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Judicial independence in Europe
Models of self-government and self-responsibility

Following European trends: challenges and choices to be made.

"*One can never harbour too much doubt in matters concerning the State*". This statement of Pierre Bourdieu may explain why we have many interesting theories about separation of powers and checks and balances.

The judiciary is part of the state. As the *mouth of law*, the judge has to apply the rules. But a modern judge also has to be the conscience of the law: he has to resist to the excesses of the other branches of power, to stand up for fundamental rights, to apply the law to those detaining power. This may be the origin of very tense situations.

For instance, today in Serbia, the government is considering the re-election of all judges. Whether this will be a opportunity to sack some judges for underlying political reasons remains to be seen.

In Italy, the parliament has passed a justice reform bill, helping Prime Minister Berlusconi to avoid trial on corruption charges. In France and Spain, movements of judges took place in October, to protest against attacks on justice by the executive branch.

Legal theory has to tackle all this. There are trends and challenges to be analysed, and choices to be made.

1. European trends

1.1. **The European Court of human rights** sets up standards, implementing article 6 of the Convention. For instance, a court martial whose members are subordinate in rank to the convening officer and fall under his chain of command is not independent (Findlay v. United Kingdom, 1997).

The Polish Maritime Dispute Chambers, whose members were appointed and dismissed by the Minister of justice can't be regarded as an impartial tribunal (Brudnika v. Poland, 2005).

A person answerable to the Home Office can't be member of an independent tribunal (Whitfield and Others v. the United Kingdom, 2005).

The criteria to evaluate weather a Court is independent from the Government consist on the "*manner of appointment of its members, their term of office, the possibility of removal and the existence of guarantees against outside pressure"*.

1.2 Trends were developed within the Council of Europe. Recommendation (94) 12 *on the independence, efficiency and role of judges* was the first document issued by the Council of Europe on the topic. It is still a base document, since its renovation, proposed in 2007, was suspended. The *European Charter on the Statute for Judges* was drawn up by judges in 1998.

In 2007**,** the Venice commission issued a **report[1]on judicial appointments**: *choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies. (…) International standards in this respect are more in favour of the extensive depolitisation of the process. However no single non-political "model" of appointment system exists (…)*

(…)*An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy*.[2]

The same year, the Consultative council of European judges (CCJE) issued an **opinion on *the Council of judiciary at the service of society***[3]. It focuses on judicial councils as the key element for the guarantee of judicial independence[4] :

It is important to set up a specific body, such as the Council for the Judiciary, entrusted with the protection of the independence of judges, as an essential element in a state governed by the rule of law and thus respecting the principle of the separation of powers ;

The Council for the Judiciary is to protect the independence of both the judicial system and individual judges and to guarantee at the same time the efficiency and quality of justice as defined in article 6 of the ECHR in order to reinforce public confidence in the justice system ;

The Council for the Judiciary should be protected from the risk of seeing its autonomy restricted in favour of the legislative or the executive branch through a mention in a constitutional text or equivalent (...)

Part of the work was designed for new eastern democracies, but it is now very helpful for the old ones.

1.3 New institutions in member states

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1 Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007)

2 However, the report concedes that in older democracies, the executive power has sometimes a decisive influence on judicial appointments : s*uch systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time*.

3 Opinion has been adopted by the CCJE at its 8th meeting (Strasbourg, 21-23 November 2007).

4 This opinion was fully endorsed by the Venice commission : see comments on the draft opinion of the consultative council of European judges on judicial councils, by Ms Hanna SUCHOCKA (Member, Poland), adopted by the Venice Commission at its 72nd Plenary Session, (Venice 19-20 October 2007).

In the United Kingdom, a *judicial appointment commission* was set up as an independent Non Departmental Public Body (NDPB) by the Constitutional Reform Act of 2005. It selects candidates for judicial office.

In the Netherlands, a Council was created in 2002 as a consequence of a far-reaching reform of the judiciary system, which was laid down in a review of the Judicial Organisation Act.

In Belgium, a *High judiciary council* was created in 1999, in an attempt to restore confidence in justice after the Dutroux case.

In France, the constitutional reform of July 2008 also concerned the High council for the judiciary. The president of the Republic is no more formally president of the Council. The section with jurisdiction over judges will be presided over by the Chief President of the *Cour de cassation*, and the section with jurisdiction over public prosecutors by the Chief Public Prosecutor at the Court.

2. Challenges

2.1 A first challenge is to build a **consensus on standards of conduct**. Responsibility is a counterpart of decision-taking power; discipline and ethics may be part of responsibility.

Making discipline an instrument to control justice may be a temptation for the executive power. For instance, in France, the minister of justice can initiate disciplinary procedures. and it is obvious that some decisions have been political : in particular, the prosecuting of judge Van Ruymbeke was a attempt to strike back : at this time, investigations in the *Clearstream case*[5] were considered politically dangerous. Judge Van Ruymbeke was not condemned by the High council of the judiciary, but he –and the financial judges' pool of Paris- were weakened.

It is also very important not to confound discipline and ethics: discipline aims at implementing duties while ethics provides a definition of general and moral rules of conduct. 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 among judges. In its opinion n°3 on ethics and liability of judges, 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*."

2.2 A second challenge is to have **fair standards of performance**, in an area where performance is very difficult to measure. This is already the challenge of the European Commission for the Efficiency of Justice (CEPEJ) : not only giving figures, but also qualitative information ; warning that comparing is not ranking, promoting

[5] In July 2004, anonymous denunciations sent to magistrate Renaud Van Ruymbeke accused various important French political figures of having received kickbacks related to the Taiwan frigates scandal, through secret personal accounts at Clearstream. In January 2006, the case was closed, on the grounds that the list of accounts was a fraud. But Prime Minister de Villepin was suspected to have ordered a secret investigation of on these accounts, which included the name of Sarkozy.

peer evaluation of statistics... Some High judicial Councils have a role in the measuring of performance. For instance, in the Netherlands, there is a workload-measurement system maintained by the Council. If a court fails to meet certain quantitative or qualitative standards, this may have negative consequences for the budget allocated by the Council. Romanian[6] and Serbian[7] associations of judges recently issued important works on this topic.

2.3 It may also be interesting to **examine failing judiciary systems**, in order to know what may be necessary to improve others. The Transparency International report of 2007 explores corruption in the judiciary. It says that *there are two types of corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery*.

And the first question most commonly identified as a factor of corruption is judicial appointments: "*failure to appoint judges on merit can lead to the selection of pliant, corruptible judges*". The report recommends an independent judicial appointment body, merit based appointments and civil society participation. Case assignment and judicial management are also important, as well as strong organisations of judges and civil society engagement.

3. Choices

3.1 What role for public prosecutors in a self governed judiciary? Judges can't decide to examine a case by themselves. In criminal cases, they depend essentially on the initiatives of public prosecutors, except in systems where victims can bring criminal prosecutions. And even in such systems, there are criminal cases without victims, such as corruption, trafficking, tax fraud… Therefore, it would be paradoxical to build a system of independence for judges, without taking into account the status of public prosecutors. There is, especially in France and now in Italy, a harsh political debate about the prosecutor's status. The Council of Europe's Committee of Ministers adopted Recommendation 2000 (19) on the role of public prosecution in a criminal justice system. It says in particular *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. (…) Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law. (…) The recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures*.

These safeguards are essential to guarantee equality of all before the law. The "clean hands" operation in Italy would certainly have been far less efficient with prosecutors depending on the ministry of justice. MEDEL considers that there is a close link between the independence of justice and the status of prosecutors.

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[6] Performance Indicators – a step ahead for a (more) effective justice, Institute for political policies, Bucarest (on line on Medel's website : http://www.medelnet.org/pages/99_2.html)

[7] Dragana Boljevic Evaluation of judicial performance, Judges association of Serbia (on line on Medel's website)

3.2 A second choice concerns **the methods of selection and the balance between judges and prosecutors on one hand, and civil society on the other hand in a High Council of Judiciary**. The CCJE says *that the Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided*. (…) *When there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers*. The wording suggests the intensity of the debate.

But the selection methods of the members should be considered as more important as the sole question of the majority. For instance, the Spanish system, where judges sit in majority, was made sterile for two years because it was impossible to find a qualified majority in Parliament to confirm the nominations. The French Council, where judges and prosecutors had a majority[8] decided nominations which were considered by the opposition as partisan –or at least very conservative.

3.3 A third choice is about **the autonomy of court administration**. The CCJE says that *the determination of the conditions for the allocation of the budget to the various courts and the decision as to the body which should examine and report on the efficiency of the courts are sensitive issues*.

This also suggests choices. How important to judicial independence is a court administration which is controlled by an autonomous body rather that the executive power? Can the judiciary be held responsible for the running of the courts without the administration being accountable to them?

Conclusions

In 1993, MEDEL drew up a Declaration to promote *Elements of a European Statute of Magistracy*. In 1996, it adopted *a Declaration of Principles on the Public prosecution service*. Many of the opinions and recommendations of the European Council take on and improve the ideas which were elaborated in that time. All these non-binding texts now consecrate common principles, standards and values.

There is no unique model, but choices need to be made to develop mutual confidence and efficiency. We have to invent new scales of justice, so that a German judge or prosecutor asking his French or Italian counterpart for some investigations can be sure that the work is done fairly and in good time. This depends on a whole system, but the guarantees of independence are an important part of this system.

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[8] The reform of July 2008 changed the composition of the Council : judges and prosecutors are now in a minority.

Annex1 : **ELEMENTS OF A EUROPEAN STATUTE OF THE JUDICIARY (MEDEL, 1993)**

(…)III. THE SUPREME COUNCIL OF MAGISTRATES

3.1. The Supreme Council of Magistrates is entrusted with the administration and discipline of the judiciary. It guarantees the independence of magistrates.
It provides for recruitment, decides the assignment of magistrates and organizes professional training.
On its own initiative, or at the request of other powers, the Supreme Council of Magistrates addresses opinions and recommendations concerning judicial policy to the Parliament or to the Government.
3.2. At least half of the Supreme Council of Magistrates is composed of magistrates elected by their peers according to the rule of proportional representation. It comprises, besides, personalities appointed by parliament. Its members are appointed for a definite period of time.
3.3. The parliament votes the budget for justice according to the proposals of the Supreme Council of Magistrates and the Government. The Supreme Council of Magistrates has a budget to carry out its tasks.
3.4. The plenary meetings of the Supreme Council of Magistrates are public, except when in camera as provided for in article 8 par. 2.
The minutes, decisions, reports, opinions and recommendations, as well as the budget and accounts, are the object of appropriate publicity. The decisions concerning the recruitment, assignment and discipline of magistrates are motivated and subject to control of their legality by a supreme court. Each year, the Supreme Council of Magistrates provides Parliament with a report on its activities and on the state of justice.