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MAGISTRATES' ETHICS AND DEONTOLOGY

ETHICS AND DISCIPLINE.

THE TRANSITION FROM CASE LAW TO THE CODIFICATION OF
DISCIPLINARY VIOLATIONS IN THE ITALIAN REFORM OF THE JUDICIAL
SYSTEM: EFFECTS ON FREEDOM OF EXPRESSION AND ASSOCIATION.

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1.- From the myth of Socrates to Antigone “One evening in July 1947, Gaetano Salvemini, returning to Italy after over twenty years exile,¹ told a group of friends what he had been told by a famous American judge: 'I'm not here to do justice but to enforce law'; that sentence impressed Salvemini who approved it”². The idea at the basis of that thesis comes back to the Socrates' praise of the law according to which he was sentenced to death³ and it was developed by Montesquieu and his rule of the judge as “the mouth of the law”. In any case, there is no room for interpretation and no possibility for the judge to have a dialogue with the legislative power and society about possible future reforms in any field of the civil life.

In reality, relating to this particular theoretical construction, it has been noted that law enforcement cannot be lacking in a moment of interpretation: as Calamandrei pointed out, in fact, interpreting the law "means to go back to the *ratio* from which it was born, that is, in essence, to the political inspiration flowing in it and enforcing its social relevance. This leads us to believe that in any legal interpretation there is a degree of political choice”⁴.

Nowadays, moreover, the judge is no longer required to a supine subjection to the law, which may be applied if and insofar as it complies with the constitutional precepts which also arise as primary conditions for the hermeneutics activity. Thus, the myth of Socrates is replaced by that of Antigone who refused to submit to the rules of Prince Creon forbidding the burial of her brother Polynices, invoking the principles of humanity that are not subject to any of the laws of the Prince⁵.

therefore, whether through the activity of interpretation or with the scrutiny of constitutionality, the judge will ultimately be assigned a role that is no longer that of “the mouth of the law” but that he is able to interact with the social and political reality in which he/she works.

2.- The raising of the disciplinary question. The evolution of the judge's role in society and the increasing importance of the jurisdiction as a resource to govern the modifications of society (sometimes even before the encroachment of the legislative power) and to protect the interests of people leads to an increasing workload for the magistrates which have, now, effective tools to affect the reality of a defined historical and social moment.

¹ Gaetano Salvemini (1873 - 1957) was a historian and professor in the University of Florence, supporter of the Socialist Party; after Mussolini's ruling in power in Italy, he was forced to leave Italy and, when he arrived in USA, he was employed in the Harvard University.

² This episode is mentioned in “*The judge and the prince*” by P. Borgogna – M. Cassano, page 49

³ PLATO, *Il Critone*.

⁴ P. CALAMANDREI, *Praise of the judges written by a lawyer* 1959 – 2011, Milan, page 271

⁵ SOPHOCLES, *Antigone*, performed for the first time in Athens in 442 b.C.

However, that is also why today the legitimacy of the judiciary can no longer reside, as previously thought, in the technical capacity of judges to apply the law to specific cases (so as to give the legislator the final responsibility for the judicial measures adopted) but must be sought in the ability of the judge and of the entire judiciary to acquire and maintain the confidence of citizens and the community. Hence the need for the magistrate not only to be impartial but also that his/her conduct inside and outside the office is such as to appear "impartial and independent" in the eyes of citizens⁶.

Indeed in recent years, judicial ethics and discipline⁷ have been object to special attention in many countries of the West and in a growing number of states, codes containing more or less detailed judicial behavior rules have been adopted.

If, on the one hand, values and principles which in different States guide the activities and conduct of judges (integrity, impartiality, independence, diligence) appear common, on the other hand, the ways through which these values are effectively promoted and protected are different. In particular, one of the most significant differences is in the degree of precision with which the principles of ethics and of judicial conduct are formulated and their application in disciplinary proceedings. Traditionally, judges were sanctioned (and still are in many jurisdictions) on the basis of disciplinary rules formulated in very vague and general terms. This type of disciplinary system has been criticized at least in two respects. Firstly, the vagueness of the rules of conduct could attribute too much discretion to the disciplinary body, risking development of a threat to the independence of the judge who might be punished for a simple interpretative tendency. Secondly, excessive discretion of the disciplinary Judge (usually made, at least primarily, by members of the judiciary and then by colleagues of the magistrate on disciplinary trial) can lead to excessive leniency and to failure to sanction objectively improper conducts which ought to have a punitive response. Precisely for these reasons, the need to codify judicial ethics by adopting organic and systematic

⁶ G. DI FEDERICO, *L'evoluzione della disciplina giudiziaria nei paesi democratici*, in *Gli illeciti disciplinari dei magistrati ordinari prima e dopo la riforma del 2006*, di D. Cavallini, CEDAM, 2011, p. XX.

⁷ Deontology (whose etymological meaning is "science of having to be") means, in the sense now commonly accepted, "*the set of moral rules governing the exercise of a profession*"; according to a more precise definition (that, especially in view of the background objective of this paper, seems particularly appropriate), the term ethics means "*the rules and principles governing special conducts (excepting technical professional conducts), implemented or otherwise connected with the exercise of the profession and membership of the professional group*". In relation to the judiciary, this set of rules, in addition to ethical significance, may also have a disciplinary one, resulting that the breach of these may lead to the imposition of a disciplinary sanction by an organism that in Italy is the "Superior Council of the Judiciary" (or rather, the appropriate Disciplinary Section). On a theoretical plan, distinction between ethical and disciplinary rules (or, equally, between ethics and discipline) is based on differing degrees of imperativeness and cogency of relative provisions.

texts is often invoked. These contain detailed rules of conduct and specifically provide for the facts having disciplinary relevance⁸.

3.- The evolution in Italy. In Italy, before 2006, there was an unique and generic rule that was used as a basis for the selection of the disciplinary violations⁹, with all the inconvenience that comes from such an undefined literal formulation. That's the reason why in 2006 Italy adopted new regulations which provide extremely detailed rules of judicial conduct. If the new system limits the discretion of the governing bodies of justice, it has been noticed, on the other hand, that it seems unsuitable in achieving the "promotional function", that consists not in punishing but in "preventing events that may interfere with the proper functioning of the administration of justice"¹⁰. This particular aspect has been valued by The Council of Europe which has clarified that codes of judicial ethics should not only aim to provide standards to be used for disciplinary purposes but also inspire the judges to adhere to the highest standards of conduct, thus performing a function of inspiration and guidance. This is why these codes should adopt standards for sanctioning practices not typically provided but that may be detected as seriously damaging the image of the judicial function¹¹.

However, this strict "typification" of disciplinary faults creates gaps in the law enforcement system, leaving entirely without penalties those conducts not expressly provided for and in clear conflict with the ethical feelings prevailing in the community and the judiciary. It also seems lacking in the above mentioned promotional profile, lowering (rather than raising) the standards of conduct of the judge. These standards, indeed, beyond the consequences that may result from their transgressions, ought to guide the members of the judicial class both in the exercise of their judicial functions and in other moments of their lives.

⁸ This trend has been shown more evidently through the attention given by several international institutions to the issue of crystallization of the ethical rules: for example, within the numerous initiatives on this point, the *Bangalore Principles of Judicial Conduct* drawn up through an initiative of the United Nations Organization on Drugs and Crime (UNODC) and the *Latin American Code of Judicial Ethics*. At European level we can mention the initiatives of the European Network of Councils of Justice (ENCJ), the Commission for the Efficiency of Justice (CEPEJ) and the Consultative Council of European Judges (CCEJ).

⁹ King's decree n. 511 31st May 1946, at article 18, punished "*the magistrate who faults to his duties or has a behavior, in or out his functions that makes him not worthy of the trust and consideration of his role, or that might compromise the prestige of the judicial order*".

¹⁰ Comment to Rule 1 of the *Judicial Conduct and Disability Act for the U.S. Federal Judges*, 1980.

¹¹ See Recommendation cm / rc. (2010) 12 of the Committee of Ministers to Member States on Judges: Independence, efficiency and Responsibilities. Recommendation 72 states: "*Judges should be guided in their activities by ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves*". Recommendation 73 also states: "*These principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and judiciary. Judges should play a leading role in the development of such codes*".

4.- The Code of Ethics for the Judiciary. In addition to the aforementioned disciplinary regulations (which have been enacted by legislative power), the judiciary has autonomously adopted its own code of ethics. The adoption of a "Code of Ethics for the Judiciary" is grounded in art. 58-bis, paragraph 4, Legislative Decree No. 29/1993 whereby it was established that *"for each magistracy and for the State Bar Department, the related Professional Associations must adopt within one hundred and twenty days from the date of entry of the enforcement of this decree, a code of ethics which will be subjected to the adhesion of members of the magistracy involved. After the expiry date of that period, the code will be adopted by self-governing bodies"*. By examining this rule, it is clear that: 1) the Professional Associations is responsible for elaborating those codes, 2) all the magistrates (whether from the accession of each of these to the Professional Associations) are asked to express their opinion on text drafted and proposed in the associated Sitting, 3) each self-governing body has only a subsidiary role, and it operates in sole case of inaction or inability of associations to draw up a text.

The formulation process of the code - and in particular the provision concerning adhesion of magistrates - seems to indicate the legislator's awareness that ethical rules are considerably more effective and successful when they are an expression of professional commitment freely undertaken by judges themselves towards citizens, as it makes each judge a kind of "guardian of himself"¹².

The rules of the code of ethics do not have the typical binding relevance of legislative precept, as stated in the preamble of the code of ethics adopted by the National Association of Magistrates¹³ in 1994; also the CSM¹⁴ has adopted a policy along similar lines. Therefore, even when ethical and juridical-disciplinary levels overlap, there is no necessary coincidence between the two sets of rules. In some cases the violation of the ethical code may be a sign or a confirmation of a breach of disciplinary rules, but in other cases it stands below the threshold of disciplinary fault¹⁵. Disciplinary sanction is warranted by the violation of the "ethical minimum", while the ethical-

¹² B. GIANGIACOMO, *Codice etico e dirigenti degli uffici di Procura*, in *Questione giustizia* (nn. 2-3-/1994).

¹³ The National Association of Magistrates (ANM in Italian acronym) is a private-law association whose membership is made up of nearly all Italian magistrates.

¹⁴ CSM (Consiglio Superiore della Magistratura) is the Italian acronym for the Superior Council of the Judiciary: see footnote 7.

¹⁵ Upon application, however, the distinction between ethics and discipline is not always so clear: it is not possible to determine precisely whether the disciplinary decisions are influenced by ethics. It happens that the Disciplinary Section, in explaining its decision, refers to the rules of the code of ethics or that code of ethics is expressly numbered among the sources of disciplinary liability. This mostly occurred before the 2006 reform when the system of disciplinary responsibility was governed by a rule from the vague and general content (so that the rules of the code could be a benchmark for filling with concrete contents behaviors from time to time brought to disciplinary trial). However, it is possible that this blend of ethics and discipline may also occur under the new legal regime both in strengthening the motivation of a disciplinary decision and in clarifying the meaning of some of the new rules of conduct (even today not always formulated so as to eliminate any doubt of interpretation).

professional precept indicates to the association members the goals that involve reaching the highest standards of professional ethics¹⁶.

However, this should not render the rules of the code of ethics as irrelevant, since the violation of the code's precept may trigger a moral and social sanction, extremely effective, not only within the sphere in which the magistrate operates, but especially within the Judicial Councils (i.e. bodies which in Italy, have at a local level, an advisory role on the activity of magistrates, in the preparation of advice for career advancement, transfer of functions from the jurisdictional office to the prosecutors), or allocation of management positions¹⁷. Thus, through these channels, the code of ethics can certainly become both intensive and effectiveness endowed instrument¹⁸.

5.- The freedom of expression: the position of The Italian Constitutional Court and of The European Court for Human Rights. Among the ethical rules of behaviour, particular attention must be paid to the ones concerning the freedom of expression and association of the judges for the rich number of relevant court cases. Particular attention should be given to the procedures developed before and after the 2006 reform, to underline the cleaner gap created by this reform between ethics and discipline (with the consequent danger of leaving, without real and/or dissuasive sanction, behaviour conflicting with the canons of ethics but not falling within any of the cases of disciplinary offence anticipated by the legislator).

It is generally known that the right of expression is among the fundamental principles of liberty proclaimed and protected by our Constitution¹⁹: Obviously, therefore judges must enjoy the same rights of freedom guaranteed to every citizen, including the right to freely manifest their own thoughts. However their functions, qualifications and roles are not indifferent and have an effect on the constitutional organisation. The main question concerns exactly the limits of such liberty²⁰.

The Constitutional Court, with sent. n. 100 of 1981, has affirmed that those limits must be functional only to balance the constitutional rank prerogatives of the judge (particularly impartiality

¹⁶ Disc. Sec. CSM, March 5th 2004 (proc. n. 100/03); Disc Sec.. CSM, March 16th 2003 (proc. n. 69/2002). See also E.J. MAITREPIERRE, *Ethics, deontology, discipline of judges and prosecutors in France*: "...it is certain that if any disciplinary fault, is a deontology fault, any failure with deontology does not involve a disciplinary action or an action of civil liability".

¹⁷ See N. ROSSI, *Prime riflessioni sul codice etico della magistratura*, in *Questione giustizia*, 1993, n. 4.

¹⁸ See G. NATOLI, *Il codice etico dei magistrati e i codici etici sovra-nazionali*, report prepared for the CSM – Rome, October 14th 2003 e M. CICALA, *Terzietà del giudice e sistema disciplinare dei magistrati*, in *Rivista di diritto privato*, 2007, f. 2.

¹⁹ See Art. 21, paragraph 1, Const.: "Everyone has the right to freely express their thoughts through speech, writing, and any other means of communication." The substantial limitations of this freedom cannot be set except by law and must be based on constitutional precepts and principles, explicitly stated in the Constitution or derived from the strict application of the rules of legal interpretation.

²⁰ W. NUNZIO, *Libertà di manifestazione del pensiero e deontologia professionale del magistrato*, report prepared for the conference organized by the National Order of Journalists and by the about "the judiciary and the media" - Genoa 23-24 October 1998.

and independence, see arts. 101, paragraph 2 and 104, paragraph 1, Cost.) with the right to free expression of thought, in the search of a correct equilibrium between needs equally guaranteed by the constitutional order. More precisely, according to the Court "the balance of the protected interests does not compress the right to express one's own opinions but avoids its anomalous exercise, that is the abuse that emerges when the values of impartiality and independence are damaged"; such values "must not only be protected with specific reference to the concrete exercise of the jurisdictional functions, but also as a deontological rule to be observed in every behaviour with the purpose of avoiding any conduct that may legitimately question the independence and impartiality of their task". The two most important indications that surface from the sentence in matter are that the independence and the impartiality of the judge are to be preserved also outside the exercise of his jurisdictional functions in order to avoid any doubts on his independence and impartiality in the exercise of the jurisdiction, and that the freedom of speech of the judge can extend up to the point where the independence, the prestige and the credibility of magistracy are not prejudiced, ending in abuse or abnormal exercise of that right.

The intervention of the Constitutional Court about the way to reach a harmonious balance between two opposite issues appears to be in line with the European Convention of Human Rights that in art. 10 declares that the liberty of demonstration of thought "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society... for the protection of the reputation or the rights of others...or for maintaining the authority and impartiality of the judiciary"²¹. According to the European Judge, to establish if art. 10 has been violated by a State, it is necessary to verify whether the restrictive measure was "foreseen by law"²², aimed at "one or more legitimate purposes" (among those enumerated in the

²¹ On the problem of the balancing among liberty of expression, investigative secrecy and privacy (not being specific object of this paper), see the decision ECHR, Craxi v. Italy, July 17 th 2003 in *Diritto e giustizia*, 2003, n. 33, with comment by G. BUONOMO "Sulla tutela della riservatezza la Corte dei diritti striglia l'Italia. Ma pesa la dissenting opinion del giudice italiano", p. 78 See the decision *Dupuis v. Francia*, in Cass. pen., 2007, n. 12, with the comment of A. BALSAMO e S. RECCHIONE "Il difficile bilanciamento tra libertà di informazione e tutela del segreto istruttorio: la valorizzazione del parametro della concreta offensività nel nuovo orientamento della Corte europea", p. 4796 ss.. See also, about the influence of the media on the principle of the presumption of innocence, R. SABATO, *Judiciary and media*, report for the seminary *The independence of judges and prosecutors: perspectives and challenges* – Trieste, 28 febbraio-3 march 2011: "According to the Court, "Article 6, para 2,[ECHR] cannot...prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected".

²² In order to interpret the locution "prescribed by law" the jurisprudence of the Court of Strasburg took over time a less formalistic orientation: the law has to be considered not only in formal sense (law coming from the Parliament) but also including the administrative acts issued in accordance with the delegation of the Parliament or having their base in the law. See the case *Silver* and the case *Barthold v. Federal Republic of Germany* (25.03.1985, Serie A n. 90) in which one of the texts mentioned was a deontological code issued by the Order of the Veterinary and not by the Parliament. See also the decision *Sunday Times v. The United Kingdom* (26 April 1979, Serie A n. 30) in which the concept of law has been clarified: "The word "law" in the expression "prescribed by law" covers not only statute law...It would clearly be contrary to the intention of the drafters of the Convention to

second paragraph)²³, was "necessary in a democratic society"²⁴. Also in Europe a lively debate is taking place on judicial ethics and discipline, proven by a number of guidelines and recommendations coming from international organizations, also composed of judges like the Consultative Council of European Judges. The Consultative Council of European Judges, established within the Council of Europe, has provided a number of suggestions regarding the specific role of the judge²⁵.

The Consultative Council has also noted with interest the current practice in some countries, where the task of communicating to the press the issues of public interest is entrusted to a judge responsible for communications or to a spokesman²⁶.

6.- The freedom of expression and the concrete application of the disciplinary rule. On the basis of indications of the jurisprudence of the Italian Constitutional Court and the one of the European Court, in the nineties the Superior Council of Judiciary adopted a series of resolutions and deliberations. These aimed to fill the lack of precision (in consideration of the wide area left open by the only disciplinary rule) and to fix some general principles in matters of liberty of expression of judges that constitute an answer to the dual need to limit the declarations of the judges and to

hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that is not enunciated in legislation...". All the quoted decisions by the ECHR are available on the website www.coe.int.

²³ The legitimate purposes, which the law may pursue and which can legitimate a restriction to the liberty of demonstration of the thought, are very numerous. A certain number of cases has concerned the restrictions to the liberty of expressions "for maintaining the authority and impartiality of the judiciary" Particularly in some situations the State has the duty to strike the individual liberties or fundamental rights, like the expression of the thought, in order to protect the right to an equitable trial that risks to be violated by the publication of information related to the proceedings. See *Barford v. Danimarca*, 22 febbraio 1989, Serie A n. 149, in *Ridu*, 1989, n. 2, p. 324 ss.; *Observer and Guardian v. Regno Unito*, 26 novembre 1991, Serie A n. 216, in *Ridu*, 1992, n. 1, p. 316 ss.; *Prager and Oberschlick v. Austria*, 26 aprile 1995, Serie A n. 313, in *Ridu*, 1995, n. 3, p. 726 ss.; *De Haes et Gijssels v. Belgio*, 24 febbraio 1997, in *Ridu*, 1997, n. 2, p. 348ss..

²⁴ The border of appreciation of this last requisite is very ample when it is at stake the protection of morals, being difficult to draw a European's notion of morals. See the case *Handyside v. The United Kingdom* (7 December 1976, Serie A n. 24): "It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject".

²⁵ See R. SABATO, *Judiciary and media*, in the report for the seminary "The independence of judges and prosecutors: perspectives and challenges" – Trieste, 28.02-3.03.2011: "Recalling the obligation of reserve of courts vis-à-vis the press, the Council stressed the need that the judge preserve his independence and impartiality and avoid any possible use of his/her personal relationships with journalists, and any improper comment on the procedures being dealt with. This consideration introduces another point of view: the need to avoid the establishment of privileged press relationships for private use of the court to the benefit of judges and/or prosecutors, and to the advantage of journalists vis-à-vis their competitors. The CCJE, given the right to information guaranteed by article 10 of the ECHR, felt that the court had an obligation to meet the legitimate expectations of citizens so that it is convenient that decisions are accompanied by a summary or a statement explaining the merits or specifying the meaning of decisions for the public".

²⁶ R. SABATO, *Judiciary and media*, quoted *supra*: "The suggestion has been accepted in Recommendation n. 12 of 2010; Article 19 in fact provides that "The establishment of courts spokesperson or press and communication services under the responsibility of the courts or under council for the judiciary or other independent authorities is encouraged. Judges should exercise restraint in their relations with the media". The primary purpose of these acts is to promote the independence, impartiality and professional competence of the judiciary by establishing the fundamental principles and obligations regarding the status of the judge that should apply at supranational level. It is anyway "soft law", i.e. regulations not binding but encouraging member states".

ensure, when necessary, the correct information of the public opinion²⁷. In those cases, the attention of the magistrates self-government body was centred on the relationship with the press: it was pointed out that it “is always appropriate that the magistrates avoid releasing declarations to the press regarding proceedings that they are dealing with, or that they are going to deal with; it is also appropriate to avoid declarations regarding defined procedures, even in a particular fragment, by that magistrate”; but (and here there is the point of balance between the two opposite issues) “when particular reason of public interest claims clearness and transparency to assure the public opinion about an open proceeding, it's appropriate that the magistrate will report the situation to the chief of the office which may allow, if he thinks appropriate, the magistrate to release a public declaration concerning non-secretive matters ”²⁸. Furthermore, The National Association of Magistrates code of ethics dedicates the first two paragraphs of Article 6 to "*relations with the press and other mass media*" and affirms that the judge can give information about judicial activities, as long as they are not secret or reserved, only in order to ensure correct information through the exercise of right to report news or to protect the integrity of citizens²⁹.

How does the Disciplinary Section apply those principles? The analysis of that specific duty may be done considering different situations: in all cases, the task of the Disciplinary Section is to determine whether a statement by the magistrate has remained within the limits allowed or has transcended into abuse owing to undue attacks on the legal position of other parties or against the exercise of constitutionally protected functions, evaluating however if any eventual over-tone or single expression or topic can be explained and justified in the particular context in which the statement was made³⁰.

Beginning with the statements on the preliminary investigation and other statements about the court case: they both refer to confidentiality in the strict sense (judicial), in particular to the duty of magistrates to avoid declarations concerning proceedings they personally are dealing or have dealt with. According to the resolutions of the CSM, the rule states that the judge must avoid giving news

²⁷ See CSM, resolution 18.04. 1990 ; CSM, resolution 19.05. 1993; CSM, 1.12.1994, in www.csm.it.

²⁸ In particular, resolution 18.04.1990, point 3.

²⁹ Art. 6 of the code of ethics, adopted in 1994 by the Central Directive Committee of the ANM, states: “1. *In relations with the press and other media, the magistrate shall not seek the publication of news relating to the activity of the Office.* 2. *When he/she is not bound to secrecy or confidentiality of information known for reasons of his/her office and feels the need to provide news in order to ensure correct information to citizens and exercise of freedom of the press, or to protect the reputation of the citizens, he/she must avoid the creation or use of personal or privileged information channels.* 3. *Without prejudice to the freedom of expression, the magistrate shall follow the criteria of balance and measure in statements and interview to newspaper and other media.* 4. *The magistrate must avoid to participate the magistrate avoid participating in broadcasts in which we know that the events of current legal proceedings will be subject to a staged representation”.*

³⁰ See Disc. Sec. 16th March 2003, n. 49 (proc. n. 69/2002).

on current or previously held legal activity, unless – and this is the exception - there are reasons of public interest that make it necessary to provide correct information to citizens (dispelling misconceptions or preventing distortions), provided that it is neither secret nor confidential information. In this case the goal of the legislator is to protect both the course of the proceeding which may be undermined in its effectiveness³¹ by the diffusion of information and independence and impartiality of the judicial function in general; of course, if none of these values is in danger, there is no duty of confidentiality to be preserved and the information can be spread. This may happen if the diffusion of information is positive for the investigations in the case, when – for example - cooperation of the citizens is necessary, when the risk of jeopardizing the investigations is not specifically proven, when the act disclosed is already known to the suspect, if statements are generic (i.e. they deal with general topics with measured tones and were not provoked) or if there is a public interest in information³².

In addition to disclosures about investigations, other statements of the judges on the subject of the case may become disciplinary relevant in several respects. The first relates to the statements of the judge on the subject of the decision, in advance of or even after the filing of the award. Early declarations, the so-called “anticipation of judgement”, create the suspicion that the conviction of the court was formed before and outside its natural place (the trial); subsequent declarations, if critical or polemic, dilute the confidence in, and the foundation of, the decision. In such situations, the values most often jeopardised are the freedom and the impartiality of the trial, and that is the

³¹ See Disc. Sec., 11th July 2003, n. 77 (proc. n. 86/02 e 39/03) which has condemned in six months loss of service-seniority and *ex officio* transfer the magistrate who, during the investigations, after he have ordered the search and the sequestration of a farm in order to protect the area from the dangers of environmental deterioration, had allowed the police to “make a press release concerning the investigation,” and “to make a disclosure through national and regional newspaper of information relating to the content of the proceedings.” The police was also authorized to “provide any further oral and photographic information about the places and the object of the investigations”. See also Disc. Sec. January 31st 2002, n. 11 (proc. n. 20 e 21/2001) who sentenced the prosecutor who had said in various interviews and press articles that he was deprived of the direction of the investigations concerning the murders of two prominent journalists “for occult reasons”. In particular he had accused the chief prosecutor of being the author of a persecution against him, disparaged the government for telling lies, discredited the other colleagues calling them “incapables”, and also the CSM for not taking any measures against the chief prosecutor who had unlawfully dispossessed him of the investigation.

³² See Disc. Sec. 26 November 1999, n. 122 (proc. n. 51/97) e Cass. SS.UU., 9 July 1998, n. 11732 who have acquitted the magistrate who in an interview anticipated the contents of statements by an important defendant, with the following reasons: “the conduct of the judge who reveal facts related to a process, known because of his office, can create a risk of interference or injury to the investigation, only if realizes a concrete and actual danger which must be demonstrated”. See also Disc. Sec. July 4th, 2003, No 70 (Proc. No. 109/2002) which have acquitted a magistrate who, in a newspaper article, had argued that the CSM decided to remove him from the investigation, considering that the article was concerning a general theme (the relations between the judiciary and policy) and contained measured tones. See, *ex multis* Disc. Sec., October 29th, 1999, No 104 (Proc. 89/97) having acquitted a judge that, although he had given an interview on acts of investigation, did not add anything new to what had already been released and entered the public domain.

reason why if the words of the magistrate tend to create suspicion that the trial had not been fair (involving the public interest to the fairness of the proceedings), disciplinary liability arises.³³

The second aspect concerns the comments, especially dissent, that prosecutors address to decisions of judges who reject the accusations they put forward. Such statements, in addition to questioning the impartiality of the prosecutor who must be a body of Justice ensuring the proper application of objective law, undermine the legitimacy of the court decision³⁴.

The so-called political criticism concerns personal statements not related to cases but of more general content, like the expression of a political opinion or the criticism of political institutions. In these cases, there is no risk for a specific proceeding but the expressions may raise the suspicion that the work of judges will be constrained by political aims and orientations and, in the worst case, even exploited for such purposes. To determine if this behaviour is disciplinary relevant, it's important to see the medium through which they are expressed and their content (which can address various topics, from the socio-political criticism to the denigration of lawyers or judges, from comments on ongoing trials to anticipations of the court decision, provided these are not relevant to the objective of the decision but are only to give an account of the reasons of fact and law that support its issue). The limit is here established according to the consequences that this action produces on the impartiality of the judge especially under the dimension of the appearance of being impartial: if the declarations released are able to affect this particular aspect, there is room for liability³⁵.

Finally, the case of the personal opinions contained in a court resolution not relevant to that purpose should be analysed: these statements stand out not only for their content but also for not respecting

³³ See Disc Sec., April 6th, 1992 (Proc. No. 10/90, 62 and 73/91) condemning the magistrate who had seriously hurt the reputation of persons prosecuted by him saying in an interview published in a local newspaper that such people "*were doing everything to avoid their process to be celebrated.*" See also Disc. Sec November 29th, 1991 (Proc. No. 36/91) condemning a magistrate who, in order to defend himself from criticism directed against him for having given a series of benefits to the offender, had given an interview stating that the evidence against the convicted were weak, so spreading the public opinion belief that an innocent man was condemned.

³⁴ See Sec. disc., February 28th, 2001, No 28 (Proc. No. 30/2001) which has condemned the prosecutor who had strongly criticized an acquittal pronounced by a court using the following expressions: "*a sentence outside reality*", "*incredible how, with such immensity of evidences, they could acquit*" "*there is no end to the worst*", "*the legal capacity of all are in stake ... how can you enclose in two hours of deliberation a so intense process?*".

³⁵ See Disc Sec., June 2nd, 2000, no. 79 (Prov. No. 76/99), which has condemned a magistrate for having made statements to the press in which he openly expressed his political inclination and the desire to join a political party. For Disc. Sec. these behaviours "*screech severely with the principles of impartiality, objectivity, balance, confidentiality, which must inspire the action of the magistrate, and have seriously damaged the credibility and the prestige of the judicial function and the judiciary over all.*" With regard to cases of acquittal, see Disc. Sec., March 5th 2004, no. 20 (proc. No. 100/2003) which has ruled out the disciplinary responsibility of a magistrate who criticize the actions of the Government in an interview to the press, by using terms like "*bad people*" and "*sleazy and bad government*": in this case the Disciplinary Court has considered that the expressions used had no offensive character in the light of the recent trend towards a greater aggressiveness and barbarization of political language. See, *ex multis*, Disc. Sec, 2nd April 2004, n. 36 (proc. No. 16/2004) which has absolved magistrates who had signed an appeal to vote of a political party, considering that their adhesion to the electoral program was a way to exercise the right of free expression *ex art. 21 Cost.*

the limitations that come with their being inserted into a judicial act³⁶. Consciously overcoming this statutory scheme to expose personal views, meta-judicial or not relevant to the function of the measure, can be considered behaviour to be assessed for disciplinary purposes. It is clear that the disciplinary jurisdiction cannot be transformed to control the content makers, but the independence of decision may not extend to cover forms of abuse or exploitation of the substantiation that are not directly consistent with the object of the trial³⁷.

In certain moments of increasing social and institutional disagreements, the need to protect the magistrate from direct attack of other power led to the so called "practices to guardianship of magistracy" which have the goal of placing the situation in the hands of the CSM in reaction to undue attacks or unjustified provocations coming from other powers or extraneous subjects to the judicial order: criticism of magistrates is possible and legitimate but, if it becomes defamatory, denigrations may determinate from the CSM an authoritative answer to publicly restore the image and the prestige of the judicial institution³⁸. Also it should not be forgotten that, in many cases, the intervention of the CSM has been accompanied by the personal reaction of the same judge under attack³⁹.

³⁶ See D. CAVALLINI, *Gli illeciti disciplinari dei magistrati ordinari prima e dopo la riforma del 2006*, CEDAM, 2011, p. 240-241.

³⁷ See Disc. Sec., 12.6.1992 (proc. n. 83/1991 e 35/1992). See also Disc. Sec., April 10th, 1992 (Proc. No 63 and 80/91) which have condemned a judge who – declaring the inadmissibility of the appeals proposed by the prosecution – had used some offensive expressions to the professional dignity of the prosecutor as *"the prosecutor never read the proceedings"*, *"the accusatory confusion is complete and evident the total absence of any specific reason"* *"evidently p.m. do not know, or if he knows, he cares little"*. See also Disc. sec., February 3rd, 1993 (Proc. No. 42/92) condemning a magistrate who, in a measure on the separation of a couple, had used expressions of contempt for society, the parties concerned and even the legal rules he had applied: in particular he called divorce as *"repudiation provided by law and judicial practice, and by the moral, prompted by disturbing elements of the good associated life which have turned the traditional morality"* and have defined the parties concerned as *"wretched family"* *"wretched parents"*. On the contrary, Disciplinary section has acquitted a judge who, in interpreting the new legislation relating to reasonable duration of trial, had accused the lawyer class for the excessive increase in the number of cases and asserted that *"justice cannot be used, as it was for school, to eliminate intellectual unemployment of youth. They are unprepared and unfit for other jobs, and take refuge in professional rolls to make ends meet"* (Disc. Sec., February 7th, 2003, n. 8 - Proc. No. 98/2002). This last decision has been taken because disciplinary Judge considered that the magistrate's words represented a mere recognition of the regulatory framework applicable to the examined case.

³⁸ See resolution of the CSM of December 15th, 1999, *La tutela dell'onore professionale e della dignità personale dei magistrati*. L'esigenza di garantire il rispetto della funzione giudiziaria See also the resolution of July 9th 1998, *Tutela dei magistrati nei confronti degli attacchi denigratori*. According to the art. 21, inside reg. of the CSM, the practices to guardianship *"presuppose the existence of such injurious behaviours of the prestige and the independent exercise of the jurisdiction to determine a disturbance to the regular carrying out or to the credibility of the judicial function."* Such tools, however, have received lots of criticisms since they did not find any basis in juridical norms and have allowed the CSM to actively intervene in the political debate making tensions with external subjects, often invested of high institutional roles, even more acute.

³⁹ Nevertheless, the judges' reactions to personal attacks have been criticized even by the ECHR in the decision *Buscemi v. Italy*, of September 16th 1999 that has affirmed that *"the duty of impartiality required the judicial authorities to maintain maximum discretion with regard to the cases with which they deal, even where they were provoked"*; the Court has finally considered that the public statements by an Italian president of a youth court had been *"such as to justify the applicant's fears as to his impartiality"*. (The case concerned a letter written by the president of a youth court to a daily paper to reply to another letter published on the same daily paper by the father of a child that had harshly criticized the provisions of the court around the custody of his daughter). See also R. SABATO, *Judiciary and media*, quoted *supra*: *"...in a number of documents the Consultative Council of European Judges has recommended that reaction may come from a specific body in charge with the protection of independence. Recommendation n. 12 of*

7.- The new system of disciplinary rule after 2006. The D. Lgs. n. 109/2006, has identified three hypotheses of violation of the duty of reservation: 1) disclosure, also due to negligence, of acts of the proceedings either secret or for which the prohibition of publication is anticipated, as well as the violation of the duty of reservation on cases in progress or on concluded cases, when it can unduly affect the rights of other people (art. 2, lett. u); 2) the public declarations or interviews that concern the parties involved in the case, either in progress or already treated but not yet concluded with a definitive provision, particularly when they are aimed at unduly affecting the rights of other people (art. 2, lett. v) as well as the violation of the prohibition subjected to the norms that discipline the organization of the Public Prosecutor office (art. 2, lett. z); 3) the solicitation of publicity of news related to his own office activity and/or the establishment and fruition of personal, reserved and privileged informative channels (art. 2, lett. aa).

The discipline introduced with the D. Lgs. n. 109/2006 seems to tackle in rather simple and concise terms a complex matter for which in the past articulated criteria of judgment had been elaborated. This is proven by the fact that the new disciplinary violations are only three, despite the variety of known cases, making use of rather general terms where nothing is said about the possible justifications like public interest or correct information of citizens, largely used in the past. Such violations, furthermore, would seem to concern only news related to the activity of the office, while the aspects of extrajudicial confidentiality seem to remain without any specific regulations. The new discipline appears therefore primarily aimed at the guardianship of confidentiality of preliminary investigations and of pending and/or defined cases⁴⁰. The new system maintains the absolute prohibition of disclosure of secret acts or of acts for which a prohibition of publication subsists, but, unlike the past, any declarations regarding the activity of the Prosecutor's office coming from the District Attorney and anyway any externalizations that do not have the characters of impersonality are forbidden. The declarations of facts or news concerning the office, therefore are admitted only if impersonal and if they come from the head attorney⁴¹.

2010 has enshrined this principle in art. 8 "where judges consider that their independence is threatened, that should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy".

⁴⁰ See D. CAVALLINI, *Gli illeciti disciplinari dei magistrati ordinari prima e dopo la riforma del 2006*, CEDAM, 2011, p. 276-277.

⁴¹ The D. Lgs. n. 109/2006, concerning the reorganization of the office of the District Attorney, established in art. 5 that: - the general Attorney personally maintains, or through a prosecutor who is delegated on this purpose, the relationships with the organs of information (§ 1); - the information on the activity of the prosecutors must impersonally be attribute to the Office, excluding every reference to the attorneys assignees of the procedure (§ 2); - it has been established a prohibition to the prosecutors to release declarations or to furnish news to the organs of information around the judicial activity of the Office (§ 3); - the general attorney has the obligation to signal to the Judiciary Council – in order to the purpose of the solicitation of the disciplinary action – the behaviors of the prosecutors that are in contrast with the mentioned prohibition (§ 4). About the possible consequences of the new regulations

As far as the general obligation of reservation about activities in progress or completed, there seem to be some differences with the past: the concrete possibility of punishing such misbehaviour is subject to its "fitness to unduly affect the rights of other people". Such criterion introduces a significant restriction of sanctions, that hence seems to aim at striking those cases in which the declarations of the judge have caused a damage to the confidential nature, reputation or dignity of the person under investigation, to other parties of the trial, or to third persons extraneous to the trial. The intent therefore is to avoid attacks of personal nature, while there is no reference to the equally important fact that declarations can jeopardize the trial activities in progress or future, like the effectiveness of the preliminary investigations or the impartiality of the decision.

Moreover, the point on which the new legislation seems to show a gap is the protection of the confidentiality outside the exercise of judicial functions especially with respect to statements that do not relate to court proceedings. Behaviors such as the statements or comments about institutions, politicians or government policy, or the expression of political ideology, do not seem related to any of the typified rules. This could have a negative impact on the protection of impartiality, especially as the appearance of impartiality that every judge should ensure even outside the exercise of the functions. Only in this way the persons should not doubt the genuine nature of the decision and the unconditioned freedom of judgment.

Unfortunately, the latest disciplinary sentences do not allow the identification of more precise orientations concerning the protection of the duty of reserve. The judged cases are few and complex because they contain a plurality of incriminations within which the violation of reserve has often a secondary value⁴².

8.- Right of association and magistrates: the enrolment in political parties. Another sector of relevant interest under the aspect of deontology and strictly related to the right of expression, is the one concerning the participation of the magistrate in associations, organizations and groups of

on a disciplinary plan, see R. FUZIO, *Le dichiarazioni dei magistrati agli organi di informazione: limiti e rilevanza disciplinare*, in *Foro it.*, 2007, f. 2, part. 5, p. 69 ss..

⁴² See Disc Sec., January 23rd 2009, n. 39 (proc. n. 84/08) which condemned a judge that had released outrageous declarations towards the Constitutional Court affirming, *inter alia*,: "Everyone knows what the Constitutional Court has become, or better how it was transformed through the contiguity of some members to the political power...some constitutional judges spend too much time into famous living rooms and they love too much the good food, so that the institutional problems arise, as well as cholesterol or line ones." Instead the Disciplinary Section acquitted a judge who, reporting to a journalist, had turned heavy accusations towards the Prosecution Office: "the problem in Naples is not Secondigliano or the populace of the districts but the illegalities that are enormous at all levels, from the Presidency of the Region to the Prosecution Office. As me other colleagues have escaped, some in Tuscany, some to Bergamo, other ones elsewhere because there are not the conditions to live and to honestly work in every level. There are judges that always postpone the more complex trials because they don't want to work on them; cases of corruption are forgiven without nothing happens". The Disciplinary Section has considered that in this case the declarations of the judge constituted legitimate explication of the right of critical that can be used also to report the serious dysfunctions in the judicial offices (Disc. Sec., June 16th 2008, n. 68, proc. n. 86/07).

various nature. The subject of the freedom of association of the magistrate and the compatibility of the magistrate's status with the ties of being a member of an association, can be analysed observing two different profiles: enrolment into a political party and the affiliation to the masonry.

Firstly, although the right of association is a fundamental right of freedom recognized to every citizen⁴³, belonging to a political party has a direct and negative impact on the independence of the judge, or better, on the appearance of independence of his role: in fact, even if the party has an organization based upon democratic values, the membership and the subsequent acceptance of the inner command structure creates the risk of subjection to the decision of the political headquarters of the party⁴⁴.

Before the introduction of the new disciplinary system in 2006, there was no explicit rule that prohibited a magistrate from participating in a political party. This idea was supported by two different justifications; first, the fact that the article n. 98 of the Italian Constitution allows the Parliament to limit and even to deny the right of the magistrates to take part in a political party: if the political power, although having the permission of the Constitution, has not established a specific prohibition, that means that there is a full freedom in being part of a political party. In second place, the Superior Council of the Judiciary (which has disciplinary power over judges and prosecutors) uses a very high (almost evanescent) idea of politics as the “politic of ideas”⁴⁵, and the ideas, do not injure the independence of the judges, who continue to have political ideas even if they do not take part in a political party.

The situation totally changed after 2006. In fact, the disciplinary rule⁴⁶ establishes that a professional magistrate could be punished as a disciplinary illicit (depending on extra functional behavior) for the “enrollment or the continuing and systematic participation to political parties or the commitment in activities of the economic or financial world that might condition the exercise of the functions or, in any case, might compromise the image of magistrate”. That new rule has created a large debate because many authors claimed that the introduction of such a limited discipline clashes with the letter of Constitution that wanted a limitation of the enrollment in political parties

⁴³ Constitution, article 18: “*all the citizens have the right to liberally associate, without permission, to reach goals not prohibited to each-one by criminal law*”; art. 49 “*all the citizens have the right to liberally associate in political parties to concur, with democratic methods, to determinate the general politic of the country*”.

⁴⁴ C. MORTATI, *Institutions of constitutional law, II volume*, Padua, 1976, 1276, note 1: “*if nobody can't contest a magistrate, because holder of political rights, to have a political opinion and to exercise that rights in conformity with that opinion, it's true the same that his particular position of independence would be, with no doubt, weakened or compromised because of the special ties depending from the enrollment in a political party*”.

⁴⁵ CSM, Disciplinary Section, March 5th 2004, n. 20 (proc. 100/2003).

⁴⁶ Artt. 1 e 3 paragraph 1, lett. h) d. lgs. February 23rd 2006, n. 109.

but not a substantial denial of that possibility⁴⁷: being part of a political party does not necessarily mean a loss of independence depending on the capacity of the judge to keep apart the dimension of the daily practice from his political ideas. Finally, such a restrictive prohibition would be lacking of reason, considering that we are talking about a primary right that must be granted to every citizen.

A recent sentence of the Italian Constitutional Court⁴⁸ has directly faced the matter, cleaning up all the doubts regarding the consistency of that law with the Constitution. The judges, on one side, state that the right of political participation must be recognized also to the magistrates; on the other side, they precised that “we must admit that the functions and the rule of magistrates are not irrelevant or without consequences in the juridical order” because these public officials encumber “special duties”, because they “for constitutional prescription (article 101, 2nd paragraph and 104, 1st paragraph) must be impartial and independent and these values must be protected not only during the concrete exercise of their functions but also as a deontological rule to be respected in every situation in order to avoid any suspicion about their independence”. Therefore, in the balancing of values that the parliament may assume in its political design, it is not unreasonable to admit prevalence at the profile of the image of impartiality instead of other constitutional rights, with the consequence that the law is consistent within the Constitution.

The fact that a magistrate is not allowed to take part in a political party does not mean that the magistrate is prohibited from being elected in a list of a party as parliament or even as a member of the Council: in fact, in these cases the law only prescribes that the magistrate has to temporarily suspend the role of the magistracy (that means that the magistrate cannot exercise functions); after the expiration of the charge, there is no obstacle for the magistrate/politician to return to the previous work. As everyone can appreciate, there is a clear contradiction in the system with obvious negative consequences about the protection of the rule of separation of powers and of the impartiality of the magistrate: in fact, on one side, the law prohibits the enrolment of a magistrate in a political party, but, at the same time, allows the same people to cover political functions and to wear again, at the end of this period, the robe of judge or prosecutor⁴⁹.

⁴⁷ Constitution, article 98, 3rd paragraph: “the law may establish limitation to the right of being part of a political party for magistrates”.

⁴⁸ Constitutional Court, July 17th, 2009, n. 224 and note by Sandro De Nardi “the article 98, third comma, Constitution recognizes to the legislator the power non only to restrict but also to prohibit the enrollment of magistrates in political parties (even if they are out of the role for a technical duty)” in *Giur. Cost.* 2009, 6, 5121.

⁴⁹ See D. CAVALLINI, *Gli illeciti disciplinari dei magistrati ordinari prima e dopo la riforma del 2006*, CEDAM, 2011, p. 235. For a different view about the phenomenon of the “politicization” of judges and about the “proper framing” of that phenomenon as “pluralism of ideas”, v. L. PEPINO, *Politizzazione*. The Author claims that the formal neutrality of the judges may hide the same risk occurred during the Fascistic period when “an unknown sewing achieved between the high level or politicization and the self

9.- The position of the European Court for Human Rights. The identification of a “point of balance” between prerogatives of the judicial class and the freedom of association has been faced also by the European Court of Human Rights⁵⁰; in fact the right of association is one of the most relevant rights recognized by the Convention of its article 11⁵¹ and all the limits produced by domestic legislation must be set under control of the Court to verify if rules are consistent with the Convention (of course, in case of exhaustion of the internal remedies).

The occasion for the statement of the Court was an appeal against a disciplinary punishment set by the Disciplinary Section of the CSM against a magistrate who was a member of a lodge of the Italian masonry from 1981 to 1993. The censure was justified because of the characters of that kind of association⁵²: in fact, the freemason has to pronounce an oath of exclusively fidelity to the lodge that overcomes the magistrate's oath of fidelity to the Nation, the member is subjected to a harsh hierarchical structure in the hand of the “great master”, is forced to reject the justice of the State in favour of the domestic one, and is tied to the association with an unbreakable oath.

The legal basis of the prohibition was identified in the article 18 of the King's decree 31st May 1946 n. 511 (the former unique basis for the selection of the behaviours disciplinary relevant) in cooperation with the law January 25th 1982 n. 17⁵³ and with two deliberations of the CSM October 22nd 1990 and July 14th 1993 which made precise the meaning of the rule of the law.

The analysis of the Court is centred upon the external requirements of the law just to see if “it was accessible and foreseeable”, reaching a positive conclusion regarding the first aspect, but underlining a flaw in the second profile: neither with the 1982 law – that prohibited the secret associations - or with the 1990 deliberation of CSM – which seems “to highlight the problem instead of resolving it”⁵⁴ - the legislator had created the conditions for a clear and undoubtable

predicated non-politicization: in this contest, the real support of the magistracy to the Fascism was the total indifference of the class of magistrate at the values on the table, the deny to the politic and the declaration of neutrality”.

⁵⁰ European Court of Human Rights – Grande Chambre, 17 February 2004, n. 39748, with note by L. Geninatti Saté e A. Francesco Morone “*the affiliation of magistrate to the masonry in the Italian law and from the point of view of the European Court of Human Rights*”, in *Foro amm. CDS*, 2004, 3, 621.

⁵¹ “everyone has the right to the freedom of pacific reunion, including the right to take part at the constitution of trade unions and to join at them to protect their interests. The exercise of these rights can be limited only by the law and when that measures are necessary, in a democratic society, for the national security, public safety, the defence of the order and the prevention of crimes, the protection of health and morality, and the rights and freedom of others. This article allows that legitimate restrictions may be issued to the exercise of these rights by the members of the army, police and of the administration of the State”.

⁵² The particular characters of that organization make the masonry a “proper juridical order alternative to the State”, in these terms G. SILVESTRI, *Justice and judges in the constitutional system*, Torino, 1997, p. 150.

⁵³ Art. 1: “secret associations, prohibited by the article 18 of Constitution, are considered those who, even inside at public associations, hiding their existence or keeping secret both the goals and social activity or totally or in part and even each other the name of the members, do activities directed to interfere in the exercise of the functions of constitutional bodies, of public administration”.

⁵⁴ European Court of Human Rights, February 17th 2004, point 39.

perception of the prohibition of being a member of a masonry lodge⁵⁵, with subsequence censure upon Italy for the sanction inflicted to the freemason judge in absence of the condition established by the Convention.

Today the question has been definitively resolved by the legal prohibition of “participation in secret associations or in associations characterized by ties objectively incompatible with the exercise of jurisdictional functions”⁵⁶, with a clear prevalence of the duty of fidelity to the State upon the freedom to membership to associations with a structure that may compromise the independence and autonomy of the judges.

10.- Conclusions. The comparative examination of norms and disciplinary pronouncements before and after the reform in matters of reserve leads to the conclusion that the new system appears inspired by lesser severity in comparison with the past, leaving however some dangerous voids of guardianship that could, and should, be filled through an exploitation of the judicial code of ethics⁵⁷. Surely the new disciplinary arrangement is in favour of the judge because the violation is defined through more punctual elements and all these elements must be present in the specific case, otherwise any disciplinary responsibility must be excluded⁵⁸.

Nevertheless we believe it possible to overcome the negative consequences of typification through a series of corrections. Firstly, the 2006 reform outlined a series of general duties to which the judge must conform his own behaviour (impartiality, diligence, laboriousness, reserve, equilibrium) and the lack of respect of such duties could also, under particular conditions, configure a disciplinary violation whereas this is not expressly anticipated by the law⁵⁹ (such an approach however does not seem to have been followed by the most recent disciplinary jurisprudence). Secondly, today many disciplinary violations are still defined with formulae of non-univocal interpretation that could be interpreted in a loose way so as to embrace a series of behaviour contrary to professional ethics that with a more restrictive interpretation of the disciplinary norms would remain unpunished. Finally,

⁵⁵ European Court of Human Rights, February 17th 2004, point 41: “Accordingly, the wording of the directive of 22 March 1990 was not sufficiently clear to enable the applicant, who, being a judge, was nonetheless informed and well-versed in the law, to realise – even in the light of the preceding debate and of developments since 1982 – that his membership of a Masonic lodge could lead to sanctions being imposed on him”.

⁵⁶ Art. 3, lett. g) d.lgs February 23rd 2006, n. 109.

⁵⁷ See F. PERRONE, *Diritto alla manifestazione del pensiero per gli appartenenti all'ordine giudiziario e “processo catodico”: cosa cambia con la riforma della deontologia giudiziaria*, in *Giustizia civile*, 2007, fasc. 2, part. 2, p. 457 ss..

⁵⁸ See, on the issue, DI PAOLA, *Punito il giudice per l'intervista-choc. E le nuove regole non fanno chiarezza*, in *Diritto e giustizia*, 2006, n. 29, p. 15 ss.. The Author in commenting a disciplinary decision (adopted before the 2006 reform) that condemned a judge for having released to the press statements relating to a presumed initiative of a member of the examining board for access to magistracy in order to favor a candidate relative of a known judge sit in the vertexes of the NAM, notices as such behaviour risks not to have relief anymore in the new disciplinary system.

⁵⁹ See A. APOSTOLI, *Implicazioni costituzionali della libertà dei magistrati*, Milano, 2009, p. 145.

the fact cannot be neglected that today many disciplinary sentences are still set in line of continuity with respect to the orientation of the past, interpreting the new violations through criteria already used by past jurisprudence; for example, concerning reserve of investigations, criteria of the past have been kept without the necessary adjustment to the new norms, like art. 5, paragraph 3, D. Lgs. n. 109/2006 that makes the Chief Republic Attorney the only legitimate spokesman in front of the press, affirming that an interview released by a deputy attorney does not imply a disciplinary violation if he has not overcome limits of self-restraint⁶⁰.

Finally, there are - in light of the European debate on ethics – three questions that call for an answer:

a) *Does the strict typification of disciplinary violations really pose a problem?*

Nowadays this topic is a highly debated issue within the Italian and European context. It is clear that typification leads to a weakening of disciplinary responses to the prospective misbehavior of judges. However this trend – besides already being expressly provided for by various acts adopted by International Organizations⁶¹ – could lead to a strengthening of judicial ethics which may play an important role where the disciplinary instruments are detected as deficient or inadequate.

b) *If ethics remain separated from discipline and may overcome the shortcomings of disciplinary codes, how can its effectiveness be enhanced?*

Probably two useful tools in achieving this goal, especially in the wake of what is happening elsewhere, could be represented as follows: 1) by the incorporation of judicial ethics within the programs of initial and continuing training of judges⁶² and 2) by the implementation of a monitoring system to update ethical rules and the development of a network of advisory opinions by which

⁶⁰ See Disc. Sec. February 19th 2008, n. 3 (proc. n. 94/2007 and 10/2007) which has acquitted a judge of the District Attorney accused of having made declarations to the press without delegation of the Office Chief, having given publicity to his/her own actions of investigation and having established with the press privileged channels, since however the declarations had not overcome the limit of the continence, so giving prevalence to a criterion of judgment elaborated by the old disciplinary jurisprudence formed when the normative typification of the disciplinary offences was lacking, and omitting any reference to the most rigorous legislation in force.

⁶¹ See art. 18 of *Magna Carta of judges* adopted by CCJE: “*Deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training*”.

⁶² About the insertion of the judicial deontology as a matter within the initial training of magistrates in France, see G. OBERTO, “*La formation des magistrats aux questions liées aux relations avec les usagers de la justice*”, in *Rivista di diritto privato*, 2000, n. 2, p. 425 ss.. See also the *Conclusions of the 6th Meeting of the Members of the European Network for the Exchange of Information between Persons and Entities Responsible for the Training of Judges and Public Prosecutors (Lisbon Network)* adopted in Bucarest, November 18th-19th 2003: “*Regarding deontology issues examined at the present meeting, participants expressed the view that speaking of deontology for judges and prosecutors implies, in theory, a reference also to rules of conduct outside of the area of discipline. They considered with interest the experience of adoption of ethical codes within the judiciary and the prosecution offices. They stressed the importance of this particular area and agreed that ethical themes should be components of training programmes in all fields*”.

judges may apply for and obtain an advisory opinion from a qualified agency regarding specific meaning of ethical rules⁶³.

c) *Besides disciplinary responsibilities, in a democratic society, what should be the deontological limits that judges should respect in expressing their thoughts, especially those of political nature?*

In order to understand this issue better, it should be taken into account that freedom of expression, when it is exercised in the mass media circuit with statements, press or television or other media interviews, is inevitably addressed to the public. This means that utterances are in direct and causal link with the public opinion, contributing to the formation of it. In these cases, freedom of expression is expressed through the exercise of the freedom of information. And information is, in fact, the main instrument in creating public opinion of course in a pluralism of information sources. So, if this is the role of public opinion in a democratic state, then the analysis, opinions and evaluations offered by magistrates in the public debate, especially if derived from the experience of their professional life, should not only be accepted but also especially sought after, in the spirit of a participatory debate. However, it is precisely the political role of public opinion and the ability to affect the mass media accorded to utterances of judges, which is now a source of concern for other branches of the State. The extension of judicial control in criminal cases and “the clean hands” affair⁶⁴ have given popularity, authority and credibility to some judges, making these dangerous communicators in the eyes of political power⁶⁵.

Therefore, self-restraint remains a guiding rule of conduct in relations between the Powers. Self-restraint "as it is, on the one hand, as a guarantee of independence, in that it reinforces the public image of judges as independent from politics and retains confidence in their figure, on the other hand, is an essential condition of their professional, moral and social authority"⁶⁶. In conclusion, we think that, abandoning any myth of the apolitical judge isolated from social reality, it is necessary to rely on self-control that every judge should exercise, protecting personal dignity and self-image.

⁶³ This suggestion is especially promoted by G. DI FEDERICO, *L'evoluzione della disciplina giudiziaria nei paesi democratici*, in *Gli illeciti disciplinari dei magistrati ordinari prima e dopo la riforma del 2006*, di D. Cavallini, CEDAM, 2011. See also Recommendation cm/rc. (2010) 12 of the Committee of Ministers to Member States on Judges: Independence, efficiency and responsibilities. Recommendation n. 74 states: “Judges should be able to seek advice on ethics from a body within the judiciary”.

⁶⁴ This is a serious scandal in the early nineties, linked to stories of corruption that involved a large number of Italian parliamentarians.

⁶⁵ W. NUNZIO, *Libertà di manifestazione del pensiero e deontologia professionale del magistrato*, quoted *supra*. However, as P. DUSI pointed out in *Delle esternazioni dei magistrati e di altri problemi connessi*, in *Questione giustizia*, 1998, n. 2, p. 434: “The problem is that in the advertising society, for the magistrates to speak become more difficult because their language cannot remain at legal level but lapse into political one”.

⁶⁶ MOCCIA, *Il sistema di giustizia inglese*, Rimini, 1994.

11.- Calamandrei's speech: an invitation for reflection. To sum up, we are honoured to use the words of Piero Calamandrei for an invitation of reflection and debate, because he lived with special intensity the atmosphere of the trial, where he could see - very closely - both the ethic of the lawyers and of the judges; making a very precise portrait of the good and bad of the word of the legal profession, all characterized with a very special Italian irony.

Regarding independence: *“The old magistrate – Calamandrei writes – kept quiet a while and then finished this way: 'Believe me: the worst disaster that might happen to a magistrate would be to be infected by that terrible disease of the bureaucrat that is conformism. It's a brain disease, similar to agoraphobia: the terror of independence; a kind of obsession that doesn't wait for the external recommendation but anticipates it, that doesn't bend to the superior pressure but imagines it and satisfies it in advance”*⁶⁷.

Concerning the relationship between judges and politics: *“I would say that it is harder for a magistrate to keep his independence in times of democracy rather than under a dictatorship.. Under a dictatorship the judge, if flexible, is forced to bend in only one direction; the choice is simple, between slavery and conscience. But in times of freedom, when the political currents blow against each-other in every directions, the judge is like the tree upon the top of a mountain: if he doesn't have a firm trunk, he risks to be taken to where the momentary wind blows”*⁶⁸.

⁶⁷ P. CALAMANDREI, *Praise of the judges written by a lawyer, Chapter XIV: about the independence or conformism and the general mood of the judge*, 1959 – 2011, Milan, page 271

⁶⁸ P. CALAMANDREI, *Praise...*, Chapter XII: *about the good and bad relationship between Justice and Politic, as they were in the past and as they are now*, page 240.