investigation which is ordered by the author of this action, being represented by the corresponding disciplinary commission of the Superior Council of Judges. The investigation is performed by inspectors of the judicial inspection department⁶, one for judges and one for prosecutors. The result of this investigation is forwarded to the disciplinary commission within 60 day time from the moment the Superior Council of Judges registers the request.

If the disciplinary commission considers the investigation unjustified, they will classify it⁷. On the contrary, after receiving the result of the investigation or of supplementary confirmation, the disciplinary commission informs the corresponding department in order to take further disciplinary actions and have a conclusion issued by the Council⁸.

The prescription period is 1 year from the moment of committing the crime.

According to art 45 of Law no 317/2004 of CSM, the disciplinary investigation focuses on actions and circumstances and any other important information proving the guilt. The investigated judge or prosecutor have the right to be heard, to make statements, to be present during the investigations, and when they refuse it their decision is put down in a minutes, which is not an obstacle for the investigation to go on. Also they have the right to study all the file documents and to ask for evidence in order to prepare their defense.

2.2. Criminal liability

Judges and prosecutors have to be independent and impartial, and for this, the legal system contains measures which protect them from abusive trials, vicious procedures and all kind of urges. It is important to say that the most important protection is to grant special capacity for criminal investigations and trials of crimes committed by prosecutors and judges⁹.

Thus, according to art 324 paragraph (1) together with art 56 paragraph (3) letter a) and art 38 paragraph (1) letter c), the criminal prosecution must be carried out by prosecutor for crimes committed by judges of Law Courts, and by prosecutors of offices affiliated to these institutions.

The New Criminal Procedure Code considers that a criminal investigation conducted by a prosecutor is an additional guarantee of lawfulness and thoroughness in cases with high complexity degree, given the matter or the author status¹⁰.

Article 95 paragraph (2) and (3) shows that judges, prosecutors and side judges can be searched, retain in custody or even preventively arrested only after there is approval from the departments of the Superior Council of Judges, and if it is a clear crime, they can be retained, searched and arrested pursuant to law, while the Superior Council of Judges is immediately informed about these actions.

2.3. Civil liability

People consider that judges are the only social category not being held responsible for their work. Therefore, people wanted to amend art 96 of Law no 303/2004 on the status of judges and prosecutors and several senators and deputies of Romanian Parliament forwarded a initiative concerning the situation when Romanian State is convicted by an international court, such as CEDO, and compelled, by final decision, to pay compensation. They consider it is absolutely necessary to have an action against the judge who, with mala fide or by negligence caused prejudices. Also, the project envisaged that "after the damages are remedied by the State, this one will start immediately an action for legal remedy against the judge or prosecutor who with mala fide or by negligence did the judicial error causing the losses". "The prescription term of the right to begin action for all the cases provided by this article, is 10 years".

But, after analyzing the law project, the reasons, the approval issued by the Law Council, the decision of the Superior Council of Judges and other opinions, the project for amending art 96 of Law no 303/2004 on the status of judges and prosecutors was rejected.

Studying the circumstances where a judge has patrimonial liability, we will see that the current legal system allows the justice seeker, who suffered because of the solution ruled by the judge, to obtain legal remedy and the State to recover from this one the paid compensation through a regress action against the judge.

Romanian Constitution and Law no 303/2004 present two different institutions: State patrimonial liability for judicial errors and judges' patrimonial liability.

Thus, art 52 of the Romanian Constitution shows that the State pays for the prejudices caused by judicial errors. It is set by law and doesn't eliminate the liability

⁶ Rules on Judiciary Inspector Body organizing and functions, art 1 paragraph (3): the purpose of the judiciary inspection is to help to improve the quality of the justice act, its efficiency, by means of independent inspections and assessment of the activity.

⁷ Resolution of 27 April 2012. The Commission for discipline of CSM, rules: classification of the case where lady Judge C.M.L., of C. Court, committed disciplinary error provided by art 99 letter m of Law 303/2004 on the status of judges and prosecutors, as amended by Law no 24/2012, and where ladies Judge N.A., C.D. and I.R. of C. Law Court committed disciplinary error provided by art 99 l t.

⁸ Liability of Laura Ivanovici, Court of Appeal of Bucharest Judge Cristi Danilet, Cluj Law Court.

⁹ www.mpublic.ro.

¹⁰ M.Udroiu, Criminal Procedure Code. Commented Articles, C.H. Beck Publishing House, Bucharest, 2015, page 865.

of judges who have done their work with mala fide or negligence.

So, the victim has to prove the mala fide or the negligence of the judge which have caused the prejudice.

Article 99 of Law no 303/2004, on status of judges and prosecutors, explains both the expression mala fide and serious negligence, saying that: mala fide is when the judge or prosecutor intentionally violates the material or procedural law, seeking or accepting to cause prejudices to a person; severe negligence is when the judge or prosecutor willingly and severely violates the law.

Also, art 96 stipulates that the state liability is set by law and doesn't eliminate the liability of judges or prosecutors who did their work with mala fide or severe negligence. The Criminal Procedure Code presents the cases where the victims have the right to claim compensation for damages caused by judicial errors made in criminal trial. The person who had a part in causing the judicial error made by the judge or prosecutor, has no right to claim damages.

It is important to see that the law makes a difference between errors made during the criminal trial and other trials. For the criminal trial, the State liability is set by the Criminal Procedure Code. Art 99 paragraph (4) stipulates that the right of victims to legal remedies in case of material prejudice caused by judicial errors in trials other than the criminal ones, cannot be put into practice unless it was previously decided, by final decision, the criminal or disciplinary liability of the judge or prosecutor, for a crime committed during the trial, and whether this crime is able to result in judicial error.

In both cases, the victim can start an action only against the State, represented by the Ministry of Public Finances.

Therefore, the patrimonial liability of the judge is secondary to the one of the State in relation with the victim and at the same time, indirect towards the victim. Thus, if the victim wants to hold patrimonial liable the judge or the prosecutor, for their activity, it is necessary to ask for the damage repair upon the Ministry of Public Finances, which is the Romanian State representative.

For this, we consider very important the provisions of art 538-541 which offer explanations about the remedy circumstances procedure for material or moral damages in case of judicial error in case of illegal freedom deprivation.

Thus, the person who was sentenced by final decision, has the right to claim legal remedy from the State if after the retrial of the case, after annulment or elimination of the sentence decision for a new crime proving that a judicial error was made, ruled a acquittal solution. The same thing happens when, in a retried

criminal case where the defendant had been judged in absentia, a final acquittal decision is ruled.

So, the first condition for a victim to obtain damages paid by the State is to have a final sentence¹¹, the source of serious material or moral prejudice. Moreover, it is necessary to have a judicial error.

Another condition is that the convicted person be acquitted by means of a final decision, after:

- the case retrial, having annulled or eliminated sentence decision for a new or recent crime proving that it was a judicial error;
- re-open the criminal case for the convicted tried in absentia.

This regulation stated by art 538 paragraph (1) of the new Criminal Procedure Code, concerning the annulment or elimination of the conviction decision, complies with the CEDO jurisprudence, which says that art 3 of Protocol no 7 of the Convention can be enforced only after the elimination of the criminal convicting decision¹².

The person has the right to claim damages also in the case of illegal freedom deprivation.

Thus, art 539 of the New Criminal Procedure Code, called "the right to compensation in case of illegal detention, stipulates exactly this right, to compensation if during the criminal case, the person was illegally detained". Paragraph (2) states that illegal detention must be proved, according to the case, by prosecutor order, by final conclusions of the judge for freedoms and rights or the decision of the Judge of Preliminary Chamber, together with the Court final decision.

It is important to take into account the fact that if art 538 of the New Criminal Procedure Code envisages only the case where a person is acquitted as the result of a case retrial for a new or recent crime or for a case where the person was tried in absentia, art 539 focuses on any illegal detention, even if this measure was adopted for a person convicted for a crime which is not punished by criminal law. Such example is represented by the retention of a witness for several days because he/she doesn't want to make a statement¹³.

In this matter, we have some CEDO decision, such as "Creangă vs Romania" and "Konolos vs Romania".

The New Criminal Procedure Code also presents the way of compensating the victim taking into account the retention period together with the consequences produced on the victim, family or the person in the situation described by art. 538.

According to paragraphs (2) - (4), the compensation represents a sum of money or a lifetime pension, or the obligation of the State to support the costs of the victim placing in a social and medical institution.

¹¹ According to art 551 NCPP the decision of the court of first instance becomes final the ruling date, when there is no appeal, or the date the appeal becomes invalid. Also, the decision of the court of first instance becomes final the date the appeal is withdrawn, if this was lodged after the set term, or the date of the decision ruling the rejection of the appeal.

¹² CEDO, Matvezev vs Rusia, decision of 3 July 2008, paragraph 38.

¹³ M.Udroiu, Criminal Procedure Code. Commented Articles, C.H. Beck Publishing House, Bucharest, 2015, page. 1383.

The compensation type shall depend on the situation of victim.

Victims with the right to compensation who, before being retained as the result of a final convicting decision, had been forced to labor, will benefit from provisions of law stating that the time worked in such circumstances shall be considered as seniority together with the time spent in illegal detention.

The passive procedure quality as described by art 538 and 539 of the New Criminal Procedure Code, shows in paragraph (5) of art 540, that it is reserved only for the Romanian State, represented by the Ministry of Public Finances, and not for the judicial bodies who caused the judicial error. These bodies shall have patrimonial liability only if the State shall begin legal action against them.

Victims with the right to legal compensation are, according to art 541 paragraph (1) either the victim or the persons supported by the dead victim.

According to art 541 paragraph (2), the prescriptive period is for lodging legal remedy demands against the State is 6 months beginning with the date of the final decision of the court and the date of the order or conclusions of the judicial bodies which proved the error of law or the illegal detention.

4. Conclusions

As we have already said, the current legal system makes the clear difference between two liabilities: the State patrimonial liability in case of error of law and the patrimonial liability of the judge in relation with the first one.

According to art 52 paragraph (3) of the Constitution, the State liability is set by the law conditions and doesn't exclude the judges' liability for having done their work with mala fide and serious negligence.

Article 96 of Law no 303/2004 details the provisions. It states that the victim has the right to legal remedy caused by error of law during criminal trials in the cases regulated by the Criminal Procedure Code.

Therefore, the terms for actions against the State are provided by art 542 of the New Criminal Procedure Code, called "Legal Remedy Action".

If the legal reedy has been done according to art 541 and if the Romanian State has been convicted by an international court for one of the cases provided by art 538 and art 539, the legal remedy action for the paid sum can be lodged against the person who, with mala fide or by severe fault, caused the situation which led to serious damage, or against the insurance company for damages in case of damages caused while doing the job. The State has to prove during the legal remedy action (regress action), by prosecutor's order or criminal final decision, that the insured person according to paragraph (1) caused with mala fide or by severe professional fault the damaging error of law or the illegal detention leading.

In conclusion, the terms for exercising the regress actions are the following:

- the existence of a final decision ruled by a domestic or international court¹⁴;
- the legal remedy paid by the State to the victim;
- proof of mala fide or the severe professional fault by means of the prosecutor's order or final criminal decision.

We can see though, the regress action of the State against the faulty judge, for the judicial error, is still an optional thing. Moreover, the Ministry of Public Finances has never lodged such action so far. Also, the same Ministry has never been notified by the Superior Council or Judges, which has the right to set the civil or disciplinary liability of judges, according to art 94 of Law 303/2004, regarding the lodging of a regress action in order to recover the prejudice caused to the State¹⁵.

References:

- Romanian Constitution;
- Romanian Criminal Procedure Code;
- Law no 303/2004, on the status of judges and prosecutors with subsequent amendments and completions;
- Law no 317/2004 on Superior Council of Judges organizing and functioning with subsequent amendments and completions;
- Order no 94 of 30 August 1999 on Romania taking part at the procedures of CEDO and of Committee of Ministers of European Council approved and modified by Law no 87 of 20th March 2001;
- Rules for organizing and functioning of judicial inspection;
- Mihail Udriou, Criminal Procedure Code, Commented articles, C.H. Beck Publishing House, Bucharest, 2015;
- Internal rules of Courts and Prosecutor's Offices;
- CEDO Decision of 23 of February 2012, ruled in case Creangă vs Romania;
- CEDO Decision of 07 of February 2008, ruled in case Konolos vs Romania.

¹⁴ Such example is when during a criminal case, a third party statement is used after it has been obtained by torture. (CEDO, Othman Abu Qatada vs United Kingdom, decision of 17 January 2012, parag 267).

¹⁵ www.cdep.ro, site accessed on 29th February 2016, at 14:30.