

Judges and prosecutors liability French report

The public debate on this subject was important in France:

- it has been one of the pretexts which ruined the constitutional reform planed in 2000, which aimed to confer a greater independence to the public prosecutors;
- Individual failures of a few were the pretext to create a special commission on the magistracy ethics, which published his report in 2003 ;
- judgements to free prisoners which were legally taken, but followed with dramatic consequences (recidivism) fed a debate on responsibility ; in 2005, the Home minister in particular declared that it was necessary “to make the judges pay” for such decisions;
- finally, the Outreau case, which revealed a malfunction of the process of law, was an opportunity for a parliamentary committee to suggest modifications on this matter.

A) Judges standards of conduct

1. Which standards of conduct for judges?

The due process of law, as provided by art. 6 of the ECHR is the only standard of conduct which is consensual.

Judges impartiality. There is no problem for a judge to be part of a political organisation or to be candidate for a political election, provided it is not in his jurisdiction. The president of the National Assembly is now a former investigating judge. It is also possible for a judge to advise a minister, provided he is not exercising his function meanwhile.

Paradoxically, participation to the public democratic debate is more difficult :

- Medel and *the Syndicat de la magistrature* recently had to support a prosecutor who was threatened of a disciplinary procedure, because he criticized in the daily *Le Monde* the Home Minister. Only this strong protestation made the general prosecutor who took this initiative withdraw his position.
- In 2004, three judges of the Paris court made clear, during a lawyers strike against a law which was then in debate, that they shared the movement of protestation. They were also threatened by their hierarchy, supported buy trade unions, and at last, not sanctioned.

- In 1996, when judge Van Ruymbeke signed the Geneva appeal, he was in the same way threatened.

The commission on ethics, which was appointed by the minister of justice in 2003, suggested to be tough on the duty of judges not to show their opinion, even as members of a trade union. These recommendations, which were strongly disputed, were not implemented, but they are still a topical question.

2. The definition of rules of conduct

Deontology is a way to define duties; *ethics* provides a definition of general and moral rules of conduct, that should not be confounded with discipline. The so called “culture of doubt”, collective thought, critical spirit should be part of judicial ethics. But these are questions that can only be discussed between judges.

The high council of the judiciary, in an opinion released in 2003, said there was no necessity to codify rules of deontology. But disciplinary decisions can nevertheless be a base for the deontology, in concrete situations.

B) Criminal, civil and disciplinary liability of judges

Criminal liability. Judges in France are responsible as all citizens. There are only two specific crimes: corruption (which is more severely punished if a judge is involved) and denial of justice.

Civil liability. The state pays for serious faults of the judicial system. In recent cases, the Cour de cassation gave a large definition of serious fault : it is *a fact or a succession of facts that characterize the incapacity of the judiciary public service to implement his mission.*

The State has a right to ask the judge who caused the damage to pay back the money. The right has never been implemented. If it was, judges would take a specific insurance, and the payment of this charge by the state would certainly be demanded.

Disciplinary liability. Principles of discipline are contained in the oath of all judges and the rules of the judiciary statute. In fact, these rules are imprecise, but this is accepted. On the contrary, the lack of guarantees during the disciplinary procedure is highly contested. For example, judges can't be assisted by a counsel. The fact that there is no time prescription for disciplinary sanctions is also considered as an anomaly of the system.

Sometimes, these disciplinary rules are invoked to forbid judges to go on strike. But as judges consider that this right is constitutional, many strikes took place since 30 years, during which only a minimum service is done.

A new problem was raised during the debriefing of the Outreau case. Some suggested that judges should be responsible for gross appreciation errors or important negligence. But in fact, it is already possible, the high council for the judiciary sanctioned a judge who took regularly decisions beyond his jurisdiction

and who issued judgments that were, beyond the formal appearances, highly irrelevant.

But it is generally considered that, excepted such pathological cases, only a Court of appeal can reverse a decision of a first degree court, and only the Cour de cassation is able to judiciary review the courts of appeal judgements. It is not admissible that every decision could be a base for a judge liability. And the Syndicat de la magistrature stressed the point that it is generally more risky to free a detainee than to keep him in jail.

General context

During his hearing by the parliamentary commission on the Outreau case, the Syndicat de la magistrature stressed the following points:

- the importance of the right to vocational training ;
- the fact that a decision taken by a college of judges may improve the quality of justice ; the right for a judge to issue a dissent was also suggested, for improving the importance of jurisprudential and doctrinal debate ;
- the necessity to evaluation the Court production as a whole, and to avoid targeting one judge for malfunctions that are an outcome of a organisation problem ;
- the possibility to give a commission (or a ombudsman) the right to receive complaints about the malfunctions of the judiciary (aside what belongs only to procedure).

On the role and composition of the high judiciary council, the Syndicat de la magistrature suggested that:

- the president of Republic and minister of justice should not be members of this authority ;
- that this Council should nominate all the judges and prosecutors; (today, among 95% on nominations belong to the ministry of justice)
- that the Council should have an inspection, to investigate on disciplinary cases (today, only the minister of justice can ask an inspection to investigate)
- that non magistrates who are part of the Council should be appointed par the parliament, with guarantees to respect pluralism (today, they are appointed by the president of Republic, the president of the national assembly and the president of the senate)
- that judges should elect their representation on a proportional way ;

To avoid the blame of corporatism, the Syndicat de la magistrature admitted could be in minority in this Council.

However, the reform of these rules is only part of a general and ambitious reform the Syndicat de la magistrature suggested in a text entitled: *Another justice is possible*, which is still on our website front-page.

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