Quality of justice

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Abstract : the study on the logic of the absurd decisions allow to understand certain dysfunctions in the judicial area. This way, the routine, the deformed vision of the real thing by some of its persons in charge, the fear of being opposed by the majority opinions for the blind respect to the rules, are in the logic of the majority of the bad practices.

On the contrary, the good functioning of an organisation is the result of its capacity to put itself in question, of accepting the critiques, of developing the evaluation checking the result of the experience.

In 2008 the Consultative Council of European Judges (CCJE) formulated a recommendation on the quality of judicial acts[1]. The meaning of quality is not easy to define. A working group of the European Commission for the Efficiency of Justice (CEPEJ) defined it as a triangle whose summits may be efficiency, legitimacy and ethics, and issued a checklist for the quality of the judiciary and the courts.[2] Efficiency means good time to bring a case, good use of resources. Ethics is founded on fundamental values of independence, impartiality, contradiction, moderation in the use of judicial powers. Legitimacy means citizens endorsement of the values of the judiciary, of its service, and of its social utility. Judiciaries in Europe and US make efforts to open up and and work more transparently and thus further so-called soft public accountability.[3]

Quality of judicial acts is not so easy to define either. The judicial system's aim is to take decisions and to enforce them: therefore, the quality of judicial decisions reflects in one way or another quality of the institution itself.

The *Syndicat de la magistrature* (SM)[4] has worked on the pathology of judicial acts after the Outreau case. In this case, 17 were initially accused of sexual offences, and 13 of them were found not guilty. Some were detained for more than two years. This case deeply shocked the public and for the first time ever, a parliamentary commission was set up to investigate on judicial malfunctions, so as to prevent the repetition of such situations.

In the course of its work on this theme, the SM met a sociologist, Christian Morel, who had worked on the logic of decision making (especially "Absurd decisions")[5]. So the starting point of our work will be the study of pathology in the decision making process.

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1. Decision making pathologies

1.1 Danger of daily routine

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[2] http://www.coe.int/t/dghl/cooperation/cepej/quality/default_en.asp

[3] Wim Voermans, *Judicial transparency furthering public accountability for new judiciaries, Utrecht Law review*, http://www.utrechtlawreview.org/archive.html

[4] *The Syndicat de la Magistrature* is the French second largest trade union of judges and public prosecutors.

[5] http://chmorel.club.fr/index.htm

In the morning of the Challenger space shuttle takeoff, a director of the NASA, convinced of the risk, tried to stop the launching procedure. He did not succeed: papers had been signed, the process was on a roll, and everyone had their nose on the grind stone.

The more routinely a decision is taken, the higher the risk factor becomes. This may also be true in the judiciary. In France, for example, the *immediate appearance* (*comparution immédiate*) before a court may result in a sentence after 24 or 48 hours in a police jail. These procedures account for the bulk of prison entrees. In this fast track production chain, the prosecutor's office, on the basis of police phone calls, sorts cases as they come in. The court has only a few minutes to examine the files (except in case of adjournment). There is no room for any form of defense: in fact, counsel is often reduced to a mere plea. Rulings are stereotypically motivated, except when there is an appeal.

Moreover a recent law reduces the courts' margin of appreciation, imposing minimum sentences for repeat offenders (with some rare exceptions). Unless one considers an increase of the number of convictions and a higher degree of severity to be a proof of efficiency, we are confronted with very poor quality decision making.

1.2 Collective traps

At the time of the Challenger disaster, the makers of the defective gaskets, rendered inoperative because of a frost wave in Florida, were locked in a vicious circle thinking process: the absence of risk evaluations comforted the managers, whereas their optimism ruled out any exploration of such risk.

Decision makers whose convictions impair their institutional role often see a distorted reality. Errors accumulate. For example, in the chain of decisions within some procedures leading to a sentence, a natural tendency is to trust those who already took a decision. It is therefore difficult to contest the quality of the police work or the scientific character of experts' conclusions. It is also difficult to contest the truthfulness of victims' testimonies. In the absence of actual likelihood of risk, the actors have total faith in the system.

A spectator effect also increases the actors' lack of the sense of responsibility. With crossed suppositions, actors reciprocally intoxicate each other. In the Outreau case, around 60 judges and prosecutors intervened. Even if one prosecutor and one investigating judge played the main roles, they were strengthened in their positions by decisions of the general prosecutor and the court of appeal. Moreover, the procedure length should be put under scrutiny: in the French system, the excessive determination of final decisions following a lengthy investigating phase is often denounced.

Finally, organizational silence is another factor of persistence of errors. The fact that dissidents remain silent during decision making in which they play a role also reinforces the error. In the Challenger disaster analysis, a study describes in detail the meeting on the eve of the launch. It stresses the surprising silence of all those who could have, by their intervention, reinforced the importance of some worrying information. Among the reasons for their silence, there was: doubt about one's

legitimacy (people felt they lacked knowledge on the question), fear that any opposition might be considered aggressive, a will to preserve the team spirit, or fear of displeasing the hierarchy. All this has its equivalent in the judiciary, where in particular the deliberation is secret and no dissenting opinion is allowed once the decision is rendered.

1.3 Loss of sense

It is the Kwai river bridge syndrome: a hero zealously builds a bridge for his enemy. He is not a traitor. His foolish behavior may be explained by the fact that he considers the action as his only goal. In the judiciary also, there are decisions that don't have any other aim than their own existence.

In some systems, action is the key word, above anything else. For example, the police put on record a large number of small misdemeanors to fulfill quotas. It is also the case when the public prosecution service prosecutes without really reading the files, or when court orders are not executed.

Similarly, the syndrome operates when one follows the rules, disregarding the aims**.** First example: an investigating judge who is concerned only with the formal perfection of the files forgets to look for the facts. Second example: long drawn preparation of cases, which may sometimes last over years and where the actors forget that all they are doing is preparing a court decision. Last example: stereotyped motivation of rulings.

The loss of sense is often at the very centre of a disaster. It is useless to change an organization if the system allows forgetting its values. In good airline companies, the first thing pilots are told in case of incident (which may entirely burden the crew) is « *don't forget to pilot*… »

2. Conditions for a reliable decision

Analysis studies were carried out on highly reliable organizations[6]. One essential fact that came out of these studies was that this reliability is conditioned by the capacity to question the system. In a reliable organization, there is evaluation and feed-back, acceptance of criticism, and clarity of aims.

2.1 Evaluation and feed-back

The culture of systemic evaluation is not very developed in the judiciary –at least not in France. The evaluation is mainly focused on individuals, on judges and prosecutors: it is always simpler to point out the liability of an individual than of a system.

A global method to evaluate the judicial service of a court may be a first answer. In France, the inspection of the judiciary can investigate courts. But it is under the orders of the ministry of justice, and its methods and standards are not transparent. Based on its knowledge of the evaluation system in Italy and Portugal, the SM

[6] See for instance : http://www.highreliability.org/index.html

defended the idea of a global method to evaluate a court. Individual evaluation of judges and prosecutors would only be part of a general audit.

The *Cour de cassation* has contributed to the spreading of information on good practices, in particular by issuing document about respect of those appearing before the courts. It gave an example, writing a charter on the right of citizens before the Court.

Il took the initiative of a consensus conference on good practices concerning civil expertise. Working groups were given a mission to propose projects of recommendations. After that phase, a jury, independent of the working groups made a synthesis of the propositions during a colloquium.

Lastly, the Court also exchanges were organized, between French and UK scholars on justice quality. All this work has been published on the Cour website.

2.2 Valorizing criticism

Criticism of the system may come from inside, and concern the working of the system itself. That category of criticism is badly considered in the judiciary. For example, the commission on judicial ethics, which issued its report in 2003, recommended including the obligation to remain silent as part of the judges and prosecutors oath. In April 2008, he President of the General Council of the Spanish Judicial Authority (CGPJ) requested that a disciplinary investigation be opened against the signatories of *the Manifesto for a Rational Debate about Criminal Policy*.[7] However this liberty of speech, for organizations of judges and prosecutors is the first conditions to allow a debate on the manner the system functions and produces decisions.

On February 29th 2009, the European court of human rights (ECHR) took an important decision on the question. The applicant, Olga Kudeshkina, was judge for more than 18 years, at the relevant time she held office at the Moscow City Court. In 2003 Ms Kudeshkina was appointed to sit as a judge on a criminal case concerning abuse of powers by a police investigator. Ms Kudeshkina was withdrawed from the case. In early December 2003 Ms Kudeshkina gave several interviews to Russian newspapers and a radio station. In May 2004, the Judiciary Qualification Board of Moscow decided that Ms Kudeshkina should no longer act as a judge.

Having noted that Ms Kudeshkina had publicly criticised the conduct of various officials, and had alleged that pressure on judges was common, the ECHR found that she had undoubtedly raised a very important matter of public interest which had to be open to free debate in a democratic society. Even if Ms Kudeshkina had allowed herself a certain degree of exaggeration and generalisation, the Court found that her statements had to be regarded as a fair comment on a matter of great public importance.[8]

[7] After actions of judges' trade unions, the ideas of the French report and the Spanish prosecutions were abandoned.
[8] KUDESHKINA v. RUSSIA [ECHR] n°29492/05

Criticism may also be an element of the system. For instance, a prosecutor may make use of his freedom of speech in a court. This freedom was recently questioned by the French minister of justice: she summoned a prosecutor whose speech was politically incorrect to come to the ministry to justify himself. (In fact, this prosecutor had refused to ask the minimum sentence for a repeat offender –as foreseen by a recent law that allows but doesn't impose a minimum sentence).

In other systems and in particular before the European Court of Human rights, it is possible within a court to express dissenting opinions. This possibility doesn't exist in in most continental law legal culture. However, the SM suggested authorizing it, in order to give more importance to deliberations and motivations in 3-judge courts.

Quality of defense may help useful criticism of decisions. Besides traditional subsidies given to private counsels, the SM took position in favor of a public service for social defense.

Developing recordings of procedures, from the police questioning till the ruling, may also help evaluation, feed-back, and checking (especially in oral procedures)

Appeal and cassation are also manners to check and to unify the implementation of law, and therefore may led to useful critics. It is important to think about that: should appeal be general or reserved to most important cases? Should appeal be a total re-judging of the case, or should it focus on specific points? Do we have to consider dismissing some requests after a short examination in some cases?

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2.3 Back to basics.

A first challenge would be to tackle the matter of training: it should not just be a case of transmitting knowledge, but should also favor the expression of critical positions. The possibility to confront different knowledge bases by mixing the composition of courts (professional and non professional judges) might be an improvement.

Confrontation of knowledge and experience is also important in this area: do we agree with a career scheme from first instance –where the young start- to the appeal courts –where more mature judges are concentrated, or would it be better for some young judges to be members of a court of appeal? Do we favor or limit cross exchanges throughout the career between public prosecution and bench? Do we favor integration of academics in the courts? Do we favor a mixed composition of the courts (with professional and non professional judges?)

This back to basics is also an issue in such disciplines as compared law, or activities favoring a European or global dialogue of judges –not only on the hierarchic mode, but also horizontally. A world wide judges' forum may also strengthen the legitimacy of justice.

Lastly, the hierarchy of rules and standards is also an issue when judges are considering conventions (especially the ECHR). In this case, the courts are in a situation where they have to set out the primary goal of judging. The SM also

suggested during a long time that French judges be given the power to warrant the conformity of law to the Constitution[9].

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The quality of justice depends on its capacity to question itself. The judiciary should submit itself to a culture of methodological doubt, collective thought, and practice evaluation;

To do that, the judiciary should in particular accept critic and contradiction from the outside as well as the inside. It should learn to take advantage of freedom of speech and pluralism of points of view. International exchanges are also a good opportunity to put in perspective certainties and to promote new ideas.

Lastly, the quality of justice depends on its quality to defend essential values and fundamental rights, in particular those consecrated by the European Court of Human rights. Otherwise, the judiciary would lack legitimacy, ethics and efficacy.

[9] The constitutional reform of July 2008 gave them this power: if, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'Etat or by the Cour de Cassation to the Constitutional Council.