

**Romania, High Court of Cassation and Justice, Panel of 5 judges,  
File no. 3378/1/2019, appeal, Judgement no. 62/2020 from  
18.05.2020**

Member State

 Romania

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Topic

freedom of expression of judges

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Sector

Freedom of Expression and Association

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Deciding Court Original Language

Înalta Curte de Casa?ie ?i Justitie

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Deciding Court English translation

High Court of Cassation and Justice (HCCJ)

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Registration N

3378/1/2019

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Date Decision

18.05.2020

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ECLI (if available)

N/A

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National Follow Up Of (when relevant)

NO

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EU legal sources and CJEU jurisprudence

International recommendations:

UN Basic Principles on the Independence of the Judiciary

The Universal Charter of the Judge

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## ECtHR Jurisprudence

### ECHR

#### Recommendation R (94) 12 of the Council of Europe

#### Freedom of speech:

Morissens v. Belgium,  
Wille v. Lichtenstein,  
Ozpinar v. Turkey,  
Baka v. Hungary.

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### Subject Matter

On 9 January 2019, on the Facebook application, C.D., judge at the Cluj Tribunal, former member of the Superior Council of Magistracy (SCM) between 2011 and 2016, opined that a succession of attacks against several national institutions “of force” (police, the prosecutors, the army etc.) had taken place and rhetorically asked: “What if, one day, we will see the army on the streets protecting ...the democracy (...) Would you be surprised to realize it is ...constitutional!?”.

The next day, he shared on Facebook application a mass media article concerning an interview given by a prosecutor and commented in the following terms: “Here, this is a prosecutor with blood in the installation: he talks openly about dangerous criminals at large, about the bad ideas of the governors while changing the laws of justice, about professional annihilations against magistrates!”.

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### Legal issue(s)

independence/freedom of expression of judges

While in the abstract, judge’s free speech right is recognised by the national authorities, the case explores the limits of freedom of expression, namely the understanding of legal standards, such as a “diligent judge” and obligation of reserve”.

In order to decide on this issue, the national authorities use the following tests:

Was the concrete manner in which the statement is made likely to break the fair balance between the need to protect the right to free expression, including that of magistrates, on the one hand, and the need to protect the authority of the judiciary and the rights of other persons, on the other hand?

In the given circumstances, was this way of expression the only way, for the judge, to express the information he/she intended to present?

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### Request for expedited/PPU procedures

NO

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### Interim Relief

NO

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## National Law Sources

Article 99 lett. a and b and Article 9 para. 2 of Law 303/2004

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### Facts of the case

The Superior Council of Magistracy (SCM) agreed, on 7 May 2019, with the accusation made by the Judiciary Inspection (JI), that judge C.D. affected the honour / professional probity or the prestige of justice by his opinions published on 9 and 10 January 2019, and sanctioned him with a 2 months reduction of salary.

The HCCJ definitively rejected, on 18 May 2020, judge C.D.'s appeal (recurs devolutiv). On 14 December 2020, the HCCJ rejected judge C.D.'s annulment appeal (contesta?ie în anulare).

On 18 March 2021, judge C.D. requested to the ECtHR to acknowledge that the Romanian authorities has violated article 10 ECHR (freedom of speech) and 8 ECHR (profession reputation). The case was decided by the ECtHR on 20 February 2024. The Court held, by a majority (four votes to three), that there had been a violation of Article 10 of the Convention. In addition, the Court held that Article 8 of the Convention was not applicable in the present case.

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### Reasoning (role of the Charter or other EU, ECHR related legal basis)

On the merits, both the SCM's decision and the HCCJ's judgement used the following criteria in order to identify and sanction a misbehaviour: the existence of the actus reus (required action), mens rea (guilt), the consequence and the personalisation of sanction.

"Related to the segment of activity that involves the act of justice, the standard should be that of the "diligent magistrate" who acts with care towards the public interest of the administration of justice and the defence of the general interests of society, who subordinates his behaviour to the demands arising from professional duties and the ethical norms that must be respected." (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraph 30).

JI accused judge C.D. that:

"His conduct, materialized in the exhibition, in the virtual public space, by publishing on the social network x a post (on 9 January 2019) in which he expressed himself in an unprincipled manner, inappropriate to his position and doubting the credibility of state institutions, suggesting that they would be politically controlled and presenting as a "solution" for guaranteeing constitutional democracy the possibility that the army "takes to the streets", contravenes the obligation of reserve imposed on magistrates in the exercise of freedom of expression." "The way in which C.D. understood to express his opinion was likely to induce, without evidence, a perception of "attacks" against state institutions." "Thus, most media headlines refer to the circumstance that Judge C.D. urges the army to take to the streets."

"Also, the comment of Judge C.D., posted on the same social network with reference to an article published on the website ziare.com proves that he uses a language that goes far beyond the limits of decency and, even more so, the limits imposed by the status held. Thus, the language of a judge must be characterized by sobriety, elitism and openness to a decent and balanced dialogue, which, under no circumstances creates damage to the image of the judicial system. The use of expressions like "here, this prosecutor with blood in the installation" cannot characterize the conduct of a magistrate, given that the obligations imposed on the latter must satisfy the demands of the public service whose functionality he ensures." "The use of a language that exceeds the limits imposed by the decency that characterizes interpersonal relations was likely to call into

question even the professional and moral probity of the judge.” (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraphs 17, 18)

The judge’s public virtual page has many followers and the press distributed his posts.

“The opinions expressed in the public space by the defendant judge, outside of the exercise of his official duties, as well as the manner in which the events taking place at that time were presented, the insidious, inappropriate and even indecent expressions used in the content of the report, are manifestations contrary to the dignity of his position, being likely to affect the impartiality and prestige of justice.

In conclusion, the defendant judge violated the obligation of reserve imposed in consideration of the positions held, his act realizing the material element of the disciplinary offense analysed.” (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraphs 23, 24) Judge C.D. acted with indirect intention, accepting the possible harm for the image of the judiciary. The consequence is the deterioration of public trust and respect for the position of magistrate, with the consequence of affecting the image of justice, as a system and service in the defence of the legal order, since the opinions expressed by the judge were taken over in the media, generating extensive public debates.” (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraph 26)

The appellant judge C.D. justified the public interest of his message concerning the army by “the need to keep the army out of the political influence”, as the method of appointing the Chief of Staff was publicly debated. “He drew attention to the fact that an inappropriate leadership could, at any time, bring the army into the streets to maintain constitutional democracy, in relation to the provisions (...) of the Constitution. (...)” Also, the fact that “his post was interpreted in bad faith by some newspapers, is not his fault. His post comes in the context of the legal education activity that he has been carrying out for many years publicly, in which the main applicable legal norms are explained to the population, through media interviews or posts on his personal account.”.(See HCCJ Judgement no 62/2020 from 18.05.2020, paragraph 42)

“The disciplinary body did not specifically indicate how his post concerning the appointment of an official in the leadership of the army or how the indication of a constitutional provision led to deterioration of the confidence in justice, as there is no witness, no post and no opinion poll in this sense while, on the contrary, the witnesses heard during the disciplinary investigation showed that, subsequent to the statements, there was no damage to his own image as a judge, on the activity of the court or of other courts. While it is difficult to make any connection between a post about the country's army and the judicial activity, the freedom of expression he enjoys, as any citizen, allows him to get involved in the public debate. The appellant also claims that the obligation of restraint requires him not to comment ongoing cases or to support parties or politicians but does not prohibit him from getting involved in the community life, an activity that he has been carrying out since 2003, when he gave his first interview in the press.” (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraphs 43, 44)

The HCCJ considered that the image of justice was affected. “The result is unequivocally reflected by the way in which the media perceived and took over the defendant's views. It is eloquent that the news publications received and transmitted to the public opinion that the message of the magistrate was that the army should go out into the streets and defend democracy”. (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraph 82).

The HCCJ did not agree with judge C.D. that “it was wrongly assumed that there was extensive public debate about the post on the army” as “the media's interest in the defendant's views were reflected by several online publications, and some of these represent well-known news channels in the mass media”. (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraphs 71,72)

To judge C.D.’s argument that “the disciplinary body noted only subjective assessments regarding the conduct expected, without clear rules regarding what a magistrate is allowed and what he is not allowed to post” (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraph 39), the HCCJ answered, by citing its own jurisprudence, Judgement no.128/27.05.2019, that “it is

practically impossible to list in a text all the facts that may be likely to violate the obligation of reserve.” (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraph 67)

Regarding the follow-up generated by the post with reference to the prosecutor's interview, judge C.D. claimed that there were no references thereof expressed in the reasoning of the decision. The appellant stated that he publicly expressed his agreement and admiration for the public appearances of a colleague (prosecutor) who defended the image of justice and campaigned for the separation of politics from justice, being known that the period in which the interview was given was one in which the magistrates protested for many months against the dangers affecting the independence of the judiciary through parliamentary or governmental actions. Judge C.D. stated that it is unacceptable that the prosecutor who gave the interview mentioning the politicians' attack on justice was not punished, but, he, who only redistributed the post, is punished. (See HCCJ Judgement no 62/2020 from 18.05.2020, paragraph 45, 46) The HCCJ did not agree with judge C.D. especially on the argument that the disciplinary court did not indicate which are the disturbing words or expressions and which of the two posts JI referred to as "insidious, inappropriate and even indecent expressions", "exceeding the limits of decency".

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#### Relation of the case to the EU Charter

NO

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#### Relation between the EU Charter and ECHR

In the HCCJ Judgement, the ECHR was cited in the JI and CD's wording, as well as by the court itself. Also, the following international recommendations were cited: UN Basic Principles on the Independence of the Judiciary, the Universal Charter of the Judge, the Recommendation R (94) 12 of the Council of Europe. The EU Charter is not cited.

The reason for citing the ECHR is, presumably, to convince the reader on the conformity of each argument with the European standards. Presumably, the protection granted through the EU Charter was considered not to be more extensive than the one stemming from the ECHR in this particular case.

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#### Use of Judicial Interaction technique(s)

Consistent interpretation (interpreting national law in the light of the ECHR)

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#### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The national court cites its own precedent, Judgement no128/27.05.2019. There are no constitutionality review involved. No jurisprudence of a foreign Constitutional Court or other foreign tribunal was cited.

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#### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The national court makes a simple citation of ECtHR cases and other international recommendations.

The interaction between the ordinary, SCM, and supreme court, HCCJ is visible in the reasoning

of the HCCJ judgement as, in this particular case, the HCCJ upheld the SCM reasoning.

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#### Strategic use of judicial interaction technique (purpose aimed by the national court)

The purpose pursued by the national court when using judicial interaction techniques, was, presumably, to solve a conflict between CC's and SCM's interpretation on the fundamental rights enshrined in the ECHR and to convince the reader on the conformity of their reasoning with the European standards.

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#### Impact on Legislation / Policy

Not directly.

The Law no 303/2004 was replaced on 15 December 2022 by the Law 303/2022. Specifically, the list of misbehaviours of Article 99 of the Law no 303/2004 was replaced by the list of Article 271 of the new, Law no 303/2022. This new law does not include any misbehaviour similar with the one of article 99 lett. a used in this case to sanction judge C.D.

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#### Notes on the national implementation of the preliminary ruling by the referring court

N/A

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Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

N/A

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Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

N/A

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Did the national court take into account national case law on fundamental rights?

N/A

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If the court that issued the preliminary reference is not a last instance court, and the "follow up" was appealed before a higher court, include the information

N/A

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Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

N/A

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#### Impact on national case law from the same Member State or other Member States

HCCJ Judgement no 278/2022 from 12.12.2022 cites this HCCJ Judgement no 62/2020 from 18.05.2020

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## Connected national caselaw / templates

HCCJ Judgement no 128/2019 from 27.05.2019

HCCJ Judgement no 278/2022 from 12.12.2022

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### Other

N/A

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### (Link to) full text

N/A

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### Author

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### History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Judge's C.D. posts on 09.01.2019 on Facebook application, that a succession of attacks against several institutions "of force" (police, the prosecutors, the army etc.) was taken place and rhetorically asked "What if, on day, we will see the army on the streets protecting ...the democracy (...) Would you be surprised to realize it is ...constitutional!?" and the comment from 10.01.2019 "Here, this is a prosecutor with blood in the installation: he talks openly about dangerous criminals at large, about the bad ideas of the governors in changing the laws of justice, about lynchings against magistrates!". Boths posts are available on Facebook application (visited on 18.01.2024)
  2. SCM Decision from 07.05.2019 in File no 5/J/2019. It is available, without considerations on, <https://www.csm1909.ro/Pages.aspx?PagelId=258&PageTitle=%C5%9Eedin%C5%A3e-ale-sec%C5%A3iei-pentru-judec%C4%83tori-%C3%AEen-materie-disciplinar%C4%83> (visited on 18.01.2024)
  3. HCCJ Judgement no 62/2020 from 18.05.2020
  4. ECtHR Judgment from 20 February 2024 application no 16915/21, ECLI:CE:ECHR:2024:0220JUD001691521 (<https://hudoc.echr.coe.int/eng?i=001-231084>).
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