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## Patrimonial Liability of Romanian Magistrates

### Introduction

Within a democratic country, nobody can be exonerated from liability for deeds committed during the performance of a public office. Magistrates are no exception to this fundamental principle of the rule of law according to art. 16 of the Romanian Constitution, "No one is above the law". Therefore, magistrates are also held liable when they break the law in the performance of their duties. Nevertheless, the legal liability of magistrates may only be applied in compliance with the conditions and forms provided by the Constitution and those special laws involving the overall principles regarding law enforcement and the exercise magistracy: the independence and the impartiality of magistrates, non-removability of judges, and the appointment of prosecutors. In other words, any regulation concerning the liability of magistrates must observe the principle of proportionality, aiming at keeping a right balance between liability and independence.

The magistrate that settles a case must be independent; otherwise the desideratum of reaching a "fair" sentence will not be reached. The litigants must also be convinced that, on one hand, the magistrate that examines their case is protected against potential forbidden pressure and that, on the other hand, the litigants themselves are protected in the event that the magistrate abuses his/her position. But the non-removability of judges and the appointment of prosecutors do not mean that they enjoy impunity. Non-removability, although indispensable according to law, is not absolute and it is not established only for the judge's benefit, but also for the benefit of justice and, in the last resort, for the benefit of society. Consequently, the magistrate's independence is a right of every citizen, and this independence cannot serve as an escape of the magistrate when he/she violates his/her professional duties in gross negligence or bad faith.<sup>1</sup> The Constitutional Court of Romania has also ruled to this end, emphasizing that the constitutional principle of the independence of the judici-

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<sup>1</sup> A. Bodnar, "Civil Liability of Magistrates in the Context of the New Legislative Proposals", p. 2, [www.juridice.ro/549626/rapunderea-civila-a-magistratilor-in-contextul-noilor-propuneri-legislative.html](http://www.juridice.ro/549626/rapunderea-civila-a-magistratilor-in-contextul-noilor-propuneri-legislative.html) (accessed: 2020.05.25).

ary cannot be interpreted as exonerating judges from liability for the judicial errors they commit, given the consequences of these errors for both the litigants and the Romanian state.<sup>2</sup>

Thus, in compliance with the Romanian Constitution<sup>3</sup> and Law no. 303/2004, on the status of judges and prosecutors,<sup>4</sup> Romanian magistrates can be held responsible for deeds committed in the exercise of their professional duties. Three forms of their liability are regulated, namely: criminal liability, disciplinary liability, and civil (patrimonial) liability.

The criminal liability of magistrates is applied for those categories of offenses that can only be committed within the process of the administration of justice. Civil or patrimonial liability is mainly that which leads to a state obligation to compensate, to repair damage caused by judicial errors, without excluding the state's right to recourse against the persons who, by their actions have led to the payment of the compensation. While the disciplinary liability specific to the functioning of judicial authority crystallizes around the concepts of offense and sanction, it is manifested through their very specific content and through the procedures of investigating the offense and enforcing the sanction, as well.<sup>5</sup> Disciplinary liability may coexist with civil liability or it may be completed by it.<sup>6</sup>

Regarding actions or inactions that have no connection with the exercise of professional duties, magistrates, just like the other Romanian citizens, may face criminal or civil liability, in compliance with common law. Their professional position has no relevance in this matter.

Furthermore, we analyze the civil liability of magistrates in light of the latest amendments to this institution, disciplinary liability and civil liability being mentioned only when they are relevant to civil liability.

## 1. Domestic regulations concerning the civil liability of magistrates

The judges' civil liability was regulated for the first time in Romania by the Code of Civil Procedure (art. 305), which came into force in 1865. The first specific mention of magistrates' civil liability in a law on judicial organisation is found in art. 127 of the Law on judicial organisation of 1890. The Law on judicial organisation of 1938 established in art. 184–186, as another innovation, the right of the "persecuted parties" to take le-

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<sup>2</sup> Constitutional Court of Romania, decision no. 799 from 17 June 2011, published in the Official Gazette no. 440 from 23 June 2011.

<sup>3</sup> Constitution of Romania, republished in the Official Gazette no. 767/2003.

<sup>4</sup> Law no. 303/2004, on the status of judges and prosecutors, republished in the Official Gazette no. 1024/2019.

<sup>5</sup> E. Barbu, Silviu Gabriel Barbu, "The constitutional dimension of the liability of magistrates-short considerations" [in:] *Liability in the Constitutional Law*, C.H. Beck Publishing House, Bucharest 2007, p. 78.

<sup>6</sup> I. Deleanu, *Constitutional Institutions and Procedures – in Roman Law and in Comparative Law*, C.H. Beck Publishing House, Bucharest 2006, p. 798.

gal action not just against judges, but also against “all members of the body of judges,” including the prosecutors, by “recursive action.”<sup>7</sup>

At present, the institution analyzed by us is regulated by provisions that are mainly contained, in the following legislative acts:

### **1.1. The Constitution of Romania of 1991, revised**

The constitutional lawmaker regulates a patrimonial liability of the state for every type of judicial error as well as, alternatively, a liability of magistrates, through 52 par. 3 of Constitution of Romania: “The State is financially liable for any damages caused by judicial errors. The State liability is established under the terms defined by the law and does not exclude the liability of those judges who have acted in bad faith or were grossly negligent.”

Accordingly, the Constitution of Romania establishes the principle of the state’s direct liability for judicial errors and, by way of exception, establishes the subsidiary liability of magistrates regarding the facts and deeds committed in the performance of their duties. The state’s liability is engaged in order to protect the rights of the party injured by a public authority, but also in order to protect the magistrate, as long as the source of an error results from the behavior of other participants in the trial (witnesses, experts, interpreters) or from other objective reasons.<sup>8</sup> On the other hand, if the judge performs his duty in bad faith or by being grossly negligent, the State has the possibility of bringing proceedings for recourse with the aim of retrieving the damage caused to the injured party by assuming the patrimonial liability for the judicial errors.

Thereby, in the light of the Constitution, a magistrate guilty of committing a judicial error is liable only to the state, and it is not possible to engage his/her liability directly to the parties injured by a judicial error.<sup>9</sup>

### **1.2. Law no. 303/2004, on the statute of judges and prosecutors**

The provisions of par. 3 of art. 52 of Constitution are summed up and detailed by art. 96 of Law no. 303/2004, which represents the legal basis for the patrimonial liability of magistrates.

The above-mentioned provisions have recently been the subject of some legislative amendments, intensely debated in the legal world and in Romanian society. They were eventually censured because of their unconstitutionality by the Romanian Constitutional Court. These provisions establish the principle of indirect liability, namely the right of an injured party, with a view to repair any damage, to only proceed

<sup>7</sup> I. Popa, *Laws of Justice. Amendments, Necessity, Boycott*, Universul Juridic Publishing House, Bucharest 2019, p. 98.

<sup>8</sup> Constitutional Court of Romania, decision no. 633 from 24 November 2005, published in the Official Gazette no. 1138/2005 and decision no. 263 from 2 April 2015, published in the Official Gazette no. 415/2015.

<sup>9</sup> I. Muraru, E.S. Tănăsescu, *Romanian Constitution. Comment by articles*, C.H. Beck Publishing House, Bucharest 2008, p. 522.

against the Romanian State, represented by the Ministry of Public Finance. But at the same time, they widely regulate the terms of seeking proceedings for recourse against the judge or prosecutor who performed his/her professional requirements in bad faith or in a manner exhibiting gross negligence, as we shall show at length in chapter 3.

### **1.3. Code of Criminal Procedure**

In art. 538–542, the Code of Criminal Procedure regulates proceedings regarding compensation for property damage or emotional distress in the event of judicial error or in the event of unlawful deprivation of liberty, referring to the state's proceedings for recourse against a person who, in bad faith or gross negligence, by ordinance (made by the prosecutor) or by final judgment, has caused the loss-generating situation.<sup>10</sup>

1.4. Government Ordinance No. 94/1999 on the participation of Romania in proceedings before the European Court of Human Rights and the Committee of Ministers of the Council of Europe and the State's recourse following judgments and friendly settlement conventions.

In the light of the provisions of Government Ordinance No. 94/1999, the Romanian State may exercise the right of recourse against persons who, by their activity, are guilty of having caused the State's obligation to paying the amounts established by the judgement of the European Court or a friendly settlement convention.

In such a case, the civil liability of magistrates is also established under the conditions laid down in Law no. 303/2004, on the status of judges and prosecutors, which has been mentioned above.

## **2. The notion of judicial error**

An examination of patrimonial liability of a magistrate is subject to the existence of a judicial error, an autonomous notion, which raises the question of the defective nature of the functioning of the justice system, and which must be interpreted according to the letter and spirit of art. 52 par. 3 of the Romanian Constitution. In compliance with this constitutional text, a judicial error entails misconduct of a certain seriousness in the application and interpretation of legal regulations, whether they are procedural or substantive, but which have severe consequences for fundamental rights and liberties. Therefore, not just any insignificant mistake may be characterized as a judicial error, but only those unusual deviations from the usual way of conducting judicial proceedings or of applying substantive law regulations, evidenced in manifest errors, unequivocal errors, incontrovertible errors, crass errors, gross errors, absurd errors, or errors that have caused factual or judicial conclusions that are illogical or irrational. Non-unitary case-law, a change of previous case-law, or what are simple wrong

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<sup>10</sup> Art. 542 of Code of Criminal Procedure, published in the Official Gazette no. 486/2010.

judicial interpretations, likely to be corrected by ordinary or extraordinary remedies, are not designated as judicial errors within the meaning of art. 52 par. 3 of the Romanian Constitution.<sup>11</sup>

We must also mention that it is not required that a judicial error result from the ruling of a wrong court order, contrary to factual or judicial reality, but it may be also regarded from the perspective of the manner of conducting proceedings (lack of expediency, unjustified postponements, a court decision given with undue delay). A crass breach of the judicial proceedings may have as a consequence damage to fundamental rights as serious as disobeying substantive law regulations.

Considering these guidelines drawn by the Romanian constitutional court and after a first failed attempt,<sup>12</sup> the legislator, by amendments to art. 96 par. 3 of Law no. 303/2004, republished in 2019, stops with the following definition of judicial error:

A judicial error occurs when:

- a) the performance of procedural acts is ordered in obvious breach of substantive or procedural law, whereby a person's rights, freedoms, and legitimate interests are seriously violated, thus causing damage that cannot be remedied by ordinary or extraordinary avenues of appeal;
- b) a final court decision is pronounced that is obviously contrary to the law or the factual situation resulting from the evidence produced in the case, severely affecting a person's rights, freedoms, and legitimate interests, and such damage cannot be remedied by ordinary or extraordinary avenues of appeal.

Based on the above-mentioned legal text, it is apparent that the legislator was interested in applying the concept of judicial error on both the levels of the functioning of justice, namely the activity of judges, which is evident in some judgements, and the activity of prosecutors, which is evident in the issuance of ordinances or indictments. The manner of drafting of the provisions of art. 96 par. 3 section a) is unitary, meaning that it concerns both the activity of the judge, in terms of the way the judge has heard the case and the activity of the prosecutor. On the other hand, section b) of the same paragraph only focuses on the activity of the judge, evidenced in a ruling of some final judgements. It should be noted that section b) does not exclude the application of section a) regarding the activity of the judge, as, it has been emphasized by the decision of Constitutional Court no. 45/2018, the flaws in the functioning of justice also involve manifest irregularity concerning the carrying-out of procedure, which means that ruling a correct judgement does not automatically lead to a "cover-up" of any procedural errors committed during the proceedings, which were of sufficient magnitude and caused serious damage to a person's rights, liberties, and legitimate interests.

Let us also note that, regarding the new text of par. 3 of art. 96, that it removes the previous distinction between judicial errors committed within criminal trials and

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<sup>11</sup> Constitutional Court of Romania, by decision no. 45 from 30 January 2018, published in the Official Gazette no. 199/2018.

<sup>12</sup> The first form of the amendment of Law no. 303/2004 was declared partially unconstitutional, including the part regarding the liability of magistrates, by decision no. 45/2018 (cited above), and decision no. 252 from 19 April 2018, published in the Official Gazette no. 399/2018.

errors committed within other trials than criminal ones, basically unifying their general legal regime. But, on the other hand, par. 4 of art. 96 provides that, by the Code of Civil Procedure and Code of Criminal Procedure, as well as by other special laws, in which specific hypotheses exist, must be regulated. In this respect, as we have stated before, art. 538–542 of the Code of Criminal Procedure regulates the procedure of repairing property damage or emotional distress in the event of a judicial error or unlawful deprivation of liberty. According to this special procedure, in criminal matters, judicial error exists also in the event of a previous final conviction for which, subsequently, following a retrial, a final acquittal decision was ordered.<sup>13</sup>

### **3. The conditions when the liability of the state may be incurred for judicial errors**

According to the same art. 96 par. 1 of the Law on the status of judges and prosecutor, “the state shall be held liable with its assets for the damages caused by judicial errors”. Consequently, a judicial error represents the only source of state liability for any dysfunctionalities of the justice system and the state has this general obligation of objective liability, without imputation of guilt, for judicial errors, as opposed to magistrates, who are only liable for judicial errors committed in bad faith or out of gross negligence.

Within the new text of art. 96, the civil liability of the state for judicial error is no longer to be connected with incurring criminal liability or disciplinary liability on the part of the magistrate, but strictly with the idea of judicial error. In other words, the compensation owed by the state for judicial error is conditional on the commission of a deed by a judge or prosecutor for which he/she has been criminally or in disciplinary terms held liable. The state pays compensation to the injured parties, if a judicial error has taken place, regardless of the conduct of the magistrate in question; basically, the civil liability of the state is far away from the area of the criminal or disciplinary liability of a judge or prosecutor. As a consequence, the liability of the state becomes a direct and objective liability, not being conditional on the subjective position that the judge or prosecutor held during the trial. This mechanism, *per se*, is not contrary to art. 52 par. 3 of the Romanian Constitution, as republished, but is broadly speaking an expression of it, at the hands of the lawmaker.<sup>14</sup>

As we have clarified the scope of the two sections of par. 3 of art. 96 of Law no. 303/2004 on juridical error, we notice that within the content of section a) there are certain conditions of admissibility of an action brought for finding judicial error. These are as follows: the existence of a civil or criminal trial during which the alleged judicial error took place; the existence of some procedural acts performed kept by the judge or prosecutor; the infringement or breach of the legal provisions of substantive law or

<sup>13</sup> Art. 538 of the Criminal Procedure Code, published in the Official Gazette no. 486/2010.

<sup>14</sup> Constitutional Court of Romania, decision no. 45/2018.

procedural law by making these procedural acts; the breach has an obvious character; the breach so committed has affected or severely breached a person's rights, liberties, and legitimate interests; the generating of a damage which, of course, may only be of the same degree of intensity as the breach caused to the person's rights, liberties, and legitimate interests, that is severe damage; and the damage caused cannot be corrected by an ordinary or extraordinary remedy.

As far as section b) of the paragraph indicated above is concerned, the following conditions of admissibility obtain: the existence of a civil or criminal trial during which the alleged judicial error took place; the existence of a final judgement; the final judgement is contradictory to law or the factual situation, which emerges from the evidence provided in the case; the breach is obvious; the breach committed this way has affected or has severely breached a person's rights, liberties, and legitimate interests; the generating of a damage which, of course, may only be of the same degree of intensity as the breach caused to the person's rights, liberties, and legitimate interests, that is severe damage; the damage caused cannot be corrected by an ordinary or extraordinary remedy.

Therefore, there are at least seven conditions of admissibility of bringing an action to acknowledge judicial error for the two legally distinct hypotheses, which reflects the existence of a very strict filter, so that it does not concern any mistake committed during the criminal investigation or during the trial, but strictly only those individualized within the analyzed text.

Hence, an action claiming the liability of the state for judicial errors has the legal nature of a deed in tort liability where judicial error is established (namely the committed deed, except for the hypotheses of art. 538 and art. 539 of the Code of Criminal Procedure, where the error has already been established), the actual loss (the damage produced which is to be repaired by the compensation that is to be given to the injured party), and the causal relationship between the tort and the damage.

With the purpose of repairing the damage, the injured person may only take action against the state, represented by the Ministry of Public Finance, and does not have any possibility of bringing an action against the magistrate who is supposed to have committed the judicial error. The competence of solving the civil action shall lie with the court within the jurisdiction of which the complainant-injured party resides. If the court finds that the above-mentioned conditions are met and, as a consequence, the action is admitted, in terms of the damage caused by judicial error, the payment of the amounts owed by the state by way of compensation will be made within a maximum period of one year from the date of communicating the final judgement.

Eventually, the state has possibility of bringing proceedings for recourse against a magistrate, if the state considers that the judicial error has been caused by the magistrate as a result of performing his/her duty in bad faith or with gross negligence.

#### 4. State regress against the magistrate

According to the provisions of art. 52 par. 3 of the Romanian Constitution and art. 96 par. 8 of Law no. 303/2004, as republished, state liability shall not remove the liability of magistrates and prosecutors who have performed their job in bad faith or with gross negligence. In this way, the Romanian State has the possibility of bringing proceedings for recourse against the magistrate who is supposed to be guilty of causing the damage.

It is important to stress that, despite some repeated attempts at lawmaking aiming at making it obligatory for the state to proceed against the magistrate, this action continues to have a facultative character. The repeated proposals, although adopted in the legislative body, have not entered into force due to the Constitutional Court,<sup>15</sup> which by numerous decisions has declared the amendments brought in this respect unconstitutional.

Among the arguments advanced by the Court in order to support its point of view, let us mention:

- no matter how clear the text of a legal provision is, there is, inevitably, an element of legal interpretation and the complexity of some cases may sometimes lead to a different application of the law in the practice of courts. Some interpretations may lead to a breach of the rights of some persons, but, to the extent that the interpretation should correspond in a reasonable manner to the reasoning of the regulation, the magistrate must not be held liable, since case-law differences are inherent in a legal system;<sup>16</sup>
- the obligation of the state to exercise the right of regress may lead to unacceptable situations where it automatically undertakes such an action every time it discovers damage caused by judicial error, having no longer a right of assessment as to whether the magistrate performed his/her duty in bad faith or with gross negligence; this would require, in a mechanical manner, the intervention of the court;<sup>17</sup>
- in the event of the obligation of introducing proceedings of recourse, the magistrate would be summoned to court every time the state “lost” a trial based on objective civil liability. But, although the proceedings of recourse aim at subjective civil liability, the compulsory character of the state action would not leave any margin of discretion, so that it can distinguish whether the criteria required for the engagement of the subjective civil liability of the judges or prosecutors are met. Once the state has been held liable for the damage caused, that does not preclude the presumption that the magistrate acted in good faith and according to the highest professional requirements. Only if there are serious doubts regarding this, may

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<sup>15</sup> See, Constitutional Court of Romania, decision no. 80 from 16 February 2014, published in the Official Gazette no. 246/2014 and decision no. 45/2018.

<sup>16</sup> Constitutional Court of Romania, decision no. 1014 from 8 November 2007, published in the Official Gazette no. 816/2007.

<sup>17</sup> Constitutional Court of Romania, decision no. 80/2014.



the state exercise the proceedings of recourse. As a consequence, the state has the obligation to institute a filtering procedure with a view to bringing a proceeding for recourse, and to present its evidence regarding the personal and subjective position the magistrate had while ruling on the merits of the case in question. Therefore, the burden of evidence falls on the state, and the previous presumptions can be overturned only as the result of an intervention of a court decision resolving the action in recourse.<sup>18</sup>

Despite these legal arguments, within Romanian society there is a strong trend supporting the idea of the necessity of the competent state bodies' starting proceedings for recourse against magistrates, in order to avoid the situation that the damage caused to litigants permanently remains to the charge of the Romanian taxpayer. The idea has also been suggested<sup>19</sup> that, if left to the discretion of some political bodies of the state, the possibility of starting proceedings for recourse might be influenced by a series of subjective factors, such as: political power and the magistrate's relationship with it, the position of the magistrate in the professional hierarchy or his/her position within the legal system, and the personal and group relationships between the decision maker and the person possibly held liable, etc.

Compared to the arguments put forward, I consider that only a law text that provides the possibility of proceedings for recourse, and not the introduction of some proceedings for recourse, complies with the constitutional provisions in force, namely art. 52 par. 3 in conjunction with art. 124 par. 3.<sup>20</sup> On the one hand, these provisions aim at avoiding the introduction of some proceedings for recourse capable of affecting the independence of justice and, on the other hand, at guaranteeing the possibility of holding a magistrate liable whenever there has been bad faith or gross negligence.

But, by contrast, under no circumstances, can we praise the attitude of the Romanian State which, up to this moment, has never addressed the proceedings for recourse against magistrates for the mistakes committed by them, and who have caused serious damage to the national budget. This aspect has also led to the the multiple convictions Romania has suffered before the European Court of Human Rights due to judgements ruled that repeatedly breached the Convention terms. Taking this fact into consideration, we may say with certainty that not only legislation has caused a total lack of patrimonial liability of magistrates, but also the "decisional impotence" of the authorities of the Romanian State with competence in this field, which have not succeeded to even up the balance between the independence of judicial power and the liability of those ones performing acts of justice.

As far as the actual procedure of the proceedings for recourse against a magistrate is concerned, as is provided by art. 96 par. 7–10, it requires the following stages:

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<sup>18</sup> Constitutional Court of Romania, decision no. 45/2018.

<sup>19</sup> I. Popa, *Laws of Justice...*, p. 103.

<sup>20</sup> Art. 124 par. 3 of Constitution of Romania, as republished: "Judges are independent and subject only to the law".

- a) In the first stage, the Ministry of Public Finance, within two months from the notification of the final judgement by which it was bound to pay compensation to the victim of a judicial error, must notify the Judicial Inspectorate of the Superior Council of Magistracy to find out, in an advisory capacity, if a magistrate has caused a judicial error as a result of carrying out his/her job in bad faith or with gross negligence;
- b) In the second stage, the Judicial Inspectorate of the Superior Council of Magistracy must verify if the judicial error caused by the magistrate was committed as a result of performing his/her job in bad faith or with gross negligence, according to a procedure provided for by art. 317<sup>1</sup> of Law no. 317/2004<sup>21</sup>. The verification is performed by a commission made up, depending on the quality of the verified person, of three judges, as legal inspectors, or three prosecutors, as legal inspectors. In the event that, in the same case, both judges and prosecutors are verified, two commissions shall be made up which shall verify the acts distinctively, depending on the quality of the verified persons. The procedure, which guarantees to the investigated person the right of defence and to offer evidence, etc., must be completed within a period of a maximum of 120 days, by drawing up a report that is submitted to the Ministry of Public Finance and to the investigated judge or prosecutor. The report is a consultative one, as provided for in art. 96 of Law no. 303/2004 in par. 8. It is compulsory for the Ministry of Public Finance to require it during the procedure, but it is not compulsory for the Ministry of Public Finance to obey it, to the effect that its conclusions are not necessarily binding in respect of starting proceedings for recourse against a magistrate. But this consultative report does offer a landmark for the specialists at the Ministry of Public Finance, as well as arguments regarding the guilt of the magistrate in committing a judicial error.
- c) In the third stage, the holder of the right to action, that is the state via the agency of the Ministry of Public Finance initiates the proceedings for recourse against the judge or prosecutor if, in the wake of the above-mentioned consultative report and on its own assessment, it considers that the judicial error was caused by the magistrate's or prosecutor's carrying out his/her job in bad faith or with gross negligence. Therefore, the proceedings for recourse are left at the discretion of the Ministry of Finance, without the possibility that the eventual decision not to initiate the action be attacked by interested persons or the Prosecutor's Office in court. As regards the term of initiating proceedings for recourse, it is six months from the date of notification of the report to the Judicial Inspectorate. The jurisdiction of the action lies, in first instance, in the civil section of the Court of Appeal in the defendant's place of residence. In the event that the judge or the prosecutor against whom the proceedings for recourse have been initiated, carries out his/her duties within that court or the Prosecutor's Office attached to that court, the proceedings for recourse are held at a nearby court of appeal, chosen by the applicant.

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<sup>21</sup> Law no. 317/2004 on Superior Council of Magistrates, republished in the Official Gazette no. 185/2019.

- d) Within the proceedings for recourse, the state must prove the fact that the magistrate is personally at fault in causing the judicial error and that this fault may be qualified as resulting from bad faith or gross negligence. Thus, the representatives of the state shall have the obligation to present the evidence or proof regarding the personal and subjective position held by that magistrate while judging the case. Therefore, the burden of evidence lies with the state and the previous presumptions, simple in nature, may be overthrown only as the result a verdict solving the proceedings for recourse.

The assessment on the existence of bad faith or gross negligence must be made in compliance with the conditions provided for in art. 99<sup>1</sup> of Law no. 303/2004. In the light of par. 1 of this article, there exists bad faith when the judge or the prosecutor breaches knowingly the rules of substantive law or procedural law, seeking or accepting injury to a person. Within the meaning of par. 2 of this article, there exists gross negligence when the judge or prosecutor is guilty of disobeying, in a serious, unmistakable, and inexcusable manner, the rules of substantive law or procedural law.

These circumstances determine, in my opinion, the ineffectiveness of the rules concerning the patrimonial liability of magistrates, because both gross negligence and bad faith are subjective notions, impossible to prove. It is then obvious that the state will almost never manage to prove that a judicial error was the result of the gross negligence or bad faith of the magistrate. If, however, the state succeeds in doing so, the patrimonial liability of the magistrate is engaged within the limit of the compensation the state was forced to provide by a judgement in favor of the person whose rights, liberties, or legitimate interests were seriously breached by the judicial error.

Every judge and prosecutor is bound to professionally insure himself/herself by concluding an insurance contract of professional civil liability, regarding the risks resulting from judicial errors, so that they shall not run the potential risk of losing their material goods. But, magistrates should be able to use this professional insurance for malpraxis only if the judicial error results from an action of gross negligence and not from bad faith.<sup>22</sup>

Against a judgement ordered by the Court of Appeal, one may exercise the right of appeal within the corresponding department within the High Court of Cassation and Justice.

## Conclusions

In recent years, the topic of the magistrates' liability has become a matter of extreme concern in Romanian society because of the specificity of judicial work in the

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<sup>22</sup> Art. 2 of Rules regarding the compulsory professional civil liability insurance for judges and prosecutors, published in the Official Gazette no. 482/2019.

the post-communist period (the return of the properties that had been nationalized, the struggle against corruption, etc.) and the impossibility of implementing in practice the institution of magistrates' material liability. In spite of finding some judicial errors, of the countless convictions ordered by the European Court of Human Rights, and of the significant compensation paid to injured persons, the Romanian State has not taken any regress action against allegedly guilty magistrates, claiming the impossibility of putting into practice the mechanism of engaging patrimonial liability. Given the circumstances, the amendment of internal regulations concerning the institution analyzed in this article has become a necessity.

The new provisions keep, in a correct manner, the principle of a magistrate's indirect liability and an injured person's right to address him/herself, in order to repair the damage, only to the Romanian State, ensuring, thus, magistrates' independence in their work. In return, as an innovation, there has been established a reasonable moment of starting the limitation period for the State's regress action against a magistrate allegedly guilty of causing the damage, as well as the requirement of compulsory insurance on the part of magistrates.

After a failed attempt, there has been noted a constitutionally accepted definition of judicial error and gross negligence, a basis for a magistrate's civil liability, but its efficiency and appropriateness can only be attested by case law, the only way that can emphasize the pros and cons of the new regulation.

A question mark may also be placed against the State's obligation, prior to taking a regress action, which, after all, remains optional, to address the Judicial Inspectorate of the Superior Council of Magistracy in order to find out, for informational purposes, if a magistrate is guilty or not. The provision is somewhat odd, because the Inspectorate is not the body that establishes a magistrate's guilt, but a court of law is. A potential favorable report for a magistrate, be it with an advisory status, given by his/her peers, could easily discourage even more the Romanian State's desire to hold liable, from a civil point of view, magistrates that have performed their duty in bad faith or with gross negligence and, for which, only the Romanian taxpayer has so far paid.

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## Summary

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### Patrimonial Liability of Romanian Magistrates

In this article, the author analyzes the institution of magistrates' material and civil liability, dealing only in a tangential manner with aspects of criminal or disciplinary liability.

The author reviews the internal regulations that make up the regulatory framework of the institution, by underlining the recent amendments brought to the mechanism of engaging magistrates' patrimonial liability through the provisions of the law on the status of judges and prosecutors. More specifically, we analyze some aspects regarding the engaging of civil liability – only in the event of judicial error, conditions of admissibility, and the proceedings of actions in finding judicial error aimed against the Romanian state, as well as in the event of the state's recourse against a magistrate suspected of having committed a judicial error.

**Keywords:** damage, judicial error, liability, magistrates, state recourse

## Streszczenie

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### Odpowiedzialność majątkowa rumuńskich sędziów

Artykuł został poświęcony analizie odpowiedzialności materialnej i cywilnej sędziów, odnosząc się w ograniczonym zakresie również do kwestii odpowiedzialności karnej i dyscyplinarnej sędziów. Autorka dokonała przeglądu aktów tworzących ramy regulacyjne tych instytucji, zwracając uwagę na niedawne zmiany dotyczące mechanizmu odpowiedzialności majątkowej sędziów wprowadzone na mocy przepisów ustawy o statusie sędziów i prokuratorów. Dokładnej analizie poddane zostały niektóre aspekty dotyczące wszczęcia postępowania w przedmiocie odpowiedzialności cywilnej sędziego w przypadku błędu sądowego, przesłanek dopuszczalności takiego postępowania, wszczęcia postępowania przeciwko państwu rumuńskiemu o stwierdzenie błędu sądowego, a także roszczeń regresowych państwa wobec sędziego podejrzanego o popełnienie takiego błędu.

**Słowa kluczowe:** szkoda, błąd sądowy, odpowiedzialność, sędziowie, regres