

THE RIGHT TO AN INDEPENDENT COURT OF LAW. THEORETICAL ASPECTS. THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

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Abstract

International specialized literature approaches the concept of court of law from two perspectives: on the one hand, this concept refers to the court of law, regarded as a key linking element within the unitary judicial system, and, on the other hand, to the panel of judges, regarded as the main subject of the criminal procedure, i.e. the judges who take part in trying a criminal case. In a criminal case, the court of law plays the most important role and its main attribute is the function of jurisdiction, which represents the sum of powers granted to a magistrate for the administration of justice¹. The court of law plays a significant role in the rule of law state; thus, both at national and international level, attempts are made in order to set up a legal framework consisting of norms issued by national lawmakers or by official international institutions or by some magistrate associations or NGOs. All these efforts are meant to underline the significant role that the judiciary plays in a rule of law democratic society. In this study we shall try to analyse the concept of “independent court of law”, as this is presented in the national system of law, in its specific norms that are provided by international normative acts and in the principles deriving from the ECHR case-law.

Keywords: *the right to a fair trial; the right to an independent court of justice; criminal case; the European Court of Human Rights (ECtHR); unification of case-law.*

Introduction

The concept of **independence of the court of justice** implies two aspects: the court's independence from the other state authorities and the court's independence from the parties involved in the trial.

The judge's independence from the other state authorities – particularly, from the executive power – depends upon the appointment procedure and the length of the term of office, the judge's protection from external pressure and the judges' appearance of independence.

The judge's independence means that litigations are settled in the absence of any interference from any state body or from any other person². At the same time, the judge's main

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¹ V. Cădere, *Tratat de procedură civilă*, 3rd Edition, Cultura Națională Publishing House, Bucharest, 1928, p. 44, *apud* I. Leș *Instituții judiciare contemporane*, C.H. Beck Publishing House, Bucharest, 2007, p. 2.

² I. Leș, *Organizarea sistemului judiciar românesc. Noile reglementări*, C.H. Beck Publishing House, Bucharest, 2004, p. 38.

obligation is to *independently* and impartially interpret, clarify and protect the rule of law state³.

Thus, almost all the UNO member states have adopted national constitutions and international agreements that have gradually extended the judges' power in most of the states and in international relations. The separation of powers – which is provided by the Constitution – is meant, among other things, to represent a strong judicial guarantee for the judges' independence.

Regional and international conventions on human rights, as well as other international juridical instruments, provide the right to “a public and fair trial within a reasonable term by an independent and impartial court of justice that is set up by the law.” In addition to this, more and more international treaties continue to extend such individual rights of access to independent courts of law that should guarantee the fair implementation of the judicial procedures.

In this study we are going to approach the independence of the court of law principle from the Romanian legal system perspective, while taking into account international regulations and the standards imposed by the ECHR Convention and case-law.

1. Standards regarding the independence of the court of justice that are established by the Romanian system of law

National internal regulations on the independence of the judiciary are basically provided by the fundamental law of the state and they are also set forth by the laws on the organization of the judiciary.

Thus, according to Article 124 § 3 of the republished Romanian Constitution, “judges shall be independent and subject only to the law.”

The judges' independence is ensured by other constitutional guarantees. We refer to the provisions of the Constitution that define the most important role played by the Superior Council of Magistracy, i.e. the guarantee of justice independence (Article 133 § 1 of the Romanian Constitution). In this respect, the Constitution also indicates the powers of the Superior Council of Magistracy, which are exercised in order to accomplish the most important role played by this council, i.e. the role of being the guarantor of justice independence⁴.

Article 2 § 3 of the republished Law no. 303/2004 on the judges and prosecutors statute sets forth that “judges shall be subject only to the law and impartial.”

Article 2 § 4 of the republished Law 303/2004 sets forth that “any person, organization, authority or institution shall abide by the independence of judges”. At the same time, “the continuous professional training of judges and prosecutors shall guarantee their independence and impartiality in exercising their powers (Article 35 § 1).”

As to the judges' independence, Article 73 of Law 303/2004 provides that the judges' rights ... shall be set forth in conformity with the place and role played by justice in the rule of law state, with the responsibility and complexity implied by the position of a judge..., with the restrictions and inconsistencies provided by the law as to these positions; the judges' independence is meant to *guarantee independence and impartiality*. ... The judges' and prosecutors' Statute also sets forth the role played by the Superior Council of Magistracy in “protecting judges...against any action that might affect their independence or impartiality or that might raise suspicion as to their independence and impartiality.” “The judges or prosecutors who consider that their independence or impartiality is affected in any way by interference actions in their professional activity may address to the Superior Council of Magistracy for the necessary measures to be adopted according to the law.”

³ Ernst-Ulrich Petersmann, *Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with Principles of Justice and International Law*, in *European Journal of Legal Studies*, vol. I, nr. 2/2007, according to <http://www.ejls.eu/index.php?id=2>.

⁴ Similar provisions can be found in Law no. 317/1.07.2004 on the Superior Council of Magistracy – the law was republished in the Official Gazette of Romania, no. 827/13.09.2005.

Law 304/2004 on the organization of the judiciary also provides legal guarantees for the independence of judges. Thus, Article 10 sets forth that “all the persons shall enjoy the right to a fair trial and a solution to their cases within a reasonable term by an impartial and independent court, set up by the law.” Article 46 § 2 provides that “The investigations made by presidents or vicepresidents personally or by especially appointed judges shall comply with the principle of independence of judges and they shall abide by the judges’ subjection only to the law, as well as by the authority of the *res judicata*.”

At the end of this subparagraph we underline the importance of magistrates’ professional associations from Romania, which, without exception, have as an object of activity the obligation to ensure and reinforce the independence of the judiciary. We refer to the Romanian National Union of Judges, SoJust-Society for Justice, the Romanian Magistrates’ Association and the Association of Romanian Judges.

Thus, at the end of 2008, the Romanian National Union of Judges elaborated a document entitled “Principles for consolidating and promoting the independence and impartiality of justice”⁵, which includes a minimum set of norms that should guarantee the efficiency of these desiderata for justice (and for the whole society, at the same time):

a) the firm assumption by the lawmaker and executive power of a coherent legislation in all domains of social and economic life, so that the application of the legislative norms should no longer encounter difficulties which sometimes could not be dealt with by the judiciary; the public assumption – provided in the governing program that the new Parliament votes after the future executive is invested – that the judiciary will not be constrained by any action or omission;

b) the conscious assumption by the judiciary of its own independence and impartiality, especially by assuming its own responsibility for the magistrates’ actions and deeds in exercising their constitutional powers;

c) the assumption by the political class of the necessity to revise Romanian Constitution, which is an insurance instrument and a safeguard of justice independence;

d) enhancing efficiency, responsibility and adaptability of the Superior Council of Magistracy to the constitutional role it plays;

e) excessive bureaucratization of the Superior Council of Magistracy and the Ministry of Justice;

f) underlining the role of lawmaker played by the Parliament from two perspectives:

1) adopting - as soon as possible and after adequate public debates attended by specialists in law both theorists and practitioners - the civil code, the code of civil procedure, the criminal code and the code of criminal procedure. It is necessary for the new realities that are pointed out by these codes to eliminate the constant modifications of these fundamental laws, a situation that was specific for the last 18 years. Judicial stability and security can not exist if legislation is permanently instable and incoherent; 2) annihilating the executive power’s tendency to annex the legislature powers by excessively adopting emergency ordinances meant to amend or modify organic laws.

A problem for the Romanian criminal procedure system – which is linked to the independence of the judiciary – is represented by the system of military tribunals. In this respect, there existed cases in which Romania was accused of having broken the right to a fair trial when judging civilians for criminal matters by military courts.

Thus, judicial military criminal bodies play a well-defined role in the Romanian criminal judiciary system. This category includes: military tribunals, the public prosecutor’s offices

⁵ According to <http://www.unjr.ro/comunicate/principii-de-intarire-si-promovare-a-independentei-si-impartialitatii-justitiei.html>.

attached to these tribunals and special criminal investigation bodies, whose functioning is regulated in Article 208 a) – c), the Criminal Procedure Code; more precisely this category includes: the commanders of headquarters and officers that are especially appointed by their commanders, the heads of commandants' offices and the officers that are especially appointed by their superiors, commanders of military centres, as well as the officers appointed by their commanders. The competence of military tribunals was regulated while taking into account the quality of the offender and also the nature of the crime. In this respect, the powers of the military courts were exercised in accordance with the offences committed by the military staff and the offences committed by civilians (no matter if they are employed by military institutions or not); these offences were committed in connection to these employees' service duties or they were directed against the military bodies patrimony. All these offences were prosecuted in conformity with the procedure applied by the special criminal investigation bodies, military prosecutors and military tribunals.

As to the competences provided by the law in the special literature, opinions have been expressed according to which military criminal judicial bodies, even if they are special⁶ bodies, are not granted a special form of competence⁷. In other words, special competence must not be mistaken for the competence of the special⁸ bodies.

Thus, the inclusion of military tribunals in the category of judicial bodies that have special competence has been contested. Special competence is specific to judicial bodies that belong to a distinct judicial system and this aspect does not refer to the place occupied by military bodies within the national judicial system, which is unitarily regulated. In this way, for the military tribunals to be granted special competence, they should have been placed outside the system of courts and this hypothesis is not valid for military⁹ tribunals.

This thesis is supported by another opinion according to which military tribunals do not have special competence because they also judge criminal cases that involve crimes which aggrieve various social relationships; consequently, these tribunals do not have special competence for a certain sector of social¹⁰ activity.

However, military criminal bodies are specialized bodies whose existence is required by the particularities specific to military life. Over the last years, as to the Romanian criminal policy, there has been noticed a tendency to reduce the number military criminal judicial bodies and limit their powers. In this respect, we mention the fact that the Military Division of the High Court of Cassation and Justice was cancelled, its powers being taken over by the Criminal Division of the High Court. At the same time, the legal framework regulating the material and personnel competence of the ordinary military tribunals has been confined through many modifications that have been brought to the criminal procedure laws.

⁶ In this respect, e.g., military tribunals are considered to be courts with special jurisdiction (V. Dongoroz, in V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Explicații teoretice ale Codului penal român. Partea generală, vol. II*, the 2nd Edition, the Romanian Academy Publishing House and the All Beck Publishing House, Bucharest, 2003, p. 101).

⁷ V. Rămureanu, *Competența penală a organelor judiciare*, the Scientific and Encyclopaedic Publishing House, Bucharest, 1980, p. 43.

⁸ N. Volonciu, *Drept procesual penal*, the Didactic and Pedagogical Publishing House, Bucharest, 1972, p. 131.

⁹ For example, the criminal procedure regulations prior to the present Criminal Procedure Code provided a large range of specialized judicial bodies (tribunals for the railways, maritime or fluvial tribunals), among which military tribunals occupied a distinct position. They held a special position in the judiciary system because they belonged to a separate judicial system, which implied the existence of a military supreme court.

¹⁰ I. Neagu, *Tratat de procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2010, pp. 360-361 (at present, however, as a consequence of the significant modifications brought to the norms regarding military competence, one can notice a more specific character of the cases judged by the military criminal bodies).

Thus, Law no. 281/2003 provides that crimes committed by civilians against the assets owned or administered or used by the Ministry of National Defence, the Ministry of Administration and Interior, the Ministry of Justice – the General Directorate of Prisons, Romanian Intelligence Service, Foreign Intelligence Service, Special Telecommunication Service and Protection and Guard Service, which have a military role or are linked through their nature to the defence capacity and security of the state – are no longer in the competence of military tribunals.¹¹

In the same way, offences committed by the civil employees of military institutions and related to their service duties are no longer brought before military tribunals. Article I § 5 from Law no. 356/2006¹² provides that offences committed by civilians against the defence capacity of the state, according to the provisions of the Articles 348-354 of the Romanian Criminal Code, shall be brought before civil courts, as a consequence of abrogating Article 26 § 1 § b of the Criminal Procedure Code. Last but not least, it is of great significance, when mentioning the criminal policy principles that are applied in Romania, to point out the fact that offences committed by the military staff shall be judged by the military criminal bodies only if they are perpetrated in relation to their service duties (Article 26 and Article 28, the Criminal Procedure Code). The requirement to establish a connection between the illicit act that was committed by the military and the military's service duties is also provided in Article 28² of the Criminal Procedure Code. Thus, in the first instance, the Military Tribunal judges offences committed by the military staff against the security of the state and the offences against peace and mankind. The norm we are discussing about does not refer to the military's service attributions, but, obviously, these crimes usually imply the breach of the service attributions.

As an exception, according to Article 28² § 1 (c) of the Criminal Procedure Code, the Military Court of Appeal judges in first instance the crimes committed by military magistrates; this article does not provide as a condition the identification of a connection between the illicit act and the offender's service attributions. In this situation, however, the offender's quality of a magistrate is of major importance for establishing the competence of the Military Court of Appeal; the result is that a legal framework – similar to the one concerning offences committed by civil magistrates employed in courts of first instance, tribunals, courts of appeal, respectively public prosecutor's offices attached to these courts – is created.

We appreciate that the limits imposed on the jurisdiction of Romanian military tribunals are in line with the ECHR case-law, according to which criminal cases that involved civilians and were judged by the military courts were, in fact, mistrials.

2. Standards concerning the independence of the judiciary that are set forth by different international instruments

At international level, an impressive body of laws are issued by different world or regional organizations for protecting human rights, ranging from magistrates' international professional organizations to NGOs set up for this purpose, all of which militate for the independence of justice.

The enumeration of the important international judicial instruments must start with a reference to **the Universal Declaration of Human Rights** which, in Article 10, entitles any person the right to be judged by an *independent* court of law.

¹¹ Prior to Law no. 281/2003, the material competence for offences committed by civilians against the assets owned by military institutions underwent another confinement, i.e. the provision that these assets must have a military destination or refer to the defence or security capacity of the state.

¹² Law no. 356/2006 on modifying and amending the Criminal Procedure Code, as well as on modifying other laws, was published in the Official Gazette of Romania no. 677/7.08.2006.

In 1985, at the 7th United Nations Congress on Prevention of Crimes and the Treatment of Offenders, a set of fundamental principles regarding the independence of the judiciary¹³ were adopted. Thus, this document provides that the independence of the judiciary shall be guaranteed by each state and set forth in the National Constitutions. The judiciary systems shall be entitled to deliver judgements in the cases that are being tried, on the basis of the facts and in conformity with the law, without any direct or indirect restrictions, inappropriate influence, incentives, pressure, threat or interference coming from any party or for any reason. At the same time, the judicial systems shall have jurisdiction for all the legal matters and shall have exclusive authority to decide whether any potential case is within their competence, as the law sets forth.

The document also refers to the inconsistencies existing between the requirements imposed by a rule of law state and the courts of law that do not enforce the procedures that are provided by the law. At the same time, the document refers to those aspects that are adjacent to the independence of the judiciary and that are closely linked to non-determination. Thus, the following aspects are taken into account: the freedom of speech and assembly of the members of the judiciary, the selection and training process of magistrates, the conditions provided for magistrates as to the performing of their offices, as well as the length of their term of office, professional secret, immunity, respectively norms referring to magistrates' judicial liability.

In this respect, as far as freedom of speech is concerned, the document states that – according to the Universal Declaration of Human Rights – the members of the judiciary are entitled to freedom of speech, faith, association and assembly, as all the other citizens are; this means that when exercising these rights the judges will have to behave in a manner that implies the preservation of their dignity and impartiality and the independence of the judicial system. Judges will be free to form or join judges associations or other associations which represent their interests, promote their professional training and protect their judicial independence.

In order to be recruited as personnel for the offices available in the judicial system, these persons should enjoy a good moral reputation and should also have a high professional training. Their selection must be independent of any potential forms of discrimination, on grounds of race, colour, sex, religion, political orientation or any other opinion, property, birth or statute. However, the requirement that a candidate to a judicial office should be a citizen of that state is also regulated and it is not regarded as a discriminatory one.

The exercise of judicial powers implies the ensurance of those conditions that are necessary for creating a proper legal framework in order to make the performed activity more efficient. Judges (no matter if they are elected or appointed) have life tenure and the age limit is regulated in the national legislations. The promotion of judges shall rely on objective factors, such as professional training, moral integrity and experience.

The independence of the judiciary also implies the preservation of the professional secret.

Finally, the independence of the judiciary exists only on condition that judicial liability is strictly regulated with reference to the judges.

Recommendation no. 94 (12) issued by the Committee of Ministers of the Council of Europe to the member state regarding the independence, efficiency and the role of judges¹⁴

¹³ Milano, 26.08-6.09.1985. The principles were validated by the Resolution 40/32 (29.11.1985) and the Resolution 40/146 (December 1985) by the United Nations General Assembly.

¹⁴ Recommendation no. 94 (12) was adopted by the Committee of Ministers on the 13th of October 1994, at the 516th meeting of the state secretaries. The texts of the Recommendation project and the explanatory Memorandum were drawn up by a work group as regards the independence of civil justice. After these documents were examined by the European Committee for International Cooperation, they were sent to the Committee of Ministers from the Council of Europe. The Committee of Ministers adopted the text of the recommended project and approved the publication of the explanatory memorandum.

was adopted in order to comply with the provisions of Article 6 of the Convention and also with the previously presented document

This regional document primarily refers to the concrete measures that are necessary to be adopted for the independence of justice to be guaranteed: the independence of judges shall be guaranteed by observing the provisions of the Convention and the constitutional principles; the national systems will comprise the following rules: 1) the judges' decisions shall not be subject to any revision except for the legal means of appeal; 2) the term of office and the remuneration of judges shall be guaranteed by law; 3) no other bodies except for the courts of law shall decide upon the specific competences of the judge, as provided by the law; 4) except for the decisions regarding amnesty or pardon, the government or public administration are not entitled to decide upon the retroactive invalidation of the delivered judgements.

A magistrates' decision forum is necessary to exist and it is regarded as a judicial authority (as the Superior Council of Magistracy is in Romania) that shall have the competence to select and train magistrates and to organize their career. It is very important for this authority to enjoy, in its turn, complete independence.

Norms that guarantee the independence of the judiciary are included, such as: regulating the sanctions for those who try to influence the judges' decisions in any possible way; the aleatory distribution of the cases; the minute regulation of the hypotheses according to which a case can be removed; inamovibility.

According to **Recommendation 94 (12)**, the meaning of the phrase "independence of judges" does not exclusively refer to judges but it covers the whole judiciary. The independence of judges is bound to be guaranteed according to the provisions of the Convention and in conformity with the constitutional principles of every national system. As to the measures adopted for implementing this principle, one should take into account several aspects, depending on the legal traditions of every state. The law should provide norms that regulate the situations which can be classified as appeals against the delivered judgements. The revision of the delivered judgements by the government or the administration outside this legal framework will obviously be inadmissible. Similarly, the judges' term of office and their remuneration should be guaranteed by law. As to the judges' term of office, **Recommendation 94 (12)** comprises specific rules regarding the cases that classify the judges' suspension or removal from office as possible. Moreover, a specific recommendation is made for the judges' remuneration. Courts of law should also be entitled to decide upon their own competence, as the law provides it, and administration or government should not be entitled to make decisions that lead to the annulment of the delivered judgement, except for some special cases, such as: amnesty, pardon, clemency or other similar situations.

The judges' independence is first of all and mainly linked to the maintenance of the separation of powers in the state. The executive and legislative bodies have the duty to ensure that judges are independent. Some of the measures taken by these bodies might directly or indirectly interfere or might modify the way the judicial power is exercised. Consequently, executive and legislative bodies have to restrain from adopting any measures that could undermine the judges' independence. Moreover, pressure groups or other interest groups should not be allowed to undermine this independence.

The independence of judges must be guaranteed when judges are recruited and also during their whole professional career, without any discrimination. All the decisions regarding the judges' professional life should rely on objective criteria and even if every member state has its own method of recruiting, electing or appointing, the selection of candidates for the judiciary and the judges' career must be based on merit. Such decisions are important to be made only on the basis of objective criteria especially when the decision for appointing judges is made by bodies that are not independent from the government or from administration or, for example, from the Parliament or the Head of the State.

The independence of the judiciary must be observed not only when a judge is appointed but also during his entire professional career. For example, the decision of promoting a judge to another position might be, in fact, a disguised sanction of an “uncomfortable judge”. Such a decision is clearly incompatible with the terms of **the Recommendation 94 (12)**.

An important aspect for ensuring the fact that the most appropriate persons are appointed to the office of judge is represented by the lawyers’ training. Persons who build a career as a judge must enjoy an adequate judicial training. Furthermore, professional training contributes to the independence of the judiciary. If judges have appropriate theoretical and practical knowledge, as well as other abilities, it means that they could act more independently from the administrative and, if they intend to do so, they could change their professional orientation without being obliged to continue to work as judges.

Similarly with the **Fundamental Principles regarding the Independence of the Judiciary**, in the Contents of the **Recommendation 94 (12) on the independence, efficiency and role of judges**, dispositions regarding the judges’ authority, the conditions of performing the assigned job tasks, the right to association, the applicable judicial regime can be found in this document.

Thus, we shall make reference to the way in which the rules regarding the judges’ responsibility are set forth. In this respect, in order to protect the rights and obligations of all persons, the responsibilities of a judge are: a. To act outside any influence and in an independent way when judging all cases; b. To solve all cases in an impartial way and in conformity with the collected evidence and in accordance with the law, to ensure that each party is fairly heard during the trial and that the procedural rights of the parties are observed according to the provisions of the Convention; c. To dismiss a case or to decline competence whenever there are valid grounds that he must do so in conformity with the exhaustive provisions of the law (e.g. in case of health problems, conflict of interests etc.);

d. whenever necessary, to explain in an impartial manner judicial matters for the parties; e. whenever necessary, to encourage the parties to reach an agreement; f. To motivate his decision, using a plain language, except for the cases when the law or customs provide it differently; g. to undergo any training that is necessary for him to accomplish his tasks in an efficient way.

If these responsibilities are not fulfilled or they are fulfilled in a wrong way or with delay, measures are to be taken according to the judicial profile of the profession. E.g., the following measures are taken: a. the withdrawal of the case from the judge; b. the transfer of the judge; c. the judge is sanctioned with a salary cut; d. the judge’s suspension¹⁵.

¹⁵ According to Article 100 of the republished Law no. 303/2004 on the Statute of Judges and Prosecutors, the disciplinary sanctions applied to judges and prosecutors - depending on the seriousness of their misconduct - are: a) warning; b) cut of the monthly salary with up to 15% for a period of up to 3 months; c) disciplinary removal for a period of 3 months to another court of law or a public prosecutor’s office in the constituency of the same court of appeal or in the constituency of the same public prosecutor’s office attached to one of these courts; d) exclusion from magistracy. As one can notice in the national system, the hypothesis of ordering for a case to be withdrawn from a certain judge is not regulated. These sanctions can be imposed by the Superior Council of Magistracy if a judge is accused of misconduct for: a) breach of the legal provisions regarding the statement of assets, the statement of interests, the incompatibilities and interdictions imposed on judges and prosecutors; b) intervening to satisfy certain requests, demanding and accepting to settle one’s own personal interests or the family members’ interests or other persons’ interests otherwise than the legal framework provides for all the citizens, as well as interfering in another judge’s or prosecutor’s activity; c) performing public activities that have a political character or expressing one’s own political orientation when exercising the service duties; d) disclosing the secret of deliberation and the confidential nature of the performed works; e) repetitive and guilty breach of the legal disposals regarding the obligation to solve the cases within a reasonable time; f) the groundless refusal to accept applications, conclusions, reports or other documents from one of the parties in the trial; g) the groundless refusal to accomplish a service duty; h) exercising the office and breaking the procedure norms in bad faith or out of gross negligence if the deed is not an offence; i) delaying the performance of the works on imputable grounds; j) unmotivated and repeated absence

The European Chart on the Statute for Judges was adopted with the same purpose¹⁶.

Thus, this document reiterates a series of rules which have the value of principles and of which we point out those aspects that refer to the judges' inamovibility. The **Chart** sets forth the principle of the judges' inamovibility, according to which the removal of a judge is possible only if the judge agrees to be removed from office¹⁷. This principle is not applied if the judge's removal is provided as a disciplinary sanction in case modifications of the judicial organization occur and this implies the disappearance of a court of law or in case the judge is called to support a court that undergoes a difficult situation.

The temporary appointment stipulated in the last enumerated case must have a limited duration which is defined in the statute. However, taking into consideration the delicate situation of transferring a judge when the latter did not express his consent, we must underline the fact that they have the right to an appeal before an independent court that has the obligation to check if the transfer was legitimate.

In the Romanian national system, according to the republished Law no. 303/2004 on the statute of judges and prosecutors, if a court of first instance, a tribunal or a specialized court of law can not function properly because of a temporary absence of certain judges or because of a vacancy or other similar causes, the President of the Court of Appeal, at the proposal of the court of law within that appellate court's constituency, can appoint judges from another court of law within the same constituency *on the basis of a written agreement signed by those judges*. The delegation of judges from courts of first instance, tribunals and specialized courts of law to another constituency can be decided on the basis of the written agreement of those courts, with the approval of the Superior Council of Magistracy, and if the President of the Court of Appeal requires this in the constituency where the delegation is necessary and with the approval of the President of the Court of Appeal within the constituency where these judges work. The temporary appointment of appellate judges in control positions is decided *on the basis of the written agreement thereof*, at the request of the Superior Council of Magistracy and of the President of the Court of Appeal until that position is occupied by appointment according to the present law. The appointment in control positions of judges at the High Court of Cassation and Justice is decided by the Superior Council of Magistracy *on the basis of the written agreement thereof*, at the proposal of the President of the High Court of Cassation and Justice. The delegation of judges can be provided for a period of 90 days the most per year and it can be prolonged for other 90 days *with the written agreement thereof*.

According to the same normative act, in Romania the removal or transfer of judges can not be accomplished without *the written agreement* of the judge.

At the end of this subparagraph we are going to mention a series of provisions stipulated in **the Bangalore Principles of Judicial Conduct**. Thus, the independence of justice is the premise for the rule of law state and it represents the fundamental guarantee of a fair trial. The judge,

from work; k) adopting a reproachable attitude during the exercise of the service duties to the colleagues, lawyers, experts, witnesses or lawmakers; l) non-accomplishment of the obligation to transfer the basic norm to the court of law or the public prosecutor's office where the judge is employed; m) breaking the disposals regarding the aleatory distribution of cases; n) directly taking part or through the agency of other people in gambling activities or investment systems that avoid the transparency of the funds as the law stipulates.

¹⁶ The preliminary project of **the European Chart on the Statute for Judges** was adopted in the spring of 1998 on the second multilateral reunion on the statute of judges from Strasbourg (8-10 iulie 1998).

¹⁷ Regulations have a correspondent in Romanian national legislation. Thus, Article 2 § 1 and § 2 of the republished Law no. 303/2004 on the statute of judges and prosecutors provides that "The judges appointed by the President of Romania shall be irremovable according to the law. The irremovable judges can be removed by transfer, delegation, relocation or promotion only if they agree with this and they can be suspended or removed from office according to the provisions of the present law."

consequently, must support and be an example for the independence of the judiciary and also from an individual and institutional point of view.

The fair enforcement of this principle requires the observance of the following rules: a) the judge shall exercise his judicial office independently, on the basis of his own approach of the facts, on the basis of a faithful interpretation of the law, without being influenced or persuaded, forced, threatened or without allowing any direct or indirect intrusion that might come from the part of certain circles, no matter what the reason for such an interference; b) the judge shall be independent in society, in general, and in relationship with the parties involved in the litigation that he has to settle; c) the judge shall not only avoid any improper relationship but he shall also be beyond any influence that might come from the executive or legislative powers, and he must be perceived as such by any outside observer; d) when exercising his juridical office, the judge shall be independent from his magistrate colleagues as to those decisions that he must make independently;

e) the judge shall encourage and support all those measures that lead to the accomplishment of the judicial obligations in order to maintain and reinforce the independent functioning of justice; f) the judge shall manifest and make proof of a judicial attitude of good quality in order to consolidate the public trust in justice, without which the independence of the judiciary cannot be maintained.

Last but not least, we mention the documents elaborated by the Consultative Council of European Judges at the Council of Europe.

3. Standards for the independence of the court of law set forth by the ECtHR case-law:

The European Court of Human Rights set forth that the independence of a court of law depends on the following aspects:

- a) the appointment of judges;
- b) the length of the judges' term of office;
- c) the existence of a legal framework that offers judges protection against potential external pressures;
- d) the possibility to check the judges' appearance of independence¹⁸.

Thus, it has been established that the exigencies of independence are met by the Parole Board (a common law advisory body that can express opinion on the way in which the penalty must be executed by the convicts and that enforces a procedure which implies a set of major guarantees¹⁹), the Jury Court in Belgium (the Belgium legislation provides many guarantees that are meant to protect the Jury Court magistrates from external pressures, while the appointment of jurors is subject to certain very strict rules)²⁰, the Prison Visiting Committee (jurisdictional institution that is specific to the UK prisons and that has contentious powers and whose members

¹⁸ N. Mole, C. Harby, *Le droit à un procès équitable*, Conseil de l'Europe, Strasbourg, 2007, p. 33. See also, ECtHR, Decision adopted on 16.12.2003 in the case *Cooper vs. the UK*, according to HUDOC; ECtHR, Decision adopted on 16.12.2003 in the case *Greaves vs. the UK*, according to HUDOC; ECtHR, Decision adopted on 22.06.1989 in the case *Langborger vs. Sweden*, according to HUDOC; ECtHR, Decision adopted on 22.11.1995 in the case *Bryan vs. the UK*, according to HUDOC; ECtHR, Decision adopted on 2.06.2005 in the case *Zolotas vs. Greece*, according to HUDOC; ECtHR, Decision adopted on 21.09.2006 in the case *Maszni vs. Romania*, published in M. Of. nr. 585/24.08.2007.

¹⁹ ECtHR, Decision adopted on 2.03.1987 in the case *Weeks vs. the UK*, in V. Berger, *Jurisprudența Curții Europene a Drepturilor Omului*, 4th Romanian Edition, Romanian Institute for Human Rights, Bucharest, 2003, p. 138.

²⁰ ECtHR, Decision adopted on 1.10.1982 in the case *Piersack vs. Belgia*, in V. Berger, *op. cit.*, p. 204.

are independent)²¹. The Bar Council of Antwerp was also considered an independent body on the basis of its administrative, disciplinary, contentious or advisory powers. At the same time, the independence of the Council members is undoubtable since they are subject to their own consciousness²² alone.

The ECHR appreciated that the Royal Air Force Court Martial meets the independence standards because this court is comprised of members who have superior juridical competence and are presided over by a highly qualified civilian who is appointed by the Minister of Justice and who is entitled to give directions as to the administration of evidence and the settlement of the legal problems according to public mandatory procedure he is subject to²³.

If these conditions are not met, the procedure set forth by the Crown (the Queen of the Netherlands and the Public Health Minister) does not meet the requirements regarding the exigence of the independence of the court of law. In this respect, the royal decree - by which the Crown statuated the challenge - has the force of an administrative procedure act issued by a Minister who is responsible before the Parliament. This royal decree could not be subject to the control of a judicial body²⁴.

In the same way, the Austrian National Council for Persons with Disabilities or the Lausanne²⁵ Police Commission can not be considered independent bodies. As to the latter example, it has been pointed out the fact that the unique member of this commission is a high official from the police and thus he is likely to be required to accomplish other tasks, too. In this context, the lawmakers will tend to see him as a member of the police who is part of a hierarchical system and who is solidarious to the police forces.

In another case, the problem whether a court of law (The Turkish State Security Court) which is composed of two civil judges and a military judge meets the requirements of an independent court of justice. In this respect, the independence of the two civil judges can not be doubted, but the ECHR analysed the statute of the military judge who is a part of this court of law. Thus, although the military judges undergo the same training program as the civil judges and are protected from external pressure, they are, nevertheless, part of the army, an institution which is subordinated to the executive power. At the same time, military judges are subject to a disciplinary regime and are assessed within the military system they belong to. At the same time, military judges are appointed by the administrative system and the army. Taking into consideration these aspects, the ECHR held that this court of law does not offer guarantees of independence²⁶.

The court's lack of independence has also been pointed out as to the circumstances in which the members of the court were appointed and could be removed by the executive²⁷.

As to Romania's case, the issue regarding the independence of the court of law has been repeatedly analysed; in the following lines we are going to analyse some of these cases.

²¹ ECtHR, Decision adopted on 28.06.1984 in the case *Campbell and Fell vs. the UK*, in V. Berger, *op. cit.*, pp. 217-219.

²² ECtHR, Decision adopted on 30.11.1981 in the case *H. vs. Belgia*, in V. Berger, *op. cit.*, pp. 226-228.

²³ ECtHR, Decision adopted on 16.12.2003 in the case *Coper vs. the UK*, according to HUDOC.

²⁴ ECtHR, Decision adopted on 23.10.1985 in the case *Bentham vs. the Netherlands*, in V. Berger, *op. cit.*, pp. 161-163.

²⁵ ECtHR, Decision adopted on 29.04.1988 in the case *Belilos vs. Switzerland*, in V. Berger, *op. cit.*, pp. 181-183.

²⁶ ECtHR, Decision adopted on 9.06.1998 in the case *Incal vs. Turkey*, in C 1, pp. 213-216; see also: ECHR, Decision adopted on 28.10.1998 in the case *Ciraklar vs. Turkey*, in M. Udroui, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român. Tratat*, C.H. Beck Publishing House, Bucharest, 2008, p. 574; ECtHR, Decision adopted on 8.07.1999 in the case *Surek vs. Turkey*, *ibidem.*; ECtHR, Decision adopted on 10.02.2004 in the case *Önen vs. Turcia*, according to HUDOC. See also: A. Mowbray, *Military Judges and The Right to a Fair Trial*, in *Human Right Law Review*, vol. 6, nr. 1/2006, pp. 176-183.

²⁷ ECtHR, Decision adopted on 3.03.2005 in the case *Brudnicka vs. Poland*, according to HUDOC.

Thus, the judges' obligation to comply with a case-law that was set forth by the joint divisions of a country's Supreme Court did not contravene the independence of a court of law because the reunion of the divisions of a high jurisdiction is meant to confer special authority to certain decisions adopted in important areas of the judiciary; this does not imply that the lower courts' rights and duties to independently examine the cases brought before them are aggrieved²⁸.

In the case *Vasilescu vs. Romania*²⁹, the ECHR held – according to Article 6 §1 of the Convention – that the Romanian prosecutors, as representatives of the Public Ministry, are first of all subject to the General Public Prosecutor, and then to the Minister of Justice, and thus, that they are not independent but subject to the executive.

In the case *Maszni vs. Romania*³⁰, the ECHR analysed whether the military tribunal – which tried an offence inflicted on a civilian – was an independent court of justice. Thus, basically, the ECHR held that military tribunals have competence to deliver judgements for the crimes directed against the military personnel on condition that the guarantees of independence and impartiality provided by Article 6 §1 of the Convention are met. However, a different hypothesis was formulated with reference to the situations in which national legislatures entitle military tribunals to judge civilians in criminal matters.

Thus, according to the text of the Convention, the competence of military tribunals to judge cases against civilians is not absolutely excluded on condition that the exigence implied by this competence should be minutely examined.

The ECHR underlined the fact that it analyses with utmost care the circumstances in which the military tribunal is exclusively comprised of career military magistrates; in this case, the compliance with Article 6 §1 of the Convention is possible only under exceptional circumstances.

Without denying the special role played by the army in the constitutional organization of democratic states (this role is limited as far as national security is concerned because the exercise of the judiciary lies with the civil institutes), the ECHR held that military tribunals should basically not have the competence to judge civilians. Thus, the state should oversee that the civilians accused of committing an offence, no matter what this may be, will be judged by civil courts. At the same time, the power of the military criminal justice should not encroach upon civilians unless there are solid grounds for justifying such a situation and only in conformity with the clear provisions set forth by the law. These grounds should be proved in every particular case *in concreto*. The *in abstracto* inclusion of certain categories of offences within the competence of military tribunals might not be sufficient. Such an inclusion might place civilians in a position which is different from that of the citizens who are judged by ordinary courts of law and this could lead to inequality before the law, a fact which should be avoided in criminal matters.

Referring to the enforcement of these principles, the European Court of Human Rights noticed that the Romanian lawmaker – without being loyal or subject to the army – was, however, quoted before the military court for common offences.

Analysing the statute of military judges in Romania, the European Court of Human Rights noticed that certain independence and impartiality guarantees are provided by our legislation.

²⁸ ECtHR, Decision adopted on 16.07.2002 in the case *Ciobanu vs. Romania*, in C. Bîrsan, *op. cit.*, p. 493.

²⁹ ECtHR, Decision adopted on 22.05.1998 in the case *Vasilescu vs. Romania*, published in the Official Gazette of Romania no. 637/27.12.1999. For the same solution, regarding the lack of guarantees for the independence of Romanian prosecutors, see ECtHR, Decision adopted on 3.06.2003, in the case *Pantea vs. Romania*, published in the Official Gazette of Romania no. 1150/6.12.2004; ECtHR, Decision adopted on 26.04.2007, in the case *Popescu (1) vs. Romania*, according to HUDOC; ECtHR, Decision adopted on 26.04.2007, in the case *Popescu (2) vs. Romania*, published in the Official Gazette of Romania no. 830/5.12.2007.

³⁰ ECtHR, Decision adopted on 21.09.2006 in the case *Maszni vs. Romania*, published in the Official Gazette of Romania no. 585/24.08.2007.

Thus, the military judges undergo the same professional training as their civil counterparts do and benefit of constitutional guarantees which are identical to those of the civil judges - they are appointed by the President of the State at the proposal of the Superior Council of Magistracy, are irremovable and enjoy professional stability. On the other hand, other characteristics of the military judges' statute can cast doubt upon the judges' independence and impartiality. Articles 29 and 30 of the Law no. 54/1993³² provide that military judges are career officers, are paid by the National Ministry of Defence, are subject to military discipline and their promotion is regulated by the internal military³¹ norms.

Under these conditions, the European Court of Human Rights established that the right to a fair trial is aggrieved if the military tribunal - which judged a criminal case involving an offender accused of committing common crimes - did not observe the independence exigency. Thus, it was held that the offender's doubt as to the independence and impartiality of the military tribunals can be considered as objectively grounded.

The lawmaker's right to a fair trial obliges the state to ensure the fair application of the judicial procedures, while ensuring the equality of the parties before an independent and impartial system of justice which is set up in accordance with the law. This obligation is permanent because, otherwise, the right to a fair trial is aggrieved by the national jurisdictions.

Conclusions

In Romania, in criminal trials, the court of law is defined as the most important processual subject and it is included in the specialized literature in the category of the official processual subjects. The lawmaker's right to a fair trial determines the state to ensure the fair enforcement of the judicial proceedings, as well as the equality of the parties involved in the trial in accordance with the legal provisions. This regulation has a permanent character and, otherwise, the right to a fair trial is aggrieved by the national jurisdictions.

The present Romanian legal framework meets the requirements imposed by the organization and functioning of an independent system of justice. A number of guarantees that support these essential requirements for the judiciary and the fairness of the judicial procedure are also regulated. Subsequent to the ECtHR decisions, important modifications have been brought to legislation in matters of criminal procedure. Thus, e.g., we mention the limitation of the military judicial bodies competence only as to the offences committed by the military personnel (declining military tribunals any competence to judge the offences committed by civilians, no matter what these may be) or exclusively placing the remanding in custody measure with the judge, thus reducing the prosecutor's competence.

³¹ We notice that, although Law no. 54/1993 was abrogated, the regulations were taken from Law no. 303/2004 on the statute of judges and prosecutors. Thus, according to Article 30¹ "A person who meets the requirement provided by the law for becoming a magistrate can be appointed in the position of a military judge or prosecutor after this person became an officer within the National Ministry for Defence". According to Article 73 § (4) § (5) and (6) "(4) Military judges and prosecutors are active military officers who have all the rights and duties that this position implies. (5) The remuneration and the other rights that military judges and prosecutor have are ensured by the National Ministry for Defence, in conformity with the legislative provisions regarding salaries and the other rights that are specific to the judiciary personnel and in conformity with the regulations regarding the payment rights that are specific to the quality of a military, and to the quality of a civil employee for this Ministry. (6) Military ranks and promotion of military judges and prosecutors shall be made in accordance with the norms that are applied for the full-time employees within the National Ministry for Defence."

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