

JUDICIAL ERROR. NOTIONS OF COMPARATIVE LAW

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Abstract

Due to recent changes in the field of the judicial error regulations, that lead to a new definition of the concept and to the creation of a dual system of liability for the damage caused through a judicial error (on one hand, an objective liability of the State and, on the other hand, a personal liability of the magistrate), the paper aims to reflect the potential impact these new regulations can cause in the field of the judicial activity. The solutions for which the lawmaker opted will be analysed, by comparison with similar regulations that exist in various European law systems (which represents also a source of inspiration for the law making process) and proposal will be made, in order to ensure an effective and uniform law application. The research methods used in order to achieve this aim are the comparative method, the analytic and historical methods.

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We aimed to analyze the problematic of the judicial error, through a perspective of comparative law, observing the recent regulations on this matter adopted in Romania and their consequences on the field of State liability, on one side, and of the magistrate, on the other, for the damage caused by a judicial error, but also observing the similar regulations provided by the Spanish and the French law systems, states that have a longer tradition in the field of regulating the field analyzed.

1. The innovation of the liability system for the judicial error in the national law

The recent modified regulations regarding the three laws composing the domain concerning the organization and function of the judiciary (Law no. 303/2004 regarding the statute of the magistrates, the Law no. 304/2004 regarding the judicial organization and the Law no. 317/2004 regarding the function and organization of the Supreme Council of the Magistracy) brought a series of innovative changes in the field of the liability system for the prejudice caused by a judicial error. Thus, it has been consecrated a dual system of liability, on one side, the liability of the State, as a guarantor of the well-functioning of the Justice public system, and on the other side, the liability of the magistrate who acted by a gross negligence or with a bad faith, thus causing the judicial error that generated the prejudice. Also, taking into consideration the fact that acting with gross negligence or with bad faith and thus causing a judicial error forms in the same time the element of the disciplinary misconduct stated by the letter t) of the article 99 of the Law no. 303/2004, one can observe a certain connection between the civil liability and the disciplinary liability of the magistrate.

The necessity to regulate the notion of judicial error in an accessible and predicable manner, according to the standards of the European Convention for Human Rights, generated its new definition. Even treating this problematic under the old regulation, the doctrine² stated that the disciplinary liability of a judge is restrained by the coexistence of two other main principles necessary in a democratic state: the independence of the judiciary and the principle of *res judicata* case law.

The Law no. 242 of 2018, that modified the regulations found in the Law no. 303 of 2004 states that there is a judicial error when a procedural act was instated with the evident breach of the substantial or procedural regulations, and this act harmed the rights and freedoms of a person, a harm that could not be repaired by using the remedies at law.

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² I. Gârbuleț, *Abaterile disciplinare ale magistraților*, Ed. Universul Juridic, Bucharest, 2016, p 482-489.

And the third paragraph of the article 96 states that a judicial error can be caused in the situation when, by pronouncing a sentence that is definitive, contrary to the facts or law regulations, have also been harmed the rights and freedoms of a person that could not be repaired by the remedies at law.

The Romanian Constitutional Court had to state whether these regulations respect the fundamental law, and it concluded that a clear definition of the judicial error is needed, as long as not every error of judgment represents a judicial error, but only those errors that represent serious, "manifested, indubitable, gross, absurd or that caused factual conclusions that are illogical or irrational", and any erroneous judicial interpretations should be corrected by using the remedies at law.³ The Court also stated that the autonomous notion of judicial error necessitate a clear and complete regulation, as being related to a severe harm of the rights and freedoms of citizens, and under the premise of a misconduct of the judicial proceedings⁴.

By the analysis of the new regulation results that there is no condition, in order to establish the incidence of a judicial error, to ascertain a guilt of a magistrate, in the conjecture of deciding over the liability of the State for the judicial error, in a process that is on the role of the High Court where the plaintiff resides, an eventual guilt of the magistrate being analyzed in the process generated by the regression action promoted by the State, if it is condemned to repair the prejudice caused by the judicial error. It is thus confirmed the new conception of the law maker, that separated the two types of liability (the objective one, of the State, for the prejudice caused by a judicial error, and the subjective one, of the magistrate that acted with gross negligence or bad faith).

The same Decision of the Constitution Court stated that the condemnation of the State to repair the prejudice caused by the judicial error should not automatically imply the liability of the magistrate, if the gross negligence or bad faith have not been proved.

The Decision no. 252 of 2018 of the Constitutional Court stated that it is not an attribute of the Judicial Power to decide on the opportunity of promoting a regression action against the magistrate, but it is an attribute of the Executive Power, as the State has been previously condemned to repair the prejudice caused by a judicial error. This is a conclusion that, as we shall see, was not embraced by other law systems, such as the Spanish one.

Following, we shall offer a comparative perspective on the civil liability of both the State and the magistrate for the prejudice caused by a judicial error, as it is applied in Spain and France.

2. The regulation concerning the judicial error in the Spanish legal system

As long as neither the Spanish Constitution nor the organic laws define the concept of judicial error, the doctrine⁵ created a definition, starting from the case law on the matter.

Thus, a number of the Supreme Court sentences consider that the judicial error is cause by a sentence pronounced with an unfair, evident, fundamental misinterpretation of the law and that caused a visible negative consequence in the society. This kind of interpretation generates a confusion between the facts and situations brought forward to justice and it implies a negligence concerning the application and the interpretation of the law, missing a necessary connection with the *ratio decidendi*.

Also, the Supreme Court of Spain stated that the judicial error must have been caused by an incontestable erroneous understanding that lead to irrational, absurd, illogical conclusions that affected the harmony of the judicial order, resulting in an action of inaction of the magistrate outside the sphere of the legal.

³ Decision no. 45/2018 of the Constitutional Court, par. 216, published in the National Journal of Romania no. 199 of March 5, 2018, online at https://www.ccr.ro/files/products/45_-_27_febr_2018.pdf, accessed on November 12, 2018.

⁴ Decision no. 252/2018 of the Constitutional Court, par. 151, published in the National Journal of Romania no. 399 of May 9, 2018, online at <http://www.cdep.ro/proiecte/2017/400/10/8/deciziacc252.pdf>, accessed on November 12, 2018.

⁵ A. Gonzalez Alonso, *Responsabilidad patrimonial del Estado en la administracion de Justicia*, Ed. Tirant lo blanch, Valencia, 2009, p 163.

It has been stated that there is no judicial error if it was generated by external unforeseeable conditions, like the *force majeure*.

As a result, according to the Spanish Supreme Court case law, the error must have been caused by pronouncing an erroneous sentence and this link of causality must be an objective one, over passing the subjective view of those who pretend to have been harmed.

It is not considered a judicial error the situation where a simple error of calculation has been produced, or another material error that can be rectified at any moment (article 267 of the Organic Law concerning the organization of the Judiciary).

As a consequence, this definition of the judicial error, as seen through the characteristics mentioned above, excludes the situation where a sentence that reinterprets a previous judicial matter is pronounced. This is because the principle regarding the independence of the Judiciary allows any new interpretation on any matter, as long as it is concluded in sphere of a legally permitted action of the magistrate. Any contrary interpretation could lead to the creation of a veritable tertiary remedy at law that could suppress the principle of judicial security.

It also has been stated that a severe negligence of the magistrate, or acting with a bad faith, could lead to his or her civil or criminal liability, but it could not be considered as a negligence not knowing certain facts because the litigants or other participants omitted to inform the magistrate on these facts. As a result, there would be no judicial error if the justice seeker that pretends to have been harmed contributed in any way to causing the judicial error, by proving a conduct not characterized by good will. Also, all the elements of the civil liability must be analyzed, like the existence of a prejudice, of an illicit doing, a guilt and a link of causality⁶.

The Spanish law distinguishes⁷ between the notion of judicial error, that necessarily implies a normal functioning of the judicial system, but there is an error of a judge, committed in the exercise of his or her judicial function, and other situations that can cause a prejudice and that imply either a malfunction of the judiciary (caused by an error of the auxiliary) or an error caused by the judge when he or she carries out other tasks, apart from the judicial ones.

Nevertheless, the Spanish Judicial Power Council, as an institution guaranteeing the independence of the judiciary, stated that there is not an attribution of the Executive to ascertain whether an action represents a judicial error or not, this kind of competence being exclusively attributed to the Council, and any contrary interpretation causing a hindrance to the independence of the Judiciary.

As a consequence, it has been established that is necessary that the process regarding the stating over the existence of the judicial error must have as a premise the imperative of repairing the damage caused, and promoting that action being the only way in order to repair the harm, after using every remedy at law at the disposal of the plaintiff⁸.

Thus, the Spanish Constitution Tribunal stated that⁹, following the filing of a lawsuit regarding the existence of a judicial error, the decisions taken by the tribunal that caused the error could not be restored into question, being necessary to respect the security of the judicial decisions, the process aiming solely at compensating the litigant for the prejudice suffered. Everything that has been stated by pronouncing the decision that caused the judicial error must remain valid, if they had not been modified through a remedy at law, with the sole exception of the situation when fundamental rights or freedoms have been violated, and which implies the necessity to overrule that part of the decision.

In any other situation, apart from trespassing the principle of judicial security, a different course of action could hinder the necessity of a fair trial that implies the right of the litigant to a decision pronounced by a court following a process that was trialed for a reasonable amount of time, a decision that cannot be overruled after it caused effects in the judicial order.

⁶ *Idem*, p. 164.

⁷ Stated by the reports issued by the Council of the Judiciary of Spain, *apud* A. Gonzalez Alonso, *op. cit.*, p 165.

⁸ *Idem*, p. 165.

⁹ STC 39/1995 din 13 februarie 1995, *apud* A. Gonzalez Alonso, *op cit*, p. 166.

The Spanish doctrine¹⁰ classified the judicial errors in two main categories: procedural errors and substantial errors, and this last category comprises more groups: the *iuris* errors (concerning the erroneous interpretation and application of the law) and the *facti* errors (referring to facts, thus meaning the erroneous appreciation of the situation resulting of the proofs administered during the process).

Thus, the judicial error could be caused either by the erroneous interpretation of the law or of the proofs administered in the procedure, but this last type of the error will be repaired by promoting the remedies at law.

Analyzing the subjects of the judicial error we can observe that this type of liability could only be applied to the magistrates that are still functioning in the judiciary (for the comparison, the article 96 of the Law no 303 of 2004 regulates that the liability for the judicial error continues to exist even if the magistrate no longer serves the public office) and not to the auxiliary personnel. From the lack of regulation regarding this aspect in Romanian law, we could conclude that the regulations regarding the judicial error are not to be applied to the auxiliary personnel.

Also, if a magistrate is called on the office for a limited period of time, it has been considered that their acts could cause a judicial error, too, and it is the same situations for the actions of the justice of the peace (that mainly solve disputes that are not contentious).

On the other side, even if the problem of the liability of the auxiliary for the judicial error have been analyzed, the conclusion was not to apply these regulations to the auxiliary, as long as they work under the authority of a judge and, even if their acts are acts of public power, the majority of the doctrine concluded they cannot be held liable for the prejudice caused by a judicial error, this being also stated by the Supreme Court¹¹.

Regarding the object of the judicial error, this must be caused by an action of a judge exercising his or her public judicial function, such as sentences that are definitive or with a provisional character, the error being caused in any phase of the procedure and at any level of jurisdiction (this is a different regulation that the one adopted in the Romanian legal system, that states the possibility of causing a judicial error by issuing other acts, not only sentences).

It has also been stated that a judicial error could have been caused by an action of the Court of Auditors, when it implies judicial functions. But the institutions that have only an administrative function cannot cause a judicial error.

And also a process concerning stating over a judicial error caused by the Constitution Court of Spain cannot be admitted, as long as this Court establishes its own competence and its jurisdiction is unique.

The judicial error cannot be caused by a misconduct of the Public Prosecutor Office, as long as this institution acts in order to secure the rights and freedoms of every person and also the public interest, and thus it does not solve contentious matters, which is another distinctive regulation than the one existing in the Romanian legal system.

3. The regulation concerning the judicial error in the French legal system

In civil matters, the regulations instating a liability of the magistrate has been postponed by a moral impediment, concerning the lack of opportunity of this kind of liability concerning the persons called to apply the law.

It has been considered as being rather necessary to create a system that would avoid the harassment of the members of the judiciary by the persons discontent of the result of a trial. This mechanism should not foresee the principle of the authority of the case law and the necessity to protect the magistrates from the maneuvers of intimidation that could affect their independence, taking into consideration the specifics of the judicial decision making process¹².

¹⁰ *Idem*, p. 166.

¹¹ A. Gonzalez Alonso, *op cit*, p. 167 and 168.

¹² J. Joly-Hurard, *La deontologie du magistrat*, Ed. Dalloz, Paris, 2014, p. 61.

The French doctrine stated that the judicial error has been defined as being the severe and repeated trespassing of a procedure rule, that has been stated by a definitive sentence¹³.

The French system regulates a mechanism of liability for the judicial error similar to the one generally in place for the liability of the State for any misconduct of a public administrative service. A regulation tributary to the conception that Justice is also a public service, for the good administration of which the State has to be held responsible. And a regression action against the magistrate must only be promoted if there is a negligence, a personal guilt, in his way of attending the judicial function.

The State obligation to repair the prejudice cause by a judicial error (stated by the regulations of the Code of judicial organization of 1972 only appears when a serious error occurs, or a denial of justice, and in the absence of any guilt of the magistrate.

The same law also regulates about the personal liability of the magistrates, for having a personal guilt in causing the error, and which distinguishes whether he is a judge practicing a judicial function or not. In the first case, the French law confers the Judicial Authority the exclusive competence in order to decide on the necessity to sanction the magistrate or to promote a legal action against him or her.

The personal liability of a judge only is put into action if a Tribunal (*de grande instance*) stated, deciding on a lawsuit started against the State, on the existence of a judicial error caused by the magistrate in his function and that derives from a personal misconduct of his. Only after this kind of liability has been stated, the State has the right to promote a regression action (which is optional) against the magistrate, and that would be trialed before the Court of Cassation¹⁴.

This type of action is typical for the field of administrative law, and is common to all situations where the State is called to repair a prejudice caused by a clerk of the State. Since this kind of possibility has been created in the French legal system, there has been not a single regression action against a magistrate, situation that lead to the conclusions that the judge liability is only a fictional one¹⁵.

Concerning the liability of the State for the judicial error caused by a gross negligence or a denial of justice, the restrictive interpretation on the matter by the French courts, in the first stage of the application of this regulation, lead to the condemnation of the French State by the European Court for Human Rights, that stated over the failure to ensure an effective right to access a tribunal. This is the reason why, in recent times, the interpretation of the two notions is a more permissive one¹⁶.

The possibility to commit a serious error when carrying out the public function implies from the very beginning the idea that the respective public office presents a very high risk of committing errors, this being the reason why the State would not be condemned to repair any type of prejudice caused during a process, but only that which is extraordinary, of a severe magnitude, situation that excludes the possibility that the justice seeker might have assumed a certain risk when starting the process.

The national jurisprudence had to define the gross negligence, in the absence of a similar definition in the legislation¹⁷.

Thus, similar to the case law of the Romanian Constitutional Court previously mentioned¹⁸, it has been considered a gross negligence the situation that comprises a severe, gross, inexcusable not knowing of the professional duties. This interpretation of the French doctrine also covers for the case of a bad faith, as it is regulated in the Romanian law system, as long as in the French system a

¹³ S. Salas, *Erreurs judiciaires*, Ed. Dalloz, 2015, p. 144-145, 153, 157-158.

¹⁴ J. Joly-Hurard, *op. cit.*, p. 63-64.

¹⁵ S. Guinchard, *Responsabilite du fait du fonctionnement du service public de la justice*, "Repertoire Procedure Civile", Dalloz, Paris, no. 11.

¹⁶ J. Joly-Hurard, *op. cit.*, p. 65.

¹⁷ J. Joly-Hurard, *op. cit.*, p. 66.

¹⁸ Decision of the Constitutional Court no. 45 of January 30, 2018 published in the National Journal of Romania no. 199 of March 5 2018.

case of gross negligence is also considered the situation of an animosity between the magistrate and a litigant or an unfair conduct, animated by negative intentions¹⁹.

Because this kind of an interpretation, due to its high degree of subjectivity, made it difficult to prove the gross negligence of the magistrate, the doctrine and jurisprudence adopted a more permissive interpretation, defining it as an action or a series of actions that reflect the inability of the public system of justice to fulfill its public purpose.

Even having stated this permissive definition, it has been considered²⁰ that the principle of the necessary protection of the authority of the case law makes it impossible that any similar type of liability exist for what is mentioned in a sentence, as long as these errors could be repaired by promoting a remedy of law.

As a consequence, the liability of the State will only exist if the plaintiff complains about a severe prejudice that was caused by an abnormal functioning of the judiciary. It has been concluded this way also by the European Court of Justice (case *Kobler vs. Ostrich*) and that stated the prevalence of the liability of the State even for the misinterpretation of a EU regulation that has been caused by pronouncing a sentence of the judiciary, concluding that the principle of the liability is not always limited by the one of the authority of the case law. A similar interpretation results from the article 5 paragraph 2 of the European Charter for the statute of the magistracy, that stipulates the existence of the State liability for a prejudice caused by pronouncing a sentence²¹.

As for the notion of denial of justice, it has also been defined several times by the French doctrine and jurisprudence. Starting from the initial meaning, that is a refusal to judge a process, covering the situations where this type of refusal was invoked indirectly by mentioning the lack of the legislation or an unclear regulation, this type of interpretation obviously supposed a bad faith.

The jurisprudence extended the sphere of this notion, by transforming it into an objective one, and defining it in strong correlation to the failure of the State to ensure the protection of the rights and freedoms of the citizens.

Thus, it has been considered a denial of justice the situation when the process lasted for a long time before the Courts or the situation when the statement of reasons was written only 9 months after the ruling of the Court or in the case when the ruling took place 11 months after the debates were closed²².

This new interpretation of the notions of gross negligence and denial of justice that can lead to a judicial error are in line with the right to a fair trial, as it is stated in the constant jurisprudence of the European Court for Human Rights, thus offering an effective access to justice.

4. Conclusions

Observing the new Romanian regulation regarding the judicial error, we can conclude by stating it is similar to the one existing in other European legal systems, the common element being the necessity that the State is liable to repair the damage caused by a judicial error, as the guarantor of the judiciary well-functioning. If the national regulation went forward and consecrated the obligation of the State to promote the action in regression against the magistrate guilty of having acted with gross negligence or bad faith, we can observe that this type of action, although it exists in the French legal system, it has never been put into practice. It has been considered as being more effective the disciplinary liability of the magistrate and the exclusive competence in this area are assigned to the Judiciary Power.

Even if the internal legal system offers the possibility to promote the rules of a civil and disciplinary liability in a cumulative manner, for the case of acts done with gross negligence or bad faith, as in the French or Spanish systems, the national case law will shape the parameters for

¹⁹ F. Hourquebie, *Le pouvoir juridictionnel en France*, L.G.D.J., 2010, p. 171-174.

²⁰ J. Joly-Hurard, *op cit*, p. 67.

²¹ *Idem*, p. 68-69.

²² *Idem*, p. 70.

applying the new regulations, of an accessible and predictable manner and by ensuring the right to a fair trial judged by an independent and impartial Court.

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