

# DISCUSSIONS ON STATE LIABILITY FOR JUDICIAL ERRORS IN OTHER TRIALS THAN THE CRIMINAL CASES

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*Abstract. Romanian law stipulates two cases for the state civil liability for judicial errors: in criminal trials, and in other trials than the criminal ones. The last hypothesis is regulated by art.96 from Law no.303/2004. We try to analyse the cases that can be considered judicial errors, and the conditions for the State liability engagement. In our view the cases that can enter in the application area of the above cited article of law, cannot be particularized in a restrictive manner, only illustrative. Also we think that the conditioning of the state liability to the magistrate liability is unconstitutional.*

**1. Legal basis.** According to art. 52 para. 3 of the Romanian Constitution<sup>1</sup>, “The State shall bear patrimonial liability for any prejudice caused as a result of judicial errors.” The fundamental law, before its revision in 2003, at art. 48 para. 3 provided the institution of patrimonial liability of the state for judicial errors, but this liability was limited only to judicial errors committed in criminal cases.<sup>2</sup> Subsequently, the liability for judicial errors in criminal cases was not expressly provided, in the present the constitutional text does not provide a distinction in this regard. The new formulation extends liability also for judicial errors in other trials than criminal ones.

By art. 96 of Law no. 303/2004 on the statute of prosecutors and judges<sup>3</sup> the general conditions of the patrimonial liability of state and of magistrates for judicial errors, as well as the special conditions of liability for judicial errors in other trials than criminal ones, were established. These are special provisions, departing from the common law of liability for damage due to misfeasance<sup>4</sup>. However, we appreciate that this responsibility has the nature of liability for damage due to misfeasance, for the persons own act, objective and based on the idea of guarantee and risk of activity.

**2. The general conditions of state liability for judicial errors.** The applicability of general principles of liability for damage due to misfeasance, engages the responsibility of the state for any

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<sup>1</sup> Refers to the republished Constitution in Official Monitor no.767 from 31 October 2003

<sup>2</sup> The old text published Official Monitor no. 233 from 21 November1991 provided that „*The State shall bear patrimony liability for any prejudice caused as a result of judicial errors in criminal cases.*”

<sup>3</sup> Republished in Official Monitor no. 826/13 September 2005

<sup>4</sup> The liability that is analyzed in the present study, resembles with the liability for damage caused by illegal administrative acts, that is a separate instance of liability for damage due to misfeasance, thus a concrete application, with certain particularities of the common liability for damage caused by misfeasance. See L.Pop, *Unele aspecte în legătură cu răspunderea pentru prejudiciile cauzate prin acte administrative ilegale*, in Dreptul no.9/1994, p.33-35

damage caused by judicial errors, if the general conditions of liability are fulfilled: the existence of damage, of a wrongful act, represented by the judicial error and the causality link between the judicial error and prejudice.

In analyzing state liability for judicial errors in the light of the elements of liability, a first condition is damage. This damage is caused by the violation of a subjective right or of a simple legitimate interest of the damaged party. Art. 52 para. 3 of the Constitution and art. 96 para. 3 and 4 of Law no. 303/2004 make reference to the right of the injured person to compensation for damage caused by judicial errors.

If in what regards the state liability for damage caused by convictions of unlawful deprivations of liberty, legal texts provide only the right to compensation for the caused “damage”, in the case of state responsibility for judicial errors in other trials than criminal ones, it is necessary for damage to be a “material” one. This means that in the latter situation, the state’s liability is engaged only for material damages, and not also for moral damage. We consider that these provisions are in contradiction with European human rights case-law and as well as with community case-law. Thus, in finding the state responsible, the European Court of Human Rights ruled that compensation can be awarded for example for the violation of the right to respect for family life<sup>5</sup>. Moreover, community case-law considered that concept of “financial losses” includes all the psychological and mental suffering of the victim<sup>6</sup>. We consider that the possibility of compensation has to include both the material damage and the moral damage, because it is necessary to cover the effective loss, *damnum emergens*, and also the unrealized benefit, *lucrum cessans*.

A second condition is the existence of a judicial error, that can be the result of an action or of an inaction. We are in the presence of an action when the judicial error is the result of rendering a wrong solution in a case. We also could have judicial error as inaction, for example in the situation when the judicial error occurs by holding a person in detention, although there is a judgment regarding the release of the detained person; similarly, judicial error through inaction occurs in the case of unfulfillment of a legal obligation to enact a procedural act, thus in the mentioned two cases, as a consequence of the victim suffers a damage. Unlike the Code of Criminal Procedure, Law no. 303/2004 does not provide the cases that can be considered judicial errors.

In the only case that we know, until now, in which the question of judicial error occurred in a civil case<sup>7</sup>, the supreme court considered that “judicial error cannot be quartered on the interpretation of evidence or on the justified or unjustified refuse of the court to admit evidence requested by the parties, as long as these *do not imply bad faith or gross negligence of the judge in exercising his or her attributions.*” The court held that according to art. 52 para. (3) of the Constitution, the state is liable for damage caused by judicial errors, and the state’s liability is upheld according to law and does not remove the liability of magistrates who exercised function with bad faith or by gross negligence.

The court considered that by the delivered judgment cannot be considered as a wrongful act that caused a damage, because the decision’s revision was possible due to the evolution of science, that integrated in the judicial activity new investigation methods, that can generate certainty in establishing paternity, such is DNA examination. “The quashing of Decision no. 105/1982 excludes the fault of those for who the state is liable, because the new investigation methods, generated by scientific progress and unknown at the date of the revised judgment, are to be considered, in the wording of art.

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<sup>5</sup> See *Monory versus Romania and Hungary*, published in Oficial Monitor no. 1055 from 26.11.2005

<sup>6</sup> O.Manolache, *Tratat de drept comunitar*, Editura CH Beck, 2006, București, p.803 and the case law cited there.

<sup>7</sup> Înalta Curte de Casație și Justiție, Secția civilă și de proprietate intelectuală, *Decizia nr.5626 din 8 octombrie 2008*, în Înalta Curte de Casație și Justiție, *Jurisprudența Secției civile și de proprietate intelectuală pe anul 2008. Recursuri în interesul legii în materie civilă*, Editura Hamangiu, 2009, p.175-178

322 point 5 of the Code of Civil Procedure, evidence of that could not be presented in court due to circumstances beyond the will of the parties. But, in the case, the appellant plaintiff did not prove neither of the elements of liability for damage due to misfeasance, as provided by art. 998 of the Civil Code, on which his claim was based, because the simple quashing of the decision by revision does not imply the existence of these elements”.

In legal literature<sup>8</sup>, an opinion was presented according to which, the situation considered by art. 304 points 7, 8, 9 Code of Civil Procedure as ground for appeal, can be considered judicial errors. These situations are the worst cases of illegality and groundlessness of a decision, which may trigger the amendment of the decision, or represent instances when *the judgment does not provides the reasons for the adopted decision or when the judgment is based on contradictory reasons or reasons that are not in relation with the nature of the case; when the court, incorrectly interpreting a legal document, changed the clear and obvious meaning of the document; when the judgment is rendered without a legal basis or was given by violating and misapplying the law.*

We cannot agree with such an opinion. Interpreting the provisions of Law no. 303/2004 in a limited manner only as regarding just certain cases, that still can be repaired by appeal, is contrary to the applicable constitutional provisions. This interpretation prevent the reparation of damage due to some doctrinal interpretations, even though the lawmaker did not provided expressly the situations that are judicial errors, allowing court the possibility of appreciation over such situations. Regulating certain *criteria* that can determine situations that can be considered judicial errors, is more plausible. Thus, we consider that such a criteria could be the *illegality of the decision or of the measure and the arbitrary character of the imposed measure*<sup>9</sup>.

In what regards the *illegality of the judgment or of the measure* of the judicial organ, we have to bear in mind that in Romanian law, in principle, any solution has to be based on legal provisions.

In this way, the provisions of art. 261 para. 1 point 5 Code of Civil Procedure underlines that the court’s judgment must include the reasons in fact and in law that formed the belief of the court, as well as the reasons for which the request made by the parties were dismissed. Certainly, there are situations that are not regulated by law, and it is the obligation of the court to find the applicable principles and interpretation that is rendered by taking into consideration similar legal provisions. Even is such a situation, a certain legal basis exists, provided by art. 3 of the Civil Code, according to which the judge cannot refuse to judge, because the law *“has no provisions or is obscure and insufficient.”* The violations and misinterpretation of legal provisions leads to illegal judgments and to the breach of the subjective right or of the interest of a person. Consequently, a judicial error is produced.

Regarding the *arbitrary character of the disposed measures*, it has to be mentioned, that the judicial organ has to base the solution on evidence. Evidence is to be analyzed according to legal provisions and in the view of the parties’ position.

If evidence is not verified and analyzed, the rendered judgment will be subjective and can lead to a judicial error. Certainly, it has to be examined on a case-to-case basis, to what extent, the omitted evidence or argument could have led to another solution. A decision that lack support of evidence, will make place to abuse and arbitrary, fact that have influence on the parties.

If law would regulate only a few situations for state liability for judicial errors, an unfair situation would be created for citizens, in what regards other possible judicial errors that would not fit in the strict patterns of law. Social development leads to unexpected situations, reality could overcome

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<sup>8</sup> I.Petre, *Considerații în legătură cu răspunderea patrimonială a statului și a judecătorilor și procurorilor pentru erori judiciare, în lumina dispozițiilor constituționale și legale.*, in Dreptul no.9/2005, p.101; L.R.Boilă, *Răspunderea civilă delictuală obiectivă*, Editura C.H. Beck, 2008, p.407

<sup>9</sup> L.R.Boilă, op.cit., p.406-407.

fantasy. For these reasons, we believe that a margin of appreciation for the court is necessary, in order to allow the court to analyze the gravity of the violations of the subjective right or legitimate interest, taking into consideration the individual elements of every case in part.

Of course, as in criminal cases, situations that are judicial errors cannot be listed exhaustively, but only in an illustrative manner, in order to allow a subsequent case to case analysis.

Concluding from the above presented arguments, we consider that we are in the presence of a judicial error, in other trials than criminal ones, in every situation when:

1. a final judgment is rendered, that is quashed in appeal, and the judgment is modified;
2. an irrevocable judgment is rendered, that is quashed in an extraordinary appeal, and the judgment is modified;
3. an unfinal but enforceable judgment is rendered, that imposes a measure that caused a damage for the judicial error's victim, that is quashed in an ordinary or extraordinary appeal, and the final solution is contrary to the imposed measures.

Regarding the causal link, it has to be established between the judicial error and the occurred damage, and it has to be proved according to the general provisions of liability.

**3. Special conditions of liability.** Besides these general conditions: the existence of damage, of a wrongful act, represented by the judicial error and the causality link between the judicial error and prejudice, we consider that legal provisions provide a number of other conditions, that are specific for the discussed form of liability.

a) In the present wording of art. 52 para. 3 of the Romanian Constitution, it is provided that "The State shall bear patrimony liability for any prejudice caused as a result of judicial errors", without, thus there is no reference that the judicial error has to occur within the framework of a trial. This is a new provision that corresponds to a better cover of the situations that can lead to judicial errors. Judicial errors will always consist of solutions of judicial bodies. But they can derive from solutions that are not necessarily rendered in contradictory proceedings. Thus, for example, in the situation provided by art. 504 para. 3 Cod of Criminal Procedure, when the judicial error occurs due to the prosecutor's ordinance regarding deprivation or limitation of liberty or due to initiation of criminal proceedings, there are no contradictory proceedings. Moreover, in the case of non-adversarial proceedings, for example, before the Trade Registry, there are no trials.

Consequently, having in mind the legal provisions, and the doctrinal definitions, we consider that judicial error, and damage, should occur within the framework of judicial proceedings.

b) In what regards judicial errors in other trials than criminal ones, Law no. 303/2004 does not provide the way by which these errors should be found. From the provisions of art.96 para. 4 of that Law, it would appear that the error is found by the decision that finds the criminal or disciplinary liability of the magistrate who caused the error. But we cannot retain such an interpretation. First, the process in which judicial error is upheld must precede the decision that upholds the liability of the magistrate. Second, in each trial there are different procedural relationships. While in the framework of the trial regarding the existence of judicial error, there are the same parties as in the original trial in which the error occurred, in the second trial, regarding the liability of the magistrate, a party is only the judge or prosecutor sent on trial or disciplinarily sanctioned.

That is why we rally to opinions expressed in the literature<sup>10</sup>, according to which, a separate judgments, that upholds the judicial error is also necessary. But the question arises whether this decision may be rendered in an ordinary appeal or, only by the way of an extraordinary appeal. *De lege*

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<sup>10</sup> L.R. Boilă, *op.cit.*, p.410; Dojană, M., (2008) *Răspunderea statului pentru erorile judiciare săvârșite în procesele de altă natură decât cele penale* in Community law and national law. dissertations presented at the scientific session of the Legal Studies Institute, Editura Hamangiu, 2008, p.83;

*lata*, in the case of judicial errors in criminal trials, an extraordinary appeal is necessary, because, the initial judgment has to be a final one. In criminal trials, the judgment of the court is final only after appeal. Thus, it remains for the victim of the judicial error, to use one of the extraordinary appeals, revision or complain for annulment.

In the case of civil trials, the law does not provides any requirements regarding the final character of the judgment that contains the judicial error, thus, judicial error could appear regardless the state of proceedings. However, practically, the issue of a judicial error and of the damage caused could appear only after a judgment that can be enforced is rendered. Thus, we believe that a judicial error could be upheld even in an ordinary appeal, subject to the condition, that the challenged judgment should be an enforceable one.

c) Another condition, expressly provided by art. 96 para. 4 of Law no. 303/2004 only for the case of judicial errors in other trials than criminal ones, was criticized in literature<sup>11</sup>, and it was challenged before the Constitutional Court, but, until now, all the exceptions of unconstitutionality regarding this articles were dismissed<sup>12</sup>. The text of the mentioned article makes reference to the *necessity of a previous final judgment that upholds criminal or disciplinary liability of the judge of prosecutor*, for a judicial error committed during the trial and it this action is capable to determine a judicial error. Thus, the situations for upholding the state's liability for judicial errors are unduly restricted only to those events in which there is a criminal conviction or a disciplinary measure against the magistrates. We are again in the same situation in which once the Constitution Court upheld the exception of unconstitutionality of art. 504 para. 1 Cod of Criminal Procedure, in the old wording of the cited article, article that had in view only two listed situations, state of affairs that was in contradiction with the Constitution<sup>13</sup>.

We consider, imposing as a condition the establishment of criminal or disciplinary liability, previously to the filing of the action for compensation, is in contravention with the right to access to court and with the right to a fair trial. Establishing such conditions requires a slow mechanism, thus there is a possibility, that many juridical errors will be supported by victims, although the error is not imputable to them (for example, a wrong expertise or failure to present a key witness, failure that leads to a wrong decision). In legal literature it was correctly underlined<sup>14</sup>, that art. 94 para. 4 of Law no. 303/2004, is an attempt to limit the liability of the magistrate and not to limit the liability of the state.

We consider that the principle provided by the Fundamental law is that of the state's liability for judicial errors without any distinction regarding the legal materials in which judicial error occurs, and regardless the quality of persons that produced the judicial error. Regarding the actual content of the mentioned legal text that differentiates the engagement of liability depending on the nature of the proceedings in which judicial error occurred and on the quality of the parties, whether they are parties in a criminal or civil trial, this text is unconstitutional in relation with the provisions of art. 52 para 3 and art. 16 of the Constitution. The difference between the two situations of liability, the one in criminal cases, the other in civil cases, discrimination is caused among the victims of judicial errors, on the basis of the case's nature in which the judicial error occurred.

Secondly, the provisions of art. 96 para. 4 of Law no. 303/2004, add supplementary conditions to the constitutional provisions.

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<sup>11</sup> I.Petre, *op.cit.*, p.102-103 ; M.Dojană, *op.cit.*, p.81-82; L.R.Boilă, *op.cit.*, p.408-409

<sup>12</sup> See *Decision no. 277 of 22 March 2007*, published in Official Monitor no. 308 of 09.05.2007, *Decision no. 182 of 26 February 2008*, published in Official Monitor no. 255 of 01.04.2008; *Decision no. 1.406 of 16 December 2008* published in Official Monitor no.167 of 17.03.2009

<sup>13</sup> See *Decision no.45/1998*, published in Official Monitor no.182 of 18 May 1998 and *Decision no. 255/2001*, published in Official Monitor no.837 of 27 December 2001

<sup>14</sup> I.Petre, *op.cit.*, p.102

Given the legal text, in what regards judicial errors in other cases than criminal ones, the prior proving of the magistrates' guilt is necessary, and this has to be regarded as a precondition for filing action for compensation<sup>15</sup>. In such circumstances, on the basis of art. 96 of Law no. 303/2004, the state will be liable only if the guilt of the magistrate is proved, because it is necessary to ensure the protection of the victim, and also the protection of the magistrate, who will not be held responsible directly in relation with the victim, but only in relation to the state. It is completely unfair that the objective liability of the state is conditioned by the subjective liability of the magistrate. This situation is contrary to the scope for which the institution of liability for judicial errors was regulated, the intention of the lawmaker was to limit the liability of the magistrate and not to limit the liability of the state.

d) In what regards the adding by the lawmaker of the condition that require the judge or the prosecutor to commit an act *during trial* that engages the state's liability and if the act is capable to create a judicial error, we consider that this provision should be examined from two viewpoints.

The first aspect would be to determine from where to where lie the concept of during trial? It refers only to the discussion phase or it also has in mind the period before the first day of appearance? Moreover, the preparation of the lawsuit or the period after the judgment becomes final are to be counted or not in the content of the notion?

By a logical and systematic interpretation of the mentioned provisions, corroborated with the provisions of the Code of Civil Procedure, we consider that the lawmaker, by the expression referred above, intended to mean only the period starting with the filing of the lawsuit and ending with the delivery of the judgment. The concept of trial, cannot refer only to the phase of discussions, but it is extended from the moment of filing the action, that represent the starting point of the adversarial proceedings, and until the delivery of the solution. This implies, for example, a wrong resolution applied by the judge at duty regarding the amount of stamp duty.

A second aspect would be that of knowing if the magistrate or other persons can commit the act that generates the error before filing the action. We consider that there can be situations in which the fact that caused the judicial error had occurred before the action was filed. This is unlikely to happen in relation to a judge, but it is possible regarding other persons. If in the case of magistrates, it is clear that the act that determines the judicial error has to occur during trial, this is not the case of other persons who can provoke a judicial error.

In this regard, what interests us *is if the fact determines or not the judicial error, during the proceeding or after*. We believe that the judicial error must be committed by imposing, during trial, certain measures, solutions that are contrary with reality, but it is possible that this is due to acts committed before or during trial.

**4.Conclusions.** The express regulation by law of the need to repair damage caused by judicial errors in other cases than criminal ones, is a step forward. Unfortunately, the current provisions have numerous gaps or contradictions. We consider that the modification of art. 96 para. 4 of Law no. 303/2004 would be necessary, in the sense that state liability for judicial errors should not be subject to the criminal or disciplinary liability of the magistrate. This limitation was introduced as a result of misinterpretation of the European Charter on the statute for judges<sup>16</sup> that underlines at para. 5.2 the necessity to limit the civil liability of judges to compensation from the state for of a gross and

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<sup>15</sup> In the sense of state liability only in the situation when the judges or prosecutors criminal or disciplinary liability is upheld, see L.Ivanovici, C.Danileț, *Răspunderea judecătorilor și procurorilor*, in „Curierul judiciar” no.1/2006, p.70 and following.; O.Puie, *Răspunderea autorităților publice și a persoanelor fizice pentru prejudiciile cauzate în materia contenciosului administrativ, precum și aspecte privind răspunderea patrimonială a statului pentru prejudiciile cauzate prin erori judiciare*, in Dreptul, no. 2/2007, p.110

<sup>16</sup> *European Charter on the statute for judges, Strasbourg, 8-10 July 1998*, accessed on [www.csm1909.ro](http://www.csm1909.ro)

inexcusable breach of the rules governing the performance of judicial duties, with the prior permission from an independent authority. This provision regards only the limitation of the liability of judges and of the state, having effect only in the relation between the state and judge. By this provisions the state “is covered” by the liability of judges in order to be relieved of liability, and in order to always have the possibility to recover the compensation from the magistrates. The formulation of a eventual article of law regarding the right of redress of the states could be made in the following wording: *The right of redress of the state against judges or prosecutors, cannot be exercised unless the criminal or disciplinary liability of judges or prosecutors is previously established by a final judgment, and if the incriminated act was capable to determine a judicial error that engaged the state’s liability and the state was obliged to pay compensation.*

Similarly, there is a difficulty regarding the possibility to repair moral damages caused by judicial errors in other cases than criminal ones. The text of art. 96 para. 4 of Law no. 303/2004 provides that the injured person has the right to compensation for “material damage” caused by judicial errors in other cases than criminal ones. We consider that by this formulation, the right of damaged persons, to obtain integral compensation is seriously limited, and thus discrimination is created in relation to the injured parties in criminal cases, as well as to persons that seek to obtain compensation on the basis of general provisions of liability. In relation with the constitutional provisions of art. 52 para. 3, provisions that contain no restrictions for obtaining compensations, the reformulation of the mentioned legal provisions is necessary, in such a manner to allow for the injured person to obtain compensation for damage caused by judicial errors, without any distinction.

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