

CONSIDERATIONS ON THE RELATIONSHIP BETWEEN THE SECRECY OF DELIBERATION AND THE WITNESS QUALITY OF THE JUDGE IN A CRIMINAL CASE REGARDING CORRUPTION OFFENCES COMMITTED IN RULING A DECISION

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Abstract

The present article deals with the correlation between judge's obligation of secrecy of deliberations in relation to an offense under the criminal law on which it is researched and its possibility to waive the obligation of professional secrecy under his hearing as a witness in the context of the administration of evidence for the investigation of an offense of corruption.

Key words: *independence, impartiality, secrecy of deliberation, immunity, the new Code of criminal procedure*

1. Independence and Impartiality of Judges

According to art. 124 par. (3) of the Romanian Constitution and to art. 2 par. (3) of Law no. 303/2004 on the statute of judges and prosecutors², *judges are independent and shall only submit to the law*. Final judges are appointed by presidential decree and enjoy immovability. Immovable judges can be transferred, delegated, detached or promoted with their consent only. Their suspension or release from position can only be made under the conditions strictly and limitedly provided by Chapter VI of Law no. 303/2004. Any decision regarding the selection, recruitment, appointment, career development or cessation of a judge's positions belongs to the Superior Council of Magistracy, which is the guarantor of the justice independence, is independent and is submitted in its activity only to the law.

Therefore, the provisions of Recommendation no. 94 (12) of the Council of Europe's Committee of Ministers³ to the member states regarding the independence, efficiency and role of judges have been transposed into the domestic legislation; according to such provisions, in order to guarantee the judges' independence, a

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² Republished in the O.J. no. 826 of 13 September 2005.

³ Available on the website: www.echr.coe.int.

series of *guarantees* must be ensured, such as: the impossibility to review a court decision outside the legal means of appeal, the guarantee by the law of the judge's mandate and remuneration, the impossibility to retroactively invalidate court decisions by the government or central public administration representatives, except for the cases of granting amnesty and pardon.

The same Recommendation consecrates the fundamental idea according to which the judge, in exercising his/her duties, holds a public (state) position. **Therefore, the judge is in the service of law and can only be held liable in front of the law.**

Justice's independence is not a privilege or a personal prerogative of the judge¹, but a responsibility imposed on each judge, allowing the judge to settle a case in an honest and impartial way, based on the law and on the evidence, without external pressure or influence and without fearing any interference. The essence of the justice's independence principle consists in the full freedom of the judge in judging and settling the cases brought before justice.

The judge's independence principle creates the premises of another principle - judge's impartiality.

According to art. 4 par. (1) of Law no. 303/2004, throughout their entire activity, judges are bound to ensure the supremacy of law, to observe the individuals' rights and freedoms as well as their equality before the law and to ensure a non-discriminatory legal treatment to all the participants in the judicial proceedings, irrespective of their capacity. Judges must fulfil their duties without favouring any participant and without showing prejudgements or preconceptions, with limitation to the interpretation and enforcement of the law in the matter and to the observance of the principle of equality of arms between the accusation and the defence.

Thus, according to art. 9, art. 10 and art. 11 of the Deontological Code for Judges and Prosecutors², *judges must abstain from any behaviour, act or manifestation capable of altering the trust in their impartiality*. Within this line, judges must not make any observation or note that could reasonably suggest the formation of an opinion regarding the guilt or lack of guilt of a person or that could influence the fairness of the proceedings.

Judges are allowed to grant legal assistance, under the conditions provided by the law, only in personal matters concerning their ascendants, descendants or spouses, as well as concerning the persons under their guardianship or conservatorship. In such situations, they are not allowed to make use of their judge capacity in order to influence the solution granted by the court of law or by the prosecutor's office, or in order to create an apparent such influence.

¹ "Comment upon the Bangalore Principles on Judicial Conduct", Konrad – Adenauer – Stiftung, Rule of Law Program South East Europe, C.H.Beck publ., 2010.

² Adopted by S.C.M. Decision no. 328/2005 (O.J. no. 815 of September 9th, 2005).

The obligations determined by these principles upon the judge include the **avoidance of the conflicts of interest**.

The family and social relations of judges must not influence the solutions they adopt in exercising their work duties. Thus, according to art. 71 Crim. proc. code, the fact that the judges' impartiality could be impeached due to the case's circumstances, the parties' quality or when there is the risk of disrupting the public order constitute a reason for removal jurisdiction. Thus, the legitimate suspicion refers to circumstances that could influence the judges' impartiality – the quality of the parties; the risk of disrupting the public order can be owed to the large number of defendants and of injured parties, the exaltation of the local passions or other circumstances that cause the fear of aggressive actions capable of influencing the independence and impartiality of the judges within the court having jurisdiction to judge the case.

Within the same purpose of ensuring the judges' impartiality, the Regulation on the Internal Organization of judicial courts¹ provides under art. 95 *the random distribution of cases through an IT system* or, in the event the distribution through the IT system is not applicable due to objective reasons, the distribution of cases through the cyclic system method should applied.

Judge's integrity represents one of the criteria for the evaluation² of his/her professional activity. The magistrate's integrity refers to the fact that his/her impartiality, fairness, honesty cannot be impaired by any wrongful practices. In order to evaluate the magistrate's impartiality, the Evaluation Guide proposes the following *criteria*: preoccupation for complete and correct information, assurance of equal treatment for all the parties to trial, maintenance of an equal behaviour towards the parties during the trial session, preoccupation for a reasonably equivalent argumentation between the parties resulted from the motivation of the decisions, avoidance to expressly manifest his/her own beliefs of a different nature than the legal one and preconceptions during the trial session and within the contents of court decisions.

Given that the justice's impartiality reflects the judge's impartiality, both from internal perspective as well as perceived by an outside observer, it may be stated that the term of conflict of interest - in its broad meaning, exceeding the range of the offence provided by art. 301 Criminal Code - also includes the real conflicts between the judge's personal interest and his/her obligation to rule impartially, as well as the external circumstances in which a reasonable observer would or could perceive such a conflict.

¹ Adopted by S.C.M. Decision no. 387/2005 (O.J. no. 958 of October 28th, 2005).

² According to the Guide for the evaluation of the magistrate's professional activity, approved by S.C.M. Decision no. 10/2008, available on the website: www.csm1909.ro.

2. Correlation between Judge's Immunity and Criminal Trial

Immunity, as the right of a person to not be subjected to the jurisdiction of a state or to not be subjected to certain criminal proceedings unless several steps are taken for obtaining the consent or endorsement of a body of which the relevant person is usually part, is regulated through various means, going from total jurisdictional immunity, in the criminal and civil cases, in relation to both the investigated person or upon which legal actions have been taken, as well as in relation to the summoning or hearing as witness, to the most restricted range targeting only the endorsement of precautionary measures restrictive of liberty or of search proceedings.

As *criminal liability* for committing *corruption* offences is concerned (as, in fact, for any other offence), the magistrates only benefit from the guarantees provided by art. 95 of Law no. 303/2004 regarding the approval by the Superior Council of Magistracy of the search proceedings, remand in custody, house arrest or pretrial detention.

Consequently, while in exercise of their position, the judges who commit deeds that could take the form of offences in any circumstances (for example, by accepting bribe) cannot benefit from immunity in relation to the ordinary criminal trial; no special condition is required for the initiation of the criminal prosecution, formal criminal action or arraignment of a judge.¹

Deliberation for the settlement of the case in first instance is the proceeding through which the judging panel, after the conclusion of the debates, checks and evaluates the presented evidence and the procedures followed in the case, in order to make a final assessment upon such evidence and procedures and upon the solution to be given to the criminal law conflict².

The deliberation *is attended only by the members of the panel in front of which the debate took place*. The judging panel deliberates *in secrecy*.

The judging panel firstly deliberates *upon the de facto issues*, which refer to the firmness of the accusation brought to the defendant and, if it is established that the defendant committed the deed for which he/she is tried, then it must formulate an answer *upon the de jure issues*³.

The secrecy of deliberation is a principle according to which the members of the judging panel weigh upon all the de facto and de jure circumstances of the case, without the participation of other persons. It is, at the same time, an obligation of judges.

¹ "Corruption and Anti-corruption in the legal system", Konrad – Adenauer – Stiftung, Rule of Law Program South East Europe, C.H.Beck publ., 2010.

² *Ibidem*.

³ Nicolae Volonciu, Andreea Uzlaşu (coordinators), Corina Voicu, Georgiana Tudor, Victor Văduva, Raluca Moroşanu, Daniel Atasiei, Teodor-Viorel Gheorghe, Cristinel Ghigheci, Cătălin Mihai Chiriţă, *The new Code of criminal procedure commented*, Hamangiu Publishing House, Bucharest, 2014, p. 318.

Deliberation weighs upon the existence of the deed and of the defendant's guilt, upon the determination of the penalty, of the educational or safety measure, if the case, as well as upon the duration of the precautionary measures depriving of liberty and of the admission to a health facility.

The judging panel also deliberates upon the reparation of the damage caused through the offence, upon the precautionary and cautionary measures, upon the material probing means, judicial expenses, as well as upon any other issue relating to the fair settlement of the case.

Deliberation can also target issues that formed the object of incidents referred to in previous stages, which have been incorporated into the merits of the case, meaning that the court postponed their settlement during the deliberation stage, for example, a change in the legal classification.

All the members of the judging panel have the duty to formulate an opinion upon each issue, and the president is the last one to formulate an opinion.

The way in which the judges decide upon the solution, weighing the de facto and de jure arguments, presenting reasoning and logical arguments is what defines the complex cognitive process of deliberation. Deliberation can only weigh upon the deed, the person, the case-effect relationship between the two and upon the other aspect stated by art. 393 of the Criminal Procedure Code.

The interference consisting in other persons' interventions (or even of one of the case's judges) distorts the deliberation process. Such interventions may be of illicit nature and the verification of such illicit nature and their classification into the field of disciplinary or criminal liability or - on the contrary - their exclusion from any of these fields can only be accomplished following investigation acts.

The presented arguments lead to the conclusion that a judge *suspected*¹ of having committed a criminal deed (corruption or other) in connection to the deliberation moment cannot block the investigations carried out in relation to the circumstances of committing such deed, invoking the independence he/she benefits as a judge.

The judge's obligation to maintain the secrecy of the deliberation in connection to the deed for which he/she is criminally prosecuted ceases when, under the terms of art. 307 of the Criminal Procedure Code, he is acquainted with his/her suspect capacity, prior to his/her first hearing, as well as with the deed for which he/she is suspected, the deed's legal classification, his/her proceeding rights provided under art. 83 of the same code, for which a report shall be concluded.

The purpose of the verifications carried out by the criminal investigation bodies within the above-presented context is not to reform the ruled decision.

¹ The suspect, as main subject of the proceeding, is the person in relation to whom the reasonable doubt of having committed a deed provided by the criminal law results, from the data and evidence to the file.

The verification of the sentenced decision's legality and reliability under such circumstances remains the duty of the control courts, without violating the provisions of art. 16 par. (2) of Law no. 304/2004 on judicial organization, according to which "court decisions can only be dismissed or changed through the appeal means provided by the law and exercised according to the legal provisions."

3. The witness quality of the judge in connection to the deliberation process

The witness is the individual, other than the suspect, the injured party and the parties in the criminal trial, who has knowledge of de facto deeds and circumstances that serve for the ascertainment of the existence or inexistence of an offence, for identifying the person that committed the offence and for knowing the circumstances necessary for the fair settlement of the case and for finding out the truth in the criminal proceeding.

In current speech, witness is that person that was present, faced with his/her own feelings the occurrence of a certain event or was directly acquainted with certain knowledge relating to that event.

If the judge is a *witness* in a trial dealing with the perpetration of an offence connected to the deliberation process, the obligation to maintain the deliberation secrecy ceases by taking the oath as the judge is - first of all - in the service of justice.

Art. 116 of the new Criminal Procedure Code determines the object and the limitations of the witness's statement. Therefore, the witness can be heard with reference to the de facto deeds and circumstances that make the object of probation and the extension of the hearing is allowed in order to check his/her credibility.

The same article, under par. (3) determines the rule according to which the deeds or circumstances of which secrecy or confidentiality can be opposed by law to the judicial bodies cannot make the object of the witness's statement.

The exception from the previously stated rule can be found in the subsequent paragraph and allows the derogation from the obligation of maintaining the professional secrecy (or the secrecy of deliberation, given that for the judge the deliberation secrecy is part of the professional secrecy), if *the competent authority or the entitled person* expresses his/her *consent* to such purpose or when *there is a different legal cause* to remove the obligation of maintaining the secrecy or confidentiality.

As the judge is concerned, there is no "competent authority" within the meaning of par. (4) art. 116 Civil Procedure Code to authorise the witness statements given by the judge in connection to deeds he/she became aware of in exercising his/her position.

Likewise, the provision regarding the "entitled person" in the second instance of paragraph (4) cannot be applied in connection to the judge.

Therefore, the criminal procedure does not provide for the judge the possibility to be "released" from the obligation to maintain the deliberation secrecy.

Under the conditions of managing the presented evidence for the investigation of having committed a corruption offence - the judge can skip the confidentiality obligation provided by the law.

During his/her hearing, the judge can testify about deeds that **target *not* the cognitive process of deliberation, but the external interference in this process, which may be of illicit nature.**

The indicated aspects were analysed by the Superior Council of Magistracy, by means of Decision no. 846 bis of July 3rd, 2014.