

Discipline, ethics and the independence of the judiciary

Medel already organized a meeting on this subject in Prague last year; we discussed it with our Romanian colleagues and it was a subject of great current interest in France. When speaking of discipline and ethics, we have to expose some areas of confusion and to focus on what is really at stake: responsibilities, the balance of powers and the defense of fundamental rights.

I. Areas of confusion:

1. **Making liability a special way to appeal.** There were attempts to do this in Romania, and also in France recently. The French constitutional court said it affected the independence of the judicial system and was therefore unconstitutional. The court's decision also specified that a judge could not be prosecuted unless a serious and deliberate breach of duty was stated in a definitive ruling. A judge should not be immediately liable for his decisions.
2. **Making discipline a political instrument to control justice.** For instance, last year, Medel and the French *Syndicat de la magistrature* had to support a vice-prosecutor who was threatened by a disciplinary procedure for having criticized the interior minister in the daily *Le Monde*. Only strong contestation made the general prosecutor who took this initiative withdraw his position.

This year, we are still supporting Judge Van Ruymbeke, one of the best known and most competent judges specializing in economic and financial cases. The prosecution alleges that there was a mistake in a very sensitive investigation he conducted, although this is strongly contested. In fact, the case is being used as an opportunity for the executive power to weaken a judge who was investigating very sensitive cases.

3. **Basing discipline on ethics.** Discipline aims at implementing duties while *ethics* provides a definition of general and moral rules of conduct. These rules should not be confused with discipline. For instance, the "culture of doubt", collective thought and critical spirit should be part of judicial ethics. But these are questions that can only be discussed between judges.

In its opinion n°3 the Consultative Council of European Judges emphasizes that *"all judges should aim to develop and aspire to high professional standards. But it would discourage the future development of such standards and misunderstand their purpose to equate them with misconduct justifying disciplinary proceedings."*

In its recommendation (2000/19) on public prosecutors, the Council of Europe stresses that drafters do not envisage a *"code of conduct"* as a formal code, but rather as a reasonably flexible set of prescriptions concerning the

approach to be adopted by public prosecutors, clearly aimed at delimiting what is and is not acceptable in their professional conduct.

II. Resistance

1. Revealing what is really at stake :

It is always easier to search scapegoats rather than to change the system. Some interpretations of ethics or « lustration » may lead to witch hunts, but not to a better justice. But radical and comprehensive changes of judicial systems may be more efficient than replacing or prosecuting the current judges and prosecutors. And some initiatives by the executive in the fields of discipline or ethics are simply ways to undermine the independence of the judiciary, especially when justice threatens illegitimate and private interests. That's why we also have to think about improving the system, searching for real responsibilities rather than finding scapegoat

2. Resisting making discipline and ethics new instruments of executive power.

The intervention of an executive authority to govern the discipline and ethics of the judiciary would contravene the separation of powers.

- A whole section of the United Nations Basic Principles is devoted to discipline, suspension and removal. Article 20 sets out the principle that "decisions in disciplinary, suspension or removal proceedings should be subject to an independent review".
- Recommendation No. R (94) 12 of the European Council says that disciplinary measures should be dealt with by "a special competent body" and controlled by a superior judicial organ. In this connection, judges should benefit, at least, from protection equivalent to that afforded under Article 6.1 of the Convention on Human Rights.
- The recommendation of the Council of Europe (2000/19) on the role of public prosecution in the criminal justice system emphasizes that states should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability.

3. Resisting on the grounds of human rights conventions.

The essential duties of judges and public prosecutors are:

- Commitment to the implementation of fundamental rights;
- Commitment to fair trial ;
- Primacy of international jurisprudence when treaties create an international hierarchy of courts.

In France and in most of the European states, this is firstly a legal duty, but also a way to promote high standards of human rights, and therefore a way of enhancing judges' legitimacy.

Conclusion

1. **It is essential to implement comparable statutory rules for judges and prosecutors**, even if liability problems may occur differently. In all systems, the importance of public prosecution is such that it is impossible to speak about judges' independence without taking this fact into account. For instance, eight federal US public prosecutors were fired in March 2007, probably because they were investigating cases involving Republicans. Similarly, the British government decided to drop an important case of corruption that arose from a sale of weapons by the U.K. to Saudi Arabia. On the other hand, the operation "*Mani pulite*" (Clean hands) was possible in Italy because public prosecutors had an independent status.
2. **The first rule of ethics is commitment to fully implement the law**, which often means taking risks, for instance the risk of opposing the government. Examples of this would include: Sartzetakis, an investigating judge in Greece who, in the early 1960s, revealed a police conspiracy to assassinate a member of parliament; Italian judges and prosecutors, among them Falcone and Borsellino, struggling against the Mafia; Spanish judges, among them Baltasar Garzon, taking the initiative to prosecute Pinochet and other authors of crimes against humanity in Chile and Argentina.
3. **The debate on ethics reveals the concept and aims of justice in a modern democratic state**. Judges must play a major role in making justice a *new force for democracy*. This was the title of our 20th anniversary meeting, and is still our common aim.

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