

HUMANS BETWEEN RULES AND ETHICS

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Abstract

The quality of magistrates is not a gift of nature or a right conferred by the rank you occupy in a society, instead it represents one cumulation of principles, social and moral values that society confers upon the invested, which must be respected and improved, so that the time factor does not alter their significance. Analysis of the liability of judges must, however, start from the responsibility of all persons who carry out a public service. Justice is also a public service and those who are exercising the act of justice cannot remain outside the democratic principles of accountability and responsibility.

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1. State of the art

For the judges to ensure the rule of law, they need a status and special guarantees, such as independence and impartiality. There is an international judicial corpus iuris concerning various interests in strengthening the role of the judge. I will just mention some of them: Universal Declaration of Human Rights (UN, Paris, 1948), the International Covenant on Civil and Politics (UN, 1966), European Convention of Human Rights (Council of Europe, Rome, 1950), Basic Principles of Independence Justice (UN General Assembly, 1985), European Charter on the Statute of Judges (Council of Europe, Strasbourg, 1998), The EU Charter on Fundamental Rights (European Council, Nice, 2000), The European Judges' Charter (European Magistrates' Association, 1987), Universal Statute of Judges (International Union of Magistrates, 1999), Bangalore Principles on Judicial Deontology (UNODC, Judicial Group for the Enhance Integrity, 2001) etc. Therefore, the judge is the constitutionally appointed person for the execution of justice, which he executes under the law. Judges of the courts are independent, impartial and irremovable and they are subject only to the law.

Judges make decisions in an independent and impartial manner and act without any direct or indirect limitations, influences, pressures, threats or interventions, from any authority, including judicial. Justice, as a system, but also individual judges, must be able to exert their powers without being influenced by legislative power, executive power or by various groups of interests and people. In applying the law, the independence of judges excludes the notion of subordination and hierarchy. The international principles explicitly state that judges must make decisions and exercise freedom and act without restriction and without being subjected to influences, incitements, pressures, threats or unlawful, direct or indirect interference, regardless of whose side they come.

By his achievement of justice balance in the application and interpretation of legal norms, the magistrate must observe the social, moral and legal principles and in the exercise of his duties he must show good faith. So, in Romanian judiciary, inspired mostly from the French one, the accountability of the magistrate requires identification of the activities performed by him (judge or prosecutor) for the execution of the act of justice and the criteria in relation to which it defines its criminal, civil, administrative or moral responsibility.

The magistrate's responsibility was also admitted by the European judicial institutions, which appreciated that it requires caution, determined by the need to preserve independence and freedom against any kind of pressure. The magistrate's responsibility should not be regarded as a breach of the independence of the judge and the prosecutor, because such an interpretation would make independence stand out with irresponsibility.

In reality, the two notions have the role of ensuring the transparency and fairness of the act of justice. Even if it seems a contradiction between the terms (*independence* and *responsibility*), the first one assures the magistrate independence from other powers in the state and influence of any kind and the second one assures the balance of this separation.

The forms of liability of magistrates cannot differ from other forms of legal responsibility. What is specific to the magistrate is the responsibility he carries with the decision he takes. This decision has repercussions on people's lives (Deaconu, 2012). So, before answering for the judgments issued, the magistrates must be accountable for the importance of their role in society. They must understand that the objective of justice must be the desire of people not to have to resort to its services.

Speaking of the independence of the judiciary and of the judge, all the legal guarantees services offered in the support of the judges' independence must be doubled by their behavior of devotion and respect for the law. It is not enough for a judge to judge well in an independent

manner. Judges must possess an inner balance, courage, understanding of society, and judgment. To be able to divide justice, they must first of all, be fair and honest.

2. The Correlation Between Criminal Liability and Disciplinary Liability

More frequently, the cumulus of legal liability occurs when, through a single offense, committed with guilt or without guilt, there have been violated both criminal and disciplinary rules and at the same time there is a violation of the conduct rules imposed by the Code of Ethics. Although, the criminal rules, the disciplinary deviations and the rules established by the Code of Ethics concern the same definition of the magistrates' activity: independence, impartiality, integrity, decency, equal treatment of all citizens before the law and competence. In case of criminal liability cumulated with disciplinary and moral responsibility, disciplinary and moral responsibility are conditioned by the fact that the act does not constitute an offense. Consequently, if a magistrate is investigated for committing a criminal offense which renders him incompatible with the exercise of his position or disciplinary research has begun upon him, he is suspended until the final prosecution of the criminal proceedings.

In the framework of criminal liability and disciplinary liability, the form and degree of guilt is an essential element both for characterization as a crime or disciplinary deviation of the magistrate's offense and for the application of criminal punishment or disciplinary sanction, whereas in the case of moral responsibility is essential the curse of the magistrate in relation to the ethical and social principles imposed by the magistrate statute and its community.

The cumulation of the three forms of accountability of the magistrate is also justified under the assumptions that can be applied. Thus, the commission investigating a criminal act attracts the administration of a criminal punishment; the commission of a disciplinary offense attracts the application of the sanctions provided by Art. 100 of Law no. 303/2004, which may reach up to excluding from magistracy.

3. Duties Of The Superior Council Of Magistracy In The Field Of Disciplinary Liability Of Magistrates

Article 99 of the Law 303/2004 provides the following discipline misconducts for magistrates:

- a) manifestations which affect the honor or professional probity or the prestige of justice, committed in or outside the exercise of his/her duties;
- b) violation of legal provisions on incompatibilities and prohibitions on judges and prosecutors;

- c) unwilling attitudes in the exercise of service duties towards colleagues, the other personnel of the court or prosecutor's office in which they operate, judicial inspectors, lawyers, experts, witnesses, judges or representatives of other institutions;
- d) carrying out public activities of political nature or manifesting political beliefs in the exercise of their duties;
- e) unjustified refusal to receive requests, conclusions, memos or acts filed by the parties to the case;
- f) unjustified refusal to perform a duty of service;
- g) failure by the prosecutor to comply with the provisions of the hierarchically superior prosecutor, in accordance with the law;
- h) repeatedly and for imputable reasons not complying with the legal provisions regarding the speedy settlement of cases or repeated delays in the performance of the works, for imputable reasons;
- i) non-observance of the duty to refrain when the judge or prosecutor knows that there is one of the causes provided by the law for his or her abdication, as well as repeated and unjustified requests for abstention in the same case, which has the effect of delaying the trial;
- j) non-observance of the secrecy of the deliberations or the confidentiality of the works that have this character, as well as of other information of the same nature, which has become known in the exercise of the function, except for those of public interest, according to the law;
- k) absent from service, repeatedly or directly affecting the activity of the court or the prosecutor's office;
- l) the interference in the activity of another judge or prosecutor;
- m) unjustified non-compliance with the administrative provisions or decisions ordered in accordance with the law by the head of the court or the prosecutor's office or other administrative obligations stipulated by law or regulations;
- n) use of the function held to obtain favorable treatment by the authorities or interventions for solving certain claims, accepting or claiming the resolution of personal interests or of family members or other persons, other than within the legal framework regulated for all citizens;
- o) serious or repeated failure to comply with the provisions on random distribution of cases;
- p) obstruction of inspection activity of judicial inspectors by any means;
- q) direct participation or interpenetration of pyramid games, gambling or investment systems for which transparency of funds is not ensured;

- r) the complete lack of motivation of court decisions or judicial acts of the prosecutor, according to the law;
- s) the use of inappropriate expressions in court judgments or judicial acts of the prosecutor, or the obviously contradictory reasoning of the legal reasoning, such as to affect the prestige of the judiciary or the dignity of the magistrate; failure to comply with the decisions of the Constitutional Court or the decisions of the High Court of Cassation and Justice in resolving appeals in the interest of the law;
- t) exercise of the position in bad faith or serious negligence.

Actions committed by the magistrate with bad faith or negligence may also constitute disciplinary misconduct. For instance, there is bad faith when the judge or prosecutor violates the material or procedural rules of the law, pursuing or accepting the injury of a person. There is serious negligence when the judge or prosecutor disregards, in a gravely, unreasonable and inexcusable manner, the rules of substantive or procedural law.

Verification of complaints about the good reputation of judges and prosecutors in office is done by the Judicial Inspection, *ex officio* or at the request of any interested person. The inspection report drawn up as a result of the checks on good repute shall be communicated to the magistrate subject to the notification and to the person who submitted the complaint, within 15 days from the drawing up, for the objection. This inspection report, along with the objections formulated, shall be forwarded to the appropriate section of the Superior Council of Magistracy. On the basis of the report and the objections formulated, the corresponding department adopts the decision regarding the fulfillment or non-fulfillment by the magistrate of the good reputation condition, or, if it considers that the objections are well founded, disposes, in written and reasoned manner, the resending of the report in order to complete the verifications, expressly indicating the issues to be filled in.

During the procedure of verification and verification of the fulfillment of the good reputation condition, the corresponding department of the Superior Council of Magistracy, *ex officio* or at the proposal of the judicial inspector, may order the suspension of the magistrate, until the procedure is completed, unless his/her activity does not affect the impartial conduct of verification procedures or if these procedures aren't likely to seriously undermine the prestige of justice. The decision of the Section may be challenged with appeal to the Plenum of the Superior Council of Magistracy within 15 days of the communication and the decision of the Plenum may be appealed with appeal to the High Court of Cassation and Justice Administrative Appeal Division within the same term. The court's decision is irrevocable. The irrevocable

decision, which establishes the non-fulfillment of the good reputation condition, is communicated to the Romanian Presidency, in order to issue the decree of dismissal.

4. Deontological Rules On Magistrates

The Code of Ethics for judges and prosecutors sets their standards of conduct in accordance with the honor and dignity of the profession (see the Superior Council of Magistracy: Decision no. 328/2005 for the approval of the Code of Ethics of Judges and Prosecutors, published in the Official Gazette, Part I no. 815 of 08.09.2005; Decision no. 607/2005 amending and supplementing the Regulation on the organization of the competition or examination for the appointment in the leading positions of judges and prosecutors, published in the Official Gazette, Part I no. 61 of 23.01.2006; see also the Regulation on Capacity Examination of Legal Specialized Staff Assimilated to Judges and Prosecutors of the Ministry of Justice and the National Institute of Criminology, published in the Official Gazette, Part I no. 122 of 08.02.2006, as well as the Order of the Minister of Justice no. 410/2006 approving the Regulation on the Capacity Examination of Legal Specialized Staff Assimilated to Judges and Prosecutors within the Ministry of Justice and the National Institute of Criminology, published in the Official Gazette, Part I no. 122 of 08.02.2006).

Compliance with the norms contained in the Code of Ethics is a criterion for assessing the effectiveness of the quality of the activity and integrity of judges and prosecutors. The following principles have been retained as rules of judicial deontology:

1. Judges and prosecutors must promote the supremacy of the law, the rule of law and defend the fundamental rights and freedoms of citizens.
2. Judges and prosecutors must defend the independence of the judiciary.
3. Judges and prosecutors must exercise his/her office with objectivity and impartiality, having as the sole law the law, without complying with pressures and influences of any kind. Judges and prosecutors must refrain from any conduct, act or manifestation that could alter confidence in their impartiality. In case of incompatibility, judges and prosecutors are obliged to abstain, according to the law. They may address the Superior Council of Magistracy for any act likely to affect their independence, impartiality or professional reputation.
4. Judges and prosecutors cannot militate for the admission of others to a political formation, cannot participate in the collection of funds for political parties and cannot afford the use of their prestige or image for such purposes.
5. They cannot give any support to a candidate for a public office of a political nature.

6. They cannot serve the acts they perform in the exercise of their service duties in order to express or manifest their political convictions. Judges and prosecutors may not attend public meetings of any political nature.
7. Judges and prosecutors are permitted to provide legal assistance, under the conditions provided by law, only in their personal circumstances, their ascendants, their descendants or their spouses, as well as in those of their guardians. In such situations, they are not allowed to use the capacity of judge or prosecutor to influence the court or prosecutor's decision or to create the appearance of such influence.
8. Family and social relationships of judges and prosecutors should not influence the solutions they take in the performance of their duties; they are forbidden to intervene to settle claims, to claim or to accept the resolution of personal interests or of family members or other persons, other than within the legal framework.
9. Intimidation in the work of other judges and prosecutors is forbidden.
10. Judges and prosecutors are obliged to perform their professional duties with competence and fairness, to observe the administrative duties established by laws, regulations and orders.
11. Judges and prosecutors must impose order and solemnity during the settlement of cases and adopt a dignified and civilized attitude towards the parties, lawyers, witnesses, experts, interpreters or other persons and ask them for appropriate behavior.
12. Judges and prosecutors are under the obligation of not disclosing or using for purposes the information they have obtained in that capacity other than those directly related to the exercise of their profession. If, according to the law, the works are of a confidential nature, judges and prosecutors are obliged to keep the respective materials inside the court or the prosecutor's office and to allow them to be consulted only within the framework provided by law and regulation.
13. In the exercise of their leading functions, judges and prosecutors must be concerned with initiative and responsibility regarding the organization of the work of the staff. In making his decisions, he must give priority to the interests of the courts and prosecutor's offices, as well as to the good administration of justice. Judges and prosecutors with leading positions cannot use their prerogatives to influence the conduct of proceedings and the settlement of cases.
14. They are obliged to refrain from any acts or deeds that might compromise their dignity in office and in society. The relationships of judges and prosecutors in their collectives must be based on respect and good faith, regardless of seniority in their profession and function. Judges

and prosecutors cannot express their views on the professional and moral probity of their colleagues.

15. They cannot carry out actions which, by their nature or manner of financing or enforcement, may in any way impede the performance of professional obligations, impartially, justice and legality.

16. They are obliged to abstain, according to the law, from any activity related to the act of justice in cases involving the existence of a conflict between their interests and the public interest in the performance of justice or defense of the general interests of society.

17. They may be members of committees for the examination or drafting of normative acts, internal or international documents.

18. They may be members of civilian or academic societies, as well as any private legal entity without patrimonial purpose.

19. They must defend citizens' equality before the law and promote impartiality by ensuring non-discriminatory legal treatment, respecting and defending the dignity, physical and moral integrity of all persons who participate in any capacity in judicial proceedings.

20. They must promote the proportionality of coercive, deprivation or restrictive measures taken by virtue of law and the speedy procedures for the speedy restoration of the breach of law. Judges and prosecutors are obliged to exercise due diligence in order to carry out their assigned work, in compliance with legal deadlines, and, if the law does not provide, within reasonable terms.

21. They may participate in the elaboration of publications, may produce articles, specialized studies, literary or scientific works, and may participate in audiovisual programs, except those of a political nature or of those that may affect the image of justice.

Conclusion

Therefore, in order for the state to act in a regressive manner against the magistrate, the judicial error must have caused the damage by bad or serious negligence. If any of these conditions are not met, the state may not, through action in regression, appeal against the magistrate in order to recover the damage.

According to this article, the state recognizes the injured citizen, as a principle, to be compensated, but practically restricts the exercise of this right, conditioning it upon the pre-existence of a court decision that concerns the judge or prosecutor. There are situations in which a person, although victim of a judicial error, cannot be compensated because the magistrate did

not act in bad faith or in serious negligence. The state is the guarantor of fundamental rights and the way its institutions work and therefore, from the point of view of state-citizen relations, the reason that led to a judicial error is irrelevant. Then, both the prescription of the right to action for the correction of the judicial error and the exercise of the right to regress is very short (1 year) according to Art. 96 Law 303/2004), making the provision inapplicable.

This law, which limits the exercise of the right to compensation, should be abolished, by allowing any citizen who has been injured as a result of a judicial error, to claim the damages from the state, whether the error was or not caused by the judge's fault or the prosecutor's.

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