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ABSTRACT
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CIVIL LIABILITY OF THE STATE FOR MISCARRIAGES OF JUSTICE

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State liability for miscarriages of justice is a relatively new topic, particularly current, complex and difficult, extremely tempting through the issues to be settled and not less risky by the ambiguities hanging over it. Also this topic is distinguished by the controversy it generates and the diversity of solutions which can be identified in different legal systems.

The actuality of the subject is justified both by the legislative consecration of State liability for miscarriages of justice since 1989 and the inclusion of this form of liability in the basic law, as well as by the fierce debates on the patrimonial liability of magistrates for miscarriages of justice.

The current regulation is poor in presenting the cases that constitute miscarriages of justice. Even if the case-law in criminal matters provides a rich study material, we have not seen any cases of State liability in civil matters. This precisely because of the extremely restrictive legal provisions in recognizing the victim's right to compensation for damage.

We must point out that during the elaboration of this paper there was an adoption of amendments to the Civil Code, the Code of Civil and Criminal Procedure and the Law on the Statute of Magistrates. Even now there are new projects in this regard, among which the most important relates to the amendment of the Constitution through the introduction of the compulsory redress action of State against the person responsible for committing the miscarriage of justice. In relation to the complexity of the situations that may arise in practice, legislation is in a permanent update, so an attempt was made to present the topic addressed both in terms of the regulatory documents in force at the moment and the regulatory documents that will enter into force in the future (the Code of Criminal Procedure, draft amendment of Law no. 303/2004).

The proper administration of justice, which is an exclusive attribute of the State, is also a fundamental right of citizens of any democratic State. In other words, the deficiencies in the organization and functioning of the justice constitute violations of this right, with a necessity to compensate the damage caused to the recipients of the public service of justice.

The place of State civil liability for miscarriages of justice is disputed among several areas of law – civil law, administrative law, criminal and procedural law. By choosing this controversial subject, on which there is no rich bibliographic material in Romanian law, but present both in doctrinal debates and court practice, we hope to contribute to the clarification of the conditions for State liability engagement for miscarriages of justice, the legal nature and its foundation, to come to the aid of law theorists and practitioners.

The complexity of the study consists among others in the fact that the research of State liability institution for miscarriages of justice requires us to analyze and assess both the legal nature and its foundation from the perspective of civil law but also those it has contact with: criminal law, administrative law, labor law, etc.

The emergence and evolution of State liability for miscarriages of justice is organically related to the emergence and evolution of civil liability and State liability concepts.

Even if the legal nature of such liability would be solved, the topic addressed would not have been exhausted, because the analysis of liability engagement conditions and damage compensation criteria is not easy at all.

We intend to define as accurately as possible the concept of miscarriage of justice and to determine in the extent possible the cases when it may occur by identifying innovative solutions for simplifying the procedures of compensating the victims of miscarriage of justice and the criteria that should be taken into consideration at their compensation. We have tried to answer a number of questions raised by State patrimonial liability for miscarriages of justice.

Which is the foundation of liability? Which is its legal nature? Which are the legal relations which are established and who are their holders? Which are the conditions for State liability and which damages can be caused by miscarriage of justice? Does the current legal framework provide the necessary mechanisms for compensating the damage caused by miscarriages of justice? It is possible to maintain a balance between the independence of the judiciary and awareness rising for the damage generated?

These are just some of the objectives that we have set ourselves, pointing out our ideas in relation to the topic being addressed and that underlie the proposals of *de lege ferenda* advanced within the paper.

All of this led me to choose the subject proposed for debate in this study, without claiming to elucidate all the theoretical and practical issued it may raise or without asserting infallible truths, but trying to outline a picture of this institution.

Over the seven chapters, divided into sections, the thesis aims at approaching the context of State liability for miscarriages of justice and its elements.

Naturally, **the first chapter** presents the national and international legislative framework and the terminology used throughout the paper. Then we have reviewed the European and international regulation of State liability for miscarriages of justice and have analyzed the interpretation given by the European Court of Human Rights to the concept of a fair trial.

With regard to State liability we have noticed that it has experienced an evolution from the denial of liability to the consecration of State liability for miscarriages of justice in the fundamental law of several countries, including Romania.

Currently, the entire judicial doctrine and practice is unanimous in considering that the State is liable for exercising its functions regarding the legislative function for laws' issuance, the executive function for proper enforcement of laws, and, in the case of the judicial function, regarding the control over the implementation of laws, not to give place to miscarriages of justice. The judge applies the law addressing disputes and interferes only in the event of disputing the law enforcement and his role ends when the decision was made. The administration, however, unlike the judge, monitors the implementation of the law and the compliance with the public needs without any trial.

We have inventoried the possible objections that may be made to State liability engagement for miscarriages of justice in an attempt to bring our own arguments to refute them.

Chapter II addresses the legal nature of State liability for miscarriages of justice. It started with a presentation of comparative law with regard to liability's nature. Thus, we have found that currently there is a distinction in the French law between State liability for miscarriage of justice when it appears in conjunction with the organization of justice service and when it results from the operation of the public service of justice. In the first case it is considered that case settlement is the appanage of administrative courts, and in the second case jurisdiction belongs to the civil courts of common law[1].

We have also indicated the elements of comparative law in Belgium, Italy and Germany, observing that there are particularities about the legal nature of State liability for miscarriages of justice in every legal system.

In Romania, the literature of administrative law has qualified State liability for miscarriages of justice as a patrimonial administrative liability that occurs as a result of the improper functioning of the public service of the State[2]. It has also been shown that patrimonial administrative liability is a liability with autonomous nature, subject to its own special rules, other than those enshrined in the Civil Code and governing the liability regime of individuals[3].

Contrary to these arguments, civil law authors consider that tort liability is the common liability in matters of the State liability for damages, being a patrimonial liability that belongs to the civil law. Tort liability elements must be fulfilled for its engagement and by attracting State liability

[1] D. Sabourault, *La fonction juridictionnelle entre autorité, indépendence et responsabilité* in *Justice et responsabilité de l' État*, coordinator Maryse Deguergue, Presses Universitaires de France Publishing House, 2003, Paris, p.175.

[2] D. A. Tofan, *op.cit.*, pp. 257-258, A. Iorgovan, *op.cit.*, pp. 461-463.

[3] V. Vedina , *op.cit.*, p. 290.

it is aimed to remove damages and to reinstate the injured person's patrimony in its original state, or to compensate the person. It was also considered that the nature of patrimonial liability for damage does not differ according to the norm violated and is always civil.

After the presentation of the doctrine we have turned to Romanian jurisprudence on this subject, observing that the Supreme Court's practice is contradictory with regard to liability's nature.

For a better understanding of the theoretical premises of the issue, we have presented a synthesis of the views and conceptual delimitations concerning the legal nature of State responsibility and have spotlighted our own arguments in support of the civilist thesis of State patrimonial liability.

Thus we have noted that the constitutional provision of article 52 paragraph 3 refers to the determination of State liability "under the law..." At the same time, in the previous paragraph it was pointed out that the determination of the conditions and limits of the exercise of the injured person's right, in the case of administrative courts, is made by *an organic law*. But if the legislator considered that we were dealing with an administrative liability, it could make reference to the Law on administrative courts, which did not happen, and even in that case there would be discussions.

At the same time, we have noticed that the violation of other rights and obligations present in other texts of the same Constitution does not entail, as a rule, administrative liability engagement. For example, although the Constitution provides for the obligation of the State to protect the health or to ensure a healthy environment, State liability in case of violation of these obligations has a civil legal nature. Thus, the basic law contains a number of provisions with the nature of general principles in all branches of law, not only in terms of administrative law. It cannot be considered, however, that administrative law monopolizes State bodies' liability. In the event of State liability intervention in the case of the various rights specified in the Constitution, such as the protection of property right, non-discrimination of employees, the secrecy of correspondence, such regulations constitute the source of law for civil law, labor law, criminal law, etc.

In all cases where the question of compensating the damage caused has been raised, there is a civil liability and not an administrative liability. Damage compensation may consist even in an amount of money or a life annuity, and awarding conditions and criteria are analyzed according to the principles of civil law.

We believe that State liability for damages caused by miscarriages of justice is a tort liability. Its goal is the full compensation of the damage caused and reinstating the victim in the previous situation *(restitutio in integrum*).

To extend administrative liability also for the *compensation for the damage* caused to any person means to take it outside the classical elements of civil liability, which would lead to unacceptable consequences.

We have noticed that the State may seek redress against the person guilty of causing the miscarriage of justice, the redress being specific to civil actions and the competence for the settlement of the action for bringing the State to account belongs to the civil courts and not to the administrative courts.

We have studied the possible applications of the assumption of State liability for miscarriages of justice as a civil liability for the deeds of others or as a liability of the principal for the deed of the agent.

In this respect, we have shown at length the reasons for considering that *de lege lata* there is no subordination relation between the State and the judges – there is no power of the State over the judges in relation to their rulings.

From the analysis of the regulations in force we have found the following assumptions or cases of liability:

1. State liability for damage caused in the event of illegal conviction or deprivation or restriction of liberty, according to the provisions of articles 504-507 of the Code of Criminal Procedure (articles 538-542 of the New Code of Criminal Procedure), *as an assumption of civil liability for a personal deed*, which shall be subject to tort liability rules, as well as the civil procedure. Settlement of such cases shall be done by the civil courts of common law.

2. State liability for miscarriages of justice perpetrated in trials other than the criminal trials, governed by article 96, paragraphs 1, 2 and 4 of the Law no. 303/2004, is *a special civil liability for a personal deed* subject inclusively to tort liability rules.

3. General State liability for miscarriages of justice, in cases other than those covered by the special law, is based on the provisions of article 52, paragraph 3 of the Constitution. Law no. 303/2004 make mention of State liability for miscarriages of justice only in the context of their perpetration by magistrates, without covering the whole sphere of potential miscarriages of justice. The deeds of other participants in the criminal procedure (witnesses, parties, experts, etc.) or even of the authorities the courts are working with (probation service, service of personal records, judiciary police, etc.) are not covered by the statutory provisions mentioned. We consider that where the miscarriage of justice is due to the deeds of persons or authorities that do not have the magistrate status, State liability will derive directly from the constitutional text, since currently there is no another regulation. Tort liability elements will be analyzed also by reference to the provisions of

articles 1348 and 1357 of the New Civil Code, in the absence of other provisions relating to liability's conditions.

The third chapter is dedicated to the foundation of State liability for miscarriages of justice. After a foray into several national law systems, in particular into the French system, we have proceeded to a brief overview of the theories concerning the fundamentals of civil liability.

We have concluded that each of them has its place in civil liability foundation, the guilt remaining the common denominator of most of the civil liability assumptions. With the development of the society, law branches and the increased emergence of special laws, strict liability will gain an ever-growing audience, responding to the need to compensate the victim for the damage caused, in the spirit of fairness and moral limits. In our vision, civil liability foundation should not be related only with the guilt of the perpetrator. The primary basis of the liability must be assessed in the light of the patrimony suffering from the damage and the requirement of its compensation. Without damage there would be no civil liability.

In a separate section, we have put into question the fundamentals of State liability for miscarriages of justice in the Romanian law. We have considered that in order to see which the foundation of State liability for damages caused by miscarriages of justice is we must answer the question whether or not the existence of its guilt or fault is necessary. Both administrative law authors and civil law authors consider that State liability for miscarriages of justice is a strict liability[4].

In our view, the provisions of article 96 of Law no. 303/2004 show the existence of two assumptions of State liability, with different peculiarities: State liability for miscarriages of justice *perpetrated in criminal trials* and State liability for miscarriages of justice *perpetrated in trials other than criminal trials.*

With regard to the foundation of State liability for miscarriages of justice in criminal matters, we have found that compared to the legal provisions in force it is not necessary to prove in advance the guilt of the magistrate. This, for the sake of protecting both the victim and the magistrate who will be liable directly only to the State. The person injured through the miscarriage of justice must be protected both against the potential insolvency of the perpetrator of the offence, and by ensuring expediency in the settlement of the action brought against the State for compensation for the damage incurred. Magistrate protection refers actually to the compliance with the continuity of the judicial process, by avoiding syncopation and disruption of judicial activity that may arise due to the introduction of a wave of vexatious actions against magistrates.

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[4] *Ibidem*; A. Iorgovan, *op.cit*, p. 463; O.Puie, *op.cit.*, pp. 108-112; V. Vedina , *op.cit.*, 2009, p. 291.

It should be noted that the State, based on the constitutional text, is liable for any miscarriage of justice regardless of its origin. The source of the miscarriage may be a perjury, a wrong expertise, a wrong address, a wrong extract from the land register, etc. The State will be liable in this case also, since it is the one providing the service used by the citizen. It appears that we cannot speak in this case of the existence of a legal relationship between the person who causes the miscarriage of justice and the State, of a principal-agent relationship or of another relationship by virtue of which it may be assumed that the State will be liable for the deed of others.

We consider that the foundation of State liability for miscarriages of justice caused in criminal trials is the *idea of activity risk*, in the broad sense of the term, which does not rely on one's own guilt. The functioning of Justice itself shows for people a risk of being injured, being necessary to ensure the possibility of compensating the damage which could be incurred. This compensation must come from the one who has taken this risk, i.e. the State.

So far in the doctrine and the jurisprudence there were discussions in the case of risk theory on its different versions: profit risk, authority risk and fairness idea. In all these theories, the common line is the existence of a subordinate relationship between the person exercising the authority and the person performing the activity. This translates into the ability to issue orders, provisions, guidance and instructions to the latter.

By performing an activity, everyone assumes the full spectrum of related rights and obligations together with the risks entailed. If a person has the possibility of organizing his/her own work, he/she is also liable for all the consequences generated by performing such work. We consider that the notion of risk in its simplest content is the central axis of the liability of a legal person under private or public law. Thus, in the case of activity risk it is not necessary to have a subordinate relationship and the exercise of an effective control, but it is sufficient for the State to organize the activity in question and to provide the framework for conducting it, including through the improvement and professional evaluation of magistrates. The purpose of regulations is to ensure patrimonial compensation of the victims of miscarriages of justice. This is the only way to justify and engage State liability for any damage caused by the activity of its services. If we emphasized the punishment of the perpetrator of the miscarriage of justice, we would depart from the purpose of the legislator and would get into the peculiarities of the other law branches – criminal or disciplinary liability, etc.

Accordingly, we believe that the activity risk in our view is the foundation of State liability for miscarriages of justice in criminal matters.

Then we have approached the issue of liability foundation for miscarriages of justice perpetrated in trials other than criminal trials. In this situation, State liability is engaged only provided that the guilt of the magistrate who pronounced the judgment which constitutes a

miscarriage of justice is proven. We consider that the need for a final judgment, indicating a criminal or disciplinary liability of the magistrate, relates in fact to a condition that is required to be met in the prior proceedings. It follows from the provisions of article 96 paragraph 4 of Law no. 303/2004, which provides for the need to establish, in advance, by a final judgment, the criminal or disciplinary liability, as appropriate, of the judge or prosecutor. It is a fault of a person that is separate from the legal relationship arising between the victim and the State Without the proof of fault, State liability for miscarriages of justice cannot intervene, due to failure to comply with a condition of admissibility of the application for compensation and not because the State would not be liable due to the lack of proof for *its own* fault.

The reason for being in the presence of a strict liability, based on the idea of third-party claim and activity risk[5], is that the State has an obligation to ensure all conditions for miscarriages of justice not to happen in conducting the public service of justice. It is a liability by virtue of the activity undertaken exclusively by the State and to ensure that the results of its service, i.e. correct solutions of judicial bodies.

The provisions of the Romanian Constitution enshrine the third-party claim obligation on the part of the State for damage caused in the work of justice. The purpose of the regulation, as indicated by the text, is to protect the victims of miscarriages of justice in patrimonial terms. So the focus is on the remedial function of civil liability, not necessarily on the penalizing function.

Whenever there is a mistake in the process, State liability will be engaged, leading to the presence of a strict liability, ***which is based on strict third-party claim, which is based on activity risk.***

This is the foundation of State liability both in criminal and other matters; however, in the last case, the requirement of proving the fault of the magistrate, as a condition of admissibility, is not discarded *de lege lata* (see article 96 of Law no. 303/2004), in case of liability for miscarriages of justice in trials other than criminal trials.

Chapter IV briefly depicts the characteristic features of State liability for miscarriages of justice. We have considered that this is a special civil liability regulated by different normative documents which entail the same requirements as civil liability in the common law. State liability is engaged in the presence of tort liability conditions for the personal deed: injury, wrongful act, causality relation between the wrongful act and the unjust damage caused. Channeling these items in

[5] For the same opinion of a strict liability, based on the idea of third-party claim supported by the activity risk, and in the case of article 96 of Law no. 303/2004, see L. Pop, *The regulation of subsidiary liability in the draft of the New Civil Code,* in Dreptul no. 10/2007, pp. 29-30, including note 31.

the sphere of the topic addressed in this paper, it is necessary to have a damage, a miscarriage of justice and a causal link between the miscarriage of justice and the damage incurred by the victim.

We have considered that State liability for miscarriages of justice is an assumption of strict liability and that State should be liable for the faulty work of the State service. The liability must be engaged regardless of the source of the miscarriage of justice. The remedial obligation is independent of the obligation of the person perpetrating the deed that has generated the causal chain. If State's obligation to remedy the damage would be a subsequent and ancillary to the obligation of that person, we would reach an unacceptable consequence by not being able to remove State liability as a result of invoking exonerating causes by the perpetrator of the detrimental deed. This would keep the consequences of the miscarriage of justice and would make impossible damage compensation.

The issue of whether or not the perpetrator's fault or the exonerating causes exist arises only in the redress action of State sought against that person.

We have also pointed out that the liability for miscarriage of justice to the victim always belongs to the State, a solution adopted by the majority of the countries in the world. It comes in support of defending the independence of magistrates, which should not have the sword of Damocles hanging over their heads and should not be afraid in making decisions. If it would be possible to sue directly the person responsible for the error, we would pave the way for possible abuses of those who would pursue the actions, and the magistrates would judge the causes thinking of solutions that avoid such actions and do not reveal the truth. It also provides a faster compensation of the victim of the miscarriage of justice who no longer has to prove the guilt of the magistrate, avoiding prolonging the uncertainty of the legal relationships and further damage.

In the trial where it was requested to engage the State in compensation, as a result of the miscarriage of justice, in our opinion the State cannot make a claim against the magistrate. It is what follows from the interpretation of legal texts referred to in article 96, paragraphs 6 and 7 of Law no. 303/2004, under which any person injured can file a claim only against the State. Only after the damage has been covered by the State it may file an application for compensation against the judge or the prosecutor who, in bad faith or gross negligence, has committed the miscarriage of justice causing damages.

We have pointed out that redress action of the State can be exercised only within certain limits and we have identified the conditions for seeking redress. In general, they are the same both in the case of miscarriages of justice in criminal matters and in the case of miscarriages of justice committed in other trials, except for the requirement of a judge or prosecutor as the person causing the miscarriage.

The purpose of State liability engagement is full compensation of the damage, civil liability being supported by two irrefutable principles: the principle of full compensation of the damage and the principle of compensation in kind of the damage[6].

Given the aim pursued through State liability for miscarriages of justice – damage compensation and victim's protection, the court will be able to adopt any measures likely to lead to the restoration of his/her rights or the compensation for the losses incurred. This, of course, to the extent that the law does not expressly limit the remedial action that may be available to him/her.

Chapter V of this paper addresses the conditions of State liability engagement for miscarriages of justice. Naturally we have explained the concept of a miscarriage of justice for which the legislator did not provide a definition. The miscarriage presents itself in various forms and can be classified according to several criteria. What is common is that the miscarriage of justice is *a false representation of the legal reality or, in other words, it is a mistake.*

The error may consist in an action or inaction which contravenes the letter and spirit of law. In the event of an action we consider, for instance, the issuance of an unlawful judgment, and in the case of an inaction the lack of judgment by the court on all the facts or evidence. Even if, at first sight, a judgment or order has been issued in compliance with the legal provisions, the possibility exists that the solution to be reached after the establishment of erroneous states of things based on the data, information or works of other persons (witnesses, institutions, experts, translators, etc.).

We have considered that in relation to current regulations, the concept of miscarriage of justice has two meanings, a narrow and a broad one.

In a narrow meaning, miscarriage of justice refers to the judgment non-compliant with reality or given with the wrong application of the law. As we have seen, this meaning appears indisputably in relation to criminal trials. We can see that the provisions of article 504 of the Code of Criminal Procedure refer to the wrong solutions issued by courts and the measures ordered by the criminal investigation body. Thus, it was considered that miscarriage of justice in criminal trials is defined by the legal text indicated itself.

In our view, miscarriage of justice, *stricto sensu*, is the *false representation of reality in the resolution of a case or in measures taking by a judicial body, which causes injury to a natural or legal person.* The miscarriage can be caused by any person, but it judicial nature is acquired in the narrow meaning of the definition, only when it is contained in a judgment of the Court, resolution, ordinance or indictment of the Public Prosecutor's Office. Miscarriage of justice cases listing by law can only be illustrative and not restrictive.

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[6] See L. Pop, *General theory…*, op.cit., p. 167

In a broad sense, miscarriage of justice includes all malfunctions[7] which may occur in the service of justice, relating to delayed cases, abusive detention, unjust convictions, wrong expertise, non-compliance with the right of the defense, etc. As a matter of fact, jurisprudence of both the European Court of Justice in Luxembourg[8] and the European Court of Human Rights in Strasbourg[9] relating to State liability of the State for various failures of justice is rich. We believe that the concept of a fair trial relates to judicial activity and abuse of procedures can lead to the existence of miscarriage of justice. Miscarriage of justice can be defined *lato sensu* as a *malfunction of the service of justice, regardless of who has caused it, leading to the violation of the rights of a natural or legal person and causing patrimonial or non-patrimonial damage.*

We have then made a separate analysis of miscarriages of justice in criminal matters and in the case of other trials. The current Romanian Code of Criminal Procedure governs by article 504 the cases of miscarriages of justice and damage compensation[10]. We have also had in mind the amendments proposed to be brought by the New Code of Criminal Procedure.

Unlike the Code of Criminal Procedure, Law no. 303/2004 does not define the cases in which we find ourselves in the presence of a miscarriage of justice, but merely indicates the need for prior existence of a final judgment establishing criminal or disciplinary liability, as appropriate, of the judge or the prosecutor for a deed committed in the course of trial judgment and if this deed is likely to lead to a miscarriage of justice. Thus, possibilities for engaging State liability for miscarriages of justice were unduly restricted only to those situations where there is a criminal or disciplinary conviction of the magistrates.

We have considered that, compared with the many cases of miscarriage of justice one might find in practice, the legislator would not be able to cover their whole area so the instauration of *criteria* likely to lead to the determination of what might constitute a miscarriage of justice would be more plausible. In this sense we consider that it should be taken into account the *illegality of the decision or the measure ordered and the arbitrary nature of the decision made*[11].

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[7] For discussions relating to State liability not only for the wrong judgments and measures, but also for its general conduct in connection with the administration of justice, in the light of the provisions of articles 26 and 50 of the Convention, see H. Dipla, *La responsabilité de l'etat pour violation des droits de l'homme*, Editions A.Pedone, Paris, 1994, pp.30-32.

[8] See G. Tudor, D. C lin*, CJEU Jurisprudence*, vol.1 and 2, C.H.Beck Publishing House, Bucharest 2006.

[9] Our aim here is not to make an exhaustive presentation of this jurisprudence, therefore we make reference to the works of some reputed authors, C. Bîrsan, *op. cit. Vol. I*; C.L. Popescu, *Jurisprudence of the European Court of Human Rights* (2004), C.H.Beck Publishing House, Bucharest, 2006. The species have in mind especially the miscarriage of justice in its broad sense of justice malfunction. For the narrow sense and the repercussions of procedural mistakes on court judgment, see *Kadlec et al. v. the Czech Republic*, in C.L. Popescu, *op.cit*., 2006 pp. 53-56

[10] For discussions on this topic see R. Iosof, *Comments on situations that can be considered judicial errors in criminal trials,* in International Symposium „Dimensions of change at the beginning of the XXIst century",: October 23-24, 2009, Risoprint Publishing House, Cluj Napoca, 2009, pp.101-106.

[11] L. R. Boil , *op.cit*., pp.406-407.

Then we have presented the typology of miscarriages of justice, the wrong representation being due to both internal factors and external factors of the judicial body. It is made up of magistrates who in turn are fallible people. Therefore, the wrong assessment of evidence or different interpretation of legal texts may give rise to a miscarriage of justice, being a subjective opinion of the magistrate and as a consequence it causes a subjective miscarriage of justice.

In other cases we are dealing with the external factors of the magistrate: statements of witnesses, expert opinions, etc., that he cannot control and must consider as such. In this case the miscarriage of justice will no longer be due to the fault of the magistrate but to objective causes that he could not foresee and change.

Therefore we can assume that depending on its nature, miscarriage of justice is subjective or objective and the factors that led the magistrate to adopt the decision were internal, i.e. subjective, or external, i.e. objective.

Considering that we approve the civilist concept of legal nature of liability we have proceeded to analyze the elements of tort liability: wrongful deed consisting of the miscarriage of justice, damage, causal link between miscarriage and damage.

A review of the types of damage that can be caused to the victim of miscarriage of justice and the conditions which must be fulfilled in order to be able to consider that the injured person has the right to compensation has been conducted.

Considering the topic of this paper, we have found, however, that in addition to the conditions of tort liability in common law a number of special conditions must be met. These would be: the miscarriage had occurred during legal proceedings; there is a judgment of miscarriage of justice finding; there is a final decision which establishes criminal or disciplinary liability, as appropriate, of the judge or prosecutor.

We have noticed that in the case of this special civil liability we are dealing with a single exonerating cause expressly indicated by the legislator, namely the deed of the victim which has contributed in any way to committing a miscarriage of justice by the judge or prosecutor.

The effects of State liability for miscarriages of justice have been the **subject of Chapter VI** of this thesis. We have made a presentation of the procedures of damage compensation in the event of errors in criminal trials and in other trials, and the elements of such actions.

Thus we have identified the persons that can be the perpetrators of the action, the person that may have a passive procedural quality, the competent court to be vested with the settlement of such actions, and we have studied the invocation of the statute of limitation.

The analysis was done separately in case of errors in criminal matters and errors perpetrated in other matters because every action has its specific characteristics. There are differences with respect to perpetrators, the competent court and the statute of limitations.

Compensation of damage caused by miscarriages of justice has been addressed in a separate section. We have started from the principles to whom this challenge is subject to, namely from the principle of full compensation of damage and the principle of compensation in kind of the damage.

We have spotlighted the criteria which may be envisaged to compensate for material damage, with a focus also on the solutions offered by the case law and the doctrine in this area.

In the case of bodily injury, we have analyzed both the compensation of the patrimonial side of the bodily injury and its moral component by reference to the provisions of the New Civil Code.

We have turned our attention also to the rebounding damage in the light of the provisions of the Code of Criminal Procedure and the New Civil Code, identifying in the French jurisprudence a number of cases which have not been so far covered by any study in Romania. We believe that the French courts orientation can be envisaged to carry out legislative changes in our country but also to the issuance of judgments by the Romanian courts. We also brought some notes on the new provisions of article 1391, paragraph 2 of the New Civil Code.

In the case of compensation for moral damage, we have had in mind moral damage caused by infringements of the affective personality and those caused to the social personality. We have studied this issue both in the view of Romanian courts jurisprudence and based on the judgments of the European Court of Human Rights.

We have asked ourselves whether it is possible to compensate for moral damages in the case of miscarriages of justice in trials other than criminal trials, compared with the text of article 96, paragraph 4, the first thesis of Law no. 303/2004 which refers specifically to the “injured person right to compensation for *material* damage”. To observe the sense of these provisions, we have also had in mind other regulatory documents in this regard. According to the Constitution, the State is liable in patrimonial terms for the *damage* caused by miscarriages of justice, and there is no differentiation as to their nature. Furthermore, using the constitutional norm, paragraph 1 of Law no. 303/2004 shows that the State is liable in patrimonial terms for the *damage* caused by miscarriages of justice, without any distinction.

It appears that the law does not prohibit compensation for moral damage, but does not foresee it. However, article 5 of the New Code of Civil Procedure (former article 3 of the old Civil Code) and article 4, paragraph 2 of Law no. 303/2004 require that the judge is not allowed to refuse to rule on the grounds that the law does not provide for or that it is unclear or incomplete. According to the techniques of interpretation, if the special law does not provide for, we shall refer to the rules of the

general law, which is the Civil Code in the case of tort liability. Its provisions refer to the need to compensate for the damage, without distinguishing between material or moral damage. Thus, *de lege lata,* we consider that moral damage compensation will be made under articles 1349, 1357 and 1381 and seq. of the New Civil Code. It would be inconceivable to exclude from compensation an entire category of damages which are most often encountered in practice[12]. It would cause flagrant inequities both between the victims of miscarriages of justice and between the persons guilty of causing the damage.

De lege ferenda, it would be desirable to expressly regulate the possibility to grant compensation for moral damage in the case of miscarriages of justice in trials other than criminal trials, which would lead to avoidance of the various interpretations of the text. Also this would correlate the paragraphs 1 and 4 of article 96 and would put the legal provisions in accordance with the constitutional provisions.

Under a separate section reference has been made to the possibility of introducing an automatic compensation, in the case of unlawful deprivation or restriction of liberty. From studying the possibility of a compensation in the case of unlawful deprivation of liberty, we have noticed that, in many States, there is an automatic compensation system for damage in various situations. Since there is no need to check the fault in terms of guilt, there is no question of extending it and thus there is no question on the amount of compensation for the damage incurred. Thus, in France, the Law of 17 July 1970 has set up a "Commission for compensation of provisional detentions"[13].

In Switzerland, social security legislation contains provisions governing the calculation of the compensation, settling a maximum which cannot be exceeded[14]. In Germany the law (Strafrechtsentscädigungsgesetz) provides for an automatic flat-rate compensation for each day of

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[12] In the sense that the only reference to „material damage" of the legal text is restrictive in relation to the provisions of article 52, paragraph 3 of the Constitution, aiming, in general terms, without distinction, the „damage caused by miscarriages of justice", see also I. Deleanu, *Treatise on Civil Procedure,* vol.I, AllBeck Publishing House, 2005, p. 111.

[13] Since 2001 its name was changed to the *Commission nationale d'indemnisation (National Commission of Compensation).* The Commission includes the President of the Court of Cassation or his representative, as a Chairman; two magistrates with chamber (department) president or counselor degree, appointed by the office of the court, three alternates, also appointed by the office of the court.

[14] Based on the Federal Law on accident insurance, the so-called „2-step" method was discussed in the Swiss doctrine and jurisprudence. Thus, according to article 24 of the Law, an insured person is entitled to a fair allowance, in addition to the invalidity annuity, which cannot exceed the maximum amount of the annual gain ensured at the time of the accident. Its revision is only possible if the aggravation is important and was not predictable. For damage with the special nature, the scale by analogy could be applied, taking into account the seriousness of the infringement. So, the first step calculates the basic compensation according to the amounts existing in the tables made available to the Court, and in the second step the amount in question is raised or reduced in relation to the concrete circumstances of the species. In the second step general common law criteria established by jurisprudence and doctrine shall apply.

detention, in case of unlawful remand custody. Similarly, in the United Kingdom, there is a clear scale according to which the compensation is calculated.

In the case of unlawful deprivation or restriction of liberty, the question arises on the category of rights and damages of such a situation, the patrimonial or non-patrimonial rights. It is observed that the injured right of the person is the right to liberty which is guaranteed by article 23 of the Constitution. The constitutional provisions also regulate the conditions for taking the measures of depriving a person of liberty. This guarantee of the State also extends to the infringement of this right and, thus, the appearance of the obligation to pay compensation to the person injured.

Subjective rights intimately linked to their holder, since they are deprived of economic content, are not subject to monetary assessment and are not a part of the patrimony of that person. This category also includes the right to liberty.[15]

The Romanian jurisprudence retains amongst others the duration of the remand custody as a criterion for the granting moral damages. Would it be possible to separate this criterion from the rest of the criteria considered in granting financial compensations? We believe that the answer may only be affirmative. This would objectivize the damage caused by violation of the right to liberty. Of course, the compensation only of the damage caused by violation of the right to liberty is not able to compensate for the rest of the losses caused. We believe, however, that it is important to set a starting point in assessing the amount of damage, which can be done by setting up a schedule and a maximum ceiling for deprivation or restriction of liberty. After setting up the amount, one can discuss about compensation for other categories of damage according their proof. The compensation can be done both by patrimonial assets and cash compensation. At the same time such a provision would not preclude the possibility of seeking redress against the responsible person under the law[16] where the offender has not contributed to a guarantee fund.

We believe that the compensation of the victim of an unlawful deprivation or restriction of liberty could take place by setting up a scale based on the number of hours of detention or the days, months or years of unlawful detention. Also, a maximum ceiling for cash compensation could be set.

Setting up a single criterion in the case of deprivation of liberty and setting up the possibility of compensation for other types of damages, in the event of their justification, would create a uniform jurisprudence and would provide equitable satisfaction to the victim of miscarriage of justice. In this way foreseeability of compensation solutions to victims would be ensured. However, the European Court of Justice has sentenced Romania in several cases exactly for the lack of

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[15] E. Lupan, I. Sab u-Pop, *Treatise on Romanian Civil Law, vol. I, General Part*, C.H.Beck Publishing House, Bucharest, 2006, p. 111.

[16] The same opinion was expressed in the French literature: M. Sousse, *La notion de réparation des dommages en droit administratif français*, Librairie Générale de Droit et de Jurisprudence, Bibliothèque de droit public, 1994, p. 155.

foreseeability of the decision made during the trial, by the existence of a non-uniform jurisprudence. Therefore, one might establish a compensation committee following the French model, but at the level of Courts of Appeal, composed of the President of the Court and two Vice-Presidents of the Court Sections, to settle the claims of damages due to unlawful deprivation or restriction of liberty. The procedure for the settlement of such cases should be held in the Council Chamber. A single remedy should be envisaged against the Commission's decisions, which shall be settled by the High Court of Cassation and Justice in open session precisely to ensure uniform jurisprudence. Moreover, for the Romanian judicial system it would not be a first since currently, under Law no. 211/2004, each tribunal has its Commission for granting financial compensation to victims of crimes, but it grants financial compensation to victims of crimes, not the victims of miscarriage of justice[17]. This simplified procedure would help to a faster settlement of requests, would relieve the ordinary courts from the large volume of cases and would avoid the presentation of evidence in relation to the compensation for deprivation of liberty, the only interesting issue being its duration.

In Chapter VII, the object of the study was the redress action of the State against the person guilty of committing the miscarriage of justice.

Under separate sections we have analyzed both the situation where the perpetrator of the miscarriage of justice has the capacity of magistrate and the case where the miscarriage of justice is committed by another person.

We have presented the legal framework of liability of magistrates in Romania and how this liability is regulated in other national legal systems, and the unanimous opinion is that the civil liability of magistrates is a liability for one's own deed, subsidiary to the State liability. The foundation of the liability is subjective, since the constitutional text and the laws in the matter establish that the guilt of the magistrate must take the form of bad faith or gross negligence, so his liability is based on the idea of fault.

The liability of the magistrate has, however, certain limits which should not stop the awareness of those performing the noble service of justice, not even by invoking the independence. Instead of

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[17] According to article 28, paragraph 2 of Law no. 211/2004 (published in the Official Gazette no. 505 of June 4, 2004), the Commission for the granting of financial compensation to victims of crimes is made up of "at least two judges, appointed for a 3-year period by the General Assembly of the Judges of the Tribunal". The request for financial compensation and the request for the grant of an advance on the financial compensation shall be settled in the Council Chamber, with the attendance of the victim. Prosecutors' participation is mandatory. The decision may be appealed to the Court of Appeal within 15 days of the notification. The funds necessary for the granting of financial compensation or its advance payment for victims of crimes is provided by the State budget through the budget of the Ministry of Justice. The State, through the Ministry of Justice, is a subrogee of the rights of the victim which has received financial compensation or an advance payment for the recovery of the amounts paid to the victim. Please note that the idea of the existence of this Commission was taken from the French system where it is called "Commission d'Indemnisation des Victimes d'Infractions Pénales", which operates within the Tribunaux de Grande Instance (High Court Tribunals), the equivalent of the Romanian Courts. Thus, at the level of Courts of Appeal the same model could be taken in the case of commissions for the compensation of the wrongfully arrested people.

speaking of irresponsibility, we speak of “the limits of the liability of the judge”[18], which consist of: independence and irrevocability of judges; independence and stability of prosecutors, collegiality of panels, secret of judging counsels, possibility of exercising the rights of appeal, authority of a final decision.

In continuation of our approach we have proceeded to the spotlighting of the conditions of seeking redress. In this regard we have considered that it is necessary to have a judgment requiring the State to grant compensation; compensation for the damage must have already been made by the State, the person against whom redress is sought must have caused the damage generating situation with bad faith or gross negligence. The last condition is evident from the provisions of article 507 of the Code of Criminal Procedure, where it is shown that the redress sought against a person who, in bad faith or gross negligence, has caused the damage generating situation is mandatory. In civil matters, in relation to the provisions of article 96, paragraph 4 of Law no. 303/2004, it appears that the bad faith or gross negligence should be established by a decision of sentence to a criminal punishment of the magistrate or a disciplinary sanction.

Another novelty brought by this paper is the proposal to establish an insurance system for judges and prosecutors. The existence of culpable deeds of judges and prosecutors, as well as the possibility of their liability engagement has led to discussions about the need to maintain the independence of magistrates and their defense in the case of pressures they would be exposed to by direct patrimonial liability to the victim of the miscarriage of justice on one side. If, so far, the State has been their “insurer”, the question arises increasingly in relation to the incurrence by the guilty persons of the damage they have caused. Some States have conceived a general insurance system for professional misconduct.

In Spain the judges fully and mandatory subscribe to a professional liability insurance, as a guarantee against the civil ruling to compensation of damage or against the consequences resulting from the disciplinary penalties ordered against them.

Furthermore, in Italy, the National Association of Italian Magistrates took the initiative of negotiating with some of the most important Italian insurance companies the general conditions for an insurance master agreement, a standard to which judges should be able to subscribe on a discretionary basis.

A mechanism for magistrate insurance would be welcome in Romania. Such a mechanism would create the possibility to avoid the redress sought directly against the magistrate. Thus, we believe that there were two possibilities:

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[18] M. Capelletti, *Le pouvoir des juges,* Presses Universitaires d Aix-Marseille, Economica, Paris, 1990, p.131

1. The establishment of a guarantee fund at the disposal of the State, which shall act as an insurer, a fund to which judges can contribute after their willingness, on a discretionary basis. If they have contributed, the compensation claimed by the victim shall be advance from this fund, without any ceiling, and the redress shall be no longer sought by the State. If the magistrate has not contributed, there would still be the possibility of seeking redress.

2. The possibility of magistrate insurance at the existing specialized companies.

We consider that the establishment of a guarantee fund, administered by the State, would be the best solution for a possible patrimonial liability action.

It should be stipulated that in case of the redress sought based on gross negligence, the State must sue also the institution at which the judge or the prosecutor is insured for civil liability. The obligation to pay compensation can be established only in charge of the insurance institution and subject to the amount insured.

We believe that this variant would meet better the current requirements of the society. First, it would be unequivocally provided that the redress sought against the magistrate is settled by summoning to the insurer. This avoids the possibility of interpreting the text in the variant of the Ministry of Justice for the purpose of promoting a separate action against the insurer. Secondly, it is clearly specified that the payment obligation belongs only to the insurer and not the magistrate. The binding nature of such insurance is debatable. According to some magistrates, the conclusion of the civil liability insurance for miscarriages of justice perpetrated due to gross negligence should be optional and not mandatory; according to others, it is proposed that, on the contrary, to consecrate expressly the mandatory nature of the civil liability insurance, and the payment of insurance premiums from the State budget. We believe that it should be mandatory only up to a certain limit. For a larger amount, insurance can be concluded separately on a discretionary basis.

Such insurance exists in the Netherlands, the insurance premium being considered a bonus that is added to the magistrate’s salary and that is paid from the budget.

It is therefore necessary to regulate as fast as possible a system of insurance of magistrates for the professional risk with the provision of criteria for minimum and maximum capping of the amount insured and the monthly insurance premium. At the same time, it should also be expressly prohibited to pursue direct civil actions against the magistrates for miscarriages of justice, such as the actions based on the common law of tort liability.

The draft law amending Law no. 303/2004, in the variant of the Ministry of Justice, creates the circumstances of an imbalance between the powers of the State, because, although the judge and the prosecutor are liable for the damages caused by miscarriage of justice, the perpetrators of those situations – public authorities and institutions – are not liable effectively, after engaging State

liability[19]. Indeed there are many cases where other people who do not have the quality of a magistrate had created the situation that generated the miscarriage of justice. What happens in their case? We have tried to provide an answer in the section relating to patrimonial liability of other persons who have contributed to the perpetration of the miscarriages of justice.

In the case of miscarriages of justice in criminal matters there is no contingent liability depending on the status of the person, as opposed to the case of miscarriages of justice in trials other than criminal trials, where the legislator has expressly stated that the redress action can only be sought against the judge or prosecutor. In relation to the provisions of the Code of Criminal Procedure, which provide that the State seeks redress against the person who, in bad faith or gross negligence, has caused the damage generating situation, the question arises whether the State can seek redress against any person or only against its employees. We have replied to the effect that the State can seek redress against these persons, provided that their guilt is proven. The legal text requires that this guilt to have the form of bad faith or gross negligence.

Article 12 of the G.O. no. 94/1999 sets up a assumption of redress action regardless of the nature of the trial the miscarriage of justice occurs into. It is the case of State's conviction to the European Court of Human Rights or the case of amicable resolution of such dispute. One might consider that this assumption deals with the liability for miscarriages of justice only when State's conviction occurred based on article 3 of Protocol 7 to the Convention.

Please note however that many times disputes in court occur as a result of violation of articles of the Convention other than the one shown above. In our opinion, we can talk about the existence of miscarriages of justice in this situation also, their base being represented by the deeds of people who do not have the quality of magistrates. Providing incorrect information to the Court, wrong expertise, inaccurate police investigations, etc., can be the basis of other provisions of the Convention, which can cause miscarriages of justice.

In the case of patrimonial liability of other persons who have contributed to committing the miscarriages of justice, the Foundation is clearly the idea of fault.

To seek redress several conditions must be met in the case of such persons, conditions resulting from the analysis of the legal provisions applicable in the various hypotheses studied. Thus, first, in all the circumstances it is necessary to have a judgment requiring the State to pay compensation to the victim of miscarriage of justice. Secondly, as a result of that judgment and the establishment of State liability, actual compensation must be paid to the victim of miscarriage of

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[19] According to *Point of view concerning the draft law on the amendment and completion of the Law no. 303/2004 concerning the status of judges and prosecutors and the Code of Criminal Procedure regarding the material liability of magistrates* of the Directorate for legislation, documentation and litigation of the Superior Council of Magistracy (SCM) recorded at this institution under no. 19572/1154//2010.

justice. Thirdly, redress action is sought against the person who has caused the damage generating situation, and he/she is the only party having a procedural status.

By the conclusions of the thesis we have summarized the main ideas that can be learned from the analyses made, bringing to the attention our proposals *de lege ferenda*.

1. Romanian legislation contains provisions, even if not sufficient, related to compensation miscarriages of justice. Where special laws, namely the Criminal Procedure Code and the Law no.303/2004 are lacking, it intervenes the fundamental law, the Constitution, and the general law, the Civil Code, as the miscarriage of justice is the result of an illegal act, so that *the principles of civil liability in tort are applied.*

2. State liability for miscarriages of justice is a special assumption of civil liability. The fact that compensation for the damage caused by miscarriages of justice is governed by the rules of public law, namely the Constitution, Law no. 303/2004 and the Code of Criminal Procedure, does not change the nature of this institution. Civil nature is given by the fact that the relationships generated are patrimonial; the subjects of the legal relationship, i.e. the injured party and the State, are in equal legal position. We are in the presence of a distinct, special case of civil liability for the State's own deed, similar to the case of the legal person's liability for its own deed. However, State liability shows some peculiarities. Miscarriage of justice will be a solution of the judicial authority, a prosecutor or a judge. In connection to the parties of the legal relationship, they are represented by the victim of the miscarriage of justice, on the one hand, and always the State, on the other hand.

3. The foundation of State liability is based on *the idea of guarantee which has as support the activity risk.* The state is the one called upon to repair the damages caused by its own service, which is held to guarantee. Assuming its monopoly of justice administration, it must support the risk that arises following such an activity. It is an strict liability of the State that can't be confused with the subjective liability of the person who caused the miscarriage of justice. Strict liability performs a dual function: compensatory and educational-preventive. To avoid doubts regarding the foundation of State liability in the case of miscarriages of justice in trials other than the criminal trials, we consider that it would be desirable to repeal or amend the provisions of article 96 paragraph 4 of Law no. 303/2004. The conditioning of a strict liability of the State, deriving directly from the constitutional provisions, by a subjective liability of the person, established by a law that should abide by the Constitution, is a non-constitutional provision which should not be maintained.

4. Miscarriages of justice, whether they relate to jurisdiction or proceedings, in law consideration and enforcement or in evaluating the evidence, must be compensated *only in the appeal*; other miscarriages of justice that cannot be corrected in this way (i.e. excessive delays in file

processing) should lead, at the most, to a complaint of the dissatisfied justice seeker *against the State*.

5. Any correction of other errors in the administration of justice (including, for example, excessive delays) shall be addressed *exclusively to the State, and* it is not proper for the judge to be exposed in respect of the carrying out his legal function to any personal liability, unless he makes a deliberate mistake or gross negligence.

6. Definition of miscarriage of justice cannot be completed in a comprehensive manner. The miscarriages should be taken into consideration as an element of liability without restricting State liability engagement for other illicit deeds. Laws may stipulate the conditions of application for compensation, but the jurisprudence has to rule specifically on situations that constitute miscarriages of justice, as in the case of tort liability, where the Civil Code and other special laws cannot restrict the illicit deeds but only the liability of the perpetrator. Miscarriage of justice in its narrow sense consists in the *representation of reality during the settlement of a file or a decision made by a judicial body likely to cause damages.* Miscarriage of justice should not be circumscribed by a restrictive enumeration of situations where it can occur. It is necessary to define the broad sense of the term by reference to the its main features. Therefore, we consider that the most correct legal definition would be that the miscarriage of justice is the *malfunction of the service of justice, caused by any person, leading to the violation of the rights of a person, whether natural or legal, and which causes patrimonial or non-patrimonial damage.*

7. In relation to the concrete situations where miscarriage of justice occurs we believe that a distinction should be made between subjective miscarriage of justice, generated by the magistrate, and the strict error, due to other people or factors external to the activity of the magistrate. The State shall be liable for both types of miscarriages of justice. In the first case for the miscarriage of the magistrate, and in the second one for the miscarriage caused by other people. This distinction is relevant especially in the case of seeking redress and establishing the liability of the perpetrator of the situation that has generated the miscarriage.

8. The case of not including the definition of the miscarriage of justice in the legal norms would require the regulation in Romania, as in other countries, of the concept of malfunction of the public service of justice. It is necessary especially because currently there no other grounds for State liability in the event of delayed cases, procedural errors during the trials, the trial of people with clear violation of their rights, etc. We believe that we have to draw up a law which provides for State liability for miscarriages of justice, but also for the malfunction and improper organization of the judiciary. It would cover a much wider range of vices of trials, such as: incompatibilities, delays in case settlement, etc. Although they are not miscarriages of justice within the narrow meaning of the

concept, they are causing injury to the participants in the act of justice. The law should stipulate expressly only the conditions which must be fulfilled in order to find ourselves in the presence of a redressable injury and should list only as an example the miscarriages of justice in criminal and civil trials.

9. We believe that the wrong way, both the legislator and the doctrine have confused the concept of *miscarriage of justice* with that of the *deed causing it*. Miscarriage of justice, in the narrow sense, will always be only the act that contains a mistake, a false representation of reality. The act in question is a judgment or an order of the prosecutor.

Contribution to the challenge of miscarriage of justice may, however, consist of a deed committed by any other person, even if he/she is not a magistrate. There are two distinct compulsory legal relationships.

a) Between the person injured by the miscarriage and the State, whose body has made the decision,

b) Between the State and the perpetrator that has caused the miscarriage.

The State, by virtue of the constitutional principle is required to cover the damage caused by miscarriages of justice, but not by virtue of any legal work relationship with the magistrates, but based on guaranteeing the service it organizes and which has issued a wrong decision, whether it is attributable to the magistrate or to another person. In seeking redress, there is, however, a distinction between persons having capacity of magistrates and other persons that do not have this capacity, but by their deeds have caused the miscarriage of justice.

10. The New Code of Criminal Procedure limits intolerably the scope of situations for which the State is liable only to the person discharged after retrial or unlawfully deprived of liberty. A number of other miscarriages of justice are excluded from compensation, such as: unlawful measures of restriction of liberty, search warrants, abusive acts of the criminal investigation phase, as well as the measures adopted during the criminal trial likely prejudice the party (seizure of property, taking a measure of safety, etc.). In this situation the only solution available for the persons injured *de lege lata* is the action based on common law, by reference to the Constitution and international conventions.

11. In the case of miscarriages of justice in trials other than criminal trials, it would be necessary to amend the provisions of article 96 of Law no. 303/2004, meaning that State liability should not be subject to criminal or disciplinary liability of magistrates. This condition has been introduced as a result of misinterpretations of the recommendations of the European Charter of Judges which points out in paragraph 5.2 the need to restrict civil liability of judges to "State compensation for gross and unforgivable negligence, through legal procedures, with the previous

consent of an independent authority". This provision refers only to the limitation of liability of the judge and not the State, and is only valid in the framework of the relationship existing between the State and the judge. By the current provision, the State has actually sought to exempt from liability and to have a way to recover always the damages from the magistrates. The formulation of an eventual article on seeking redress by the State could be made in the following way: *seeking redress by the State against the judge or the prosecutor can only be used if its criminal or disciplinary liability was established, in advance, by a final judgment, for a deed committed in the course of the court proceedings and if this deed was likely to cause the miscarriage of justice.*

The project developed by the Ministry of Justice, brought to public debate in August 2010, aims at amending the Law no. 303/2004 and introducing Article 96^3 with the following content*: in all cases, seeking redress by the State shall be exercised only after the criminal liability of the judge or the prosecutor for an offence committed during the trial, or, as the case may be the disciplinary liability was determined beforehand by a final decision.*

We believe that the version we have proposed would better respond to the requirements of establishing the liability of magistrates. If we accept the variant of the Ministry, the consequence would be that seeking redress, in the event of criminal liability of magistrates, may be promoted only if it concerns an offence *perpetrated during the trial.* At the same time, however, in the case of disciplinary liability, the same action can be brought for a disciplinary misconduct *that was not perpetrated during the trial.* At the same time we believe that it would be desirable to express in clear terms the requirement that the deed has been likely *to cause miscarriage of justice.* Even if the magistrate has committed a crime or offense, not always he is the one that has caused the miscarriage.

12. With respect to compensation for damage caused by unlawful deprivation of liberty a compensation committee may be established at the level of Courts of Appeal, composed of the President of the Court and two Vice-Presidents of the Court Sections, to settle the claims of damages due to unlawful deprivation or restriction of liberty. A single remedy should be envisaged against the Commission's decisions, which shall be settled by the High Court of Cassation and Justice in open session precisely to ensure uniform jurisprudence. This simplified procedure would help to a faster settlement of requests, would relieve the ordinary courts from large volumes and would avoid the administration of evidence for the quantification of compensation for unlawful deprivation of liberty, the only interesting issue being its duration. Of course that this recommendation can be improved and it is not protected from criticism. Furthermore, in the current proceedings it is possible to establish a scale system with minimum and maximum limits for compensation.

13. As we have seen there is a vagueness about the possibility of *moral damage compensation* in the case of miscarriages of justice in trials other than criminal trials. Article 96, paragraph 4 of Law no. 303/2004 provides that the person injured is entitled to the “compensation for the moral damage” caused by miscarriages of justice perpetrated in trials other than criminal trials. We believe that this formulation limits intolerably the right of the injured persons to full compensation of damage and constitutes a discrimination to the victims of miscarriages of justice in a criminal trial, and the persons seeking compensation for damages by virtue of the common law. Taking into account the constitutional regulations of article 52, paragraph 3, which do not restrict damage compensation depending on its nature, it is necessary to reformulate the provisions referred to in the sense of recognition of the right of the injured person to compensation for the damages caused by miscarriages of justice, without distinction as to their nature.

14. The award of damages must give priority to *the restoration of the previous situation,* namely the compensation in kind of the damage. Although these situations are rare, they can still occur in practice. Action relating to compensation for the consequences of the miscarriage of justice through property restitution or restoration of rights cannot be removed from the scope of the legal provisions relating to the miscarriage of justice. The necessity of restoring the previous situation of the victim is also the result of perpetrating a miscarriage of justice. The settlement, by a single action, of all aspects related to compensation of damages is more favorable to the injured person, by easing the probation, than an invalidation of the judicial execution by way of common law.

15. As a general principle, the legal rules should *expressly* stipulate that judges are exempt from all liability with respect to direct complaints against them in connection with the good faith exercise of their function. With regard to seeking redress, wee consider that it would be desirable to avoid the introduction of such an action by the State against a magistrate. If there is a possibility of such actions on the part of the State, the judge and the prosecutor will become concerned about how to avoid such action and not correct settlement of the case. When an application for compensation is submitted against the State, the judge will be tempted to give justice to the State and not the victim of the miscarriage of justice, precisely because of the reflex of self protection in front of potential patrimonial liability. Moreover, the conclusion of the Consultative Council of European Judges is that it is not suitable that a judge to be displayed, in respect of the exercise of the legal functions, to any personal liability, even by State compensation, unless he makes a deliberate mistake. We believe that it would be desirable, however, in the case of keeping the possibility for seeking redress, with magistrate liability substantiation only on bad faith. In the case of fault of the magistrate in the form of gross negligence or imprudence, it would be liable only in disciplinary terms.

16. In the current legislative context there is an option of the State between the incumbency of seeking redress or on the contrary only the possibility of to promote it. The first variant does not give place to discussion on the dependence of magistrates to the administrative body because it would ensure the liability of all perpetrators of miscarriages of justice. In the case of the second variant, there is a question mark over the ability of the magistrate to resist the temptation to have an attitude favorable to the State to avoid their liability. Last but not least in this latest situation there is a possibility of "selection" by the administrative body of the magistrates against whom to file or not claims. We believe that two ways could be to followed:

a) The establishment of a guarantee fund at the disposal of the State, magistrate contribution being discretionary, according to their desire. In case of participation in this form of insurance, the compensation claimed by the victim shall be advanced from this fund, without possibility of seeking redress by the State. If, however, the judge or the prosecutor did not contribute to the fund, it is necessary to seek redress.

b) The promotion, as before, of an action against the magistrate, following that, to the extent that he does not contribute to an insurance institution, to bear the damages claimed by the State.

17. The limitation period should be unified. Thus, at present, there are three periods of limitation applicable to applications for compensation for miscarriages of justice. In the case of criminal trials there is a term of 18 months prescribed by the article 506 of the Code of Criminal Procedure, while in the other trials there is a 1-year term referred to in article 96 of Law no. 303/2004. For the rest of situations to which the legal provisions mentioned are not applicable, the limitation period of three years provided for in article 2517 of the New Civil Code shall apply. This leads to a discrimination between the victims of miscarriage of justice. More privileged is the victim of a miscarriage of justice not included in assumptions expressly governed by law, which shall have a period of 3 years for filing the action, which is paradoxical.

The draft amendment to Law no. 303/2004 provides that for compensation of damages, the injured party may file an action within 18 months from the date on which the judgment by which the miscarriage of justice has been found remains irrevocable. This project initiated by the Ministry of Justice[20] comes in contradiction with the provisions of the New Code of Criminal Procedure, promoted by the same Ministry. As we have pointed out in the section relating to the limitation of action for compensation for damage in case of miscarriages of justice in criminal trials, the New Code of Criminal Procedure will provide for a 6-month period. Once again different terms for

[20] Reference is made to the draft Law on the amendment and completion of the Law no. 303/2004 concerning the status of judges and prosecutors and the Code of Criminal Procedure published on the website of the Ministry of Justice www.just.ro, accessed on August 24, 2010

requests of the same kind, which contradicts the decisions and recommendations of the European Court of Human Rights in the case of *Visan v. Romania* exposed *in extenso* in that section.

It is desirable that the limitation period to be the same in both civil and criminal matters, the time of commencement of the term being the time when the judgment by which the miscarriage of justice has been found remains final.

We believe that a uniform provision is required, which considers that the application for damages must be file within one year of the date when the victim or the persons entitled, have taken note or should have taken note of the decision by which the miscarriage of justice has been found. To this end, it would be good that those decisions to be communicated always to the persons injured. The establishment of such a time limit ensures a faster compensation for damage and contributes to finding out the truth. It would also compel the victims of a miscarriage of justice to increased diligence in their actions, for the compensation of their own patrimony.