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ETHICAL PERSPECTIVES ON THE MAGISTRATE'S INDEPENDENCY PRINCIPLE

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Abstract

The term *independent* expresses a special form of autonomy, based on personal initiative freedom in the context of exercise capacity to make decisions.

Keywords:
magistrate's ethics , the principle of judicial independence, negative legislator

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Introduction

The term *independence* expresses a special form of autonomy, based on the freedom of personal initiative in the context of exercising one's capacity to make decisions.

The term *autonomy* has its origin in the Greek philosophy, where it means self-government and self-determination.

Ethical considerations on the magistrate's independency principle

The original meaning of autonomy is life lived according to a self-imposed law[3]. In applied ethics, the term *autonomy* has double origin, on the one hand in Immanuel Kant's[4] critique of practical reason, as well as in the groundwork of the metaphysiscs of morals[5] of the same philosopher from Königsberg. In the two mentioned books, Kant fundaments his philosophical vision on the state and the right according to which the source of any law is the categorical imperative as a supreme form of moral law[6]. Moral law is inherent to the human being and is manifested as autonomy, understood as the capacity of the individual to self-determine, based on his own ration as moral landmark[7]. For the German philosopher, legality means compliance of the acts of individual will to the moral law[8]. For the will to be good, it needs to be guided by the feeling of duty[9]. The categorical imperative represents the maximum will of the individual, being the source of any normativity, and in the same time the source of dignity of the human being. Liberty is for Kant transcendental and universal, being part of the thing itself, while autonomy is based on judgments simultaneously universal and necessary, of a priory type, but having an immanent nature, being therefore constitutive of practical reason[10]. Modern ethics starting from the kantian vision is realistic and universal – moral truth is universal and can be

[3] Antonio Sandu, *Etică şi deontologie profesională*, Editura Lumen, Iaşi, 2012, p.99.
[4] Immanuel Kant, *Critica raţiunii practice*, trad. Nicolae Bagdasar, Editura Ştiinţifică, Bucureşti, 1972.
[5] Idem, Întemeierea metafizicii moravurilor, Editura Humanitas, 2007.
[6] Peter Singer, *Tratat de etică*, Editura Polirom, Iaşi, 2006.
[7] Antonio Sandu, *Etică*.....….p.89.
[8] Ibidem.
[9] Immanuel Kant, *Critica.*
[10] Antonio Sandu, *Etică*.....….p.89.

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deduced on a rational basis – and deontological, establishing moral norms with value of universal quotes[11].

The independence of the magistrate represents a particular form of exercising one's own autonomy, by the subject invested as magistrate. He needs to have the capacity to make decisions according to his own consciousness and own interpretation of the law that he is invested with. Law enforcement is therefore a rational fact, and the magistrate is asked to exercise his practical reason towards the case in question. From this situation results a series of cases of incompatibility which lead to refrain from judging or recusal. According to the Romanian law, these cases are governed by Art. 41 and Art. 42 from the New Code of Civil Procedure:

Cases of absolute incompatibility Art. 41

(1) The judge that has pronounced an interlocutory order or a decision that solved the case, cannot judge the same cause in appeal or appeal for annulment or revision, and not even after being sent for rejudgment.

(2) Also, cannot be part of the judgment the one who was witness, expert, arbitrator, attorney, assistant, magistrate assistant or mediator in the same cause.

Other cases of absolute incompatibility Art. 42

(1) The judge is also incompatible to judge in the following situations:

1. *When he has previously expressed his opinion regarding the solution for the cause he was assigned to judge. Discussing with the part, ex officio, certain issues of fact or law, according to art. 14 alin. (4) and (5) doesn't make the judge incompatible;*
2. *When there are circumstances that justify the fear that he, the spouse or the ascendants or descendants or their related persons, have an interest in connection to the case that is being judged;*
3. *When it's the spouse, relative or related person up until the fourth degree including with the attorney or the representative of any of the parts, or if he is married to the brother or sister of the husband of any of these persons;*
4. *When the spouse or former spouse is a relative or related up until the fourth degree including with any of the parts;*

[11] Antonio Sandu, *Etică profesională și transparență în administrația publică,* Editura Didactică și Pedagogică, București, 2014

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5. *If him, the spouse or their relatives up until the fourth degree, including their related ones, are part of a process that is being judged in the court that any of the parts is judge in;*
6. *If between him, the spouse or their relatives up until the fourth degree, including their related ones, and one of the parts, there has been a criminal trial with at most 5 years before being assigned to judge the cause. In the case of criminal complaints formulated by the parts during the process, the judge becomes incompatible only when the criminal action is moved towards him;*
7. *If he is a guardian or curator of any of the parts;*
8. *If he, the spouse, ascendants or descendants have received gifts or promises of gifts or other advantages from any of the parts;*
9. *If he, the spouse or any of their relatives up until the fourth degree including their related ones are enemies with one of the parts, the spouse or their relatives up until the fourth degree;*
10. *If when he is invested with solving an appeal, the spouse or a relative has participated, as a judge or a prosecutor, in judging the same cause before other instance;*
11. *If he is spouse or relative up until the fourth degree or related to any member of the panel;*
12. *If the spouse, relative or related up until the fourth degree has represented or assisted the part in the same cause before other court;*
13. *When there are other elements that intentionally lead to doubts regarding his impartiality.*

(2) Dispositions of alin. (1) regarding the spouse that apply also in the case of cohabitants.

In the cases of incompatibility works the absolute presumption of impartiality which is why the magistrate judge is in a situation of incompatibility should refrain from judging the cause. If he didn't refrain from it, and the parts, or one of them is aware of such cause, he may request the recusal of the magistrate.

The same principle of independence understood as autonomy made the Romanian legislator to prohibit judges to join unions, political parties or to carry out economical activities other than teaching.

Common understanding of the term *independence* targets "the situation of a person that judges and acts independently, not being

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influenced by others"[12]. The literature defines independence as "attribute of the position that allows the judge to act in achieving the legal act and, especially, to decide only based on the law and own consciousness, without any subordination or influence"[13].

The most important stake of the principle of independence of the magistrates is the systemic one, namely the independence of justice as a whole. The independence of justice is a guarantee of the state of right and of the existence of separation of powers within the state[14].

The independence of justice and the guarantee of the state of right

Real consolidated democracies contain two significant elements, namely the elective democracy or free choices and constitutional guarantees and the constitution of the state of right. The State of Right requires the rule of law in the existing conditions of equitable guarantees regarding the rights of citizens and the predictable functioning of the state institutions. Even with an absolute political majority in the administrative or political institutions, they cannot arbitrarily impose will other than within the limits of law, of the Constitution and international Conventions. The state guarantees civil and political right, their restrain being made only for reasons of public utility and respecting the principle of proportionality. It is the role of justice in its different instances, including the Constitutional Court to ensure the functioning of the State of Right.

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[12] Sofia Luca, Diana-Magdalena Bulancea, Deontologia magistratului, în Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008, p. 68.

[13] Project for a new Code of ethics of the judges in Romania, elaborated by C.S.M. in collaboration with the ProEtica Seminar of the Department of Philosophy of "Babes Bolyai" University from Cluj-Napoca, as a consequence of the implementation of the deontological Code of judges and prosecutors, available online at: http://www.alexandrina-radulescu-csm.ro/docs/proiect-cod-etica.pdf , accessed at 17.04.2014; Also see Sofia Luca, Diana-Magdalena Bulancea, Deontologia magistratului, in Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008, p. 68, and also Ion Popa, *Tratat privind profesia de magistrat în România*, Editura Universul Juridic, Bucureşti, 2007, p.181.

[14] Mona Maria Pivniceru, Cătălin Luca, Reglementări internaţionale cu relevanţă în materia deontologiei judiciare, în Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008.

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One of the characteristics of modernity is represented by the expansion of audiences that take part in the civil and political deliberation. For the author, rationality and deliberation represent an essential characteristic of the modern public sphere[15]. The affirmation of individuality and autonomy specific to the post-Kantian modernity leads to the constitution of certain "instances of de-privatization of communication"[16], inducing a critically-informed attitude of facilitating the expression in the public sphere. The emergence of the public sphere constitutes an instrument of political legitimation and reconstruction of liberal democracy in conjunction with that of the state of right. Modern liberal democracy includes the idea of State of Right as being the only one able to guarantee individual liberties. The modern legislative system is a positive one, being necessarily individualized. The laws are issued by a legislator and their violation is being sanctioned by the state[17]. The issue of *guaranteeing human rights* is correlative to the one of the sovereignty of the people as two distinct sources of legitimation of exercising power. Constitutionalism limits the capacity of the legislator which represents an absolute majority of the people in the capacity to violate the fundamental human rights, as well as a series of fundamental principles of constitutional right[18]. Constitutional democracy must encode the fundamental rights of the citizens, as well as the popular sovereignty, both being original institutions at the basis of constitutional democracy[19].

Talking about the role of the "negative legislator"[20] of the Constitutional Courts by ensuring constitutional control, Constitutional Court, or other instances limitating the abuse of right[21]. The

[15] Antonio Sandu, „Deliberative Democracy and Communicative Action of Jürgen Habermas [Democraţia deliberativă şi acţiunea comunicativă la Jürgen Habermas] „, *Anuarul Universitatii „Petre Andrei" din Iaşi Fascicula: Drept, Ştiinţe Economice, Ştiinţe Politice*, Year 2013, Issue 12, December, pp: 231-243.

[16] Antonio Sandu, *Deliberative*…….. pp: 231-243.

[17] Jurgen Habermas, „Constitutional Democracy, a Paradoxical Union of Contradictory Principles? „, *Political Theory*, Vol. 29 No. 6, December 2001, pp:766-781. A se vedea şi Antonio Sandu, *Deliberative*…….. p. 238.

[18] Jurgen Habermas, *Constitutional*…… pp:766-781.

[19] Antonio Sandu, *Deliberative*…….. p. 239.

[20] It was used the term "negative legislator" with the meaning of CCR in the Decision No. 448 from October 29, 2013 regarding the exception of non-constitutionality of the dispositions of art. 40 alin. (3) from the Law no. 41/1994 regarding the organizing and functioning of the Romanian Society of Radiobroadcast and the Romanian Society of Television. Published in the Official Monitor no. 5 from 07.01.2014.

[21] Camelia Ignătescu, *Abuzul de drept*, Editura Lumen, Iaşi, 2013.

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Constitutional Court has repeatedly exercised the role of "negative legislator" through the solution of unconstitutionality given in the case of certain laws passed by the parliament with a wide majority based on popular support. In 2012, the Constitutional Court has invalidated the referendum to dismiss the president due to not achieving the needed electing threshold of 50%, which statuated the fact that the constitutional democracy and the State of Right is departed from the tirany of the majority, replacing it with the rule of law[22]. Jurgen Habermas considers the model of deliberative democracy as basis of the unification of the principle of law ruling with the one of absolute sovereignty of the people[23]. Constitutionalism and the State of Right are historically placed in opposition to despotism. Jurgen Habermas considers the process of democratization as being one of "taming the power" and diminishing the violence in the exercise, referring to the two conquests of the contemporary democracy: institutionalizing the equal liberty of any citizen as well as the increase in administrative efficiency of the state[24]. The rule of law and rationalization of the administrative streamline leads to significant transformations *in substance* of the power of state and expressing public authority. The substance of international right has suffered a series of transformations, aiming to the transition from coordination to a real international cooperation[25]. The State of Right not only requires institutional mechanisms to guarantee the supremacy of the law, but also a real independence of the magistrates, not only a formal one. Real independence requires abstention from the politics to intervene in the problems of justice, or to make statements regarding the lawsuits. In this regard we quote the CSM declarations that protect the dignity of the magistrates when they consider there are unjustified criticisms from the political factor. In this case we bring into attention the declarations of the DNA chief prosecutor Laura Codruta Kovesi, who on March 15, 2014 notified CSM regarding carrying out checks on the statements of Radu Mazare, Mayor of the city of Constanta, in order to notice a potential

[22] Antonio Sandu, *Deliberative*…….. p. 239.
[23] Ibidem.
[24] Jurgen Habermas, "Plea for a constitutionalization of international law", *XXIII World Congress of Philosophy. Philosophy as Inquiry and The Way of Life*, Athens 4-10 August, 2013. A se vedea şi Antonio Sandu, *Deliberative*…….. p. 239.
[25] Antonio Sandu, *Deliberative*…….. p. 239.

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touch brought to the "right to image of the magistrates, with consequence of affecting independency of legal system[26]".

"The National Anticorruption Office shows, in a press release sent Tuesday, that the Mayor Radu Mazare made several statements between 9-10 April where he is trying to suggest that the DNA investigation concerning himself is "ordered" and that he is a victim in a political conflict. In regard to the facts that were made his responsibility, from many press articles, the content of the statements and the language used exceed the constitutional and procedural framework regarding exercising the right to defence and the freedom of expression and its limitations", said DNA[27].

As shown in the above DNA press release, the independence of justice can be affected by attacks on its credibility through mass-media by public persons, especially if they enjoy a certain notoriety. We are facing a conflict of values, both reasoning on the development of the state of right, guaranteeing the right to defense and freedom of expression versus the right to image of the magistrate. It is the task of CSM to weigh how much it influences certain declarations of certain public persons the independency of justice.

In the DNA press release it shows that there is a jurisprudence of CSM vis-à-vis the release in mass-media of denigrating statements towards the magistrates that result in affecting the independence of the legal system[28]. The Supreme Council of Magistrates is asked to watch over the independence of the magistrates and to defend their honour and public dignity.

Mona Pivniceru and Catalin Luca show that the legal independence is the one allowing the magistrate to make "decisions that would contrary the interests of other elements from the state (president, ministers, legislators etc.)"[29].

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[26] *** DNA requires the Superior Council of Magistrates to check if the statements of Mayor Radu Mazare affect the independence of the legal system, consulted online at 17.04.2014, at: http://www.hotnews.ro/stiri-esential-17044353-dna-cere-consiliului-superior-magistraturii-verifice-daca-afirmatiile-lui-radu-mazare-aduc-atingere-dreptului-imagine-magistratilor.htm .

[27] Ibidem.

[28] Ibidem.

[29] Mona Maria Pivniceru, Cătălin Luca, "Reglementări internaţionale cu relevanţă în materia deontologiei judiciare", în Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008, p. 33.

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Immovability of the judges. Ethical perspective

A particular dimension of independence of the magistrates is the their need for immovability.

According to the Legal Dictionary, the principle of immovability of the judges represents the "rule according to which judges, once appointed, can be moved through transfer, delegation, detachment or promotion, only with their consent, and cannot be suspended or removed from their position in any other condition than the ones stated by the law"[30]. This principle is understood as being one of the most important principles of organizing justice in a democratic state of law. However respecting this principle represents a guarantee of independence and impartiality of the judges, consecrated by the Constitution of Romania, republished in Art. 125 alin. (1), according to which the judges named by the President of Romania are immovable in the conditions of the law, and also in Law no. 303/2004 regarding the status of judges and prosecutors, republished, that in art. 2 states that the judges named by the President of Romania are immovable[31]. The judges may also be searched, detained or taken into custody only with the consent of CSM, except for the situation of being caught in act, when they can be arrested and searched according to the law, with the obligation for CSM to be informed as soon as possible by the person that ordered the detention or search. Disciplinary responsibility of the judges can be invoked for the deviations from the work related duties, and for acts that affect the prestige of justice only for direct perpetration of deviations, not being able to invoke as reason for sanction the solutions pronounced by the judge, even if they were being abolished by superior courts.

Judges may be suspended from their position only by CSM in one of the following cases:

- When a criminal action was driven against the judge;
- In case of serious mental illness, when there is the risk that it might prevent him from exercising the prerogatives of his position;

The dismissal of judges can be ordered by decree of the President of Romania on the proposal of Superior Council of the Magistrates:

- In case of resignation;
- Retirement;

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[30] *Dicţionar Juridic* consulted online on 17.04.2014 at: http://legeaz.net/dictionar-juridic/principiul-inamovibilitatii-judecatorilor

[31] Ibidem.

Sandu, A., Cabalau, C. (2014). Ethical Perspectives on the Magistrate's Independency Principle. Anuarul Universitatii „Petre Andrei" din Iasi, Fascicula: Drept, Stiinte Economice, Stiinte Politice, 2014, Tomul 14, Decembrie, pp. 121-134.

- In the situation of transfer to a different position;
- In the situation of professional incapacity;
- As disciplinary sanction;
- In case of final conviction;
- In the situation of infringement of the dispositions regarding the interdiction to be operating workers, including under-cover, informers or collaborators of the Intelligence;
- In case of not promoting the exam verifying knowledge by persons named in the position without competition;
- If they no longer fulfil the conditions stipulated by the law regarding: Romanian citizenship, domicile in Romania and full working capacity; lack of criminal record or fiscal record; medical and psychological ability to work[32].

Mona Pivniceru and Catalin Luca show that the fundamental principles of the Organization of United Nations with regard to the independence of the magistrates along with the international complementary documents form a minimal standard with role of control over respecting the rights and duties of the magistrates. In the vision of the authors, the independence of the magistracy is not a finality, being considered a method of access to the State of Law[33]. The role of regulating the independence of the magistrate is creating a procedural framework needed for the protection of the rights of the justice seekers. Independence means also the responsibility of the judge towards public trust in the criminal system. The independent and responsible judge has the duty to base his pronouncements on legal grounds as his own conscience and reason dictates[34].

The independence of justice in report with society

The independence of the magistrate is not only reflected in relation to other powers of the state or other subject of the economical and social life, but also in report to the parts of his own legal system, and the democratic mechanisms of organizing the magistracy, and in the same

[32] Ibidem.

[33] Mona Maria Pivniceru, Cătălin Luca, "Reglementări internaţionale cu relevanţă în materia deontologiei judiciare", în Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008, p. 33.

[34] Ibidem.

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time towards the parts implicated in the processes[35]. The authors mentioned showed that the independence of the magistrate must be done also in relation to the mass-media which can create a false opinion on judicial independence[36]. In this regard we bring into discussion the phenomenon of "telejustice" ("telejustice" – telejustitie is a Romanian concept which defines the media shows presenting persons in preventive arrest even before being sent to trial) especially in mass-media according to "sources" such as recordings, evidence in different criminal records in phases of prosecution which are normally not made public. This situation being frequently repeated leads to the loss of public confidence in justice. In this regard we mention the proposal of the Prime Minister Victor Ponta to move his office from the Government to the office of the Ministry of National Defense, due to false interceptions – in his opinion – that have appeared in the press and that were recorded in the very office of the Prime Minister[37].

A different dimension of the independence of the magistrate is the obligation of professional competency and of solid practice. This obligation is considered by Mona Pivniceru and Catalin Luca as being the independence towards one's own ignorance[38].

Sofia Luca and Diana Magdalena Bulancea talk about two acceptions of the independence of the magistrate, namely: functional independence, systemic towards the external factors such as other powers in the state, the legislative and the executive ones, of mass-media, of the economical environment, other persons and also social organizations, as well as the personal independence as fundamental ethical value of the

[35] Ibidem, p. 34.
[36] Ibidem.
[37] Victor Ponta moves his office from the Government to the Ministry of Defense, invoking the "set up" in the case of Duicu. The rumor about the intention of the Prime Minister has circulated a year ago, consulted online on 17.04.2014 at: http://www.hotnews.ro/stiri-politic-17042334-victor-ponta-mutat-biroul-ministerul-apararii-fiindca-mai-bine-securizat-treaba-duicu-fost-inscenare-astept-mai-multe-inscenari-pana-noiembrie.htm
[38] Mona Maria Pivniceru, Cătălin Luca, "Reglementări internaţionale cu relevanţă în materia deontologiei judiciare", în Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008, p. 35.

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profession of magistrate and the fundamental principle meant to ensure the justice being made and the trust of the audience in justice[39].

Functional and systemic independence of the judiciary is regulated in the international law through:

- Basic principles of independence of justice (act adopted at the 7th Congress of United Nations regarding the Prevention of Crimes and the Treatment of Criminals, which took place in Milan from August 26 until September 6, 1985 and approved through resolutions of the General Assembly 40/32 from November 29, 1985 and 40/146 from December 13, 1985)[40].
- Recommendation R (94) 12 of the Committee of Ministers of Member States of the Council of Europe regarding the independence, efficacy and role of the judges[41].
- Recommendation R (2000) 19 of the Committee of the Ministers of Member States of the Council of Europe regarding the role of the judge in the legal criminal system[42,43].

Personal independence is included in the content of the international acts, mentioning the principles of Bangalore that show that the "Judge, therefore, will support and exemplify the independence of the legal system both from the point of view of the individual and the institution"[44].

[39] Sofia Luca, Diana-Magdalena Bulancea, "Deontologia magistratului", în Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008, pp: 68-81.

[40] Cristi V. Danileţ (trad.) "Principii de bază ale independenţei justiţiei" (act adoptat la al 7 – lea Congres al Naţiunilor Unite referitor la Prevenirea Infracţiunilor şi la Tratamentul Infractorilor, care a avut loc la Milano din 26 august până la 6 septembrie 1985 şi aprobat prin rezoluţiile Adunării Generale 40/32 din 29 noiembrie 1985 şi 40/146 din 13 decembrie 1985), accessed online on 17.04.2014 at: http://www.cristidanilet.ro/docs/Princ.%20de%20baza%20ale%20indep.%20just.doc

[41] Sofia Luca, Diana-Magdalena Bulancea, "Deontologia magistratului", în Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008, p. 70.

[42] Ibidem.

[43] Also see other international norms presented by Sofia Luca, Diana-Magdalena Bulancea, "Deontologia magistratului", în Mona Maria Pivniceru, Cătălin Luca, (coord.) *Deontologia profesiei de magistrat. Repere contemporane*, Editura Hamangiu, Bucureşti, 2008, pp: 70-81.

[44] Sofia Luca, Diana-Magdalena Bulancea, *op. cit.*, p. 82.

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Conclusions

In conclusion, the independence of the magistrate is a fundamental premise of the state of right and of good functioning of justice, targeting on the one hand the institutional framework and the reports of justice with other powers and the society in general, and on the other hand, the personal situation of the judge, his professional competence, the integrity and the prestige it enjoys.

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