# PRESSURE FACTORS AND CONFLICTS OF INTEREST IN THE JUDICIARY

## HANDBOOK FOR JUDGES

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The content of this handbook does not necessarily represent the official position of the Konrad Adenauer Foundation. The responsibility for the content lies with the authors.

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## Abbreviations

| | |
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| U.N. | United Nations |
| CoE | Council of Europe |
| ECHR | European Court for Human Rights |
| | (the number indicating the year represents the date of the decision) |
| UN Principle | Principle from the basic principles of the independence of justice |
| Pact | International Covenant on Civil and Political Rights |
| IBA | International Bar Association |
| CSM | Superior Council of Magistracy |
| HCCJ | High Court of Cassation and Justice |

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Rule of Law Program South East Europe

# Introduction

The right of each person to a trial by an *independent* and *impartial* tribunal is a fundamental human right, and a pillar of a democratic state based on the rule of the law. The State parties to the European Convention on Human Rights and Fundamental Freedoms (ECHR) one of which is Romania have recognized this right through their ratification of the ECHR. Article 6, paragraph 1 of the Convention states: "[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The independence and impartiality of a judge, both personal and substantive, can be influenced and endangered by various internal and external pressure factors and conflict of interest situations. Judicial independence can only be effectively defended against such factors and situations through a multi-faceted approach which must include not only institutional and normative instruments, but also awareness-raising and consciousness-building measures. Among the latter are seminars which help judges and those responsible for guaranteeing judicial independence reflect upon which pressure factors and conflict of interest situations exist, why and how they can negatively impact judicial independence, and how judges can deal with these situations in their daily work.

This publication and its best practice guidelines are the product of such seminars. The Konrad Adenauer Foundation, through its Rule of Law Program South East Europe and working together with the Society for Justice, organized these seminars in seven Romanian court districts (Tg. Mures, Cluj-Napoca, Oradea, Suceava, Focsani, Timisoara, and Slatina) throughout 2006. The guidelines come from the participants' observations and comments in the seminars as well as from their answers to a questionnaire in which the judges were asked *inter alia* to define the terms "pressure factors" and "conflicts of interest", as well as to describe whether the institutional, normative, and practical protections against such influences are sufficient. The guidelines are intended to serve as a tool for Romanian judges in dealing with pressure factors and conflict of interest situations in their daily work, thus contributing to the further improvement of the independence of the Romanian judiciary.

The publication at hand is the translated version of the original Romanian text of the handbook. This explains why the handbook refers to the specific legal and factual situation in Romania. The Rule of Law Program intends to organize comparable seminars for judges in the other program participant countries, and to publish similar handbooks tailored to the specific needs of those countries.

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Bucharest, August 2007

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# Rule of Law Program South East Europe
# Konrad Adenauer Foundation

The Rule of Law Program South East Europe of the Konrad Adenauer Foundation is designed as a program to promote dialogue on rule of law issues within and among the countries in South East Europe. It aims to support, in a sustainable manner, the establishment and consolidation of a democratic state of the rule of the law. Program participant countries are Bosnia-Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Romania, and Serbia. In these countries, the Rule of Law Program wishes to contribute to the development and solidification of an efficient legal order and a justice system that is in accordance with the fundamental principles of the rule of law. As such, both are core elements of a democratic system, and a prerequisite for membership in the European Union.

The Rule of Law Program South East Europe focuses on the following five areas:

- Constitutional Law (both institutional and substantive) and Constitutional Jurisprudence
- Procedural Law
- Protection of Human and Minority Rights
- Independence and Integrity of the Justice System
- Reconciliation with the Past by Legal Means.

Within these areas, the Rule of Law Program organizes seminars, training sessions, and conferences at the national and regional levels. In addition, the Program prepares publications for guidance, education, and reference for future projects and studies.

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# The Society for Justice

**History:** *The Society for Justice* was established at the end of several months of intensive communication on the Internet (*http://groups.yahoo.com/group/reformaj/*), among individuals who share a broad interest in the reform of the Romanian justice system that is now in progress - judges, prosecutors, CSM members, the minister of justice, solicitors/barristers, legal advisors, journalists, students, and political analysts. In this unique virtual environment, draft laws, draft regulations, cases, political events and legal events were debated upon.

**Establishment:** From 5-7 August 2005, the most active of the *reformaj* members convened at Lapusna, the County of Mures, for an informal conference, to discuss the state of play in the Romanian justice system. The principal conclusion stemming from the debate was that the system was experiencing a profound crisis caused by impermissible delays in achieving a genuine reform. Such delays have led to the consolidation of a conservative legal oligarchy that was not socially committed, but often governed by privileges and caste spirit. By their reluctance to have a critical thinking about the real issues and by ignoring minimum ethical standards, those groups have created a disastrous image of the legal professions they represent. That is why the general feeling of the public is that the Romanian justice system is being hampered by clan-like policies and undermined by nepotism, competing interests, and poor performance.

A group of participants in that debate decided to establish *The Society for Justice*. *The Society for Justice* association was registered at number 53/13.09.2005 to the register of associations and foundations, deposited with the Targu Mures Court House, according to the closure 95/30.08.2005 of the Targu Mures Court House, and is based in Targu Mures, 34 Infratirii Street, ap. 11.

**Aim:** The primordial purpose of our organisation is to contribute to the fulfilment of an authentic and comprehensive reform, not only of the magistracy, but of other legal professions, as well as that of the legal education system, for the purpose of improving the quality of justice rendering in general. For that aim, *The Society for Justice* intends to use the legal expertise of its members to encourage the act of justice in the interest of the public. The association also intends to facilitate the public debate and uphold an active civic attitude on the Romanian justice system.

**Membership:** The organisation currently brings together 20 members, 12 of whom are founding members. They represent the various legal professions as well as the civil society. The SoJust criteria for recruiting new members are mainly solid expertise that can be used by the organization, strong communication skills and responsiveness.

**Objectives:** Through *The Society for Justice*, all stakeholders interested in the quality of the system where they work can cave a tool of civic and professional action to bring about and even impose substantive changes by:

·providing professional mobility in the justice system based on merit and

performance;
.improving the quality of the higher legal education in Romania;
·complying with ethical standards that would remove possible conflicts of interests;
·promoting an active attitude among the judges and prosecutors in what regards the interests of the citizen;
·ensuring a justice system that would be independent from political and group interests;
·rendering the system of justice responsible to justice seekers and society alike.

**Action:** Our action is described at www.sojust.ro. In the course of the year that has lapsed since our establishment, we have looked into conflicts of interests, solicited and indicated clear criteria for the appointment of judges to the High Court of Justice and Cassation, taken a stand on certain actions of the members of the Superior Council of Magistracy (CSM), contributed with observations to the 2005 EC Report on the progress towards accession regarding the Justice chapter, closely monitored the work of CSM and of the Ministry of Justice, prepared the press review on justice matters on a temporary basis, and encouraged the expression of critical views on the various changes in progress.

SoJust has developed partnerships with the Rule of Law Program South East Europe of the Konrad Adenauer Foundation in the area of a unitary practice and conflicts of interest, as well as with the National Council for the Combating of Discrimination.

The most prominent achievement of 2006 was "The Independent Report on the Romanian Legal System". An outcome of the voluntary contribution of the members of our association and of collaborating experts, the report presents the merit of encompassing almost all the aspects of legal affairs ranging from the management of the courts to the personal relations between judges and prosecutors; from the quality of legal papers to ways to evade law. The report uncovered, without reservation, irregularities that poison an optimal operation of the institutions of the state.

In the beginning of 2007, SoJust completed its survey on "Pressure Factors and Conflicts of Interest in the Judiciary". Starting from the attributions of independence and impartiality that must characterise the justice system in a democratic society, the study is based on the legal provisions and on the practice in the framework of which judges have been operating from this point of view. The study is intended as a starting point for debating on such themes that have not been covered enough in Romania so far.

# CHAPTER I

## Argument

**Importance of justice**. Justice is one of the pillars supporting any democratic society while also being a public service with the principal mission of serving the interests of the public. There is no question that, from this standpoint, the public expects judges to judge fairly, correctly, and impartially. These qualities are, in fact, the foundation of the work of the courts of law and of the staff that participates either directly or indirectly to rendering justice. The civil society is becoming increasingly vocal in demanding that courts take the due measures to prevent the process of law from being compromised by interests or personal relations of the judges themselves or of the other members of the court staff.

These words are not mere assertions but, rather, have the value of principles, being founded in the ABC any judge has to go through before becoming immovable.[1] Independence and impartiality belong or should belong to the inner structure of each and every member of the judiciary in equal share to the professional competence, thereby providing security and confidence for those seeking protection for their rights that have been violated as well as to the rest of the society.

A society that is confident in its judicial system, in the effectiveness of the norms, and in applying the principle according to which a society where all its members are equal before the law is a strong and prosperous society.

Unfortunately, the Romanian society does not enjoy the comfort of such a statement. This is a fact verified by many surveys conducted and published suggesting an alarming distrust of the society in the justice system (in this context we should note that the percentage of the population who does not trust the justice system is indirectly proportional with the segment of justice-seekers which properly raises questions as to the actual causes of such kind of attitude), as well as by stances taken by the main political actors, this being one of the few matters on which representatives of all political parties seem to agree.

**Transparency of the system**. We are now at the point where there is an acute need for change in order to mitigate the differences emerging between the Romanian society and an authority, the nature of which is different from the nature of all other authorities exactly because it cannot be punished by the voters.

In addition, we advocate openness with regard to the channels of communication between the judicial system and the society that generated it since the work of the courts of law cannot be separated from the existence and needs of the society it belongs to. It is the very recognition of such reality that comes with accepting the existence of possible pressure factors or conflicts of interest, a recognition that helps find solutions to manage situations in a

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[1] See the analytical curriculum for "Ethics and Organisation of the Judiciary" studied at the National Institute of Magistracy, at http://www.inm-lex.ro

way that does not hamper the act of justice. Our concern is not singular, as the Consultative Council of European Judges in its Strasbourg meeting on 13-15 November 2002, looked at the matter of the principles and rules governing judges' professional conduct with a special focus on ethics, incompatible behaviour, and impartiality.[2] The conclusions of the council's work suggested that judges should be guided by certain principles that would give them the necessary answers to resolve fairly situations that may arise pertaining to their independence and impartiality. In addition, such principles should be imposed by judges themselves and they should be completely distinct from the system of disciplinary liability. It was also found that it would be preferable to have a specialised body of dedicated professionals to act as consultants for the judges that may find themselves in an ethical or incompatibility situation in connection with their statute or generated by an extra-professional activity.

**SoJust and RLP SEE.** Fully aware of this dual perspective of the need for a dialogue, *The Society for Justice (SoJust)* and the *Rule of Law Program South East Europe (RLP SEE)* of the Konrad Adenauer Foundation have organised, for the first time in Romania, meetings with judges from a number of courts around the country to address the extent to which conflicts of interest and pressure factors are a reasonable source of concern at this point in time, as well as to pinpoint ways of managing such situations.

Our judge colleagues who attended the debates came from the jurisdiction of the Courts of Appeals in Targu Mures, Cluj, Oradea, Suceava and Timisoara, as well as of the Vrancea and Olt Tribunals. The average number of participants was 15 judges at each such meeting, which means that in total, 105 judges have attended such conferences.

The organisers mainly sought to create an informal framework enabling the participating judges to freely express their opinions on unclear situations generated by the subject and on how issues like that could be solved. The need exists for a strong change of perception regarding the evaluation of judges. For instance, the magistrate who openly admits to an existing issue he/she is ready to raise with the parties or with the steering college of the court house in order to secure a due process of law is more just, independent, and impartial than the judge who prefers to hide the issue and remains silent about it hoping it will never be disclosed.

Every meeting followed a scenario imagined by the organisers with the participants answering questionnaires, an activity that was repeated at the end of the event. SoJust members then made short presentations around notions of *independence versus pressure factors* and *impartiality versus conflicts of interest*, presentations aimed at prompting debates on the selected theme.

Case studies were also employed,[3] with the role of capturing solutions suggested by the judges under the existing legislation and practice and observing whether or not such norms are actually capable of settling any incident.

The representatives of the Superior Council of Magistracy (CSM) and the Ministry of

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[2] Opinion no. 3 (2003) of the Consultative Council of European Judges, available at http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/textes/Avis_en.asp

[3] Presented at chapter IV.

Justice who had been invited to attend the events,[4] generally answered questions about the way in which CSM fulfils its role as a guarantor of the independence of justice enshrined by law. In addition, the intended role of the National Integrity Agency was discussed in comparison to the general landscape of institutions that are already competent to analyse incompatible behaviour and conflicts of interest in the case of public services. This latter discussion became all the more relevant with the ANI founding act being on the agenda of the Parliament when our project was being implemented.

**Polling the judges.** Our colleagues, the judges, were asked to fill out the questionnaires in two distinct stages before the presentations and then after the talks. This was done to check whether or not our issues on the agenda were topical and if there was indeed a need to deploy a unitary best practice for the resolution of conflicts of interest and the pressures put on judges in their work, even outside the actual legislative framework. Consideration was taken into account that the judge has to play his/her role in an independent way both individually and from the point of view of the system he/she is part of. They were also asked to state their opinion on which of the actors involved in the smooth functioning of the justice system should be assigned the task of developing homogeneous best practices in the area.

From this point of view an important insight was obtained from questions about concrete situations the participants had been in as well as the proposals they made for a concrete management of such situations.

Their answers allowed us to draw a number of predictable conclusions, although they may appear surprising with a superficial reading. The answer to the question *"Have you been subjected to any pressure in order to pass a certain decision?"* was "Yes" in 30% of the cases (with the majority indicating that those had been indirect pressures,[5] or suggestions more than actual pressure), and "No" in 70%.[6]

Despite the notable difference that would normally make one believe there is a climate of security reigning among judges, the answer to another question: *"Do you feel you are sufficiently protected by the Romanian legislation from the possible factors of pressure external to the system?"* was "No" in 70% of the cases and "Yes" in 20%, while 10% either chose not to answer the question or said they didn't know the answer.

These two questions and the answers to them depict the relationship between the Romanian society and the judges who should represent a guarantee of every citizen's rights

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[4] Judge Lidia Barbulescu, elected member of the Superior Council of Magistracy (in Suceava and Slatina) and Vice President of the High Court of Cassation and Justice, and Judge Alexandrina Radulescu (in Oradea and Focsani), elected member of the Superior Council of Magistracy participated on behalf of the Superior Council of Magistracy. Monica Macovei (Slatina), Minister of Justice, and Cristian Anghel (Cluj, Oradea and Timisoara), Deputy Director in the Ministry of Justice of the Directorate for Liaison with the Public Ministry and for the Prevention of Crime and Corruption, attended on behalf of the Ministry of Justice.

[5] Judges maintain in any context that the press puts pressure on them through media campaigns although the campaigns are not generated by a genuine inquisitive journalistic curiosity and are not, except in very rare situations, the result of personal investigations conducted by journalists.

[6] A special mention needs to be made regarding the judges who answered the question candidly, understanding that the conduct issue belongs to the person who starts such action and not to the judge who, although put in a peculiar situation, manages to remain independent and impartial and pass a lawful and substantiated decision.

being respected and protected: 70% of the judges who have not been subject to any pressure in their work so far do not feel sufficiently protected. Note that these discussions all happened in the year when measures had been taken at a declarative level to secure the independence of the judiciary.

The question *"Is the conflict of interest an acutely topical issue in the judicial system?"* was answered affirmatively by 45% of the participants, negatively by 45% and 10% would not or could not answer.

That is, therefore, the context that generated the usefulness of this work. It is intended as a starting point for as many debates possible, the finality of which should be rules of conduct being adopted to safeguard the independence and impartiality of the judge hearing a case in any possible situation.

**Structure of the paper.** A justification of the topics addressed (pressure factors and conflicts of interest) have to depart from what is necessary to order to safeguard a fair trial: independence and impartiality. Although the independence of the judiciary[7] has been at the forefront of political discussions in Romania over the recent years and despite the existence of a constitutional body (the Superior Council of Magistracy) with its mission to defend the judiciary, neither the public nor the judges are clear about the meaning and complexity of the notion.[8] Even more serious, there is no debate approaching impartiality, a supreme value of independence, as a theme. That is why we felt the need to firstly present the international standards governing those notions starting from international instruments and case law.

The second part of the paper will look at the "pressure factors" and "conflicts of interest" seen as elements disturbing an independent and unbiased act of justice viewed with regard to the Romanian norms governing the two notions.

The last part will cover the conclusions of the seminars attended by judges, the themes of which were the pressure and the conflicts of interest. The definitions suggested by the participants will be included, and the debates case studies will be appended.

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[7] In common language the term "justice" is often used to cover the work of all the judicial bodies involved in the process of law. In reality however, justice is only the attribute of the judge who must enjoy independence and impartiality in order to fulfil his/her immense social role.

[8] The Romanian Association for Transparency, "Study on the perception of the independence of the judicial system by magistrates", *2006*, at 21, is available at http://www.transparency.org.ro/doc/studiu_CSM_2006_corectat_final.pdf. Similar opinions can also be found in the survey conducted by the same organisation in 2005 at 13, at http://www.transparency.org.ro/doc/Per_mag.pdf.

# CHAPTER II

## Independence and Impartiality of Justice

**- International Standards -**

### I. Introductory considerations

#### 1. Preamble

In order for judges to secure the supremacy of law while correctly fulfilling their duties, they need a statute and special safeguards: independence and impartiality. There is a broad range of international instruments available in this matter, which belong to what is essentially an *international judicial Corpus Iuris*. They reflect the concern of the various world or regional inter-government or non-government bodies for strengthening the role of the judiciary. These legal instruments, binding or non-binding, make up the foundation of a set of international legal standards which, in turn, could lead to the consolidation of the judiciary in connection to the executive and legislative powers or in front of other groups or individuals that act with or without an empowerment from the state.

#### 2. International instruments

All the international and regional instruments guarantee the *right to a fair hearing before an independent and impartial court of law*. While the independence of the judge is enshrined by his professional statute, impartiality is more a private matter. It is a virtue. The former means that there must be no subordination whatsoever, while the latter means the absence of any prejudice, passion, weakness, or personal feeling. The former is to be looked at in relation to a third party while the latter is analysed in relation to the magistrate himself.

**a. instruments generated by formal organisations:**

- The Universal Declaration of Human Rights (UN[9], Paris, 1948) and The International Covenant on Civil and Political Rights (UN, 1966);
- The American Declaration of the Rights and Duties of Man (International Conference of American States, Columbia, 1948);
- The Declaration on Human Rights in Islam (Organisation of the Islamic Conference, Cairo, 1990);

[9] Romania became a member state of the United Nations Organization on 14 December 1955.

- The European Convention on Human Rights (Council of Europe,[10] Rome, 1950);
- The American Convention on Human Rights ("The San Jose Covenant", Costa Rica, 1978);
- The African Charter on Human and Peoples' Rights (Organisation of African Unity, Banjul, 1981);
- The Canadian Charter of Rights and Freedoms (annex to the 1982 Constitution);
- The Basic Principles on the Independence of the Judiciary (UN, 1985);
- The European Charter on the Statute for Judges (Council of Europe, 1998);
- The Charter of Fundamental Rights of the European Union[11] (European Council, Nice, 2000);
- Opinion no. 1 on standards concerning the independence of the judiciary and the irremovability of judges; Opinion no. 2 on the funding and management of courts, with reference to the efficiency of the judiciary and to Art. 6 of the European Convention on Human Rights; Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality of the Consultative Council of European Judges of the Council of Europe, 2001 and 2002;

**b. instruments generated by magistrates' associations:**

- The Judges' Charter in Europe (European Association of Judges,[12] 1987);
- The Universal Statute of the Judge (International Association of Judges,[13] 1999).

**c. instruments generated by NGOs or various other bodies:**

- Minimum Standards of Judicial Independence (The "New Delhi Standards", International Bar Association, 1982);
- Draft Universal Declaration on the Independence of Justice (The "Singhvi Declaration", 1989);
- Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Asia Pacific Legal Association, 1995);
- The Caracas Declaration (The Ibero-American Summit of Presidents of Supreme

[10] Romania ratified the Statutes of the Council of Europe (London, 5 May 1949) through Law no. 64 of 1993, published to the Official Journal of Romania, Part I, no. 238 of 4 October 1993 and became a member state of the Council of Europe on 7 October 1993.
[11] Romania became a member state of the European Union on 1 January 2007.
[12] One of the existing associations of judges and prosecutors, The Romanian Magistrates' Association (founded in 1993) is a member of the European Association of Judges.
[13] The European Association of Judges is a regional group of the International Association of Judges.

Courts and Tribunals of Justice, 1999);

- The Beirut Declaration (Arab Conference on Justice, 2003);
- Bangalore Principles of Judicial Conduct (UNODC, Judicial Group on Strengthening Judicial Integrity, 2001);
- Suva Statement on the Principles of Judicial Independence and Access to Justice (INTERIGHTS, The Fiji Human Rights Commission, Fiji Judiciary, 2004), etc.

## II. Independence

Relying on the theory of the separation of powers in the state, the independence of justice applies to both justice as an institution and as a system, and to the individual judges who decide on specific matters. Judges must be capable of discharging their professional duties without being influenced by the executive/legislative branches of government, by economic stakeholders, or by interest groups.

### 1. Independence of justice (institutional, structural independence)

There is a need for an independent justice to make the other powers responsible and prevent them from committing abuses ("power stops power") and to safeguard human rights and fundamental freedoms. It is the general rule that the independence of the judiciary should be regulated by the Constitution or through legal provisions.

#### 1.1. Judiciary and the Legislature

Apart from its legislative competence, the Parliament is not supposed to intervene in justice matters except for particular situations where it may grant amnesty or pardon. The issuing of normative acts designed to block jurisdictional or execution procedures, or hearing judges in connection with decisions they pass are inadmissible practices.

To prevent the courts and judges from being affected by specific regulations adopted with the purpose of intervening in justice matters, the IBA Standards[14] state that the legislature shall not pass legislation which retroactively reverses specific court decisions. Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service (points 19 and 20a).

[14] *Minimum Standards of Judicial Independence* adopted by the International Bar Association in New Delhi, in 1982.

### 1.2. Judiciary and the Executive

The activity of the Government in the specific area of justice is acceptable only where it performs the legislative delegation function. It is also believed that the power of pardon vested with the Executive power or with the president of the country does not interfere with the work of the judiciary.

The IBA Standards provide that the ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the judiciary as a whole (point16).

### 1.3. Military and special (extraordinary) courts

The UN Human Rights Committee unequivocally maintained that "the right to be tried by an independent and impartial tribunal is *an absolute right that may suffer no exception.*"[15] Therefore, they are to be applied under any circumstance and by all courts of justice, either ordinary or extraordinary. The organisation and operation of military and special courts separately from the civil, ordinary courts of justice raises issues with regards to the composition of the panel of judges, civilians being heard before military courts, and military personnel being tried for violating civilians' rights.

Under special circumstances, the creation of military courts or of courts with special competence, such as Courts of State Security, revolutionary Courts, Courts for Robberies and Fire Weapons, represents a regular case of violation of the right to a fair judicial procedure. "While the International Covenant on Civil and Political Rights does not ban such categories of courts, the conditions it sets clearly indicate the fact that civilians should only be heard by such courts of law in exceptional circumstances and under conditions that indeed fulfil the complete safeguards set forth in article 14."[16]

According to the judicial practice of the European Commission of Human Rights, special courts cannot be established by decision of the Executive, but "the purpose behind demanding that courts should be established by law is that the organisation of justice must not be left at the discretion of the Executive power, but has to be regulated by laws passed by the Parliament." Addressing the military courts of law, the African Commission adds that "the critical factor is whether the process is fair, just and impartial." Finding that "a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process," the Commission stated that "military tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic or fundamental standards that would ensure fairness."[17]

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[15] Human Rights Committee, Communication no. 263/1987, *M. Gonzales del Rio vs. Peru* (Views adopted on the 28th of October 1992), in ONU *GAOR* document, A/48/40 (volume II), at 20, paragraph 5.2.

[16] Communication no. 577/1994, *R. Espinoza de Polay vs. Peru* (Views adopted on 6 November 1997), in doc. UN *GAOR*, A/53/40 (vol. II), at 43, paragraph 8.8, *The International Covenant on Civil and Political Rights* stipulates, in article 14, paragraph 1, that "all persons shall be equal before the courts and tribunals" and goes on to say that, "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a *competent, independent and impartial tribunal* established by law."

[17] ACHPR, Civil Liberties Organisation, Legal Defence Centre and Legal Defence and Assistance Project vs. Nigeria, Communication no. 218/1998, decision adopted during the 29th ordinary session, 23 April-7 May 2001, at

Recognising the fact that the Executive branch often interferes in the functions and affairs of judicial authorities, including judicial appointments, transfers, mandating, promotion, discipline, as well as management of the judicial profession in most Arab countries, the signers of the Cairo Declaration on Judicial Independence[18] proposed the abolishment of emergency laws and extra-judicial courts, which restrict the freedoms and rights of individuals. Such restrictions of rights include the right to appear before an ordinary court, the right to due process (recommendation no. 8). The signers also proposed to restrict the jurisdiction of military courts to cases that concern only those who serve in the military (recommendation no. 11).

Ad-hoc tribunals are not admitted according to point 21 of the IBA Standards.

### 1.4. Independence in practice

Concretely speaking, structural independence has to become manifest in a number of fields:

#### a. Independence in administrative matters

According to the IBA Standards, judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive (points 8 and 9).

Article 14 of the Basic Principles on the Independence of the Judiciary[19] stipulates that "the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration." In addition, Principle 1, point 2, letters e) and f) in Recommendation no. R (94) 12 of the Committee of Ministers of the Council of Europe states that, "the distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges."

Examples of internal matters can also be found in article 36 of the Beijing Statement.[20] The article states that the principal responsibility for court administration,

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http://www1.umn.edu/humanrts/africa/comcases/218-98.html.

[18] The Declaration was agreed to by the participants in the Second Arab Justice Conference in Cairo, on 24 February 2003.

[19] The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 adopted the Basic Principles on the Independence of the Judiciary, that were afterwards unanimously sanctioned by the General Assembly by Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[20] The Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region, adopted on 19 August 1995.

including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role. The head of the court may legitimately have supervisory powers to control judges on administrative matters (point 32, The IBA Standards).

#### b. Independence in financial matters

According to Principle 7 of the Basic Principles, it is the duty of each UN Member State to provide adequate resources to enable the judiciary to properly perform its functions. Principle 3 of Recommendation no. R (94) 12 of the Council of Europe refers to the proper working conditions as something that may influence independence.

International instruments recognise the fact that the Executive and the Legislative powers have control over the budget of the judiciary. However, since that poses a potential threat to the independence of the latter power, point 1.8 of the European Charter on the Statute for Judges provides for the need for judges to be associated with their representatives and their professional organizations in decisions relating to the administration of the courts and the determination of their means, as well as their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.[21]

#### c. Judicial autonomy in matters of jurisdictional competence

In conformity with principle no. 3 of the Basic Principles, the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

Principle 1 point 2, letter a) III of Recommendation no. R (94) 12 stipulates that no organ other than the courts themselves should decide on its own competence, as defined by law.[22]

#### d. Independence of decision-making and authority of the judiciary

As shown by principle 1 of the Basic Principles, all branches of the government, including "other institutions", are under a duty "to respect and observe the independence of the judiciary." This is not only a passive duty. Principle 1 point 2, letter b) in Recommendation no. R (94) 12 stipulates that the executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges, and Principle 2, point 1 of the same Recommendation stresses the fact that all persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge.

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[21] The Charter was adopted under the aegis of the Council of Europe by the participants in the multilateral meeting on the statute for judges in Europe, in Strasbourg, 8 - 10 July 1998.

[22] See also article 36, paragraph 6 of the Statute of the International Court of Justice, and for the European Court of Human Rights, article 32, paragraph 2 of the European Convention on Human Rights.

More drastic, the Beirut Declaration[23] in its fifth recommendation states that "[r]efraining from implementing judicial rulings by law enforcement officials is a crime the penalty of which shall be stiffened. Impeding the implementation of rulings shall be considered as refraining from the implementation."

The requirement of independence of the judiciary in decision-making is further upheld by principle 4 of the Basic Principles: "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law." In line with the same idea, Recommendation no. R (94) 12 reads: "decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law" (Principle 1.2.a.i).

The independence of the judiciary has to manifest itself towards the very judicial system under which it operates. Point 46 of the IBA Standards shows that, in the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters. A judge's attitude should also be an active one, upholding and defending independence. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.[24]

### 2. Independence of the judges (private independence)

As justice is served through the judiciary that is made up of judges, it means that the judicial power is enforced only through the court of law represented by the judge,[25] the sole carrier of all those powers.

In the opinion of the law, the independence of the judge will negate the notion of a hierarchy of subordination. International principles expressly state that the judiciary shall decide matters before them impartially, on the basis of facts, and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[26] The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.[27] The independence of a court of justice is appreciated by this point of view, both from the Executive and the parties, and from exterior powers such as the mass-media.

[23] The *Declaration* was drafted by the First Arab Conference on Justice held in Beirut on 14 - 16 June 1999, by participants from 13 Arab states.
[24] The *Bangalore Principles of Judicial Conduct, 2002*, Point 1.5; The draft Code of Judicial Conduct of Bangalore (2001) was adopted by the Judicial Group on Strengthening Judicial Integrity as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002.
[25] Hence the difference between the notions of "judiciary office" that includes the courts of law, the Public Ministry, and the Superior Council of Magistracy, and the "judiciary" that only pertains to courts.
[26] UN Principle no. 2.
[27] Art. 2 of the Universal Charter of the Judge.

The legislation must postulate the independence of the judges, and public authorities must be banned for instructing them on activities falling in their competence. The Council of Europe recommends that the law provide for sanctions against persons seeking to influence judges in any such manner.[28] It is important to realise that the principle of the independence of the judiciary was not conceived for the personal benefit of the judges themselves, but rather to protect people from abuses of power. Therefore, the *independence is not a privilege of the judge, but a benefit for the public*. The Universal Charter of the Judge for that reason begins with regulating independence not as a right, but as an obligation: "Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them."[29] Points 5 and 6 in the Suva Statement[30] make it the duty of judges to ensure equality of access to justice, but also an effective access to justice requiring a full understanding of the language and procedures.

Some infringements on independence are legally enshrined by the very norms that regulate the statute of judges: their exclusive appointment by the Executive or Legislative power, the limited tenure, inadequate remuneration, and refusal to authorise establishment of professional associations. Apart from those, other forms of pressure can be found: public criticism intended to intimidate extended by the Executive or Legislative power, arbitrary detention of judges, threats or attacks against judges or their families.[31] These acts of pressure are often committed not only by the state authorities, but by individual persons either privately or in complicity with various organisation such as criminal groups or drug cartels.

The purpose of the independence of the judiciary is exactly to render impartial justice. The international instruments enshrine a number of safeguards for implementing it that need to be examined for each particular member of the tribunal in question.[32]

### a. Appointment of judges

**Systems**: There are several national systems for the recruitment (appointment) of judges. There are countries where they are recruited by the corps of judges itself, while, in other states, they are elected by the public or are appointed after a competition, without the interference of any power in the procedure. In most countries judges are appointed by the Executive.

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[28] Principle 1, point 2, letter d in Recommendation R (94) 12 on the *Independence, Efficiency and Role of Judge*.

[29] Article 1, paragraph 1 in the Universal Charter of the Judge adopted by the International Association of Judges in Taipei, in 1999.

[30] The Statement on the Principles of Judicial Independence and Access to Justice was adopted by the First International Human Rights Judicial Colloquium held in Suva, in Fiji, 6 - 8 August 2004.

[31] See UN document E/CN.4/2000/61, Report to the Commission on Human Rights by the United Nations Special Rapporteur on the Independence of Judges and Lawyers, at 74; and "Attacks on Justice - Harassment and Persecution of Judges and Lawyers" (The Centre for the Independence of Judges and Lawyers, Geneva, 10th edition, January 1999 - February 2000, at 499).

[32] EDO Commission, 18.12.1980, no. 8680/1979, *Crociani vs. Italy*.

The international law does not limit itself to a single appointment modality. Nonetheless, in enforcing article 24 of the Covenant, the UN Human Rights Committee showed major reservations about the system by which judges are elected in a few of the American states. It stated its concern about "the impact that the current system of electing judges may have, in a few states, on the enforcement of the rights" guaranteed in article 14 of the Covenant, and commended "the efforts made by a few states in adopting a merit-based selection system." The Committee also recommended that the system "for the appointment of judges by election should be re-considered in view of replacing it with a merit-based appointment system by an independent body."[33]

**Criteria**: The only selection criterion should be an objective one that assesses the integrity, training, and competence of recruited persons. The Beijing Statement introduces another criterion in purposing the independence of the individual and requiring the chosen person be best qualified for the judicial office.[34]

Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.[35]

**Mechanism**: The appointment of judges should be a strong factor of independence itself and it cannot be left to the exclusive discretion of the Executive and Legislative.

There has to be an independent mechanism in charge of recruiting and disciplining magistrates. The Council of Europe indicates that the authority taking the decision on the selection and career of judges should be independent of the government and the administration.[36] The European Association of Judges directly states that selection must be performed by an independent body which represents the judges.[37]

### b. Tenure and stability of term

Under the international norms, judges shall have guaranteed tenure until a mandatory retirement age or the expiration of their term of office, where such exists.[38] In this latter case, it is believed that a period of les than ten years in office does not satisfy the condition of independence.[39]

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[33] UN *GAOR* A/50/40 (volume I), pages 288 and 301.
[34] Points 14 and 15 of the Beijing Statement.
[35] UN principle 10.
[36] Principle 1, point 2, letter c) in Recommendation R (94) 12 of the CoE.
[37] Principle 4 of the Judges' Charter in Europe adopted by the European Association of Magistrates, on 4 November 1997. The membership of the association counts national associations of 38 countries in Europe.
[38] UN principle no. 12.
[39] Special Report on the Independence of Judges and Lawyers, document UN E/CN.4/2000/61/Add. 1, *Report on the Mission to Guatemala*, paragraph 169, letter c.

Appointed judges may not be **removed** from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law,[40] could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.[41] Any change to the judicial obligatory retirement age must not have retroactive effect.[42]

There are countries where there are procedures in place for the evaluation or re-certification of judges on a regular basis. It is the view of the UN Human Rights Committee that the practice is contrary to article 14, paragraph 1 of the International Covenant on Civil and Political Rights.

### c. Irremovability of judges during office

The strongest safeguard of the independence of judges is their irremovability. A judge holding office at a court may not in principle be moved by transfer, delegation, secondment elsewhere, even by way of promotion, without having freely consented thereto. Judges can be suspended or dismissed from office only under the law that regulates their statute.

The irremovability should not be seen as a privilege of the judges, but rather as a safeguard for justice-seekers. That is why irremovability should also apply to how judges are appointed to the various chambers of the courthouses and to the allocation of cases and the possibility of recusing the judge. There is a rule that a case should not be withdrawn from a particular judge without valid reason, such as serious illness or conflict of interest.[43]

The Council of Europe recognizes three exceptions to the principle of irremovability: 1) where transfer is provided for and has been pronounced by way of a disciplinary sanction; 2) when a lawful alteration of the court system occurs; and, 3) in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute.[44] Point 29 of the Beijing Statement says the abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

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[40] According to point 7 of the European Charter on the Statute for Judges, a judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of the dereliction by a judge of one of the duties expressly defined by the statute.

[41] Principle 6, point 1 in Recommendation R (94) 12 of the CoE.

[42] Article 8, paragraph 3 in the Universal Charter of the Judge.

[43] Point 2, letter f in Recommendation R (94) 12 of the CoE.

[44] Point 3.4 in the European Charter on the Statute for Judges.

### d. Financial security

**Remuneration.** UN principle no.11 foresees that judges be provided adequate payment as well as adequate pensions. When establishing the payment both the importance of their activity, and the fact that, as a rule, judges are forbidden to undertake any other private or public functions, should be considered.[45] The Council of Europe underlines that judges exercising judicial functions in a professional capacity are entitled to renumeration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions. More generally, it shields their behaviour within their jurisdiction, thereby promoting their independence and impartiality. Renumeration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.[46]

Point 14 in the IBA Standards foresees that Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.

**Reduction in salary.** In certain countries, salaries of judges are protected against decrease, although salary increase can depend on the Executive and Legislative powers. IBA accepts the fact that judicial salaries cannot be reduced during the judges' services except as a coherent part of an overall public economic measure (Art.15b).

**Retirement.** Retired judges also enjoy a special financial regime. Under Article 13, paragraphs 3 and 4 in the Universal Charter of the Judge, "[t]he judge has a right to retirement with an annuity or pension in accordance with his or her professional category. After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge."

### e. Protection of the judge

The power of decision held by the judges can lead to unpopular decisions being made, which calls for a protection system to be in place for the judge.

*Physically* speaking, judges need to be provided with an adequate venue to conduct the proceedings in good conditions, and to be sure they are safe form any aggressive behaviour that may come from parties unhappy with their judgement, directed either at them or at their families. The security and physical protection of judges and of their families, according to Article 40 of the Beijing Statement, must at all times be ensured by the Executive authorities. Principle 3 point 2 in Recommendation no. R (94) 12 foresees that "all necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats."

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[45] For a comparative study on 45 countries in Europe, in 2004, see Judicial Systems in Europe, 2006, done by CEPEJ www.coe.int/cepej, translated into Romanian at http://www.just.ro/files/Studii_si_analize/CEPEJ_grila_RO.rar

[46] Points 6.1 and 6.2 in the European Charter on the Statute for Judges.

Nevertheless, at a *professional* level, they need to be protected by a body independent from the Executive or Legislative powers. The Council of Europe recommends such a body within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary. Every judge who considers that his or her rights under the statute, or more generally his or her independence, or the independence of the legal process, are threatened or ignored in any way, should be able to refer to such an independent authority. In turn, this authority should be empowered with effective means available in order to remedy the situation.[47] The LAWASIA Organization maintains that such a body should be formed only of representatives of the highest jurisdiction and of the legal, independent professions.[48]

**f. Liability of the judge**

Concerning civil and criminal liability, art. 10 in the Universal Charter of the Judge foresees "[c]ivil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced."

As they are guardians of independence and the ones construing the law, judges cannot become the subject of disciplinary action on the basis of a simple discharge of their judicial functions, except when a judges" undignified behaviour has been proven. Of a much greater importance is the fact that a judge should not have to operate under the threat of a financial penalty, even though less than imprisonment. The presence of this threat may sub-consciously affect his judgment.[49] Judicial errors should be solved by appeal, respecting jurisdiction and procedure, and interpreting and applying the law or evaluating the evidence. Other judicial errors which cannot be mended in this manner should lead to nothing more than an action against the state taken by the dissatisfied party seeking redress.

Providing a somewhat different approach, both, the UN Principle no. 16 and point 32 in the Beijing Statement grant **civil** immunity to judges "[w]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State. [I]n accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions." That, of course, does not negate the responsibility of the state for judicial errors.

In cases of professional **incapacitation** or **disciplinary offences,** there are measures that can be taken against the judge. The issue that is raised is that of determining the types of sanctions and the bodies that should be empowered to enforce them.

**Protection of independence:** Principle 6 pt. 2 of Recommendation R (94) 12 explicitly requires that the enforcement of the sanctions should not prejudice judicial independence. It is essential that judges not be subjected to disciplinary measures for their position on the

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[47] Points 1.3 and 1.4 in the European Charter on the Statute for Judge.

[48] Point 8 of the Beijing Statement.

[49] See Opinion no. 3 of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior, and impartiality, paragraph 5.3.

merit of a case. With regard to Belarus, the Human Rights Committee noted "with concern the allegation that two judges were dismissed by the President, on the ground that in the discharge of their judicial functions they failed to impose and collect a fine imposed by the executive."[50]

**Competent body:** Under international law, judges subject to disciplinary procedures should be guaranteed due process of law before a competent, independent, and impartial body that should be an authority independent from the Executive power, or under the control of an authority that should be independent from the Executive power. IBA admits that the Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters.[51]

Principle 6 point 3 in Recommendation no. R (94) 12 suggests that states should consider creating, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures. In this way, such sanctions or measures would not be dealt with by a court, and the decisions would be controlled by a superior judicial organ. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention. For instance the case should be heard within a reasonable time and the accused should have a right to answer any charges.

Much simpler, Judges' Charter in Europe foresees that disciplinary sanctions for judicial misconduct must be entrusted to a body comprised of members of the judiciary in accordance with fixed procedural rules rather than ad-hoc (principle no. 9).

**Reasons:** According to principles no. 18 and 19 of the UN, judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

Principle 6 pt. 1 in the Recommendation no. R (94) 12 foresees the possibility of measures to be taken against judges who fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences.

Eventually, according to principle no. 9 of the Judges' Charter in Europe, measures may be taken against judges for judicial errors.

The grounds for removal of judges shall be fixed by law and shall be due to a criminal act, gross or repeated neglect, or physical or mental incapacity the result of which has demonstrated a manifest unfitness to hold the position of judge.[52]

**Measures:** Only Recommendation no. R (94) 12 sets forth measures that may be taken:

*a*. withdrawal of cases from the judge;

*b*. moving the judge to other judicial tasks within the court;

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[50] UN *GAOR*, A/53/40 (vol I), paragraph 149.
[51] Point 4.a in the IBA Standards.
[52] Point 29 in the IBA Standards.

*c*. economic sanctions such as a reduction in salary for a temporary period;

*d*. suspension.

### g. Freedom of expression and association

The freedom of expression and association are essential in a democratic society of rule of law and respect for human rights. The right of the judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.[33]

According to UN Principle 9, Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training, and to protect their judicial independence. Principle 4 of Recommendation no. R (94) 12 foresees that judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protecting their interests.

### h. Training and education

Principle V.3.g of Recommendation no. R (94) 12 of the Council of Europe stipulates that judges should "undergo any necessary training in order to carry out their duties in an efficient and proper manner." States should take effective measures for that purpose as well as the necessary measures to make sure that large numbers of judges benefit from adequate training. The Cairo Statement stipulates in its third recommendation that all matters pertaining to the education and training programmes provided by the state should be subject to judicial supervision. Furthermore, the qualification programmes shall be focussed both on professional and judicial training and on individual development. The responsibility for adequate training is equally incumbent on the judges themselves and on their professional associations, according to Basic Principle 9.

The training should not only be in domestic law substantive and procedural but also international law, human rights, and educational programmes regarding the social context.

### i. The right and duty to provide due process

Principle 6 in the Basic Principles foresees that the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. This means that judges hold the obligation of solving the cases before them *according to the law*, protecting the rights and freedoms of individuals, and consistently granting the various procedural rights under the domestic and international law.

[33] Article 12 in the Universal Charter of the Judge.

According to principle V pt. 3 b) in the Recommendation no. R (94) 12, it is the judges' responsibility to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law.

### j. Publicity of proceedings

Public court proceedings are a guarantee of the court's impartiality, fairness, and independence. At the same time, public proceedings contribute to elevating the public's confidence in the administration of justice.

Article 6 in the European Convention on Human Rights permits the court to exclude the press and public from all or part of the trial in the interest of morals, public order, or national security in a democratic society. Furthermore, this exclusion is allowed where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The judge is called to make a permanent assessment of the public and private interest in the case.

### k. Stability of judgement

Once a binding court decision has been passed, it can no longer be amended by a non-judicial authority to the detriment of either party to the adjudicated case.[54] As for decisions passed by the merged chambers of a higher jurisdiction, while the judges are under a duty to act consistently with existing jurisprudence, independence is not infringed as long as judgements have a value in principle in judicial activity and the courts of lower instance retain their independence in adjudicating concrete cases.[55]

### l. Obligation to motivate the decision

Principle V pt 3 b) in Recommendation no. R (94) 12 shows that judges, except where the law or established practice otherwise provides, have the obligation to give clear and complete reasons for their judgments using language which is readily understandable. Regarding this aspect, the European Court maintained in *Higgins and others*, that the obligation "cannot be understood as requiring a detailed answer for each argument," but that "the extent to which the requirement to reason may vary according to the nature of the decision and it is to be determined taking into consideration the particular circumstances of the case."[56] When the Court of Cassation did not provide exact and specific reasons in its decision in a complaint raising an alleged impartiality of the Court of Appeal, the Court held that there had been a violation of article 6 paragraph (1).[57]

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[54] ECHR, *Van de Hurk vs. The Netherlands*, 19.04.1994, paragraph 45.
[55] ECHR, *Ciobanu vs. Romania*, 16.072002, paragraph 44, *Curutiu vs. Romania*, 22.10.2002.
[56] ECHR, *Higgins and others vs. France*, 1998, Reports 1998-1, at 60, paragraph 42.
[57] Id. at 61, paragraph 43.

#### m. Appearance of independence

One of the criteria considered in appreciating independence is the appearance. The case law of the Court of Strasbourg[58] shows that it is necessary not only for justice to be made, but also for the conditions set by law in governing a fair trial appear to have been met. The appearance of independence from this point of view means the confidence that courts of justice are supposed to inspire in the public in a democratic society. The requirement is internationally enshrined through the adagio imported from the common law, according to which "justice must not only be done, it must be seen to be done".[59] In addressing suspicions concerning the possible lack of independent appearance, the point of view of the accused is considered. However, his/her claims must nevertheless be objectively justified.

Thus, it has been established that, as long as in a court of law there is a person reporting to one of the parties as position and tasks, justice-seekers have a point in legitimately questioning that person's independence.[60] This enshrines the need for a judge to be independent not only from the Executive and Legislative powers, but also **from the parties.**[61] The same decision was passed in the case of a municipal police commission worker who in that capacity was viewed as an authority with jurisdictional competence. The worker had been in a senior position in the police before and was suspected of being called to fulfil such tasks again. Justice-seekers would always be inclined to see in that person a member of the police force who is part of a hierarchy and who would act in solidarity with his colleagues.[62]

## III. Impartiality

The independence of justice and judges is not a purpose in itself, nor is it sufficient for justice to be done in an equitable manner. Impartiality is needed as well. But the two notions are not to be mistaken for one another. Thus, *the independence of justice* is a state of mind which is to be made whole at the level of the judge by an adequate statute, and at an institutional level by establishing relations with the Executive and Legislature.[63]

Judicial impartiality is also concerned with the state of mind, the attitude of the court on the matters and parties of the case (non-discrimination, tolerance, etc.), as well as the way in which proceedings are conducted. Impartiality of the court implies that judges

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[58] ECHR *Campbell and Fell vs. UK, 1984, Cooper vs. UK*, paragraph 104; *Greaves vs. UK*, 2003, paragraph 69; *Langborger vs. Sweden*, 1989, paragraph 32; *Bryan vs. UK*, 1995, paragraph 37; *Ciraklar vs. Turkey* 1998, paragraph 38.
[59] ECHR, *Delcourt vs. Belgium* 1970, paragraph 31. The full sentence of this adagio is '*Justice should not only be done, but should manifestly and undoubtedly be seen to be done*' and belongs to Lord Hewart, Lord Chief Justice from 1922 to 1940, in *The King vs. Sussex Justices, ex parte McCarthy*, of 9 November 1923.
[60] ECHR, *Sramek vs. Austria*,
[61] ECHR, *Vasilescu vs. Romania*, 22.05.1998, paragraph 41 and *Chevrol vs. France*, 13.02.2003, paragraph 77.
[62] ECHR, *Belilos vs. Switzerland*, 1998, in: V. Berger, cited paper at 183.
[63] See the Canadian Supreme Court, (1985), N.C.S. 2. *Valiente vs. Regina* 637, available at http://www.lexum.umontreal.ca/csc-scc/en/pub/1 985/vol2/html/1 985scr2 0673.html, at 2.

must make objective decisions solely based on their own appraisal of the relevant facts and of the applicable law. They must not harbour preconceptions about the matter put before them, and they must not act in ways that promote the interests of one of the parties.[64]

Impartiality is very closely connected to independence. While a court can be independent while not being impartial, a court that lacks independence cannot be impartial under any circumstance. The requirement of being independent from the parties is practically subject to the need for impartiality.

Article 5 of the Universal Charter of the Judge reads: "In the performance of the judicial duties the judge must be impartial and must so be seen. The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved." Impartiality assumes the lack of all prejudice or interest of the judge in the matter before him.[65]

Professional deontology obliges judges to practice their office objectively, having as a unique basis the law and the general principles of law, without responding to external pressures and influence. Moreover, they are bound to adopt a behaviour that would reflect even the appearance of impartiality (meaning that they should appear to justice-seekers to be impartial), in order to remove any doubt regarding the correct fulfilment of their professional duties.[66]

The impartiality of the judge means that he must be *equidistant*, so that he will not grant any favour by statements or action to either party. Moreover, his goal will permanently be that none of the parties be or feel disadvantaged. In civil matters, the neutrality of the court means to prioritize the settlement of the litigation according to the wish of the parties whe they choose to settle out of court. In criminal matters, the neutrality of the judge will be restricted to prevent any procedural misbalance between the parties, since it is the judge who eventually decides on the outcome of the proceedings.

### 1. Requirements of impartiality

The most thorough analysis on impartiality has been done by the European Court of Human Rights. Pursuant to article 6, paragraph 1 of the European Convention, the Court of Strasbourg held that the impartiality of a court is to be determined by tackling a subjective as well as an objective aspect, analysed for every particular judge on the panel:[67]

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[64] UN Human Rights Committee, Communication no. 387/1989, *Arvo O. Karttunen c. Finland* (Views adopted on 23 October 1992), in document UN *GAOR*, A/48/40 (volume II) at 120, paragraph 7.2.
[65] ECHR, *Piersack vs. Belgium*, judgement of 1 October 1982, paragraph 30.
[66] Like independence, impartiality is not only a matter of substance; it is also a matter of appearance. A judge should not only be independent and impartial, judges must also be seen to be independent and impartial.
[67] ECHR, judgement of 6 May 2003, *Klein and others vs. The Netherlands*, translation by C. L. Popescu, "Pandactele romane", no. 4/2003 at 172-76.

### a) The subjective approach

*Personal (subjective) impartiality starts from the assumption that no member of the panel should have any prejudice or predilection. The judge must have no reason to favour or disfavour either party.* The subjective approach to determining a judge's impartiality would therefore mean determining the judge's private conviction during trial and in the adjudication of a particular case. The conduct favouring or disfavouring one of the parties may, for example, consist of making remarks suggesting that the judge is convinced of the guilt of the accused or of the judge's kinship with one of the parties.

The Court in Strasbourg ruled that a member of a jury in a court that had been overheard saying that he was a racist[68] did not fulfil the condition of impartiality. Likewise, neither did a criminal chamber judge who had made a public statement suggesting[69] the accused was guilty.

Recognising that subjective impartiality brings up the "interior forum" of the judge, the European Court of Human Rights recalled that the personal impartiality of a judge must be presumed until there is proof to the contrary.[70] This applies to professional judges, members of a jury, and specialised professionals who participate alongside the judges in the adjudication of the matter.[71]

### b) The objective approach

The European Court finds the notion of impartiality contains not only a subjective, but also an objective element. Not only must the court be mentally impartial, by that "none of its members should have personal prejudice of predilections," but it also *"has to be impartial from an objective point of view," meaning that "it must offer guarantees to rule out all justified doubt in that regard."*[72]

For this aspect, the criterion introduces the need to analyse whether or not, independently from the personal conduct of the judge, there are any *determinant and verifiable facts that may justify doubts on his impartiality.*[73] Under scrutiny is the judge's functional competence. The purpose of this analysis is to determine if the judge has offered sufficient guarantees to rule out any legitimate doubt in the case he is hearing. From that point of view, the concepts of independence and objective impartiality seem to be intimately related.

In the Constitutional Rights Project matter, the African Commission on Human and People's Rights had to consider, among other things, compatibility with article 7 paragraph (1) in the African Charter on Human and Peoples' Rights with the Civil Disturbance (Special Tribunal) Act which states that the tribunal shall consist of one judge and four members of the

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[68] ECHR, *Remli vs. France*, 1996.
[69] ECHR, *Lavents vs. Latvia*, 2002.
[70] ECHR, *Le Compte, Van Leuven and De Meyere vs. Belgium*, 1981.
[71] ECHR, *Ettl and others vs. Austria*, 1987, paragraph 40.
[72] ECHR, *Daktaras vs. Lithuania*, 2000, paragraph 30.
[73] ECHR, *Hauschildt vs. Denmark*, 1989, paragraph 48.

armed forces. As such, the Commission found that the tribunal is "composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbance Act."[74] The Commission afterwards recalled that article 7, paragraph (1) letter (d) in the Charter, "requires the court or tribunal to be impartial" and continues by saying that "[r]egardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1(d)."[75]

### 2. Appearance of impartiality

In determining the existence of reasonable suspicion of a lack of impartiality on behalf of a judge, the stand-point of the accused is first considered. However, his/her view is not decisive, as such claims of impartiality have to be objectively sustained.

Principle number 3 of the Judges' Charter in Europe expressly states that not only must the judge be impartial, he must be seen by all to be impartial. The European Court, in its turn, elevates the requirement of the *appearance of impartiality* to the rank of principle. This is necessary in order to not undermine the trust of the public (and, in criminal matters, the trust of the accused above anything else) that a court of law is supposed to inspire in any democratic society.[76] The Court attached great importance to the English adagio, "justice must not only be done, it must be seen to be done." The result is that the manner, attitude, and manifestations of a judge hearing a case must be of a nature to show the parties that he/she does not intend to favour or disfavour either. It is therefore explicitly maintained that "the court must be and must appear to be independent and impartial." The consequence is that the system of "faceless tribunals" (judges wearing face masks to remain anonymous for anti-terrorist rationales) fails to guarantee the needed appearance of independence and impartiality.

### 3. Evolution of ECHR jurisprudence in impartiality matters

Impartiality is also analysed with respect to the involvement of the judge in the various procedural phases of a case. A judge, in order to prevent prejudice, has to avoid the occurrence of successively exercising the duties of distinct jurisdictional functions in the same case. Construing the notion of an *independent and impartial court* and of a *fair trial*, the Court in Strasbourg held that there has to be a separation of the prosecution and the adjudication function,[77] of the investigation and adjudication functions,[78] and of the

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[74] *ACHPR, Constitutional Rights Project c. Nigeria, Communication no. 87/93*, paragraph 13;for the text of the decree see, for example, http://www1.umn.edu/humanrts/africa/comcases/87-93.html. See also, *ACHPR, International Pen, Constitutional Rights Project, Interights [International Centre for the Legal Protection of Human Rights] on behalf of Saro-Wiwa Jr. and Civil Liberties Organisation vs. Nigeria, Communications no. 137/94, 139/94, 154/96 and 161/97, decision of 1 October 1998*, paragraph 86; for the text go to http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

[75] Id. paragraph 14

[76] ECHR, *Thorgeirson vs. Ireland*, 1992, in: M. Macovei, cited paper at 337.

[77] ECHR, *Piersack vs. Belgium*, 1984, in V. Berger, cited paper at 205.

[78] ECHR, *De Cubber vs. Belgium*, 1984.

prosecution and investigation functions.[79] The enforcement of this rule has undergone a certain evolution in the jurisprudence of the Court from a restrictive and abstract interpretation of objective impartiality to a concrete one.

It was originally established that a judge cannot adjudicate the case on the merits if, when the prosecution was launched, he had previously served as public prosecutor in charge of the department responsible for the accused's case[80] or as an investigating judge.[81] For this reason, the Strasbourg Court concluded, his/her impartiality was capable of appearing open to doubt because the trial judge had been involved in the previous procedural phases. A case known to the judge may cause him/her to base his/her adjudication on a view already stated in a previous circumstance. It has been nevertheless realized that a strict application of this rule might lead to backlogs of jurisdictional work because of the insufficiency of personnel. Critics of this rule often refer to the theory as a "tyranny of appearance."

The Court, thus, began to demand that doubts of impartiality be objectively justified by making the connection to the concrete circumstances of the case.[82] From that point on, specific types of cumulated function have been accepted provided that the investigations conducted by the judge in pre-trial phases are concretely analyzed. If the investigations are found to have been summary to avoid giving the impression that the judge has already developed a prejudice on the substance of the case, a judge who has made pre-trial decisions concerning detention on remand[83] or one who has served as an investigating judge[84] may rule on the merit of a case. The simple fact that a judge becomes acquainted with a case before trial is not enough reason to sustain a doubt of his/her impartiality.[85]

### 4. Purpose of impartiality

It is impossible to require a judge who has had pre-trial contact with the contents of a case not to make an opinion on how he would probably rule on the case. However, based on the aforementioned situations, *impartiality does not prohibit a judge from forming an opinion; it only prohibits a determination not to change it (in which case the hearings would become pointless). The judge must remain open to receiving new facts, arguments and interpretations.*

[79] ECHR, *Huber vs. Switzerland*, 1990.
[80] *Piersack, pre-cited.*
[81] *De Cubber, pre-cited.*
[82] *Hauschildt, pre-cited, paragraph 48.*
[83] ECHR, *Sainte-Marie vs. France*, 1992. Same judgment in the case of juvenile accused - see ECHR case *Nortier vs. The Netherlands*, 1993.
[84] ECHR, *Fey vs. Austria*, 1993, and *Padovani vs. Italy*, 1993.
[85] *Nortier, pre-cited, paragraph 33.*

## 5. Safeguards of impartiality

### 5.1. Conflicts of interest

Principle 5 point 3 c) in Recommendation no. R (94) 12 of the Council of Europe maintains that judges should withdraw from a case or decline to act where there are valid reasons that should be defined by law and may, for instance, relate to serious health problems, *conflicts of interest*, or interests of justice.

**Definition**: A *conflict of interest* is that particular situation or circumstance of a judge where his/her direct or indirect personal interest is in conflict with the public interests. This conflict thus affects or possibly affects his/her independence and impartiality in decision-making or the speedy and objective discharge of the professional tasks associated with his/her office.

The judge, in fact, has to choose between the public interests that justice should be done and the private interests to procure a benefit for himself/herself. This observation prompts us to state that the rule of avoiding competing interests is an application of the *memo in rem suam auctor esse potest* - no one can hear his/her own principle case.[86]

**Types of interest**: Apart from the "no prejudgement" condition, impartiality assumes there is no conflict of interest, i.e., the absence of all private, material, or moral interest of the judge in the matter.

The interest can be *material*, as held in *D vs. Ireland* where the judge owned stocks in the company taken to court in the case before him/her.

The interest can equally be a moral one. For example, in *Remly vs. France*,[87] the matter at issue was the fact that one of the jurors had declared himself a racist; in *Pescador Valiero vs. Spain* (2003), the impartiality debate was that the plaintiff had been laid off by the university with which the trial judge had close professional connections.

The beneficiary of a decision made in conflict of interest situation may be: the one who decides (*direct* interest); his/her family, friends, close ones (*indirect* interest); individuals or organisations with whom/which he/her has had or has (*current* interest) or will have (*prospective* interest) relations that are business, political, personal, etc. Of course, the interest may be *real*, when it is grounded on probing facts, or *apparent*, when it only creates suspicion on fairness. Regarding such a situation, the simple fact that an adjudicator knows one of the heard witnesses personally is not enough to draw the conclusion that he has a favourable prejudice on the testimony, as the nature and intensity of the relation needs to be also analysed.[88] The same was held in a case where one of the parties and the trial judge belonged to the same society (the Freemasonry).[89]

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[86] P.-F. Cuif, "Le conflit d'interets, Essai sur la determination d'un principe juridique en droit prive," RDT com, 2005 at 7.
[87] *Cited above*.
[88] ECHR, *Pullar vs. UK*, 20.06.1996, paragraph 38.
[89] ECHR, *Kuskinen vs. Finland*, 01.06.1999.

In the instance where the plaintiff had a polemic in the mass-media with the presiding judge on his case over the activity of the court and the presiding judge made public negative statements about the plaintiff's case prior to hearings, the Court found that the doubts of the plaintiff on the impartiality of the court had been reasonably justified.[90] In a different case, the decision was that the participation in the overall proceedings of the individuals whose behaviour was being denounced by the litigious item was sufficient to make the impartiality of the decision-making body an object of doubt. Courts are not impersonal authorities but they operate through the judges sitting in the court rooms. To be impartial, a judge must keep the necessary distance when he is called to determine whether or not an offence had been caused to the judicial authority.[91] If the judges who found against the defendant are the same as those in front of whom the offence had taken place that reason enough to raise legitimate doubts that are objectively substantiated on the impartiality of the court (*nemo judex in causa sua*). Where there is a person in a tribunal who reports in terms of office and tasks to one of the parties, justice-seekers may have legitimate doubts on the independence of that particular adjudicator.[92]

### 5.2. Incompatibilities and interdictions

Article 7 in the Universal Charter of the Judge holds that "the judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge. The judge must not be subject to outside appointments without his or her consent."

The IBA Standards list the activities that are incompatible with the judicial office: judges may not serve in executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined; judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking; judges shall not hold positions in political parties; a judge, other than a temporary judge, may not practice law during his/her term of office; a judge should refrain from business activities, except his/her personal investments, or ownership of property (points 35 to 39).

### 5.3. Disqualification of the judge

A judge who does not meet the condition of appearance of complete impartiality must refrain from hearing the case. Point 2.5 in the Bangalore Principles on Judicial Conduct lay down the situations where a judge can be removed from a case. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to,

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[90] ECHR, *Buscemi vs. Italy*, 16.09.1999, paragraph 68.
[91] ECHR, *Kyprianou vs. Cyprus*, 27.01.2004, judgment translated by C. -L. Popescu, "Curierul judiciar", no. 3/2004 at 91-92.
[92] ECHR, *Sramek vs. Austria*, 22.10.1984.

instances where the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; where the judge previously served as a lawyer or was a material witness in the matter in controversy; or where the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy. However, disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

# CHAPTER III

## Pressure Factors and Conflicts of Interest

**- National Standards -**

The independence and impartiality of the justice and the judge are formally stated in the internal legislation. At the same time, their guarantees are foreseen. However, from the analysis of these regulations, a disturbing impression of the lack of of independence and impartiality remains in that these provisions are non systematic, non unitary, and, most of all, lack consistent regulation of the pressure factors and conflicts of interests.

We shall analyse the national instruments regarding independence and impartiality, focusing especially on disturbing elements of independence, with a special view on the elements upsetting independence. Namely, we will consider the pressure factors on the independence of justice and of judges, as well as disturbing elements of impartiality. Namely, we will look at conflicts of interest and incompatibilities concerning the impartiality of judges, the latter viewed in relation with specific interdictions.

### I. Pressure factors on the independence of justice and judges

**Legal Instruments:**

- The Constitution of Romania;
- Law no. 303/2004, on the Statute of the Judge and the Prosecutor;
- Law no. 304/2004, on the Organisation of the Judiciary;
- Law no. 317/2004, on the Superior Council of Magistracy;
- Law no.161/2003, regarding some measures taken to ensure the transparency in exercising public functions, offices of public dignity and in the business environment, prevention and reprimand of corruption;
- The Criminal Code;
- The Judge's and Prosecutor's Code of Conduct adopted by decision of the Superior Council of Magistracy no. 328/24.08.2005.

**Instruments provided by the associations of the judges:**

- Non existent;

**Instruments provided by the civil society:**

- Study on the perception of judges of the independence of judiciary system, 2005 and 2006, published by the Romanian Association for Transparency.

## 1. Legal instruments regarding pressure factors as disturbing factors of independence

Independence, in the basic sense of the term, is a state and a status of a person or of a state structure wherein judgements and actions are made without being influenced by others. Transposed in the field of justice, independence can be defined as a state or circumstance in which the judicial power is a distinct system but one that is also in balance with the other constituted powers (legislative and executive) in the state. It is that particular state or situation in which the judge does justice without being influenced by the others.

### 1.1. The Constitution of Romania

**Justice, judge**. The fundamental act enshrines both the independence of the justice system and of the judge vested with doing justice. However the Constitution of Romania is unclear in its operation with the term "justice" especially when we refer to the "independence of justice".

Article 1 paragraph 4 ensures the *separation of powers within the state* as a general principle of organization and function. The segregation of the functions of the various powers in the state is nothing else than a recognition of the judicial power's independence, as a system, in relation to the other powers in the state (the Legislature and the Executive). Article 124 paragraph 3 of the Constitution enshrines the independence of the entity vested to do justice, i.e., the independence of the judge. This is accomplished by inclusion of the definition seeking to restrict independence to the enforcement of the legal provisions ("*judges are independent and only abide by the law*"). In other words, by a literal interpretation, the independence is limited by and to the prescription of the law, which dictates to the judge the way of carrying justice.

The Constitutional confusion of the notion of independence of justice as a system is created by article 133 paragraph 1, which states: "*The Superior Council of Magistracy is the guarantor of the independence of justice.*" It is clear that the term "justice" used by the Constitution in the latter article has a wider content than the phrase used by art. 1 paragraph 4, "judicial power". Art. 133 of the Constitution follows the other two judicial authorities (courts of law and the Public Ministry) from the composition of the membership of the Superior Council of Magistracy (judges and prosecutors represent the majority), as well as from the way of organization and function of the Superior Council of Magistracy. Art. 134 paragraphs 1 and 2 of the Constitution state that CSM proposes the appointment of the judges and prosecutors by the President of Romania and that it fulfils the role of disciplinary court as regards the judges and prosecutors. Therefore the Constitution is understood as providing a different meaning to the phrase "judicial power" exercised by the High Court of Cassation and Justice and by courts that are made up of judges on the one hand, from the term of "justice", on the other hand.

The latter term is exercised by courts of law and by the Public Ministry and refers to judges and prosecutors.

Paragraph 4 of art. 1 in the Constitution, as previously mentioned, states that the judicial power is separated and in balance with the other constituent powers. In our opinion, this defines the independence of it. In exchange, the prosecutors are members of the Public Ministry and *"run their activity according to the principle of legality, of fairness and hierarchical control under the authority of the* ***minister of justice****"* (emphasis added). It is obvious that the prosecutors and prosecutors' offices do not benefit from independence as long as they are under the authority of the representative of the executive power and their activity is under hierarchical control.

From our point of view, the guarantee of judicial independence, as it is stipulated in art. 133, paragraph 1, of the Constitution, interferes impermissibly with the judicial power by limiting its independence which is contrary to the principle as created by article 1 paragraph 4, that powers in the state must be separated and in equilibrium. We state that the so-called guarantee represents a pressure factor in its own right, outside of the judicial power, which creates an imbalance by the intervention of another judicial authority, i.e., the representatives of the Public Ministry, who have no status of independence as judges have. They do not have a similar text to article 124 paragraph 3 (*"judges are independent and only abide by the law"*). Therefore the CSM plenum, which also includes the representatives of the Public Ministry, has responsibilities concerning only the organization and functioning of judicial power, such as proposing the nomination or dismissal of judges to the President of Romania, promoting judges, or appointing justices to the High Court of Cassation and Justice.

Thus, the Constitution of Romania, by provisions of art. 133 and 134, as explained above, represents a pressure factor. If we see this pressure as an objective one, it is exterior to the judge himself or to his judicial power with a possible interference in his activity since important decisions for the operation of the judiciary or for a judge's career are made by the representatives of a judicial authority, other than the judicial power.

**The Constitutional Court**. Despite the lack of clearness to the constitutional safeguard of the Superior Council of Magistracy addressing the independence of the judiciary and judges in the carriage of justice, we also wish to signal the role of the Constitutional Court as a guarantor of the independence of the judiciary, conferred upon it by art. 146 letter. e in the Constitution.

This text also stipulates that within the responsibilities of the Constitutional Court are the solving of juridical conflicts of a constitutional nature among the public authorities, at the request of the President of Romania, of the Speaker of either Chamber of Parliament, of the Prime-Minister or President of the Superior Council of Magistracy. In fact, the Constitutional Court has already been informed by the President of the Superior Council of Magistracy of a possible constitutional conflict. By notifying the President of the Superior Council of Magistracy, a pressure factor occurs. *The President of Romania has made repeated generalized statements on justice and magistrate referring to "incompetence", "independence from the law", and "a high level of corruption"*. Because of the notification, this legal conflict of constitutional type does not reside *"in the existence of those serious*

*statements, but in their legal effects, because they represent factors which can create an unbalance between the state powers and even an institutional blocking"*. That pressure factor was more serious, in the view of the person who notified the Constitutional Court, as it was extensively publicised.[93]

The ruling of the Constitutional Court declined the notification made by the President of the Superior Council of Magistracy. However the perspective from which the Constitutional Court looked at the legal conflict of a constitutional nature is questionable. The Court held that we were not dealing with a constitutional conflict, even if *"the claim of the President of the Superior Council of Magistracy that both the President of Romania and the Prime-Minister have repeatedly criticised specific aspects of the activity of doing justice is substantiated"*, as the statements under scrutiny did not refer to the judiciary as a whole, but to specific courts and specific judges as representatives of that power.[94] In our opinion, the Constitutional Court omits the fact that article 124 paragraph 3 in the Constitution of Romania enshrines the independence of judges and not of the judicial power *expressis verbis*. The Court further omitted that, justice is done through the High Court of Cassation and Justice and through the other courts of justice established by law (art. 126 paragraph 1 in the Constitution). We find that a single judge's or a single court's independence being affected by another public authority creates that legal conflict of a constitutional nature that calls for the intervention of the Constitutional Court as guarantor of the independence of the judiciary and of judges in carrying justice.

### 1.2. Law no. 303/2004 on the Statute of the Judge and the Prosecutor

**General norm**. Considering the constitutional provisions of separation and balancing of the state powers, we would have expected that the common legislator would find those means to safeguard the independence of the judiciary and of judges from the legislature and from the executive in order to mitigate pressure factors that may curb such independence. Only one piece of ordinary legislation stipulates an obligation for each *"person, organization, authority or institution"* to observe the independence of the judge (art. 2 paragraph 4 of Law 303/2004). However, no sanction is available for the breach of this obligation. This gives us due reason to state that judges are not legislatively defended from such pressure factors.

The mere publication by CSM of a press statement reporting that specific sanctions had infringed on the independence of justice and in particular of judges, or that the professional reputation of the judge had been affected, is of little consolation to the judge who had been subjected to the pressure factor(s). Of course, art. 30, paragraph 2, of Law no. 317 of 2004, stipulates the duty of CSM to "notify the competent body to decide on the measures which should be taken or to order any other adequate measure under the law". Since the majority of judges named the press as a pressure factor, we have been unable to identify cases where CSM had found that the reputation of a judge had been jeopardised (meaning that his/her independence as general capability of carrying justice had been also jeopardised) by the mass-media and where "the competent body" had been notified. In fact,

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[93] See Resolution no. 435 of 26 May 2006 of the Constitutional Court, published to the Official Journal of Romania, Part I, no. 576/4 July 2006.
[94] Id.

in the case of the press, we do not know what that body would be (the Romanian Press Club is not a state authority so we cannot think of the kind of sanctions that it would be able to take; the National Audio-Visual Council is has no competence on the print media, etc.).

Romanian legislation, therefore, is hesitant not only in defining pressure factors, but also in stating a positive prohibition in a text of law regarding the pressure factors that may be put on justice and, in particular, judges. The idea, in this context, is not to necessarily punish the agent that carries the pressure directly or indirectly, but to find those mechanisms to protect the independence of the judiciary and the judge from such factors.

**Special Norms**. Law no. 303/2004 was a step ahead with regard to the guarantees of judges' independence related to their professional career. The law eliminated the possibility that decisions concerning their career could be taken by another authority other than the judicial one. An important role in the professional career of judges is given to the Superior Council of Magistracy, but also to the National Institute of Magistracy, the latter being coordinated by the Superior Council of Magistracy .

Systemizing these guarantees stipulated by Law no. 303/2004 republished, the professional development of a judge is no longer conditioned on factors that are exterior to the judicial authorities. This does not mean that there cannot be pressure factors originated inside the judicial authorities, vested with competence from that respect, in connection with the career of judges. However, there is no doubt that the transparency of decisions regarding a judge's professional career by judicial authorities competent on the professional development of judges can considerably diminish the possibility that such factors may exist.

In short, Law no. 303/2004 republished stipulates the following guarantees:

1. Admittance to magistracy and inceptive professional training are realised by the National Institute of Magistracy, which, as mentioned above, is co-ordinated by the Superior Council of Magistracy (art. 13);
2. Nomination of intern judges by the Superior Council of Magistracy (art. 21);
3. Proposals to the Romanian President for the appointment of judges represent the power the Superior Council of Magistracy (art. 31);
4. Internship capacity examination is the in the competence of the Superior Council of Magistracy via the National Institute of Magistracy (art. 26);
5. Life-long professional training is the responsibility of the National Institute of Magistracy, presidents of the courts, and judges themselves (art. 36);
6. Periodic evaluation of the judges by commissions set up by the Superior Council of Magistracy (art. 39);
7. Promotion of judges to courts of higher instance and appointment to leading positions only by competition is the responsibility of the Superior Council of Magistracy via the National Institute of Magistracy (art. 43);
8. Delegation, secondment, and transfer of judges are possible only if consented by them or upon their request, by the Superior Council of Magistracy or in case of transfer of the judges sitting in courts of first instance, tribunals, or specialised

tribunals to the jurisdiction of the same court of appeal by the president of the court of appeal.

Regarding the secondment of judges, the possibility of seconding judges outside the judiciary, to other public authorities and institutions is unconstitutional. In our opinion, the unconstitutionality is a pressure factor acting against the independence of the judiciary and of judges themselves, as we shall demonstrate below.

When this paper was written, 78 judges were seconded to other public authorities and institutions, with the most serious situation being reported at the Bucharest Court of Appeal, from where 17 judges are seconded. Thirty-three (33) judges are seconded from other courts in the jurisdiction of the Bucharest Court of Appeal (Bucharest Tribunal, district courts of first instance) even though caseloads in Bucharest are oversized and the majority of the court houses are still understaffed.

Art. 58 of Law no. 303/2004 republished stipulates: *"The Superior Council of Magistracy decides on the secondment of judges and prosecutors with their written consent, to other courts or prosecutor's offices, to the Superior Council of Magistracy, to the National Institute of Magistracy, to the Ministry of Justice or to the latter's subordinated units or to other public authorities, on other positions, including named offices of public dignity, upon the request of those institutions."* The constitutional text, on the other hand, states: *"The judicial office is incompatible with any other public or private function, with the exception of academic didactic functions in higher education." (article 125 paragraph 3 of the Constitution of Romania)* In other words, according to a fair construction of the constitutional text, judges cannot fulfil any other public function except the judicial office.

The judicial power is circumscribed to the activity of the courts and of the High Court of Cassation and Justice as the only ones that exercise the competence of the judiciary under art. 1 paragraph 1 of Law no. 304/2004 regarding the judicial organization. Thus, apart from jurisdictional functions, judges can also undertake court administration functions (leadership or other kind of activities). This opportunity is recognised only because those activities are necessary for the good and independent functioning of the judiciary represented by the High Court of Cassation and Justice and by the courts of law.

According to the constitutional principle of the separation and balance of state powers set forth in art. 1 paragraph 4 of the Constitution and, in particular, in art. 125 paragraph 3 of the Constitution, judges can not be temporarily transferred to any other public authority even if it is a judicial authority (ex: prosecutor's offices or the Superior Council of Magistracy). This is the case, even more so, to public executive authorities (Ministry of Justice, Ministry of Foreign Affairs, General Secretariat of the Government) as it cannot be done without the transferred judge losing his quality as an independent judge. The independence of the judiciary, represented by the law courts, is breached by temporarily transferring judges to fulfil other functions than the specific ones. The balance stated in art. 1 paragraph 4 of the Constitution is transgressed to the detriment of the judiciary as long as its representatives end up serving other powers within the state.

Distinctly, when a judge takes other public function than the judicial office, that judge inherently ceases to meet the condition of independence, even if he/she works in a structure called "judicial authority", such as the Superior Council of Magistracy. In such a case,

the judge reports administratively and hierarchically to superiors and on different grounds than those pertaining to the activity of the courts where judges are constitutionally supposed to perform. Art. 73 of Law no. 303/2004 creates a bridge between the rights and obligations of judges and the "justice" they administer. That is, a nexus exists between the jurisdictional work and the management of the judiciary inside a court that in no way connects it to work done by judges seconded to other public authorities. Art. 73 reads: *"The rights of judges and prosecutors are determined taking into consideration the place and role of justice in a state governed by law, the responsibility and complexity of being a judge and a prosecutor, the interdictions and incompatibilities stipulated by law for those offices and seeks to safeguard their independence and impartiality."*

In other words, the term "independence", stated in art. 1 paragraph 3 of Law no. 303/2004, is indissolubly connected to the activity performed by the judge only inside the judicial power and especially to the decisions a judge makes about jurisdictional and court management activities. From this point of view, *Principle I*, paragraph 2 letter d of Recommendation no. R 94 (12) of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges (*adopted by the Committee of Ministers on 13 October 1994 at the 516th meeting of the Ministers' Deputies)* expressly holds that "in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary."

Yet, in administrative structures such as public authorities other than the courts and public institutions, decisions made by the seconded judge are subject to the hierarchic control specific for hierarchic-administrative relations. Therefore such decisions can no longer be characterised as having been made *"without restriction, improper influence, inducements, pressures, threats, or interferences, direct or indirect"*.

It is the logical conclusion that judges who are seconded to public authorities other than the courts or public institutions lose their independence. This is the case since independence can only work for them inside the judiciary and in strict connection with decisions pertaining to the jurisdictional activity that, under art. 126, paragraph 1 of the Romanian Constitution, is only the prerogative of the High Court of Cassation and Justice and of the courts of law. Any other activity and associated decisions trespass the judiciary and diminish the independence of the judge.

### 1.3. Law no. 304/2004, republished, on the Organisation of the Judiciary

**Overview.** The principles as well as the organisation and functioning of the various components of the judiciary, the High Court of Cassation and Justice, and the courts of law, respectively, are set forth in this normative act. Generally and systemically, the internal organisation of the activity of the courthouses is their prerogative, meaning that it is managed by them. This applies to operations such as: the assignment of cases, the hierarchy in the

courthouses, the appointment of judges to sit in the various departments of the courthouses based on their specialisation, the appointment of judges to panels, and relations with other judicial authorities.

Nonetheless, the Superior Council of Magistracy, as demonstrated below, interferes with the organisation and functioning of the courthouses. Such interferences are not to be necessarily looked at as pressure factors that may be disturbing the operation of the courts, but situations that could be perceived as such. As shown in the previous chapter, appearances sometimes are as important as reality when it concerns independence or impartiality.

**Appeal for annulment**. Pressure can sometimes have its origin in the system itself. It can be interpersonal (from superiors or peers) or even institutionally enshrined. The carriage of justice pertains to the essence of the judiciary and consists of ***resolving and, adjudicating a disputed legal conflict or a non-contentious case***. Its social importance makes it absolutely necessary for it to not be conditioned on any external factor. The judge is under a duty to render justice solely based on the elements of the case and under the legal norms applicable to each particular case.

The act of justice rendering can nevertheless be hampered, for example, by the fact that a judge's decisions can be challenged and reviewed by following extraordinary remedies. That was also the situation in the Romanian legal system at some stage, when the General Prosecutor had the power to lodge an appeal for annulment against any definitive and irrevocable court decision (art. 304[1] Code of Civil Procedure, abrogated by Government Emergency Ordinance no. 58/2003) or against any definitive decision (art. 409 Code of Penal Procedure), abrogated by Law no. 576/2004. At first glance, the original reason for abrogating the option of quashing a judicial decision by appeal was to ensure the legal stability given by a court decision, we believe that by eliminating this remedy, the independence of the justice system and especially of the judges, themselves, was ensured. The instability of court rulings that are final and irrevocable or definitive, rulings that constitute the finality of the act of justice rendering, is conducive to a weakened independence of the judiciary.

For example, we can recall the well-known statement made by Former Romanian President Ion Iliescu in Satu Mare, in 1995, when he was launching a tough criticism against the judiciary for too easily returning nationalised properties to their former landlords. Immediately after that statement, the General Prosecutor introduced an appeal for the annulment of the definitive and irrevocable court decisions returning the properties nationalised after 1945 to their owners. The appeals for annulment were admitted by the Supreme Court of Justice without exception. As the General Prosecutor was subordinated to the Executive power (under article 132, paragraph 1 in the 1991 Romanian Constitution, "prosecutors operate..., under the authority of the minister of justice"), it is evident that, by introducing those appeals for annulment, the very substance of the judiciary was affected. The stability of definitive and irrevocable court decisions no longer existed. Furthermore, following the political statement "reprimanding" the judiciary for its decisions, and following the introduction of those appeals for annulment, the independence of the judge was obviously affected. Those external pressure factors, the statement of the Ex President and the appeals for annulment lodged by the General Prosecutor, created a state of insecurity among judges. In all the nationalised property restitution cases that they were to hear from that point on,

they already had adjudication limitations drawn from outside the judiciary.

**Economic-financial management**. Similarly, Law no. 304/2004 stipulates that the economic-financial management of courts falls within the attributions of courts which are independent legal entities, namely courts of appeals and tribunals. However, one should not overlook the role of the Superior Council of Magistracy (CSM), whose issues the assent resolution with respect to the budgets of secondary and tertiary paying officers, i.e. courts of appeals and tribunals, or the critical part played by the Ministry of Justice. It should be mentioned that, under the relevant legislation (particularly Law no. 500/2002 on public finances), courts which are secondary and tertiary paying officers are reduced to acting as budget enforcement agencies.

While courts are the ones to draw up the draft annual budgets, these are filtered by the Superior Council of Magistracy, which issues assent resolutions, and the final decision rests with the primary paying officer, i.e. the Ministry of Justice. In this respect, courts have only limited initiative in proposing budget drafts, and no actual authority to support it with either the authority which issues the assent resolution, or with the primary paying officer. Their decision-making power is restricted to the enforcement of their own budgets, as approved by other authorities.

In our opinion, there are pressure factors which may distort court independence in terms of their economic-financial management. Such factors, for instance, have to do both with the Superior Council of Magistracy, which issues the assent resolution (albeit to a much lower extent) and, more importantly, with the Ministry of Justice, the primary paying officer.

A change is expected in the future: as of 01.01.2008, the management of court budgets will be transferred, under art. 136 of Law no. 304/2004, to the High Court of Cassation and Justice. However, we have yet to see how the supreme court will be able to handle the bureaucratic intricacies which have contaminated the financial management in the justice system for years. Already the High Court president has made public statements indicating that the supreme court does not want to take over court budgets due to a lack of administrative capacity.

Also, in the Justice Status Report presented on 14.06.2006 to Parliament Chambers in a joint meeting, CSM, through its president, pointed out that the budget management should be transferred not to the High Court of Cassation and Justice, but rather to CSM. In our opinion, such a proposal which was likely made by virtue of the same general constitutional provision according to which CSM is the guarantor of justice independence, does not solve the justice independent problem. The pressure factors will continue to affect courts and their leadership structures.

Furthermore, the problems witnessed prior to September 2004, when the three justice reform laws were enforced, will resurface: centralisation and excessive bureaucratisation of justice in the hands of one body (the Justice Ministry in the past, CSM in the future). It is necessary to mention that in the current context, there is not one power centre at CSM, but several such centres, with the decision-making power scattered among members of this judicial authority. In other words, these power centres will be represented by each CSM member. Over the years, this structure has resulted in agreements being reached by

CSM members who, more often than not, are chosen from leading courts in the country. Such agreements ("I'll give you, if you give me") will tend to make CSM members protect the interests of their respective courts, whereas most other courts will be deprived of transparent decisions designed to meet their actual needs.

There will likely be intensive "lobbying" of each CSM member by court leadership structures who will seek to have their budgets approved. Contrary to constitutional provisions, this will create a privileged status for CSM members in relation to the other members of the judicial authority. These "lords of the judicial system" will virtually become the executive power of the justice system (whether officially recognised as such or not). Whereas, the other actors will be forced into humbleness and submissiveness so as to get budgets that will meet their needs. In our view, excessive centralisation can only result in reducing the independence of justice. In other words, such provisions may lead to the emergence of pressure factors operating on judicial independence and on the independent conduct of the justice system.

Finally, we can see no reason why prosecutors may have a separate paying officer such as the Prosecutor General, of the Prosecutor's Office attached to the High Court of Cassation and Justice yet judges cannot have a paying officer of the same status. Given that CSM is currently made up of both prosecutors and judges, a situation will be reached, where prosecutors will make decisions on the budget of the judicial power, which is unacceptable.

### 1.4. Law no. 317/2004 on the Superior Council of Magistracy, republished

**Terminology**. Not only does Law no. 317/2004 preserve the ambiguity of the phrases "independence judicial power", "independence justice", and "independence judge", but it enhances it.

Art. 1, paragraph 1 defines the Superior Council of Magistracy as the guarantor of the independence of "justice", making no reference to the "judicial power". Art. 30 paragraphs 1 and 3, however, stipulates as attributions of the Superior Council of Magistracy the protection of judges and prosecutors from any act that may affect their independence or impartiality, or that may create doubts as to it. Art. 30 also grants the Council to power to protect judges and prosecutors' professional reputation and to guarantee judges and prosecutors compliance with the law and with professional ethics and competence criteria in their professional careers. We note that the guarantee of "justice" refers neither to the legal profession as a whole, nor to the "judicial power", but specifically to judges, who administer justice, and to prosecutors, whose attributions are to protect the general interests of the society, the rule of law, as well as citizens' rights and liberties.

Therefore, the Superior Council of Magistracy does not guarantee the independence of the "judicial power", as separate from and in a balance with the other powers in the state, but only the independence of judges. It could be argued that the presence of prosecutors in the Council and their participation in important decisions regarding precisely the judicial power (such as the proposing judge appointment to the President of Romania), judge promotion, and appointment of judges at the High Court of Cassation and Justice, may explain why the lawmaker avoided explicit references to the protection of the independence of the judicial power, as represented by the High Court of Cassation and by courts, and only referred to the independence of judges, themselves.

**The bureaucratisation of CSM**. As far as the activity of the Superior Council of Magistracy is concerned, we find that it tends to be viewed as the highest "administrator" of justice. The CSM finds solutions to all problems related to the administration of justice. Although independence is their first and foremost attribution, Courts have increasingly restricted freedom in terms of their own management and left the other judicial authority, i.e. CSM, only assumed to act as a guarantor of this independence.

In fact, an extremely complex bureaucratic apparatus has been created in which decisions on the administration of justice (attributions stipulated under Law no. 317/2004) are significantly delayed and often made without consultation with the judicial body. SoJust has extensively presented these flaws in the activity of the Superior Council of Magistracy in September 2005-September 2006.[95] The diversity of attributions vested on and taken upon by CSM, its excessive bureaucratisation, the impossibility to make decisions concerning the operation of the system (e.g. selecting judges to fill court vacancies), and the hierarchical structure specific to an administrative-executive authority, rather than to a judicial one (in the sense that court leadership structures have to wait for the CSM answer to the most diverse problems, such as the number of panels of judges to operate in one tribunal, the operation of specific court departments, etc.) turn CSM into a pressure factor, i.e. a factor which hinders the expression of true independence of courts and implicitly of judges.

For instance, according to art. 41, paragraph. 1, of Law no. 304/2004 on the judiciary organisation, specialised departments and panels in courts of appeals and subordinated courts are established under a CSM resolution by a proposal by court leading structures. But such specific assessment made by CSM are questionable, to say the least, particularly concerning the establishment of specialised panels of judges. This is true, either because CSM may lack an accurate picture of the problems facing the courts, or because it answers court requests with delays, in spite of the urgency of the situation. Instead of providing for a general procedure for CSM to design the exact manner in which such specialised panels are to be established by courts themselves so as to enhance the court independence and allow for CSM to only have to check the compliance of courts with the law and the regulation, the Council must make a decision in each specific case, for each specific court.

The CSM's wish to become a "factotum" in the administration of justice is strengthened, without doubt, by the provisions of Law no. 317/2004. Considering the self-evident inefficiency of CSM and its departments, we believe a reconsideration of the entire administration of justice is called for. In order to prevent such justice administration attributions exclusively held by CSM from infringing upon the independence of the judicial power and of judges, we should resort to a principle similar to the EU *"principle of subsidiarity"*. CSM should only keep as an exclusive attribution the judges and prosecutors' disciplinary accountability. This means that courts would be entitled to manage their operations without any interference from CSM, and that the latter should only step in where acts related to the administration of justice cannot be performed by courts.

Naturally, in order to avoid abuses in the management of court cases, the law may stipulate that any judge in a court or any party concerned may challenge a decision of that

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[95] Cf. SoJust, *Raport Independent asupra Sistemului Juridic din România* – 2006, at www.sojust.ro, chapter II "Consiliul Superior al Magistraturii - intre dorinta si putinta, intre eficienta si ineficienta".

court in CSM. This would be the only way to ensure the efficiency of court independence and of the CSM role as a guarantor. Because a more thorough analysis of the meaning of the two phrases indicates foremost that, it is courts which ought to act independently, as they have this constitutional power, and that CSM should only step in, as a guarantor, where this independence is threatened in some way.

### 1.5. The codes of ethics of judges and prosecutors

Endorsement of a Code of Ethics by the Superior Council of Magistracy required outstanding effort and energy, and benefited from the expertise of civil society associations and even international bodies.[96] Unfortunately, the Code of Ethics has become an instrument scarcely used in the daily activity of the judicial power and of judges. While initially a breach of Code of Ethics provisions was subject to disciplinary penalties (art. 97 letter b of Law No. 303/2004, in the form in force before this text was abrogated by Law no. 247/2005 on the ownership and justice reform and related measures), after this text was abrogated, the only useful role of this Code is reflected in the assessment of the efficiency and quality of the activity and integrity of judges, in terms of compliance with Code norms (art. 2 paragraph 1 in the Code).

Worth noting is that art. 3, paragraph 1, of the Code stipulates that judges are bound to protect the independence of justice. Taking this "obligation" as a positive task and leaving the fuzzy term "justice" aside (since prosecutors, on whom this Code applies to an equal extent, also protect the same independence of justice), it is quite interesting to note that the text accurately suggests that judges are first and foremost under an obligation to protect the judicial power and to protect themselves from any influence of external pressure factors.

### 2. Instruments provided by associations of judges

Associations of judges have had little involvement in the effort to propose to decision-makers such public policies as to combat pressure factors and conflicts of interests. Indeed, these associations limited themselves to public statements and specific positions in defence of the independence of justice and of magistrates In doing this, they failed to undertake a coherent endeavour in this respect.

### 3. Instruments provided by the civil society

The only surveys of the pressure factors which distort the independence of the judicial power and of judges that we were able to identify are those carried out by Transparency International-Romania in 2005 and 2006. Another report, which was created by SoJust, was made public in September 2006.[97] The survey is without a doubt a complex tool outlining those pressure factors that are internal and external to the justice system. It identified factors that affect or may affect the administration of justice and the body which commissioned it. Most discouraging, however, is that the Superior Council of Magistracy, the

[96] Mention should be made here of the final report by ABA/CEELI, on funding granted by the US Agency for International Development, July 2005, http://www.abanet.org/ceeli/publications/rom_mag_ethics_code_rom.pdf.
[97] Cf. http://www.transparency.org.ro/doc/studiu_CSM_2006_corectat_final.pdf.

beneficiary of the report drawn up by Transparency International-Romania is without justification postponing the use of the report conclusions.

The survey focuses on the magistrates' perception of the independence of the judiciary. It centres around and lays emphasis on "the functional relations within the justice system and the balance of public powers, and primarily on the relations of the judicial power with the executive power, the legislative power and the 'civil power'."[98] Also, the report includes proposals aimed at enhancing the independence of magistrates and at ensuring a climate of high performance and integrity in the administration of justice.[99]

Chapter 3 of the survey tackles "*The Independence of Justice. Presenting the perception of judges, prosecutors and assistant magistrates on the independence level of the judiciary system.*" (pp. 23-36) The questions asked and the answers given by judges were quite interesting, although in some questions we noticed the use of general phrases for key concepts related to the topic of our survey. For example, in the first question, "*To what extent is the judiciary system independent?*", the phrase "judiciary system" covers a variety of actors which contribute to the administration of justice. The "judiciary system" encompasses not only judges, prosecutors, and assistant magistrates, but also the auxiliary personnel, as well as the attorneys and the judicial expert corps. Nonetheless, the data collected from judges point to the conclusion that in their case the "independence of justice" or "independence of judges" is defined in relation to factors which are not only external, but also internal to the judiciary system, to the public perception on the system, to financial matters, etc.[100] Judges believe, to a greater extent than in 2005, that current regulations are able to protect their independence.[101]

The report concludes that "one may state that the concept of "independence" of the judiciary is rather unclear among magistrates. This ambiguity of the concept, used at various levels of the public life, threatens to generate approaches and measures which do not resolve the actual flaws of the judiciary system, but rather provide palliatives and short-term solutions, which in the long run will not improve the state of the judiciary system as a whole".[102]

This conclusion, as we try to prove in this section, is first of all generated by the absence of precise, consistent, and coherent regulations regarding the general and even particular definition of pressure factors as well as of the conflict of interest with judges. Keeping in mind the conclusions of the Transparency International Romania survey, it is critical for all stakeholders in the justice system to design a regulatory framework able to provide firm and effective guarantees to the independence and impartiality of the judicial power and of judges.

Subsequently, Chapter 4 of the Transparency International survey presents the perception of judges regarding the sources of interference with judicial independence. Foremost among these sources is the mass-media with 56%, followed by members of

[98] Id. at 8.
[99] Id. at 69-71.
[100] Id. at 20.
[101] Id. at 21.
[102] Id.

Parliament 6.8%, Government members 6.6%, and Presidency 8.2%. Also, regarding the extent to which pressure is wielded on judges by interest groups with respect to rulings passed in particular lawsuits, the percentage of those who believe such pressure is wielded is disquieting (frequently 5%, sometimes 64%).

Judges believe that the relationships between the executive power, the presidential administration, and the "judiciary" (again, an inaccurate term used in reference to the infringement upon the "judicial power", the phrase which, in our opinion, should be used in measuring judges' perception on independence) are authority relations. Of those surveyed, 72.7% see a dominating position for the executive power and 59.9% see a dominating position for the Presidency.

The most powerful pressure factor as perceived by judges is the mass media. The conclusion of the focus group set up to analyse the data is that "magistrates are stressed by the idea that the media settle files instead of judges, before court rulings are passed in the respective trials, and if the rulings thus passed are different from those of the media, judges become subject to negative media campaigns and to accusations of corruption and unfairness, while their reputation is inadequately and ineffectively protected."[103]

The second major pressure factor is the executive power. However, the Government interference is seen as indirect (a conclusion shared by this analysis, as well) and related to the impossibility of the justice system to publicly counter the attacks and criticism made by governmental officials.[104] The legislature is also seen as a factor infringing upon the independence of the judiciary insofar as it fails to endorse legislative acts designed to adequately guarantee the independence of magistrates.[105]

The Transparency International Romania survey should be extended to include an analysis of outsiders' perception on the judicial power, which in fact the survey authors already intend to do. This would help outline a general view on the pressure factors which infringe upon the independence of the judicial power and of judges. Moreover, the findings would contribute to the mutual knowledge of the expectations of judges as well as those outside the system and the beneficiaries of justice.

### II. Conflicts of interest as factors infringing upon impartiality

**Impartiality**. Impartiality may be defined as the ability of an individual, in this case a judge, to make a just, objective, unbiased, fair assessment. This means that this ability is specific and related to the file and to the litigation that the judge is called to settle. It is also subjective, in that it is related to the judge's personality. After all, being impartial in a particular trial is a choice made by the judge alone. This is not to mean that the other public authorities, state structures, or individuals are not under an obligation to refrain from

[103] Id. at 34-35.
[104] Id. at 33.
[105] Id. at 34.

infringing upon a judge's impartiality in a particular lawsuit. As we mentioned above, breaching this injunction would be a pressure factor, but it is the judge alone who chooses to be biased or unbiased.

Obviously, judges have their own outlooks on life and their own feelings, even during the trials that they conduct or in which they take part as members of the panel of judges. More importantly, they may have political preferences. All these outlooks, ideas, and feelings must not prevail in a judge's activities, as they would thus affect a judge's ability to be unbiased in trials. Nonetheless, these ideas and feelings, indeed the judges' personal "history", will contribute to a particular perception of the facts that judges are called to assess. However, the extent to which judges' rulings may be influenced by their personal experience, wishes, and interests, is hard to define. In psychological terms, judges cannot ignore their personal history, much as they might consciously try to do so.

The Romanian justice system has likely failed to tackle this very complex and complicated issue. This is because judges have been regarded as, or (particularly after the 1989 Revolution) they accepted to be reduced to, the status of law enforcers, i.e., mere clerks who establish whether a legal text is applicable to a particular situation. In Western Europe, following the model of the U.S. justice system, judges tend to become first-rank social and political arbitrators. This is because of shifts in the cultural and social perception of values on which Western societies operate such as the increase in the importance attached to human rights and the emergence of the use of legal tools by individuals, NGOs, etc., in view of correcting the behaviour of public authorities. In this respect, judges' decisions play a major political part by adjusting the adequate performance of the society.

It is hard to define a limit up to which personal experiences and outlooks may interfere with the administration of justice without generating conflicts of interests. Defining these limits in each particular case falls within the attributions of the judicial authority, of judges themselves.[106]

**The concept of "conflict of interest".** In a report drawn up in 2005 by the Legal Resource Centre, and titled "Anti-corruption guide: monitoring conflicts of interests and incompatibilities",[107] authors Valerian Stan and Radu Nicolae define the notion of conflicts of interests. Thus, while corruption and corruption cases will always involve a conflict of interest,

[106] For instance, in the U.S., recognition of women's right to abortion by the Supreme Court was not possible until the first female Associated Justice was appointed to this Court (Sandra Day O`Connor, nominated in 1981), who tipped the scales in favour of recognition of this right. Until that date, "conservative" justices had prevailed in the USA Supreme Court. This is how a liberal outlook on life managed to win recognition and help endorse a women's right to abortion. In fact, the American society does not hesitate to talk about two clearly-defined trends at the U.S. Supreme Court, the "conservative" and the "liberal" ones. Both trends have an outstanding impact on major social-political matters and whose rulings have virtually changed the Americans' mentality: prohibition of racial segregation, revision of the concept of "minority" and of individual rights in relation to the majority, and so on. It is true that Sandra D. O`Connor, although a "liberal", tipped the scales in 2000 towards the Republicans (her vote was decisive in turning down rigged election claims), when the Supreme Court of the United States was called to pass a ruling on the votes shared by G. Bush and Al Gore in Florida. Justice O'Connor criticised the standards of counting ballots in this State (electronic voting had been used, so the latter candidate made allegations that the election was rigged, which proved very important in the election of the new president).

[107] http://www.crj.ro/files/GhidAnticoruptie/GhidAnticoruptie.pdf.

the reverse is not always valid.[108] In other words, the concept of "conflict of interest" is broader than the concept of "corruption". Authors also distinguish between the concepts of "conflict of interest" and "incompatibility", in that the former will trigger general "incompatibility" cases, whereas the latter is defined in detail. For example, for each separate civil servant or public dignity position, the law specifically regulates all the other offices and capacities that the respective official cannot hold concurrently with that position. Authors conclude that the incompatibility situation is in fact an instance of continuing conflict of interest.

While agreeing with the authors of the aforementioned study, our opinion is that it is not so much the continuing nature which is relevant for the two cases (conflict of interest and incompatibility), but the fact that the "conflict of interest" concept is so broad as to include instances of incompatibility as well. We agree that the incompatibility concept is a normative one, i.e., it should be included in a regulated norm. This norm could be in the form of an organic or ordinary law, an in-house regulation, or an ethical or professional conduct code. We do not concur with those authors who see this as a distinction between "incompatibility" and "conflict of interest".

On the contrary, the instances of incompatibility specifically stipulated in a norm, are actually conflicts of interests, rather than continuing states of affairs. For instance, it is specified that a judge is incompatible with trying a case if there are circumstances which indicate that the judge, spouse or close relative are in any way interested parties in the case (art. 48, paragraph 1, letter d, of the Code of Criminal Procedure). Violation of the norms which regulate conflicts of interests or incompatibilities entails the same consequences: disciplinary action taken against the individual having breached the norm or holding the individual criminally liable. This is particularly the case since phrases like the one in art. 48, paragraph 1, letter d in the Code of Criminal Procedure are of a general nature and similar to what the authors of the aforementioned study mean when they use the phrase "conflicts of interests". In our example, according to the distinction made by the authors, conflicts of interests should be discussed rather than incompatibilities. According to our definition, what we have here is an example of the particular category of incompatibilities, which is included in the more general category of conflicts of interests.

In conclusion, there is a subordinated relation between the two concepts of conflict of interest and incompatibility, with the "conflict of interest" as the genus and with incompatibilities as the species modifier. The same subordination is also found between the concepts of conflict of interest and the normative restrictions applicable to judges. Therefore, *instances of conflicts of interests include both incompatibilities, and restrictions, without being limited to these*, as the conflict of interest is a much broader concept.

**Structure of the analysis**. We have detailed this aspect because we will discuss the national Romanian instruments in this respect. We must also mention that it is not our intention to analyse each particular incompatibility, restriction or conflict of interest referred to by national Romanian instruments. Rather, we will only analyse the extent to which there is a consistent general outlook in defining concepts and in identifying cases of incompatibility and restrictions.

[108] Id. at 9.

After having reviewed the national instruments related to the perception of conflicts of interests as factors infringing upon the impartiality of judges, it is apparent that a consistent outlook on the matter is missing. Furthermore, normative acts either overlap, or avoid an in-depth definition of the notion of "conflict of interest". The only instrument to provide an almost complete definition is the draft law on the National Integrity Agency.

The misinterpretation of concepts like "conflicts of interests", "incompatibility" and "restrictions" in these instruments, the chaotic manner in which the legislator has regulated issues related to conflict of interest (the same incompatibilities tackled in several normative acts), the breach of the very principle of judicial independence, the lack of consistency in relevant normative acts, and even the absence of studies and instruments provided either by trade associations or by the civil society with respect to judges, call for joint efforts by all stakeholders, aimed at ensuring the needed consistency.

## 1. Normative instruments

### 1.1. Law no. 161/2003, amended and completed, on measures to ensure transparency in the exercise of public dignities, of public positions and in the business environment, to prevent and control corruption

**Conflict of interest**. Law no. 161/2003 stipulates, under art. 69, paragraph 1, that Heading IV ("Conflicts of interests and incompatibilities while in public office or dignity") of the normative act is applicable to all individuals holding public office or employment, with magistrates mentioned under letter e) of the article.

Chapter 2, titled "Conflicts of interests", defines the conflict of interest, under art. 70, as the situation "*... in which the holder of a civil office or public dignity has a personal interest of a patrimonial nature, which may affect the objective completion of the attributions vested on that individual under the Constitution and other normative acts*".

While the definition is incomplete and partial, insofar as it is limited to patrimonial interests, it is also flawed in that it is not applicable to judges. A systematic interpretation of provisions under Heading IV, Chapter 2 of Law no. 161/2003 leads to the conclusion that the definition given in art. 70 only refers to members of the Government, to holders of other senior public offices in the central, and to local public administration and local elected officials and civil servants. It seems that magistrates are excluded without explanation.

We find that judges do not "benefit" from a general definition of conflicts of interests in other normative acts either. As seen below, judges only benefit from provisions referring to particular forms thereof (incompatibilities, restrictions, etc.). However, it is our belief that incompatibilities and restrictions stipulated for judges in various laws, which are actually forms of conflicts of interests, are not limited to the particular forms of conflicts of interests stipulated in such laws. Yet, there may be a lot more, as they are only limited by a balance between the public interest and the private interest of the judge or another individual.

**Incompatibilities and restrictions**. Art. 101 of Law no. 161/2003 reiterates the constitutional provision that the judge office is incompatible with any other public or private office, except for higher education teaching positions.

Subsequent articles stipulate incompatibilities and restrictions (art. 102, 103, and 104).

Art. 102 stipulates that magistrates are prohibited from:

*"a) carrying out arbitration activities in civil, commercial or other litigations;*

*b) acting as shareholders, members of boards of directors, management or inspection teams in not for profit institutions or trade companies, including banks and other credit institutions, insurance and financial companies, public corporations, national companies or publicly-owned companies;*

*c) carrying out trade operations, either directly or through intermediates;*

*d) acting as members of economic interest groups."*

Art.103 stipulates that:

*"(1) Magistrates shall not be subordinated to political goals and doctrines.*

*(2) Magistrates shall not be affiliated to political parties or carry out political activity.*

*(3) Magistrates shall, in completing their attributions, abstain from expressing or displaying their political beliefs."*

Art. 104 stipulates that:

*"Magistrates are prohibited from any display which comes against the dignity of the public position they hold, or liable to affect the impartiality or prestige thereof."*

(This latter article of the law expresses a professional ethic norm which has to do with the integrity of judges.)

Art. 105 stipulates the following instances of incompatibility:

*"(1) Magistrates are prohibited from taking part in the trying of a case, as judges or prosecutors:*

*a) if they are spouses or relatives up to the fourth degree, inclusively;*

*b) if they, their spouses or relatives up to the fourth degree, inclusively, have an interest in the case.*

*(2) Provisions in paragraph (1) are also applicable to magistrates taking part, as judges or prosecutors, in the trying of a case in appeal stages, where their spouse or relative up to the fourth degree, inclusively, has taken part as a judge or prosecutor, in the trying of that case in a court of first instance."*

We must emphasis that art. 105, paragraph 3 makes reference to the Code of civil and criminal procedure, which completes provisions in Law no. 161/2003 with respect to magistrate incompatibility, abstention and substitution. It is obvious that, according to the legislator, incompatibilities are only those stipulated under art. 105, paragraphs 1 and 2, while the other provisions are restrictions.

### 1.2. Law no. 303/2004, republished, on the status of judges and prosecutors

**Incompatibility.** Art. 5, paragraph 1 of Law no. 303/2004 reiterates,[109] just as art. 101 of Law no. 161/2003 does, the constitutional stipulation that the judge position is incompatible with any other public or private position. However, the exception to this provision is broadened without justification by adding training positions in the National Magistracy Institute and the National Court Clerk School to the constitutional exception which allows judges to hold teaching positions in higher education units. In our opinion, the extension operated by Law no. 303/2004 is unconstitutional, precisely because the normative act on the judicial organisation (i.e. Law no. 304/2004) stipulates[110] that the National Magistracy Institute is not part of the national education and training system. Similarly, the lawmaker decided that the National Court Clerk School is not part of the national education and training system.[111]

A logical and consistent interpretation of constitutional provisions, in contrast with those in art. 103, paragraph 2 of Law no. 304/2004 and art. 11, paragraph 2 of Law no. 567/2004, indicates that the broadening of the constitutional exception in art. 5, paragraph 1, regarding the "training positions" in the National Magistracy Council and the National Court Clerk School is outside the constitutional framework. According to the data available to SoJust, seven judges were transferred to "training positions" with the National Court Clerk School and two judges that were transferred to "training positions" with the National Magistracy Institute. In fact, SoJust has notified the matter to the Superior Council of Magistracy, which has failed to provide a solution by the time this document was produced.

**Conflict of interest.** Subsequently, paragraph 2 of art. 5 in Law no. 303/2004 defines the general concept of "conflict of interest" in relation to a judge's duty to recuse. The lawmaker defines the concept in an oversimplified manner, namely as a conflict between judges' interests and the public's interest in the administration of justice. However, where a judge notifies a conflict of interest to the leading board and the board finds that there is no such conflict likely to affect the impartial completion of attributions, then the judge may choose not to abstain.

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[109] Art. 5, paragraph 1: *"The judge, prosecutor, assistant-magistrate or judicial assistant positions are incompatible with any other public or private position, except for teaching positions in the higher education system, as well as training positions in the National Magistracy Institute and the National Court Clerk School, as stipulated by the law."*

[110] Art. 103, paragraph 2: *"The National Magistracy Institute is not part of the national education and training system, and is not subject to current legal provisions regarding the accreditation of higher education institutions and diploma recognition."*

[111] Law 567/2004 on the status of specialised auxiliary staff of court and prosecutor's offices attached to them stipulates, under art. 11, paragraph 2: *"The National Court Clerk School is not part of the national education and training system and is not subject to current legal provisions regarding the accreditation of higher education institutions and diploma recognition."*

It is important to note that, just like with the obligation stipulated by art. 107 of Law no. 161/2003, a court management body, namely the leading board which does not have jurisdictional attributions, decides when a judge has a conflict of interest. Undoubtedly, this type of subordination is not particular to the judicial power. We cannot see how a management body, which does not administer justice or at least is not assigned such attributions, can pass verdicts on a conflict of interest case. Nevertheless, a major step in "shedding light" on potential conflicts of interests was the obligation stipulated by art. 5, paragraph 3 of Law no. 303/2004, republished[112] (with modifications operated by Law no. 567/2004, rep.), which made the statement of interests public (currently judges' statements of interests are posted on the web site of each court).

**Incompatibilities and restrictions.** Moving on, articles 7-10 of Law no. 303/2004, republished, stipulate incompatibilities and restrictions for judges. Since they do not raise any questions, we have listed them below:

*"Art. 7 - (1) Judges, prosecutors, assistant-magistrates, legal personnel of that status and specialised auxiliary staff of courts and prosecutors' offices cannot be active staff, including covert operators, informants or collaborators of intelligence services.*

*(2) Legal staff stipulated in paragraph (1) will fill in, on an annual basis, an authentic sworn statement according to the criminal law, to state that they are not active staff, including covert operators, informants or collaborators of intelligence services.*

*(3) The Supreme Defence Council will check, at its own initiative or on notification by the Superior Council of Magistracy or of the Minister of Justice, the accuracy of the statements stipulated in paragraph (2).*

*(4) A breach of provisions in paragraph (1) results in the removal from office, including the office of judge or prosecutor.*

*Art. 8 - (1) Judges and prosecutors are prohibited from:*

*a) carrying out trade operations, whether directly or via intermediates;*

*b) carrying out arbitration activities in civil, commercial or other litigations;*

*c) acting as shareholders or members in boards of directors, management or inspection teams in not for profit institutions or trade companies, including banks and other credit companies, insurance or financial companies, national companies, state-owned companies or public corporations;*

*d) acting as members of economic interest groups.*

*(2) By derogation from provisions in paragraph (1), letter c), judges and prosecutors may be shareholders pursuant to the Law on mass privatisation.*

[112] Art. 5, paragraph 3 explicitly stipulates: "*Judges, prosecutors, assistant-magistrates and the specialised auxiliary staff are bound to present, on a yearly basis, a sworn statement mentioning whether their spouses and relatives up to the fourth degree, inclusively, hold a judicial position or carry out a judicial activity or criminal investigation activities, as well as their employment. Statements are registered and attached to judges' professional files.*"

*Art. 9 - (1) Judges and prosecutors shall not be affiliated to political parties, nor shall they carry out or participate in activities of a political nature.*

*(2) Judges and prosecutors are bound, while in office, to refrain from expressing or displaying in any manner their political beliefs.*

*Art. 10 - (1) Judges and prosecutors may not publicly express an opinion on ongoing legal proceedings or on cases on which a prosecutor's office has been notified.*

*(2) Judges and prosecutors may not offer written or verbal advice on contentious issues, even where the respective trials are pending in courts or prosecutor's offices other than those with which they are working, and may not carry out any other activity which, under the law, is carried out by an attorney.*

*(3) Judges and prosecutors may plead cases before courts, under the circumstances defined by the law, only in their personal cases, in cases of their lineage and spouses, as well as of people under their guardianship or custody. Nonetheless, even in such cases judges and prosecutors are prohibited from making use of their capacity in order to influence the decision of the court or prosecutor's office, and they shall avoid creating the impression that they may in any way influence the decision."*

### 1.3. Codes of civil and criminal procedure

While Law no. 303/2004 stipulates incompatibility and restriction cases not necessarily related to case files that a judge is called to settle, codes of criminal and civil procedure consider incompatibilities and restrictions related to the case specifically assigned to a particular judge. The Code of civil procedure stipulates incompatibilities under articles 24-27,[113] and the Code of criminal procedure at art. 46-48.[114] As far as these incompatibilities

[113] We quote in full the incompatibilities in the Code of civil procedure:
*"Art. 24 - (1) The judge who has passed a ruling in a case shall take part in trying the same case in an appeal or recourse procedure, and is strictly prohibited from retrying the case after cassation.*
*(2) Also, they shall not take part in trying, who have been witnesses, experts or arbitrators in the case.*
*Art. 25. - A judge who is aware that there are recusal grounds in his respect is bound to notify such grounds to their superior and to recuse from trying the case.*
*Art. 26. - Recusal is proposed by the judge and tried in compliance with norms stipulated under art. 30, 31, and 32.*
*Art. 27. - A judge may be recused:*
*1. where themselves, their spouse or, lineage have an interest in the trial of the case or where they are spouse or relative up to the fourth degree, inclusively, with any of the parties;*
*2. where they are spouse or direct or collateral relatives, up to the fourth degree, inclusively, with the attorney or representative of a party, or if they are married with the brother or husband's sister of any of these people;*
*3. where the surviving and un-divorced spouse is a relative up to the fourth degree, inclusively, with any party, or where there are descendants of the deceased or divorced spouse;*
*4. where themselves, spouse or relatives up to the fourth degree, inclusively, have a similar case with the case in question or have a case pending with a court where one of the parties is a judge;*
*5. where the aforesaid and one of the parties have been involved in a criminal trial over the past five years prior to recusal;*
*6. where they are legal guardian or custodian of any of the parties;*
*7. where they have expressed an opinion on the case pending for trial;*
*8. where they have received presents or have been promised presents or any other benefits from any of the parties;*

are concerned, we should mention that some of them are particular (e.g. the one stipulated in art. 48 letter (a) of the Code of Criminal Procedure), while others (e.g. the kinship relation between judges and a party, or kinship relation between panel members or between judges and prosecutors) reiterate incompatibility provisions in other normative acts, such as art. 105 of Law no. 161/2003.

### 1.4. The Criminal Code

A new felony[115] has recently been introduced in the Romanian Criminal Code, whose marginal name is "conflict of interest".

Art. 235[1] Criminal Code stipulates, "*(1) The deed of a civil servant who, while in office, takes action or takes part in making a decision which directly or indirectly results in material benefits for themselves, their spouse, relatives up to the fourth degree, inclusively, or for another individual with whom the civil servant has had trade or work relations over the past five years, or from whose part they benefited from services or other benefits, is punishable by six-month to five-year imprisonment and prohibition from holding public offices for the maximum legal period.*

*(2) Provisions in paragraph 1 are not applicable to issuing, passing or endorsing normative acts.*"

Naturally, the Romanian Criminal Code (art. 147, paragraph 1, in line with art. 145 Criminal Code) uses a special definition of the concept of "civil servant", which includes judges.

The criminal norm assumption, as identified in art. 235[1] Criminal Code, defines "conflict of interest" rather broadly. It is not our intention to analyse the elements of this crime in this report, but we should point out that the concept of "conflict of interest" refers to a particular form of conflicts of interests. Namely, it refers to incompatibilities, as we use this term in this paper. It is also relevant that apart from the incompatibility cases mentioned in the normative acts listed in sub-sections 1-3 of this section (relatives up to the fourth degree,

*9. where enmity exists between themselves, spouse or relatives up to the fourth degree, inclusively, and one of the parties, their spouses and relatives up to the third degree, inclusively."*

[114] *We quote in full the incompatibilities listed in the Code of Criminal Procedure:*

*"Art. 46 - Judges who are spouses or close relatives cannot be members of the same panel.*

*Art. 47. - (1) A judge who has taken part in the trying of one case shall not take part in the trying of the same case in a higher court or in trying the case after the ruling has been annulled and appealed against, or a retrial has been ordered.*

*(2) Similarly, a judge having expressed an opinion on the ruling that may be passed in the case, prior to the trial, shall no longer take part in trying that case.*

*Art. 48. - A judges is also incompatible with trying a case, where in that case:*

*a)they have initiated criminal proceedings or ordered the indictment or passed conclusions on the case as a prosecutor at the court, or has issued the preventive arrest warrant during the criminal investigation;*

*b) has acted as representative or defence attorney of any of the parties;*

*c) has been an expert or witness;*

*d) there are circumstances indicating that the judge, spouse or any close relative have interests of any nature in the case."*

[115] Modification enacted in Law No. 278/4 July 2006, published in the Official Gazette of Romania, no. 601/12.07.2006.

inclusively), the Code mentions other incompatibilities, as well (trade or work relations over the past five years or services or other benefits from any of the parties).

We believe that the normative acts which define incompatibilities, namely the Law on the status of judges and prosecutors, as well as the codes of criminal and civil procedure, should have been modified accordingly. This manner of identifying incompatibilities accompanied by criminal penalties, without proper correlation of incompatibilities in the laws regulating the judge profession or the trying process in civil or criminal lawsuits, is awkward, at best.

**2. The draft law on the National Integrity Agency**

**2.1.** The bill drafted by the Ministry of Justice and promoted as such by the Government of Romania, which tabled it to the Chamber of Deputies on 27.07.2006, has been subject to intense and heated debate in the civil society,[116] the political community, the media,[117] and, to a lesser extent, among various categories of public dignitaries, civil servants and magistrates. There have also been debates between the civil society and the legislative power.[118]

Upon publication of this paper, the draft law, endorsed in a substantially modified form by the first Chamber notified, i.e. the Chamber of Deputies, is being discussed in the Senate of Romania. Specialised committees have presented opinions on the bill, and Senate is to endorse the final text.

**2.2.** The most relevant provisions to this report are those referring to judges (the bill uses the broader term "magistrates", which also includes prosecutors). The draft law binds judges to make public their financial statements of wealth (art. 14, paragraph 1, point 25). Judges may also be subject to wealth checks, under art. 18-29 in the bill Furthermore, they are bound to disclose their interests (art. 33, paragraph 2) and may be subject to checks for potential conflicts of interests (art. 37, paragraph 1). The bill stipulates incompatibilities, other than those referred to in Law no. 161/2003, Law no. 303/2004 and the Codes of criminal and civil procedure (art. 58, paragraph 2), and restrictions, such as the one indicated in art. 60, paragraphs 1 and 2 of the bill. In other words, the draft law is intended as a comprehensive normative act with respect to the "grey area" of corruption, where on the one hand decision preparation and decision-making are more vulnerable to the pressure of interest groups, and on the other hand corruption deeds are more difficult to identify.

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[116] Cf. http://www.transparency.org.ro/text.php?LNG=ro&MOD=2&SEC=94&ART=26 a news release signed by the three civil society organisations, Open Society Foundation, Transparency International Romania, Legal Resource Centre. Also, the comprehensive analysis by Mr. Adrian Baboi Stroe, posted on the home page of the "Society for Justice" Association, at http://www.sojust.ro/forum/viewtopic.php?t=128&sid=1aaf243893d037f762d10e9d927b077c, a study extensively referred to in this report, as it is believed to be one of the most concise, wise, objective and rational analyses of the ANI bill. In the same respect, cf. the notes on the draft law, posted by Open Society Foundation at http://www.osf.ro/ro/comunicat_detaliu.php?id_comunicat=8.

[117] Cf. the debate in "22" Magazine, at http://www.revista22.ro/html/index.php?art=3022&nr=2006-09-08.

[118] The debate took place on 11 July 2006. Speaker of the Chamber of Deputies Mr. Bogdan Olteanu, along with numerous Senators and Deputies, took part in the meeting with representatives of the civil society. Transcripts are available at http://www.cdep.ro/pls/dic/site.page?id=570.

**2.3.** As for the urgency of this normative act, we share the opinion that "*considering that the law has been included as a condition to be met by Romania until the decisive European Commission report in September 2006*"[119] the National Integrity Agency (hereinafter ANI) will have to be established, particularly since after accession Romania undertook to meet these conditions and given the aforesaid considerations. Yet, while being drafted in good-faith and intended to result in the moral cleaning of the Romanian society in those categories deemed the most vulnerable to corruption such as public dignitaries and civil servants, the bill raises numerous questions with respect to the design of the National Integrity Agency. Such conerns focus on the staffing of this central administrative agency and the investigative procedures to be carried out by ANI inspectors.

In fact, the bad timing of the ANI bill is excellently emphasised in the analysis by Mr. Adrian Baboi Stroe, which we refer to in order to avoid redundancies.[120] Essentially, the author of the analysis wonders whether it is a good time to establish new institutions "*as long as we already have a developed institutional framework, which is able to take over the intended attributions and competencies, with minimal legislative adjustments.*"[121] For instance, wealth checks should have been carried out by a directorate in the Ministry for Finances, more precisely the National Tax Agency.

**2.4.** Addressing wealth checks, the same author points out, with good standing, that it is very difficult to centralise and find a natural "common denominator" for all categories of public dignitaries and civil servants, from the President of Romania to ministers, to civil servants and contractual personnel, and to magistrates. This is particularly true since every category "benefits" from special institutions, (e.g. the Superior Council of Magistracy, ANAF, the parliamentary committee system) whose efficiency in this respect may be enhanced.[122]

**2.5.** The analysis concludes that undue emphasis is being focused on the decision made by the dignitary or civil servant, as well as on the penalties applied by individuals, while leaving aside the ethical and professional aspects of the "conflict of interest". As the aforesaid author argues: "*In order to handle such situations, the threat of extensive inspection and of a potential criminal penalty is neither sufficient, nor appropriate. While most conflict of interest "incidents" will assumingly fall within this category, there seems to be little interest in providing counselling solutions, through which those in question may request and receive advice able to help them clarify their situation and adopt the most suitable conduct (abstention, recusal or simply decision-making).*"[123]

**2.6.** With respect to wealth and interest disclosures along with checks on judges' wealth, we have no objections as there is an obvious need for these measures. However, the constitutionality of these provisions in the bill, except for the reservations referred to in the

[119] Adrian Baboi-Stroe,
http://www.sojust.ro/forum/viewtopic.php?t=128&sid=1aaf243893d037f762d10e9d927b077c.
[120] Id.
[121] Id.
[122] The aforesaid author justly concludes: "*The major advantages of such a less centralised approach would be, apart from the fact that existing potential in the current institutional framework is put to good use, as we have mentioned above, a welcome shift in the weight of the conflict of interest check process to a level which is closer and more adequate to each type of public institution, which may also lead to enhanced accountability.*"
[123] Id.

aforesaid analysis, may raise major questions with respect to checks by ANI inspectors on conflicts of interests involving judges.

The National Integrity Agency is designed as an autonomous administrative authority, organised as a separate national-level structure. The constitutional text which stipulates such structures is paragraph 2, art. 116: "*Other specialised bodies may be organised, subordinated to the Government or ministries, or as autonomous administrative authorities.*"

Regardless of the number of filters and guarantees ensured by the normative act in question, the autonomous status makes the Agency dependent on the executive power. First, its budget depends on the executive power, an aspect which already leads to the subordination of ANI to the executive. In addition, the ANI staffing depends on the Government of Romania, which once again makes ANI indirectly subordinated to the executive power. We quote below the two bill provisions in this respect, art. 76, paragraphs 1 and 2, without further comments, as the text speaks for itself: "*(1) The current and capital expenditure of the Agency is financed in full from the State Budget. The draft budget is drawn up by the Agency president, with the opinion of the Ministry for Public Finances, and is submitted to the Government in view of being included under a separate heading in the draft State Budget subject to enactment. (2) The maximum number of offices in the Agency is 200. This number may be modified under a Government Resolution, at the proposal of the Agency president.*"

More importantly, ANI inspectors, who are subordinated to the executive power (albeit autonomous), control another judicial power, although they do not have such constitutional attributions. They are not even assigned those constitutional attributes stipulated for the representatives of another judicial authority, i.e. the Public Ministry, whose prosecutors represent the general interests of the society and protect the rule of law, as well as civil rights and liberties.

Other circumstances equally relevant are: ANI inspectors may check a possible conflict of interest, whether ex officio or upon notification from any individual outside a jurisdictional framework. By definition, however, a conflict of interest involving a judge refers to the jurisdiction act that the judge completes, which as a rule has the effect of a law to the extent to which it is not cancelled by the judicial control court. Moreover, bill provisions indicate that this inspection (including the preliminary check, which may even involve the hearing of the judge suspected of having a conflict of interest) may take place concurrently with the ongoing trial in which that judge is suspected of having a conflict of interest.

Such interference is certain to infringe upon the impartiality, indeed independence of judges. The very launch of checks by ANI inspectors, even when the notification is eventually proven untrue, entails suspicions of a conflict of interest. Thus the image of fair and unbiased administration of justice is affected.

**2.7.** In our opinion, such a regulation may raise the issue of compliance with art. 6 of the European Convention on Human Rights and Fundamental Freedoms which addresses the right to a fair hearing. A judge subject to a preliminary check by representatives of the executive power, which lack the essential attribute of independence, no longer meets those conditions required by this provision in the Convention (independent and impartial).

Equally relevant are the provisions in Recommendation no. R (94) 12 by the Committee of Ministers of the Council of Europe, namely *Principle I*, point 2, letter d: "*In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.*"

Checks for conflicts of interests by representatives of the executive power represent, in this respect, an unacceptable interference with negative effects on the impartial administration of justice.

### 3. Conflicts of interests in practice and legislation

**3.1.** The phrase "conflicts of interests" is infrequent in the judicial literature and practice. We managed however to identify a number of cases that may fall in this category, starting from real-life situations that magistrates may face or situations already regulated in the legislation.

Thus, the following situations are *conflicts of interests*:

• When a person who, as a judicial inspector, is a member in the CSM discipline commission and has carried out a preliminary investigation or who orders a disciplinary action against a magistrate, then votes on the application or the discipline measure as a member of the CSM discipline commission;

• When a CSM member with non-permanent activity, holding a leadership position in a court, files an application to CSM regarding their court and then, in their capacity as CSM member, takes part in the analysis and voting on that application;

• When a member of the ICCJ leading board votes on the appointment of a judge to a ICCJ position, after having voted in their capacity as CSM member on the nomination of that judge;

• When a CSM member who is affiliated with a magistrate professional associations makes decisions on requests filed by that association to CSM;

• When the Minister of Justice nominates a person as Prosecutor General of the Prosecutor's Office attached to ICCJ and then, in their capacity as CSM member, votes on that nomination in the CSM Prosecutor Department;

• When an attorney represents in the same trial parties having opposite interests;

• When an attorney gives up one party and is then hired by the opposite party, using the information to which they had access initially;

• When the former attorney of one party decides on a case, as a judge;

• When the legal adviser of an institution offers advice to employees engaged in litigation with the institution;

• When, in an auction, legal guardians acquire, directly or through intermediaries, the property of their wards, custodians the assets they were instructed to sell, or, in the case of civil servants, the public assets they were instructed to sell (art. 1308 Civil Code);

• When a judge is a cessionary of claims falling in the jurisdiction of the court with which they work (art. 1309 Civil Code);

• When a judge who takes part in a public procurement procedure for the court where they work has their spouse or close relatives in the shareholding structure of a participating company;

• When a judge decides on a case in which the indictment has been drawn up by a prosecutor who is their spouse or close relative;

• When an examination or paper grading commission for judge promotion includes the spouse or close relative of the promotion applicant;

• When an examination or paper grading commission for the promotion of auxiliary court personnel includes a judge who is the spouse or close relative of a promotion applicant;

• When an institution leader grants a prize or award to an employee who is their spouse/relative;

• When an institution leader uses the vehicle of that institution for personal purposes, without being given this right under a regulation or contract;

**3.2.** Obviously, a judge must make objective decisions on a case, in order to reach an unbiased, suitable ruling. This requires the emergence of a culture of impartiality, which involves compliance with a number of rules that govern the conflict of interest field:

a) Conflicts of interest cannot be avoided or prohibited. Rather, they must be defined, identified and settled;

b) In administrative institutions, a conflict of interest situation is communicated to the superior, in order to identify the optimum settlement option. In justice however, the institutional leader or leading board must only be consulted on the case (which goes against provisions in Law no. 303/2004). It is the parties to the case which must be informed on the conflict of interest, and trial may only proceed on condition that parties agree with it.

c) If a decision is made when a conflict of interest exists, the decision must be regarded as null, and the deed as a disciplinary infraction or even a felony (abuse in office or corruption);

d) A third party who learns of a conflict of interest not avoided by another person is under the obligation to notify it to the institutional leader.

# CHAPTER IV

## Approach to and Definition of Notions of Conflict of Interests and Pressure Factors with Direct Refference to the Work of Judges

**1.** The conclusions below are a synopsis of the debates that have taken place over the seven meetings with the judges at the various court houses in the country (Targu Mures courts of various instances in the Targu Mures Court of Appeals; Cluj-Napoca courts of various instances in Cluj Napoca; Oradea courts of various instances in the jurisdiction of the Court of Appeals in Oradea; Suceava courts of various instances in the jurisdiction of the Court of Appeals in Oradea; Focsani courts of various instances in the jurisdiction of the Court of Appeals in Galati; Timisoara courts of various instances in the jurisdiction of the Court of Appeals in Timisoara; Slatina courts of various instances in the jurisdiction of the Olt Tribunal). The annexes to this study include the questionnaires that the judges participating in the debates answered, as well as case studies that were themselves the subject of debate.

Moderators proposed an analysis of the effects triggered by the two factors which distort the administering of justice as a starting point for the debates. This is a considerably easier approach since, at times the line between conflicts of interests and pressure factors is rather thin. As a participant stated in answering one of the poll questions, a pressure factor may become a cause of conflict as soon as it is acknowledged and accepted by the judge. For example, a judge will respond to external pressure for fear of being penalized, or maybe by hoping that the position in the hierarchy held by the ones whose interests triggered the intervention will justify a reward. Similarly, a conflict of interests may generate pressure on the colleagues whose opinion is critical for obtaining the intended solution.

**2.** In order to facilitate the dialogue, the introductory part focused on the relationship between conflicts of interests and impartiality, as well as between pressure factors and judicial independence.

**Pressure.** According to the most authoritative dictionary of Romanian, "pressure" means, in the context analysed here, a "(moral, economic, political, social) constraint exerted on somebody". The common meaning of the term "pressure" involves the existence of two parties: one which exerts pressure (an individual or public structure) and one which is subject to it (an individual or public structure). Therefore, "pressure" cannot be understood outside the relationship of the two parties: the agent and the object of pressure. In the particular case of judges, "the object", the one which is subject to "pressure", is the judge. The one which exerts pressure is the individual or public structure. The latter is possibly located within the very judicial authority.

**Interest.** In the same dictionary, *"interest"* is defined as "regard for achieving success, advantage, effort made in order to meet a particular need; advantage, benefit, gain,

profit; understanding and sympathy for someone or something". There is nothing wrong with someone being concerned with (their) interest, but there is a problem when this interest clashes with another interest. With judges, the interest they ought to take in Court activity refers to the achievement of fair judgment with full respect for basic human rights and liberties.

**Conflicts of interest.** *The public interest* in serving justice, which is specific for the judicial position, may act against the *private interest* of the respective judge or of their family, friends, or acquaintances. This is a *"conflict of interest"*, i.e. that situation where a private interest in which a judge is involved in some way or another, overlaps or clashes with the interest of properly administering justice.

A "conflict of interest", just like "pressure," involves the existence of two factors. But, while the two factors are easy to identify when talking about "pressure" (an individual or structure which exerts pressure and the judge on whom pressure is exerted), when a "conflict of interests" exists, the interest which acts against the interest of a proper administering of justice is a lot more subtle and, thus, more difficult to identify.

This is particularly true given that, more often than not, pressure may turn into a conflict of interests whenever the judge accepts pressure in administering justice regardless of the reasons for doing so (out of fear/worry, hope to promote, other advantages promised, regardless of their nature). For instance, a judge working on an important case file that is also being monitored by the media with pressure intentions may be interested in ending the negative media coverage. Thus, he may be tempted to pass an illegal, but popular ruling.

Hence, "pressure factors" are objective and external to the judge insofar as the judge has no control on the agent which exerts pressure; yet, "conflicts of interest" are subjective and tied to the judge's inner life. In principle, a judge may or may not accept to be placed in a "conflict of interests" situation. To the extent which judges accept the pressure exerted on them, *regardless of the reasons for doing so, the subjective internalisation of pressure factors will put judges into a conflict of interests situation.*

**3.** The area covered by the discussions was unexpectedly wide, confirming the fact that with judges, these problems may take various forms. The choice of solutions is by no means trivial, given that it is not only the judicial independence and impartiality that must be protected, but also the *perception of independence and impartiality.*

**Normative acts.** The tactic to create norms must contribute to the creation of a sufficiently flexible framework to enable courts to establish a long-term practice. This is because the risks are manifold. If norms are too accommodating, the conflicting state will exist but will not be identified as such. If norms are too specific, they will be too elaborate and hard to understand by those whom they address and whose rights they protect. On the other hand, training a judge is a complex and long-term process, and these resources should not be wasted unreasonably.

**Court rulings.** Moreover, participants emphasised that a ruling passed by a judge is a proof of their acquisition of professional knowledge, while it equally reflects their personality, influenced by an almost unlimited number of factors, e.g. age, personal experience, readings, attitude as to parents, faith. Regardless of all these attributions, however, justice seekers must be confident that the ruling passed will be legal and grounded.

The participants acknowledged that norms regulating the field must be neither too specific, nor strictly interpreted; that court rulings often reflect a judge's personality; and that the perception of impartiality is as important as impartiality itself. Most participants in the debate agreed that the court transparency level must be increased.

**Wealth and interests statements.** The posting of judges' wealth and interests statements on the web site of each court, pursuant to modification of Law no. 303 of 2004, under Law no. 247 of 2005, is a huge step which opens a channel of communication between courts and the individuals addressing them. However, this process is not completed and it must be continued. The idea was thus put forth that further data on judges should be made public (e.g. education, previous employment, etc.), in order to better ensure this image of impartiality that must be accompanied by proper conduct in courtrooms. This initiative does not necessarily require special regulation. It may be implemented at any time which could possibly allow the courts to rule on which data should be made public, or, at least, further the discussions with judges.

**Small localities.** Special attention was paid during the debates to the status of judges working in small communities in which, after several years in office, the impartiality image is almost absent. This is most often due to the fact that the judge's acquaintance circle reaches a significant share of the total number of families in the community. In this respect, participants stated that this may be added to the list of reasons which justify the approval of a transfer, considering that judges' professional mobility is hardly used in Romania, unlike other countries which they even encourage such replacements of judges in a court.

**Conflict of interests.** Moving on from the image of impartiality to impartiality itself, arguments grew heated when attempting a definition of the "conflict of interests" concept. Thus, apart from the answers to one of the poll questions which asked interviewees to try to define the concept, participants in the debates put forth several ideas.

The first aspect analysed was the relationship between conflicts of interests and incompatibilities. Participants concluded that lawmakers regulated the incompatibility issue on the basis of a number of assumptions which, in this particular case, cannot be disproved. After all, it is very difficult to identify the inner mechanisms which justify the emergence of a conflict of interests. Hence, this is the reason for the common temptation to assume that such conflicts do exist. Legal norms aim to prohibit the access of decision-makers to positions that may cause them to pursue their own well-being in the decision-making process. Thus, in most cases the regulated aspects are not damaging *per se*, but are presumed to be so simply because access to the moment when judgment becomes distorted is extremely difficult or even impossible to identify.

There were no problems in concluding that the incompatibilities and restrictions facing judges are varieties of the same class: conflicts of interests. Proposing several options for the definition of conflicts of interests, 47 participants in the talks made an inevitable connection between this concept and the patrimonial interest of the judge or of another person very close to the judge. Notwithstanding the vagueness involved by the phrase "very close person", 75% of the participants agreed that this refers to the spouse (with the option of replacing the term spouse with the phrase person living together) or family, indicating the kinship level which entails the presumption of conflict. Sixty percent (60%) of the judges

stated that patrimonial interest is not a necessary condition for the existence of a conflict of interests.

Under these considerations, the following definition was proposed: ***a conflict of interests involves a conflict between the judge's duty to provide impartial judgement to the case parties and the judge's private interestsof any typethat may inappropriately influence the meeting of the obligations and responsibilities granted to the judge.*** First, we find that the patrimonial aspect was eliminated. Secondly, any reference to judges' families was eliminated when an agreement was reached that, strictly speaking, the interest is always the interest of the judge called to pass a ruling in the case.

A conflict of interests may be real or perceived. If it is real, proposals were made that the judge should announce this to the other members of the collegial panel, as well as the leading college. However, the participants felt that there should be no means to compel the judge to try the respective case. In other words, the proposal was made that in such cases the role of the leading college should be only that of taking notice of the situation.

There were also opinions that until a widespread practice is established, the relevant panel should be allowed to approve or turn down the abstention application. This should be the case provided that both the application and the rejection decision are extensively explained and appended to the case file. In addition, parties must be notified of the incident.

If the conflict of interests is only perceived, and the judge is aware of this, the opinion was put forth that the judge should announce to the leading college and parties in the trial, and that talks should be included in the ruling. If one of the parties challenges the judge in a grounded petition, the decision to approve or turn down the petition will also be extensively explained by the panel passing the ruling.

The ideas taking shape during the debates emphasised the need to enhance the transparency of court activities and to widen communication channels between courts and trial parties with respect to settling such incidents. A very interesting idea was suggested that a conflict of interests may emerge in the case of a piece of legislation that the judge sees as coming against the general principles of law. The normative act in question may thus generate a clash between the interest of the parties and the general interest of the society. Or, the enforcement of the normative act may trigger an unfair solution which is unacceptably dishonest for one of the parties.

**Pressure factors.** In discussing pressure factors that exist, all participants in the discussions distinguished between the pressure exerted on the system and the pressure exerted on the judge directly. There was also a consensus on the pressure exerted on the system, and on the role of the Superior Council of Magistracy (CSM) in handling cases where the judicial power is attacked and affected as a whole. The conclusion was that CSM does not yet truly support this independence.

The media is the strongest pressure factor identified by judges. Although media stories are too rarely the result of independent journalist investigations, the conclusion was that CSM is expected to show a considerably more active and prompt involvement in those cases where various attacks affect the judicial power as a whole. Secondly, CSM should in its turn enhance transparency, not only concerning its own activity, but also the activity of courts as a whole. As an example, participants suggested that it may be useful for CSM to announce

the number of aspects notified by the media and confirmed by subsequent inspections in an annual press conference after monitoring central mass media. Even in terms of protecting judges' reputations, in each of the seven meetings the conclusion was that judges believe the procedure currently used by CSM to be inefficient. This is because answers are considerably late and lacking any effects both on the media community and on the population.

A significant number of participants answered that pressure factors were always external, although the opinion was also expressed that a pressure factor may be internal and induced by the judge. More specifically, a pressure factor may be triggered by a judge's incapacity to take responsibility for the rulings passed.

A lot more powerful, however, is the impact perceived by judges when pressures are exerted directly on them as individuals. In this case as well, mass media were quoted as the most important element distorting a judge's individual independence. The idea was expressed that, while there are regulations guiding judges' conduct in cases when the administering of justice is interfered with, in practice there are no sanctions for those exerting such pressures.

A tentative definition of ***pressure factors*** sees these as ***circumstances or actions intended, directly or indirectly, to influence the ruling to be passed in a particular case, whether they are brought about by parties in the case or by third parties***. The surprising element was the ideawhich also shaped the contents of this definitionthat even where pressure is exerted on the system as a whole, the ultimate goal is always to influence the settlement of a particular case or, at most, of a case which paves the way for a constant practice in the respective area.

As for the means to handle these pressures facing judges, discussions led to the idea that at some point the system will become immune to such meddling. At such a time, it will actually identify its independence. In the cases of flagrant interference, measures will obviously have to be proportionate.

**Drawing up a handbook.** When asked "*Do you believe a good practice handbook on 'pressure factors' and 'conflicts of interests' would benefit judges' activity and the society as a whole?*" most judges, with few exceptions, answered that such a handbook would be useful. Here are some statistical data on the answers: in the first stage, 94.07% of the interviewees agreed that a handbook would be useful; 3.57% answered it would not be useful; 2.36% either did not answer, or answered "I don't know". In the second stage, 90.78% of interviewees agreed that the handbook would be useful, and 9.22% mentioned that such a handbook would not be useful. Moreover, some participants argued that such a handbook should present concrete examples of "pressure factors" and "conflicts of interests".

As for the final question, concerning who would be in the best position to draw up and implement such a handbook (with the following options: judges themselves; the civil society; the Ministry of Justice; CSM; other persons/institutions; magistrate associations; all of the above, in a joint effort) answers varied. Interviewees indicated any of the categories would be in a good position to contribute to the handbook, especially the judges themselves (although worth mentioning that they were listed separately, rather than part of the courts or trade organisations, etc.).

As concerns who should take part in drawing up and implementing such a handbook, answers varied, with interviewees agreeing that all players mentioned above should take a more active part in drawing up and implementing the good practice handbook (41.23% in the first stage and 38.50% in the second stage). Also, "judges themselves" was the second highest ranking category mentioned by interviewees as being in the best position to draw up and implement the handbook (13.70% in the first stage and 16.68% in the second). The other options included a combination of the institutions and persons indicated above, with insignificant percentages.

We can therefore conclude that interviewees were concerned with and aware of the need for a joint effort to draw up and implement the handbook, by all stakeholders in the administering of justice.

## ANNEX I:

## Purpose of the Questionnaire

Each participant of the seminar is required to complete this questionnaire. The questionnaire serves the following purposes:

- Identifying the pressure factors, both external and internal (having to do with judges' own subjectivity and mindset), that affect the activity (or daily work) of judges.
- Conceptualizing and defining "factors of pressure" and "the conflicts of interest".
- Tackling the options of sanctioning people who do not comply with the legal provisions regarding interference in their activity and conflicts of interest.
- Drafting of basic guidelines on conflicts of interest and judicial independence. The guidelines will be published and disseminated to courts and affiliated Prosecutors' offices.

### QUESTIONNAIRE

**Question 1):** Try to define the terms "factors of pressure" and "conflicts of interest".

**Answer:**

**Question 2):** Has pressure ever been exerted on you to make a specific decision in a case?

**Answer:**

**Question 3):** Have you ever identified those interests that justified the pressure exerted on you, in a specific situation?

**Answer:**

**Question 4):** Have you ever been able to prove the link between the pressure exerted on you and the interests that determined that pressure?

**Answer:**

**Question 5):** Do you consider that you are protected enough by the present Romanian laws regarding possible factors of pressure and conflicts of interest?

**Answer:**

**Question 6):** Is "conflict of interests", from the judges' point of view, a very stringent actuality of the judiciary system? If the answer is affirmative, please explain why.

**Answer:**

**Question 7):** Do you feel that it would be useful for the judges' activity and the society, as a whole, to promulgate a guideline on good practices regarding "the factors of pressure" and "the conflicts of interest"?

**Answer:**

**Question 8):** If your answer is positive for Question 7, please identify who should have the competence to promulgate and implement such a guideline:

- judges themselves;
- civil society;
- the Ministry of Justice;
- the Superior Council of Magistracy;
- other categories of persons/institutions;
- magistrates' associations;
- all the abovementioned categories.

**Answer:**

## ANNEX II:

## Case Study no. 1

In 2003, as a consequence of the privatization process, all the shares of firm S.C. "PANIROM" S.A. from Cluj-Napoca were bought by two shareholders. S.C. "PANIROM" S.A is one of the biggest producers of bread in the country, with profits which place it among the most prosperous firms in Romania.

Immediately after buying it, the two shareholders name another board of administration. In 2000, the previous administrators of this formerly state-owned firm had also set up a firm with a similar set of activities as S.C. "PANIROM" S.A. This firm is a serious competitor in the bread market.

In 2004, the shareholders of S.C. "PANIROM" S.A. file a complaint against the former administrators (the ones who manage the competitor of S.C. "PANIROM" S.A.), accusing them of abuse of position, embezzlement, fraud, and other infractions which they allegedly committed when they were administering S.C. "PANIROM" S.A..

At the same time, one of the national newspapers publishes a series of investigative articles focused on the alleged crimes of the former administrators. This newspaper "uncovered" the alleged abuses and asked for a formal investigation.

In 2005, the prosecutors finalize several cases concerning the former administrators. Besides abuse of position, they are also accused of embezzlement. The allegedly embezzled sum is roughly 1.6 million EUROS. The prosecutors take the case to trial. During the entire span of the formal investigation, the national newspaper keeps on "uncovering" the criminal activities of the former administrators.

At the first appearance in court, the prosecutor asks the designated judge to preemptively issue an arrest warrant for the former administrators, citing the high sum involved and the dangerous nature of the defendants. The judge rejects the prosecutor's request.

The second day, the above-mentioned national newspaper publishes a piece on the incompetence of the judge in charge of the case. It also suggests, without providing any details, that the judge has a connection with the defendants.

The appeal of the prosecutor, judged two days after the article was printed, is admitted by the appeal instance.

The accused judge asks the Superior Council of Magistracy (CSM) to defend his professional reputation and to investigate the allegations printed in the newspaper. He also asks the CSM to notify the competent bodies if his lack of independence is confirmed. The judge invokes provisions from Law 317/2004.

The judge supported his request by providing a copy of a letter sent to him by the

former local correspondent of the national newspaper in question. In the letter, the correspondent apologized for the inconveniences brought to the judge by the incriminating article. Also, the journalist explained that all the articles printed in the central newspaper had been written by him at the request of the national editors of the newspaper. In later discussions with the newspaper's central management, the local journalist learned that the shareholders of S.C. "PAN|ROM" S.A. ordered all the articles. In exchange, they paid the newspaper large sums of money, part of which was concealed by the purchase of advertising space in the newspaper. The judge also furnished the CSM with press clippings which showed the massive presence of S.C. "PAN|ROM" S.A. in the advertising space of the newspaper.

At the same time, the judge formulated an abstention request, suggesting that he is in no position to judge under media pressure. The request was denied, so the case remained in his charge, to judge and give a resolution.

A few days before the pre-emptive arrest-warrant for the defendants expires, the same national newspaper publishes a second series, printed three days in a row. The series consists of articles in which the paper maintains it "uncovered" the criminal activities of the former administrators of S.C. "PAN|ROM" S.A.. The accusation against the judge are reprinted in the series. At the next term in court, the prosecutor asks for an extension of the arrest warrant, on the same grounds for which the warrant had been issued in the first place.

It is worth mentioning that this entire time (60 days), during which the judge sent numerous memos to CSM, the body gave no answer.

Questions for discussion:

- Can the attitude of the current shareholders of S.C. "PAN|ROM" S.A., and of the national editors of the newspaper, be considered a pressure factor on the judge? Argument pro or con.
- If your answer is yes, comment on whether the current legislation can prevent a repetition of a similar situation, and whether such legislation allows the sanctioning of the above-mentioned persons. Give the legal provisions.
- How do you see the resolution (normative, sanctioning) of such a case?

## Case Study no. 2

The members of the Prosecutor's Office of Court X file a complaint against the Prosecutor's Office of the High Court of Cassation and Justice (HCCJ) regarding the payment of overdue salaries. Court X admits the action in court.

The HCCJ Prosecutor's Office appeals the decision. The appeal is registered at Court of Appeal Y. All judges from Court of Appeal Y file abstention requests. The motivation is that they themselves have an ongoing case on the same topic, formulated contentiously with the Ministry of Justice.

HCCJ admits the request from the judges from Court of Appeal Y and sends the case to Court of Appeal Z. But the judges of Court of Appeal Z are in the same situation as those from court of Appeal Y. Almost all of the judges from all Courts of Appeal in the country have formulated such actions in court.

Questions for discussion:

- Will the judges from court of Appeal Z judge the appeal formulated by HCCJ Prosecutor's office or will they, in their turn, abstain from judging the case?
- What do you think?

## Case Study no. 3

Due to the random distribution of cases, Judge X receives a case in which Firm Y requires Insurance Company A to pay a large sum of money because the event against which Insurance Company A insured Firm Y has occurred. Insurance Company A invokes various reasons for not paying the money (confirmed by the written summary of an attempt to settle outside the court).

Judge X is also a client of Insurance Company A. Insurance Company A periodically runs a lottery in which one of its clients wins a prize simply for being a customer of Insurance Company A.

After evidence is presented, and the background conclusions formulated, Judge X gives a term for a resolution on the case. The next day, in the lottery organized by the insurance company and in the presence of a notary, the insurance policy of Judge X is declared the winner of the lottery.

Questions for discussion:

- What should the judge do?
- What would you do in his place?

# Case Study no. 4

Judge X has a twenty-eight year-old son named **D**, who has a wife and a three year-old child. **D** has been recently sued by his employer and received a ruling to pay damages which are the equivalent of ten years' income.

This litigation has been randomly allocated to Judge **F**, who works at the court of first instance. Judge **X** works at the court of second instance, commercial division. Judge **X** and Judge **F** are friends.

An appeal of a commercial litigation has been randomly allocated to the judicial panel on which Judge **X** sits. In this appeal, a commercial society shareholder appealed a decision of the society's general assembly. The shareholder's action has been declined by the first instance.

Judge **F**, entering Judge **X**'s office, expresses his worry that his brother-in-law is at risk of losing a huge amount of money. From Judge **F**'s story, Judge **X** deduces that Judge F is talking about the commercial litigation which has been allocated to him for judgment.

Although Judge **F** neither refers to, nor formulates any request regarding Judge X's involvement in the abovementioned litigation, he does mention that his brother-in-law is a good friend of the society's owner which sued Judge **X**'s son, as well as a good friend of a local deputy of the ruling party. Judge **F** then left Judge **X**'s office.

**X** has a look at his notes and realizes that, based on his analysis up to that moment, the appeal of Judge F's brother in law should be accepted /delayed.

Question for discussion:

- Please comment on the presented situation.

## Case Study no. 5

On the 22nd of September 2005, the prosecutor from the Bucharest office of the Investigation of Terrorism and Organized Crime, from the High Court of Cassation and Justice, initiated investigations and (on 23rd of September 2005) the criminal prosecution against individuals A, B, C, D and E accused of trafficking in human beings (at 41 paragraph. 2 art- Penal Code and 12. paragraph. 1 (a, b) 678/2001 Act regarding the prevention and protection of human trafficking); human trafficking with minors (art. 13 678/2001 Act), high risk drugs trafficking (art. 2 143/2000 Act) and for the creation of an organized criminal group (39/2003 Act).

On the 25th of September 2005, the prosecutor proposed the measure of pre-emptive arrest of individuals A-E. The judge had admitted the prosecutor's proposal and, in the same day, ordered the arrest of A-E for 30 days.

One day before the prosecutor's request for the pre-emptive arrest, most of the local newspapers ran articles about the antisocial and criminal activities of a group of persons which included the offenders A-E. The articles described the group as one which sells drugs in different neighbourhoods of Bucharest, and generates violence as part of that business.

On the 5th of October 2005, the offenders A, B, C, D, and E were sent to court for the above mentioned offences. The court ruled that they should be imprisoned.

On the 11th of October 2005 the High Court of Cassation and Justice admitted the offenders' request to be judged by a different court.

On the 19th of October 2005, the prosecutor from the Bistrita office of the Investigation of Terrorism and Organized Crime asked the Tribunal of Bistrita (the court where the trial was moved by the High Court of Cassation and Justice) to keep A-E under arrest; the reasons of the request being similar to those invoked by the Bucharest prosecutor.

The judge from Bistrita Tribunal declined to keep the five offenders in jail, explaining her decision by saying there was no need for their further imprisonment, as the criminal procedure could continue in good conditions with the accused at liberty.

One day after the judge's decision, the Romanian president accuses the same Romanian justice system of corruption in a television talk show. Asked to mention a few case of corruption within the justice system, the Romanian president referred to, among other cases, the Bistrita Tribunal's judgment. The president's declaration has been printed in the press.

The prosecutor's appeal against this decision has been accepted by the Court of Appeal.

At the next judgment date, the judge recused herself from judging the case, stating that a negative impression had been created around the case and that this impression prevented her from judging the case in an objective manner.

Questions for discussion:

- Can you identify factors of pressure in this case which could distort a normal act of justice?

- Do you believe that the judge from the Bistrita Tribunal did the right thing in the trial, by requesting her recusal?

- How would you act in similar circumstances?

- Taking into account the present regulations, what kind of measures could the Superior Council of Magistracy take (if there are indeed pressure factors which could distort the pursuit of justice)?

## Case Study no. 6

On the 15th of November 2005, a work conflict started between Company X' s trade union (which represents 500 of Company X's 653 employees) and the management of Company X. On the 23rd of November 2005, the 500 trade union employees went on strike.

In the same day, the management of Company X requested the competent court to suspend the strike on the grounds that it was illegal.

On the judging date, established urgently by the court, 200 employees marched out the court building, displaying placards which claimed that many of the town's judges were corrupt. Fifty of them entered the courtroom, waiting for the case judgment.

The representatives of Company X's management have requested that the judging be conducted as a closed-door meeting because the strikers' attitude could influence the court decision regarding its request on the suspension of the strike.

Questions for discussion:

- Could the strikers' action from the day of judgment of the strike suspension request be understood as a pressure factor? Explain your opinion.
- How would you proceed in a similar case?

## CHAPTER V

## Conclusions

**1.** The rule of law is based on the prevalence of law and organised on the basis of the separation of powers principle. Citizens must comply with the law, but so must authorities. Furthermore, the functioning of this system can only be ensured by an independent and impartial (unbiased) Justice system.

On the one hand, the rule of law requires that judges should be in a position to accomplish their professional tasks in an independent and impartial manner. On the other hand, that the executive and legislative powers should ensure this independence. But legislative guarantees for judicial independence and impartiality are not enough; courts themselves must be credible to justice seekers. Independence and impartiality must be real and recognised as such by justice seekers.[124]

**2.** Independence is not a privilege of judges, but a privilege of citizens in a rule of law; courts and judges only administer this privilege for the people.[125]

**3.** Pressure factors will always intervene in the system. Their effect is not always negative. For instance, the European Union accession was a pressure for magistrates which generated the desire to acquire the knowledge needed for the application of the *aquis communautaire*.

In the long run, none of the incidents involving pressure factors yields a negative result, insofar as it teaches the system how to protect itself. Justified questions are: can the system protect itself today, in a sufficient and efficient manner considering this protection falls within the attributions of the Superior Council of Magistracy? And, could the system, in its self-protection effort, actually create a shield which renders it immune to the problems of the other segments of the society? There seems to be one solution: open the system towards the society that it serves.

**4.** A conflict of interests may affect the judgement process or be perceived as distorting the judgement process. In the former case, the problem is simple since it entails the judge's disciplinary or administrative liability, to the extent the conflict and the causal relationship between the ruling and the interest is proved. The sensitive problem appears when there has been no distortion, yet the administering of justice is perceived as distorted. The topic has been heavily debated with some arguing that the image of a justice system which does not respect its own principles is as damaging to the society as a justice system which, in reality, actually does not.

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[124] Cf. Iulia Voinea Motoc, *Independenta si impartialitatea justitiei in Conventia Europeana a Drepturilor Omului*, "Revista Romana de Drepturile Omului", issue 10/1995, at 40.

[125] Ernst Markel, "Judicial independence in a nutshell", in EUROIUSTITIA magazine of the European Magistrate Association vol.5, Issu

Again, the solution is the transparency and removal of all forms of hypocrisy. Because in our opinion, a justice system which seems to respect its principles but breaks them skillfully is a lot more dangerous than one which respects its principles even though it is not perceived as such.

Acknowledging and making public the existence of a conflict of interests is the proof of a judge's maturity. On the other hand, a judge is a human being living in a community with their likes and dislikes, needs and obligations, prejudice and preconceptions. We find it more important for the society to become aware of these "weaknesses" of judges because judges will thus be more open about them, rather than preserve the myth of the "superman-judge".

The next step is for judges to be able to contact the leading college when such a conflict seems to exist or does exist. In turn, the college should provide a detailed and public presentation of the reasons for which the judge is permitted to either withdraw or carry on the case. Adding to this procedure, obviously, will be strict sanctions for the failure to notify such a conflict.