

Values and ethical principles for practicing as magistrate/ legal advisor out of the perspective of the codes and national and international statements of principles

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Abstract

The coordinating and regulating role of the moral values, of the Deontological Code in practicing the magistrate/ legal advisor position is analysed in this article, so that their decisions correspond the universal imperative of practical accomplishment of justice, implicitly to the audience's expectations with regard to the efficiency and efficacy of the services delivered by the institutions in the judicial system. The subject is of obvious actuality, fact which results in the existence of a relevant number of cases of violation, deforming of the ethical principles, of the specific deontological norms for the legal advisors, especially for the magistrates, which occur in performing the act of justice. The author highlights through examples, the harmful effects of some magistrates' side-slipping from the ethical principles (Independence, Impartiality, Integrity) stipulated in the most important deontological codes, statements of principles or national and international conventions. The logical conclusion, resulting from the analyses, aims to perfection the judicial system, the moral part of the legal higher education, of the magistrates' continuous training and assessment.

Keywords: ethical values, The Bangalore Principles, Independence, Impartiality, Integrity, judicial decision.

JEL Classification: K40, K42

1. Introduction

A magistrate's mastery of information in the field of legal sciences and of the procedures required for accomplishing an act of justice is not enough for ensuring the professional success expected by other institutions of the state and by the general public, as this kind of knowledge has a prevalently instrumental role and is not a purpose in itself. Ever since justice has existed, the conduct of a magistrate has been perceived and evaluated by institutions, organisations, litigants, public opinion, independent observers, as being the most important factor in accomplishing justice and in securing the credibility, efficiency and efficacy of the judiciary system. For these very reasons, a magistrate's profession is much more than the implementation of legal sciences, while observing official procedures; it depends essentially on extra scientific factors that are part of the magistrate's moral and professional personality structure: belief system, general orientation of his/her personality, ethical values underlying his/her personality and

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guiding his/her entire professional conduct, creed and view on the society, on the life and on the world as whole.

A magistrate's efforts to research and analyse, in good faith, the pieces in a file, with the intent of discovering the truth, resulting from evidence and reasoning, the corollary of which is the completion of an intimate belief – as a necessary support for making a decision to solve the case, can only produce the desired effects in interaction with the ethical and deontological values. Among the main ethical values that guide and coordinate the professional conduct of the magistrate, as it results from the most important deontological codes², national and international magistrate statutes³, universal declarations of principles for the conduct of judges and prosecutors⁴, Constitutions of democratic states⁵, conventions and charters on magistrate ethics⁶, are: independence, impartiality, integrity, decency, equality, competence and diligence (*The Bangalore Principles*, 2001). Many of the moral values and virtues, as illustrious philosopher of law (H.L.A. Hart, 1961) highlighted, are qualities consisting of the ability and disposition to carry forward beyond the limited extent which duty demands the kind of concern for other's interest or sacrifice the personal interest which it does demand. Benevolence and charity are examples of this. Other moral virtues, like temperance, patience, courage or conscientiousness are ancillary in a sense – as they are qualities of the character shown in exceptional devotion to duty or in the pursuit of substantive moral ideals in the face of special temptation or danger.⁷

2. The deontological principles – regulating system for the magistrate's/ legal advisor's career

Ethical values achieve the essential part of the moral and professional culture of magistrates, with the special mention that the two components of the magistrate's culture are complementary, so that together they make an indivisible whole. The gaps that might appear in this whole are a certain source of straying from the right way in taking judicial decisions. The political over-indoctrination, the religious belief pushed to the edge, some magistrates' sensitivity to the interferences of some political or religious leaders into the justice management, the

² For details see *The Deontological Code of judges and prosecutors*, The Official Journal of Romania, Part I, no. 815 of 8 September 2005 and *Codul deontologic al magistraților. Ghid de aplicare (The Deontological Code of the Magistrates. Implementation Guide)*, coord. magistrate Florin Costiniu, Editura Hamangiu, Bucharest, 2007.

³ See *The Universal Statute of the Judge*, adopted by the International Association of Judges, Taipei, 1999.

⁴ See *The Bangalore Principles of Judicial Conduct*, 2001 and *The Guidelines on the role of prosecutors*, adopted by the 7th Congress – UN, Havana, 1990.

⁵ See *The Constitution of Romania*, 29 October 2003, the Official Journal of Romania, Part I, no. 758.

⁶ See *The Convention for the protection of human rights and fundamental freedoms*, Rome, 4 November 1950 and *The European Charter on the Statute for Judges*, adopted by the Council of Europe, Strasbourg, 8-10 July, 1998.

⁷ See Hart, H.L.A. (1999), *Conceptul de drept (The Concept of Law)*, Editura Sigma, Chișinău, p. 179.

racism, the hate versus the immigrant, the xenophobia, the misogynist behaviour, the presence of some conservative dominants into the structure of the personality, the affiliation to a group of interests, favouring a social category or a human community etc. might persist in the conduct of some men of law with malefic effects in the performance of the act of justice, implicitly in taking legal decisions.⁸ We must emphasize that, in the knowledge-based society, imposing some rigour in legal advisors' professional training, as well as in the magistrates' selection and professional advancement, the self-education and professional improvement during the entire career, which is institutionalised in the developed countries, led to the diminishment up to the disappearance, in many situations, of the magistrates' personality characteristic producing malpractice in delivering the act of justice. Not at all coincidentally, before starting to practice their profession, judges and prosecutors take an oath that is charged with ethical significance: "I do solemnly swear that I will respect the Constitution and the laws of the country, that I will defend the fundamental rights and freedoms of each and every person, that I will fulfil my duties with honour, conscience and without partiality. So help me God!". The basis of the deontological obligations assumed by the oath taker is the cardinal ethical value, which may be God for Christians, supreme good or absolute justice for others.

The decision of a young graduate of Law, who has completed all stages of post university training that are required for acceding to a magistrate position, and who decides to take the specific oath, means that s/he has understood the Constitution and the laws of the country, that s/he masters not only the letter, but also the spirit of laws, that s/he is convinced of their legitimacy and value for the development of society. Likewise, it means that s/he consciously and assuredly adheres to a constitutional/legal system, as a necessary element for him/her to serve the fundamental human rights and freedoms. In other words, from a secular point of view, the supreme value of justice is the human being; and on a practical level – it is actually about people, equal before the law, and holders of fundamental rights and freedoms. The magistrate is someone who has sworn to fulfil his/her duties with honour and without partiality, in the service of people. The essence of the consciousness assumed by the magistrate is represented by ethical values, materialized in the morality and deontology that are specific to the magistrate career.⁹ Consequently, a magistrate who abides by this oath will have to consider ethical issues, arising from his/her good faith, in the efforts of developing an intimate belief – necessary in taking a decision, in establishing a professional sentence, thus contributing to the consolidation of the trust in the justice system among the general public.

⁸ A subtle analyze of the effects of some features of personality and highlighting the consequences on the legal decision at the US Courts is performed in the study by Maya Sen, "Is Justice Really Blind? Race and Reversal in US Courts", *Journal of Legal Studies*, published by: The University of Chicago Press, Vol.44 (January 2015), pp. 187-229.

⁹ See Popa,I., *Treaty on the Magistrate Profession in Romania*, Bucharest: Univers Juridic, 2007.

On the other hand, numerous situations appear when the deontological norms of magistrates, whether they are prosecutors or judges, are violated, which public opinion debates present as deviations from the moral principles of independence, impartiality and integrity, followed by the decrease in the citizens' trust in a fundamental institution of the State subject to the rule of law, which is the judiciary system. Such deviations from the deontological norms, performed by some magistrates, raise doubts about their good faith and indicate a misrepresentation in the development of the intimate belief, which might constitute, in some cases, a source of suffering, prejudice and infringement on the freedom of one of the litigating parties.

3. Independence, impartiality, integrity – magistrate's/ legal advisor's ethical standards

The magistrates' perennial ethical values (Independence, Impartiality, Integrity) have to coordinate and regulate their conduct in the relations occurring between one magistrate and another; between magistrates, on the one hand, and litigants, witnesses, lawyers, experts, interpreters and various observers interested in the quality of the judicial process, on the other hand; between magistrates and public servants in other institutions of the State; between magistrates and mass-media representatives; between magistrates and representatives from various NGOs, and organisations of civil society.

The magistrate's independence – as fundamental ethical value – from a psychological point of view – is a durable state of mind, a professional attitude, functionally correlated to his/her good faith, which paves the way to the development of intimate beliefs, as a subjective basis for making judicial decision. The magistrate's attitude and spirit of independence must be expressed, without exception, in any kind of intervention, influence or pressure coming from the outside. A magistrate's responsibility is to apply the law, to make decisions based on the law, on his/her own conscience, on the facts, on the evidence and on the truth, without allowing himself/ herself to be subordinated or influenced by superiors or colleagues in the judiciary system, nor by civil servants, dignitaries, journalists, friends, relatives or someone of the litigating parties.¹⁰ *The Constitution of Romania* consecrates the independence of judges: judges are independent and shall only obey the law [Art. 124 par. (3)]. Hence, the independence of a magistrate is a fundamental personality characteristic which is externalized in relations with any natural or artificial person, with any institution of the State or civil society, with any litigating party, and, temporally, throughout the entire jurisdictional activity, including activities that are prior and posterior to public procedure.

The magistrate's independence has a personal and a functional side, it has a subjective component and an institutional one, being correlated to the

¹⁰ See Sibana, A. (2008), *On the Juridical Ethics of Law Practitioners*, in Copoeru, Ion & Szabo, Nicoleta –Eds., (2008), "Ethics and Professional Culture", Cluj-Napoca :Casa Cărții de Știință, pp. 191-209.

independence of the panel and with the independence of the judicial power, which is specific to the rule of law – the certain warranty for a fair judgment. International documents of the highest importance stipulate the following as ethical rules of conduct for the magistrates:

- a judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.¹¹

- the observance of *The Bangalore Principles*, of *The Basic Principles on the Independence the Judiciary* (approved by the UN General Assembly on 29 November, 1985) or of *The Deontological Code of Judges and Prosecutors – 2005*, should naturally be reflected in the exemplarity and quality of the act of justice, in a stronger public trust in the judiciary system, without which the independence of judicial power cannot be maintained. Yet, in reality, various cases of infringement have occurred, signalled both by magistrates, and by the mass-media, which have acted as factors that might prejudice the independence of either the magistrate, or of the judicial institution, or even of the judiciary as a system. Such phenomena have been and might be: the existence of deficiencies in selecting magistrates, which allow the entrance of pseudo legal experts into the system; worn-up magistrates and their failure to adapt their professional culture to the new requirements brought about by the renewal of legislation, the judiciary or the expectations of society; adherence of some magistrates to mystical communities or political orientations; comments and disclosures in the mass-media; interference by the president of the court or the main prosecutor in the criminal investigation or in courtroom debates; interference by a fellow magistrate; threats received from a pressure group; message of a political leader; introduction of material liability for malpractice in the professional conduct of magistrates; proposal of money or other undue advantages (payment of a trip for the judge's family; the magistrate is invited to hunting parties abroad; payment of tuition fees for the magistrate's son, who is studying abroad etc.); the magistrate's adherence to certain vices (drug use, alcoholism, gambling etc.); belief in the inferiority or superiority of a human race or ethnic group; attendance of circles of politicians, masons, racketeers; friendly or interest based relations with one of the litigating parties; the judge's friendship with the prosecutor – as indicated by them entering the courtroom together; tolerance of racism, xenophobia, religious discrimination etc. in court. All these phenomena have extra- and para-verbal components, interpretable by an expert psychologist; they may be perceived by the "public eye" or by an informed and independent observer, and create the appearance of influences, raising doubts about the magistrate's good faith and acting as inhibiting, perturbing factors in the development of his/her intimate belief.

¹¹ For details see *The Bangalore Principles of Judicial Conduct*, 2001.

On the other hand, impartiality, as an overarching ethical value of conduct, unless it becomes a durable state of mind and a vector attitude in the conscience and professional behaviour of the magistrate, may have the undesired effect of deceptiveness, accompanied by nonverbal expressions, characteristic of persons infringing on moral and disciplinary norms. Theoretical approaches and sociologic empiric studies on the magistrates' professional behaviour from the perspective of impartiality, non-discrimination and moral integrity have been performed since the existence of the justice, being re-taken from one stage to another of the development of the legal system and of the society. Such analyses may be also found in the literature of specialty in the juridical culture of the late modernity.¹²

In definitions provided by dictionaries, impartiality is equivalent to a person's quality of being objective, impartial and equidistant in thought and judgment. This logical meaning of the notion is also true in the judiciary: impartiality is a durable state of mind and attitude of the magistrate that categorically demands him/her to have no prejudice or bias, to favour or disfavour no one, to be objective, honest, correct, and impartial. The content of the concept of magistrate's impartiality is complementary to the notion of independence.

Impartiality, as a fundamental ethical value of magistrates' conduct, is defined and theorized in some of the most important international and national documents in the field.¹³ Thus, as an indispensable principle to the exercise of the judicial function, both throughout the stages leading to judicial decision, and in the justification of this decision, impartiality is thus presented:

- a judge shall perform his or her judicial duties without favour, bias or prejudice.
- a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.¹⁴

Likewise, *The Deontological Code of judges and prosecutors in Romania*, reiterates, in full accordance with juridical documents and the jurisprudence of international courts, that magistrates must be impartial in exercising their professional duties, that they shall "abstain from any behaviour, action or manifestation likely to negatively affect confidence in their impartiality" [Art. 9, para. (2)]. Regulated by the perennial ethical values of justice, by the specific deontological code, the conduct of magistrates shall not fail, shall produce justice, shall ensure the effectiveness and efficiency of judicial acts; the good faith of magistrates shall function unadulterated, shall not give rise to doubts, shall be open to transparency, but, in judicial practice, there are also factors that might adulterate

¹² In such context, we may signalize among others the paper signed by Sonu Bedi, "The Horizontal Effect of a Right to Non-Discrimination in Employment: Religious Autonomy under the U.S. Constitution and the Constitution of South Africa", *Boston University Law Review*, Vol 95, Issue 3 (May 2015), pp. 1181-1204.

¹³ For details see C. Danileț (2008). *The Impartiality – an Obligation and Virtue of Judges*, in Copoeru, Ion, Szabo, Nicoleta (Eds) (2008), *op. cit.*, pp. 178-191.

¹⁴ *Ibidem*.

or undermine impartiality. Numerous magistrates, as well as other categories of jurists, journalists, professors of law, various informed and neutral observers have raised awareness about aspects pertaining to the conduct of some magistrates which raised doubts about their impartiality, for instance: the magistrate has an interest in the case; the judge is active in listening only when communicating with one of the parties; the judge has one of the parties as a tenant in one of his apartments; the judge has intimate relations with the lawyer of one of the parties; the judge and the defense lawyer are friends and frequently spend their free time together; the judge and the defendant are members of the same homosexual community; the judge was sponsored by the defendant for publishing a book; the judge pronounces the sentence since the very beginning of debates; the judge is related to one of the parties; the judge has published his opinion and beliefs regarding the inferiority of a race or ethnic group; the judge does not analyse some of the pieces of evidence in the file of one party, claiming that they are not relevant; the judge participates in solving a case where one of the parties is the son of a colleague; the judge (former rape victim) has a rapist as a litigant in the trial she presides over; the judge's wife is in the same parliamentary Commission as the accused, who is charged with involuntary manslaughter; a party to the trial is a colleague and childhood friend of the judge etc. However, the magistrate's good faith, as an attitude and system of ethical beliefs, generates the capacity to reject such distorting factors of impartiality, favouring the development of an intimate belief based exclusively on truth, evidence, support and logical reasoning.

Another fundamental ethical value in coordinating the work of magistrates is integrity. In dictionary definitions, integrity is understood as the quality of being honest, moral, incorruptible, and having a personality guided by moral values. A magistrate's integrity, as a state of mind, as a durable and prevalent attitude in his relations with himself/herself, with others and with the society in which s/he lives, is reflected in the consistency between his/her words and his/her deeds, between his/her verbal, professional and extraprofessional behaviour – as a consequence of being guided by ethical values, both professionally and personally.

The main international ethical and legal documents emphasize integrity as a *sine qua non* component in the exercise of the judicial function:

- a judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
- the behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.¹⁵

The magistrate's integrity is an obligatory moral and personality trait and a prerequisite for the exercise of the judicial function. This also results from other international and national documents, such as: *The Basic Principles on the Independence of the Judiciary* (UN Principles) – 1985; *The Constitution of Romania* – 2003; *The Deontological Code of judges and prosecutors* – 2005.

¹⁵ *Ibidem*.

Integrity is part of a unitary system of moral values, of an axiological paradigm that regulates the magistrate's verbal and behavioural conduct, which includes, in addition to independence and impartiality, other correlative ethical values, such as decency, honesty, correctness, loyalty, solidarity with one's fellow humans etc. The application of this paradigm of value by a judge or prosecutor, by the judiciary at country level and by each of the institutions composing it, is a gauge for the quality and efficiency of judicial activity, for the degree of public trust, and for an informed and objective observer's confidence in the judicial power.¹⁶

Yet, both professionally and extra professionally, there have been prosecutors and judges who demonstrated inconsistencies between their words and their deeds, between their professional status and how they responded to the requirements of this status, feigned behaviours and moral duplicity.¹⁷ Such were the cases of magistrates who were caught practicing group intercourse; who frequented Masonic societies, or clubs owned by racketeers and infamously harbouring prostitution and drug use; who repeatedly initiated quarrels with their family and neighbours; who maintained friendly relations with a rich racketeer, charged with human trafficking; who requested and received "small gifts" from persons of dubious character; who behaved in ways that contravened to common mores; who were known for their frequent quarrelling with fellow magistrates; who participated, as spectators, in striptease shows; who, by repeated ad hominem attacks, undermined the professional dignity of their colleagues; who dressed inappropriately to their position while inside the institution; who participated in pyramid games etc. Such behaviours, manifested until the sentence is pronounced, and implicitly throughout the phases that are preliminary to the public procedure of the trial, may contribute to the distortion of judicial decision. They may result in omissions, substitutions of information, shallow analysis of files, incoherence, and inadequacy in logical reasoning and analysis and in justifying judicial decision. All these are negatively reflected in the process of development and completion of the magistrate's intimate belief and, in some cases, have generated regrettable judicial errors, thus contributing to a public lack of confidence in the performance of the judiciary and to a failure to meet society's expectations with regard to the function of judicial power.

4. Instead of conclusions

The efforts of prosecutors and judges, in collaboration with other persons (police officers, lawyers, witnesses, experts, interpreters etc.), for ascertaining the deeds of the accused, the relations between criminals and their victims, between the two litigating parties, as accurately and objectively as possible, for correctly

¹⁶ For details see S. Luca & D.M. Balancea.(2008), *Deontology of the Magistrate*, in Pivniceru, M.M. & Luca,C.- coords. „Deontology of the Magistrate Profession. Contemporary Landmarks”, Bucharest: Hamangiu.

¹⁷ See Rădulescu A. (2008),”Aspects of Evaluation of the Behaviour of Judges from a Qualitative Perspective”, in Copoeru, Ion, Szabo, Nicoleta (coord.) (2008), op. cit., pp. 256-268.

evaluating the damage incurred by the victim, are regulated by good faith, by ethical values, by the deontological norms of the jurist profession – as internal factors of the magistrate’s personality. The belief and attitudes of magistrates, as dominant traits of character, as vectors of value for their personalities and as intrinsic, axiological oriented motives, should be durable states of mind, based on superior feelings, oriented by an ideal of life, by their view on human condition, society and the world, which guides all professional dealings of magistrates. A case is solved in the process of recreating facts and gathering evidence, the final product of which is the intimate belief of the magistrate – the subjective support for adopting a judicial decision.

The magistrate’s good faith, correlated to the accumulation of sufficient evidence for justly solving the case, the existence of evidence-based logical argumentation, are prerequisites for the development and completion of the magistrate’s intimate belief. In this cumulative process, the magistrate’s system of ethical values (Independence, Impartiality and Integrity) has the role of guiding and orienting his/her professional activity. Any deviation from ethical values and deontological principles, by committing acts such as those exemplified in this study, may adulterate not only the intimate belief, but also the judicial decision. In rarer cases, detachment from or underestimation of the ethical-axiological system may result in grave and regrettable judicial errors or in a narrow juridical techniques, entirely dependent on the “letter of law”, lacking perspective and, as such, likely to be materialized in “mechanical” sentences, mostly controversial and, sometimes, unfair from the viewpoint of the “spirit of law”. In such context, we might accept that “however, even were we to press ahead with such a critique, it may be that we must also carry forward the fundamental insights of philosophical jurisprudence. Ethics are about living well. And writing well”.¹⁸

Finally, another practical conclusion can be drawn, namely: the professional training of jurists in general, and magistrates in particular, should include, in terms of undergraduate and postgraduate education, the assimilation and application of knowledge on judicial psychology, sociology of law, logic, ethics and professional deontology, philosophy of law. Just as physicians are responsible for the health of the population, magistrates are responsible for the “health of society” or for remedying anomic states existing in society. Their profession needs to be permanently updated to new realities, which requires continuous learning and improvement, knowledge of the novelties having emerged in juridical culture and of its complementarities with perennial ethical values, with the principles of professional deontology and with the new expectations of the public as regards the quality of juridical services.

¹⁸ Adam Gearey.(2016), “We Want to Live”: Metaphor and Ethical Life, in F. W. Mailand’s Jurisprudence of the Trust”, in “*Journal of Law and Society*”, Vol. 43, Issue 1 (March 2016), p. 122.

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