

INDEPENDENCE OF THE MAGISTRATE – AN OBJECTIVE COMPONENT OF PROFESSIONAL STATUS

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Abstract: *The interest in the existence of an independent judicial system has made it necessary to provide guarantees that allow magistrates to fulfill the role conferred by the legal provisions. In the following, the significance of the principle of independence – a fundamental ethical value of the judiciary, the international and national legal instruments guaranteeing the independence of the judiciary, the judge and the prosecutor, as well as doctrinal and jurisprudential aspects of relevance in this area will be presented.*

Key words: *principle of independence; magistrate; judicial system; judge, prosecutor.*

The significance of the principle of independence of the judiciary

Independence is one of the fundamental ethical principles of the magistrate, together with impartiality, integrity, responsibility, competence, but there is no hierarchy between these concepts, on the contrary, they coexist from the deontological point of view.

The independence of the judiciary implies:

- the ability to decide on measures, as required by law, without any internal or external intervention;
- the ability to recognize factors likely to influence or create the appearance of influence and to reject such factors.

According to the Declaration on Judicial Ethics – London, 2010, adopted by the General Assembly of the European Network of Councils for the Judiciary, independence is not a privilege for the judge or prosecutor, it is an obligation to meet the citizen's need for independent justice.

International and national legal instruments guaranteeing the independence of the judiciary

Enshrined in the Universal Declaration of Human Rights (1948), the United Nations Convention on Civil and Political Rights (1966), the European Convention for the Protection of Human Rights and Fundamental Freedoms, independence is the subject of international normative acts, which give the idea that independence must be guaranteed by the state and enshrined in the Constitution or other national laws, and that state institutions must respect it.

The independence of the judiciary is guaranteed in various international and national normative acts, in addition to the case law of the European Court of Human Rights, the Court of Justice of the European Union, as well as the Romanian Constitutional Court and the High Court of Cassation and Justice.

At the international level, the most important guarantee of the right to an impartial and independent court is Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Other documents of relevance to judicial independence at international level are: the European Charter on the Statute for Judges (1998); Recommendation No (94)12 of the Committee of Ministers on the independence, efficiency and role of judges; Recommendation No (2010)12 on the independence, efficiency and responsibilities of judges; Opinion No 1 of the Consultative Council of European Judges on standards of independence of the judiciary and irremovability of judges (2001); Opinion No 12 of the Consultative Council of European Judges on the relations between judges and lawyers (2013); Opinion No 17 of

the Consultative Council of European Judges on the evaluation of the work of judges, the quality of justice and respect for the independence of the judiciary (2014); Opinion No 18 of the Consultative Council of European Judges on the position of the judiciary and its relationship with the other branches of government (2015); Opinion No 19 of the Consultative Council of European Judges on the role of the presiding judges (2016); Opinion No 4 of the Consultative Council of European Prosecutors on relations between judges and prosecutors (2009); Opinion No 13 of the Consultative Council of European Prosecutors on the independence, accountability and ethics of the prosecutorial profession (2018).

At national level, Art 124 Para 3 of the Constitution of Romania enshrines the independence of judges, and provisions of principle regarding the independence of judges are also found in Law no 303/2022 on the status of judges and prosecutors (Art 2 Para 3-4); Law no 304/2022 on judicial organization; Law no 305/2023 on the organization and functioning of the Superior Council of Magistracy; the Code of Ethics of Judges and Prosecutors; the Practical Ethical Guide for Judges and Prosecutors.

The normative acts were adopted with the aim of establishing and defending a democratic system, characterized by the rule of law and implicitly guaranteeing fundamental human rights and freedoms.

Moreover, the aim of establishing and maintaining an independent judiciary is necessary to strengthen it and to ensure that the responsibilities of magistrates are carried out in good faith.

Doctrinary and jurisprudential aspects of the independence of the judiciary

The analysis of the principle of the independence of the judiciary, as a principle governing the dispensation of justice, must be interpreted in correlation with the provisions relating to the role and competences of the other powers, with respect for the principle of the rule of law.

One of the constitutional principles of justice is the independence of the judge and his submission only to the law, because without

guaranteeing the independence of the judiciary, one cannot speak of constitutional democracy.

This principle means that, in his work, the judge is subject only to the law, without receiving any orders, suggestions or instructions as to the solution he is to pronounce.

In the aforementioned sense, the provisions of Art. 3 of the Law no 303/2022, stipulate that “judges shall resolve cases on the basis of the law, respecting the procedural rights of the parties, without coercion, influence, pressure, threats or direct or indirect intervention by any person or authority” and Para 4 of the same article provides the imperative obligation for any person, organization, authority or institution to respect the independence of judges.

In the case law of the Constitutional Court it has been held that, “the constituent legislator enshrined the independence of the judge in order to protect him from the influence of political authorities and, in particular, of the executive power; this guarantee cannot, however, be interpreted as being such as to determine the lack of responsibility of the judge. The fundamental law not only confers prerogatives – which, in the aforementioned text, are circumscribed by the concept of “independence” – but also sets limits to their exercise – which, in this case, are circumscribed by the phrase “subject only to the law”. The institutionalization of some forms of accountability of judges gives expression to these limits, in line with the requirements of the principle of separation and balance of powers in the state, enshrined in Art 1 Para 4 of the Constitution. One of the forms of the judge’s personal and direct legal liability is disciplinary liability, which derives from the judge’s duty of fidelity to his role and office and from the exigency he must demonstrate in the fulfillment of his duties towards the subjects of the law and the State... the constitutional principle of judicial independence necessarily implies another principle, that of accountability. The independence of the judge does not constitute and cannot be interpreted as a discretionary power of the judge or a hindrance to his or her liability under the law, whether it be criminal, civil or disciplinary liability. It is the legislator’s task to strike the necessary balance between the

independence and responsibility of judges, in compliance with the relevant constitutional provisions and the commitments that Romania has undertaken through the treaties to which it is a party” (Constantinescu, Muraru, Deleanu, Vasilescu, Iorgovan, & Vida, 1992, p. 278-279).

The independence of the magistrate cannot be seen in a dissociated way from the independence of the judiciary, but as a unitary whole, seen as a part-whole relationship.

The constitutional provisions regulate guarantees of the independence of judges, a particular interest being the conditions of recruitment, irremovability, promotion, delegation, secondment, transfer of magistrates.

Independence does not preclude the higher courts from reviewing the judgments handed down, but such review may be exercised only by means of appeal, under the conditions and in accordance with the procedure laid down by law.

The guarantee of the independence of judges both in relation to public authorities and in relation to other influences or pressures is strongly constitutionally grounded in the incompatibility of these functions with any other public or private function, the only exceptions being teaching in higher education¹.

In the case law of the Constitutional Court it has been ruled that “the phrase restrictions, influences, pressures, threats or interventions, referred to in the text under criticism, does not call into question the decisions handed down in the appeals or the decisions which are binding (decisions handed down by the High Court of Cassation and Justice following the resolution of an appeal in the interest of the law or a question of law) or generally binding (decisions of the Constitutional Court). The phrase “or even judicial authorities” refers to the inappropriate conduct, contrary to the legal regulations, of persons occupying various positions (management/executive) in the judicial

¹ Constitutional Court of Romania Decision no 45/30 January 2018, published in the Official Gazette of Romania, Part 1, no 199/5 March 2012

system or of institutions that are part of the judicial authority and who, by their administrative decisions, their positions or their activity, create a fear for the magistrate in the exercise of his/her functions that may influence his/her decisions. The rule expresses the principle that the independence of the judge in the resolution of the case before him cannot be limited by any person or state authority. Of course, the independence enjoyed by the judge does not mean arbitrariness, as the judge must obey the law¹.

Immovability is a strong guarantee of a judge's independence, as it is a measure of protection.

Under this principle, judges may not be transferred, promoted, delegated or seconded without their consent and may not be suspended or dismissed other than in accordance with the law.

In the case law of the Constitutional Court, it has been ruled that "the limits of irremovability must always be related to the conduct of the judge, this principle being fully applicable when he exercises his office within the limits and according to the law. The principle of irremovability is that rule of law which, in guaranteeing the independence of judges, protects them from the risk of being dismissed, removed or demoted from office without legitimate reason or transferred to other courts, by delegation, secondment or even promotion, without their consent (Decision no 375/6 July 2005). Therefore, the principle of irremovability protects the judge from being transferred, moved, replaced, demoted or dismissed from office at random/chance/at the pleasure of the representatives of the executive, legislative or judicial authorities, but it cannot be argued that this constitutional principle protects the magistrate from the standardization of disciplinary sanctions, applicable only in the event of finding disciplinary offences. The magistrate has the guarantee that these sanctions can be ordered and applied only in the framework of a disciplinary procedure, settled by the Superior Council of Magistracy,

¹ Constitutional Court of Romania Decision no 520/9 November 2022, published in the Official Gazette of Romania, Part 1, no 1100/15 November 2022

and not randomly, which is even an expression of this principle, being applied on a legitimate ground [disciplinary misconduct] – [Constitutional Court Decision No 45/30 January 2018, Para 235]. If the judge has committed an act that gives rise to disciplinary liability, the principle of irremovability cannot prevent the application of a proportionate and dissuasive sanction in relation to his act. The fact that demotion in office is not a temporary sanction is a matter of choice of the legislator, who has given the SCM, the disciplinary court, the possibility to apply such a sanction in cases of serious disciplinary offenses [Constitutional Court Decision no 45/30 January 2018, Para 236]¹.

As regards the assignment of judges from one section to another, by Decision no 522/2022, the Constitutional Court established that Art 21 Para 6 of the Law on Judicial Organization, “is not such as to affect the independence and impartiality of judges, as no external pressure/influence of any kind is exerted on them, which would prejudice these constitutional values. The transfer from one chamber to another is justified by the need to ensure that cases are dealt with expeditiously, notwithstanding the existence of a high volume of work in one of the chambers, the duration for which it is made is strictly determined, for a maximum of one year, and is also made only with the consent of the judge”².

Another guarantee of the independence of magistrates is established by Art 40 Para 3 of the Constitution but also by Art 232 of the Law no 303/2022, which prohibits magistrates from being part of political parties.

These rules as a matter of principle are detailed in the Code of Ethics (Art 4 Para 2-3).

Regarding the independence of prosecutors, Art 1 of Law no 303/2022, provides that: “Prosecutors appointed by the President of

¹ Constitutional Court of Romania Decision no 520/9 November 2022, published in the Official Gazette of Romania, Part 1, no 1100/15 November 2022

² Constitutional Court of Romania Decision no 522/9 November 2022, published in the Official Gazette of Romania, Part 1, no 1101/15 November 2022

Romania shall enjoy stability and shall be independent, under the conditions of the law”. They carry out their work according to the principles of legality, impartiality and superior hierarchical control, under the authority of the Minister of Justice.

Public prosecutors are not part of the judiciary, they do not carry out and do not execute justice, as they have other tasks in the judicial activity they undertake, namely the defense of the rule of law and of the rights and freedoms of citizens and represent the general interests of society.

This difference in constitutional status is also due to the different nature of the independence of justice, which is exercised by judges and realized by courts.

Art 1 Para (2) of the Law no 303/2022, it can be concluded that the careers of judges and prosecutors are separated, the management of the career of magistrates being carried out within each section of the Superior Council of Magistracy, as follows: the career of judges is managed by the Section for Judges of the Superior Council of Magistracy, and the career of prosecutors by the Section for Prosecutors of the Superior Council of Magistracy.

Another element differentiating the legal status of prosecutors from that of judges is hierarchical control. In this regard, according to Art 68 Para 3 of Law no. 304/2022, the measures and solutions adopted by the prosecutor may be overturned, under the conditions of the law, both by the hierarchically superior prosecutor and by the General Prosecutor of the Prosecutor’s Office of the High Court of Cassation and Justice. In the case of solutions adopted by the prosecutors of the National Anticorruption Directorate and the Directorate for the Investigation of Organized Crime and Terrorism, they may be overturned, according to Art 68 Para 4 of the Law no 304/2022, under the conditions of the law, by the hierarchically superior prosecutor or by the chief prosecutor of the directorate.

The provisions of Art 68 of the Law no 304/2022 on judicial organization regulate the concrete content of the prosecutor’s independence which, on the one hand, give effect to the principle of

hierarchical control when they provide that “the provisions of the hierarchically superior prosecutor given in writing and in accordance with the law are binding for the prosecutors subordinate to him”, and, on the other hand, enshrine the principle of prosecutor’s independence in the decisions taken.

Also, another dimension of the independence of the prosecutor is given by the provision enshrined in Art 71 Para 2 of the Law no 304/2022 on Judicial Organization, which provides that “the prosecutor is free to present to the court the conclusions that he/she considers to be well-founded, according to the law, taking into account the evidence in the case”.

Thus, the guarantees provided by the legislator in order to respect the independence of the prosecutor consist in the regulation of some limitative situations (Art 68 Para 5 of the Law no. 304/2022), in which the works assigned to a prosecutor may be passed to another prosecutor, as well as the possibility to refer to the Prosecutors’ Section of the Superior Council of Magistracy for the intervention of the hierarchically superior prosecutor in any form in the conduct of criminal proceedings, the adoption of the solution and the presentation of the conclusions in court or the verification of the measures ordered in relation to the assignment of works, within the procedure of defense of the independence and impartiality of prosecutors.

The issue of the prosecutor’s status has been analyzed in the case law of the Constitutional Court.

Thus, the Court found that the prosecutor’s status is determined by the provisions of Art 132 of the Constitution, which establish that prosecutors carry out their work according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice. It is clear from this constitutional text that the Public Prosecutor’s Office is linked to the executive. The Court noted that the Public Prosecutor’s Office is, according to the Constitution, part of the

judicial authority”. It is, however, a special magistracy, which does not carry out jurisdictional functions¹.

The European Court of Human Rights also emphasized that, in Romania, prosecutors, acting as representatives of the Public Prosecutor’s Office, subordinated first to the Prosecutor General, then to the Minister of Justice, do not meet the condition of independence from the executive power; or, independence from the executive is included among the guarantees that the notion of “magistrate” implies, within the meaning of Art 5, Para 3 of the Convention. Accordingly, the Court found that prosecutors cannot invoke a position of independence, like judges, since their work is carried out under the hierarchical control and authority of the Minister of Justice².

Conclusions

The independence of the judiciary, as part of the independence of the judiciary, is related to the separation or balance of powers in the state, which means that courts and judges cannot be influenced by the executive or legislative power.

Moreover, the independence of the judiciary contributes to strengthening citizens’ trust in justice and in the values that characterize the rule of law.

¹ Decision no 73/4 June 1996, published in the Official Gazette of Romania, Part 1, no 255/22 October 1996 or Decision no 259/24 September 2002, published in the Official Gazette of Romania, Part 1, no 770/23 October 2002.

² Constitutional Court of Romania Decision no 522/9 November 2022, published in the Official Gazette of Romania, Part 1, no 1101/15 November 2022

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