

**Romania, High Court of Cassation and Justice, Panel of 5 judges,  
File no. 1734/1/2022, appeal, Judgement no. 278/2022 from  
12/12/2022**

Member State

 Romania

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Topic

Freedom of expression

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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

1734/1/2022

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Date Decision

12/12/2022

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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 sources:

the Bangalore Principles,

UN Basic Principles on the Independence of the Judiciary,

the Universal Charter of the Judge.

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## ECtHR Jurisprudence

### ECHR

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

disciplinary responsibility of magistrates

Tato Marinho Dos Santos Costa Alves Dos Santos and Figueiredo v. Portugal (applications no 9023/13 and no 78077/13),

Ramos Nunes de Carvalho e Sa' v. Portugal (applications no. 55391/13, no 57728/13 and no 74041/13)

freedom of speech

Baka v Hungary

Kudeskina v. Russia

Roland Dumas v. France

Morice v. France

Morissens v. Belgium

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### Subject Matter

C.D., judge at the Cluj Tribunal, former member of the Superior Council of Magistracy (2011-2016) contributed a chapter "Justice versus Politics: from Inability to Independence" to an edited volume, entitled "900 Days of Uninterrupted Siege upon the Romanian Magistracy A Survival Guide", which was published in 2020.

In August 2020, judge C.D. posted on Tik Tok and Instagram two short videos showing himself while trimming his hedge with a chainsaw, wanting, apparently, to recreate a horror sequence from the movie "Texas Chain Saw Massacre". In comment on his Instagram account, judge C.D. offered to cut the hedge for free for anyone who needs it.

In another video, judge C.D. filmed himself while cleaning his pool and wearing only shorts.

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### Legal issue(s)

Freedom of expression of judges

While in the abstract, judge's free speech is recognised by the national authorities, the case explores the limits of a "diligent judge's obligation of reserve" when exercising his/her free speech.

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

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, for the judge, was this way of expression the only way to express the information he/she understood 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 of Law no. 303/2004

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## Facts of the case

The Superior Council of Magistracy (SCM) rejected, on 13 December 2021, the Judiciary Inspection's (JI) accusation that judge C.D. affected the honour / professional probity or the prestige of justice by his chapter in the aforementioned book while it granted the JI accusation concerning the two videos published on Tik Tok and Instagram in 2020 and sanctioned the judge with exclusion from magistracy.

The HCCJ admitted, on 12 December 2022, judge C.D.'s appeal (recurs devolutiv) and changed the sanction to "warning". Simultaneously, it rejected the JI's appeal.

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

Even though the JI's appeal was deemed admissible, on the merits, HCCJ did not agree with JI's appeal concerning the chapter in the book "900 days ...". SCM claimed that "the exposure, in a public work, of personal opinions, in an unprincipled manner, that would question the professional competence and integrity of the prosecuting magistrates, who perform their activity within the Criminal Investigation Section of the Court, as well as of the judges of the Court Constitutional, breaches the obligation of reserve". HCCJ held that "the ECtHR jurisprudence established (...) that art. 10 para. (2) of the Convention guarantees a high level of protection of the freedom of expression regarding topics of general interest, such as those regarding the functioning of the judicial system, even if the judge's statement concerns matters that raise debates with political implications, associated with a limited margins of appreciation of the authorities when the statements are related to such a subject." "In the work under discussion, appropriate and balanced language is used, which does not exceed the limits of professional ethics".

Judge C.D.'s appeal raised both procedural and material aspects.

On procedure, judge C.D. claimed that the SCM was illegally composed as the SCM partial rulings and the final decision did not include the name and the signature of the registrar, as the Civil Procedural Code required. Such provisions must be observed also in the SCM disciplinary procedure. HCCJ did not agree as the SCM is an extra judiciary court with administrative jurisdictional activity and, in HCCJ's view, the general procedural norms on the composition of the court did not apply.

Also, judge C.D. claimed that his right to defence was violated. He did not have proper access to the evidence JI used before SCM, which was wrongfully seized and composed. However, in HCCJ's view, he had enough time to study the file, including the evidence against him. Judge C.D. claimed that JI was wrongfully seized by the letter of the president of the SCM, as it did not identify the facts judge C.D. was accused of. HCCJ did not agree, as, from annexes of that letter, its' object was clear enough. In HCCJ's view, the SCM was not wrongfully composed even if one of its

members signed the letter by which the JI was seized. This does not make the composition of the SCM irregular, since the president signed the letter not as an author, but as a representative of the SCM. Also, the content of the letter does not show bias. HCCJ rejected the claim that the random repartition of the case rule was violated. C.D. claimed that the object of the disciplinary inquiry and action were exceeded by including the judge C.D.'s answers to some comments made by viewers. The SCM and the HCCJ rejected this claim as the JI could make any inquiry it found necessary.

On the merits, the HCCJ did not embrace judge C.D.'s explanations that the videos were made between the restriction of the COVID pandemic, that he did not use any official capacity, nor did he speak to the public, but to his followers, a community formed in time, his posts being only accessible to the persons he accepted. The videos are examples of his freedom of expression which he did not intend to distribute to the media. He deleted the few improper comments, even though initially he entered debates. He was not responsible for how others interpreted his activities. On judge C.D.'s view, the professional honour or probity or the prestige of justice were not affected, because no one had reason to doubt his professional probity, his honour, integrity and fairness in relation to the way he performed his function as a judge; no one questioned the prestige of justice; his conduct was not indecent, exhibitionist or ridiculous. However, in HCCJ view, the way in which judge C.D. presented himself in the videos and the answers he offered to the readers' comments, generated incisive critical reactions in the public space. The incongruity of such manifestations with judges' professional status gave the impression that the person does not fulfil the essential conditions for the exercise of the function. This places the judge, person vested with the exercise of prerogatives specific to the judicial authority, in a position contrary to the obligations of reserve, dignity, moral and professional probity, as it explicitly results from the comments of users of social networks and from the reactions provoked in the media. 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, was broken. Judge C.D. did not meet, in HCCJ view, the requirement of a "diligent magistrate".

The HCCJ concluded that the purpose of the sanction can be met with a "warning", as the facts do not present such a significant gravity as to lead to the conclusion that the requirements imposed by exercising the office of judge are not fulfilled anymore.

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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 C.D.'s wording, as well as by the court itself. Also, the following international recommendations were cited: the Bangalore Principles, 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 is not more extensive than that stemming from ECHR in this particular case.

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

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

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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 no 62/2020 from 18.05.2020. There is 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 the ECtHR cases and the other international recommendations.

The interaction between the ordinary body, SCM, and supreme court, HCCJ, is visible in the reasoning of the HCCJ judgement as, in this particular case, the HCCJ sustains most of 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 judge CD's and SCM's interpretation involving fundamental rights enshrined in the ECHR and to convince the reader on the conformity of the 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 comprise 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

N/A

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#### Connected national caselaw / templates

HCCJ Judgement no 62/2020 from 18.05.2020 (case of judge C.D.)

<https://cjc.eui.eu/data/data/data?idPermanent=630&trial=1>

HCCJ judgement no 129/2017

HCCJ judgement no 139/2017

HCCJ judgement no 164/2017

HCCJ judgement no 5/2018

HCCJ judgement no 173/2018

Constitutional Court of the Republic of Slovenia, Decision U-I-445/18 – (impartiality of Disciplinary Panel for judges) – <https://cjc.eui.eu/data/data/data?idPermanent=509&trial=1>

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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 C.D.'s chapter "Justice versus Politics: from Inability to Independence" from 2020 can be found in the collective book "900 Days of Uninterrupted Siege upon the Romanian Magistracy A Survival Guide" attached here in Romanian and English version .  
In August the same year, judge C.D. posted on Tik Tok and Instagram application two short videos showing himself while trimming his hedge with a chainsaw (news incorporating the video <https://www.youtube.com/watch?v=teanN-xvWek> ) and cleaning his pool, wearing shorts (C.D.'s Tik Tok account <https://www.tiktok.com/@cristidanilet> ).
2. SCM Decision from 13.12.2021 in File no 25/J/2021 is available, without considerations on, <https://www.csm1909.ro/Pages.aspx?PagId=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. Judgement no. 278/2022 from 12/12/2022

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