



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

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Warning: *Members of public Ministries in some of the network's member countries (Belgium, Italy, France and Romania) are magistrates. This shall be taken into account without impacting on the other members whose countries use a different system of separation between judges and the public Ministry or the body responsible for prosecution. The working group's reflections are limited to professional judges and magistrates. The different criminal and civil responsibility systems and compensation systems were listed by establishing the distinction between professional and personal responsibilities.*

Introduction:

Judges' responsibilities and professional ethics are very important issues, but they cannot be approached on a purely individual, judge-by-judge basis. Nevertheless, these issues require knowledge of the institutional system, the way it is organised, guaranteeing political, structural and material conditions and ensuring the normal working of legal activities. The independence of all legal systems must be organised, recognised and respected, and it is within this framework that a strict system of responsibilities for its agents is justified.

The role of the judge has evolved in our European societies; no longer being limited to "*being the voice of the law*", judges have become the creators of law, requiring a system of responsibility and professional ethics rules in keeping with that evolution. Moreover, our societies demand increasing transparency in terms of the way institutions function, making the relationship between judges and the media more complex. Without questioning the press's essential role in democracy, the independence of justice is also a democratic guarantee that we must respect. The independence of justice, the transparency of institutions and the freedom of the press are guarantees that must be conserved, but a balance must also be found.

Responsibility is, however, rightly affirmed as a necessary counterweight to independence¹. The working group wished to identify responsibility mechanisms that respected the independence of justice and that were likely to increase public trust.

¹Within the perspective of the Consultative Commission of European Judges (Verdict No. 3-CCEJ-), which structured its reflection along two central themes, professional ethics and responsibility, with a view to strengthening public trust in the workings of justice.

When analysing responsibility and professional ethics, prudence must be used in order to protect judges' ability to act independently from all undue pressure and manipulation so as to preserve the impartiality and effectiveness that the public is right to expect of the judicial system.

That is why, excluding exceptional cases, the interpretation of the law and the assessment of facts in terms of the law must not be left to judges' personal responsibility.

Through the normal appeal procedures and within this framework of a fair process, jurisdictional independence must be guaranteed by this exclusion.

The working group did not seek to avoid dealing with criticisms made of judges in our countries; irresponsibility, impunity, and corporativism are criticisms that appear regularly. Although these criticisms are unavoidable, judges view them as unjustified. Nevertheless, they are the expression of certain mistrust that must be analysed in order to provide an appropriate response.

The transparency of responsibility mechanisms should also be included in order to partially alleviate these criticisms. Reflections on judicial institutions' external control mechanisms should also be moved forward so as to eliminate criticisms against them. However, openness to justifiable criticism must be within the context of mechanisms guaranteeing judges' ability to act independently. The use of responsibility, unjustified complaints and procedures, as a tool to destabilise judges in sensitive cases must be avoided.

It is in this spirit that, without concession, the listing of mechanisms in the different areas of responsibility is appropriate, and will allow the necessary independence of the justice system to be guaranteed while strengthening public trust.

1 . State responsibility in the workings of justice

Justice is an important state activity that meets a public expectation which wishes to see different sections as per the rules of the law: The wish to live in a public space where freedoms and security are maintained is shared by the citizens of our respective countries. While the State should guarantee the correct administration of its services, it is in this framework that it ensures the reparation of damages in cases where it fails to function properly. This responsibility is directly linked to the organisation and working of State activities. It would be a mistake to think that the State's responsibility is a factor in judges' irresponsibility, as each State is responsible for the organisation and the means that it provides to its justice system.

That is why compensation systems, without exception, linked to State responsibility have developed in European countries for years now. Depending on the country, compensation mechanisms of this type exist to correct imprisonments or convictions that are later judged unjustified.

Generally, State responsibility mechanisms also exist to correct errors caused by "defective or abnormal functioning" of the justice service. Any deficiency that translates to the justice service being unable to fulfil its mission generally constitutes an error. By way of example, the main causes are unreasonable delays in handling procedures, serious negligence,

denial of justice, judicial error, the duration of detention, etc.

Can judicial decisions within judges' scope of interpretation, and thus jurisdictional independence, result in State responsibility? Several different models co-exist within the network's European area. It must be highlighted that in certain European countries, depending on the seriousness of the situation and its consequences, an initial decision, even within the framework of an appeal, may serve as the basis for State responsibility if it has caused irreparable damage.

The compensation system implies some form of damage caused following the analysis in which proof is found of the defective or abnormal functioning of justice.

2. Recourse actions against the judge at fault.

If a verdict is issued against the State, obliging it to provide compensation against losses, mechanisms exist that allow it to charge the judge at the root of the problem. This is the recourse action that the State may use upon discovering a judge that has committed a personal error when exercising their jurisdictional functions. Several models exist and, depending on the country, they may be either obligatory or optional.

Generally, recourse actions are optional in the network's member countries, and used only sparingly.

Where obligatory, they are normally linked to serious lackings, judicial errors, serious negligence, or violations of the ECHR where the country has been convicted, such as Romania for example. Thus, no examples exist of recourse actions being carried out.

Depending on the country, a very diverse range of solutions exist in terms of the procedure to be implemented and the competent jurisdiction to identify from this action what law may end in civil pecuniary sentencing of the judge at the root of the State's conviction.

3. Judges' criminal responsibility

Judges are criminally responsible and the difference between professional and personal responsibility is becoming less clear as the demand for judges to be responsible in this area must be proportional to their powers.

Specific incriminations linked to exercising the profession of judge are added to the criminal responsibility incumbent upon all citizens in order to strengthen public trust in the institution:

- corruption;
- respecting professional secrecy;
- respecting the secrecy of deliberations;
- revealing information;
- corrupt practices;
- favouritism or purposeful bias.

In certain countries, such as Denmark, serious violations or considerable neglect in handling procedures set out by the law constitute a crime for which the judge in question can be charged.

For infractions linked to professional practice, countries must introduce mechanisms which allow the validity of complaints to be examined quickly, without affecting respect for judicial independence, so as to prevent judges from being destabilised in sensitive cases through accusation that may be backed by press campaigns or to put an end to the actions of a judge acting incorrectly.

Judges whose criminal responsibility is questioned can and must be judged as per normal procedures; however, in order to guarantee impartial judgement, it is not unusual for Countries to take measures so that they are judged in a place other than where they exercise their functions.

4. Judges' civil responsibility

In certain countries, in such cases as civil errors can be proved against judges, those judges can be declared civilly responsible for the consequences of their decisions independently and outside of the framework of recourse actions. Civil responsibility is of the classic type. A civil error must be present in judgement or the exercise of professional functions and result in damages.

The issue of civil responsibility poses the question of insurance for judges who, although independent in exercising their functions, remain an agent of the State, and thus of its guarantee. Since 1988, Spanish and Italian judges have been insured.

Nevertheless, in no case should civil responsibility be a way of destabilising judges responsible for a case or to either directly or indirectly attack their independence. Moreover, final jurisdictional decisions must retain the authority of the issue being judged after all means of appeal have been exhausted.

5. Judges' disciplinary responsibility

Being independent does not make judges irresponsible. Moreover, a disciplinary regime including professional sanctions has been established in all of the network's countries. **Nevertheless, independent judges can be annoying. Thus in order to prevent any drifting, sanctions systems must be based on principles of legality and a foreseeable nature. Disciplinary procedures must afford the judge in question the right to a defence.**

In theory, disciplinary responsibility is limited to the professional arena; however, the distinction between professional and personal responsibility is delicate as actions from a person's personal life may have a professional impact and be the basis of disciplinary proceedings.

In order to prevent such situations, incompatibilities must be precisely explained in

judges' codes so as to clarify those complementary activities that are compatible with their functions.

The line between the two is delicate when personal actions lead to criminal proceedings which, by their mere existence, lead to disciplinary proceedings. The co-existence of these two separate procedures can be problematic when the criminal procedure ends in acquittal. Thus, prudence is required as to the scope of these two types of responsibility. A risk also exists of moral standards being increased and thus that judges' private lives will be "disciplined". This is why distinction with the private world, where it has no impact upon the professional sphere, must be made and, furthermore, excluded from all disciplinary responsibility.

The guarantee of independence requires a specific procedure before a special jurisdiction.

Depending on the country, the activation of disciplinary action is a matter either for the Minister of Justice, or the highest judicial authorities, or those responsible for the different jurisdictions.

A debate exists around the possibility of extending the right to submit disciplinary cases to individuals who wish to complain about their judge. It is true that the opening of this new type of submission would allow unjustified criticisms and judges' impunity to be tackled, but prudence must be applied to the procedure being considered. Direct submission would be a difficult phenomenon to control. All countries where it has been introduced have seen complaints multiply.

The introduction of submissions of this type must be accompanied by a filtering system to protect judges' independence, prevent their destabilisation and to ensure that complaints do not become the norm.

Not all of those countries where a Council exists to guarantee the independence of justice have a disciplinary power. In all cases a filtering commission, whose composition ensures the disciplinary body's impartiality, must siphon complaints and verify whether the facts presented are likely to constitute errors. To that end, those Councils must enjoy the support of the inspection or enquiry services.

As this covers the power to judge judges' discipline, two models of powers co-exist in Europe, depending on the country in question. Either the organisation responsible for guaranteeing independence or the judicial corps is competent to hear the errors and decide their sanctions.

Generally, it has been observed that criticism of corporativism have been made against disciplinary bodies. The need to guarantee independence justifies that these bodies be at least majoritarily composed of judges. In fact, members of the profession are better positioned to appreciate the reality of erroneous behaviour, yet this cannot prevent criticism, and the presence of non-magistrates in these disciplinary formations strengthens their legitimacy. Disciplinary Councils with mixed compositions, i.e. including representatives of society at large, are less often criticised of corporativism as those disciplinary bodies composed exclusively of members of the judicial corps.

Finally, disciplinary procedures must respect a balance between effectiveness and the rights of the judge in question. The complexity of disciplinary procedures should not be a

means of paralysing cases, for example, through appeal systems every step of the way, but must also guarantee the free exercise of the right to a defence for the judge in question.

Conclusion: “Judges’ Ethics”

In an institutional system that guarantees independence, judges’ responsibility in the different areas touched upon is designed to increase public trust in justice, yet it would appear that the issue of Judges’ Ethics must be further explored.

In fact, professional ethics covers another dimension beyond responsibility; it is not limited to the area of reparations and sanctions. Professional ethics represent a positive vision of judge’s duties and constitute both common founding values of the functioning of judging and preventative principles.

A few years ago, the debate focused on the existence of codes of ethics. Some countries adopted such codes whilst others refused. The Bengalores principles aimed to return to this objective. These issues of professional ethics are being discussed in several countries that are members of our network.

Our working group examined these principles so as to verify the existence of common professional conduct principles across Europe, principles that transcend the different legal systems. Independence, impartiality, integrity, fairness, wisdom from listening and prudence, coherence, competence and knowledge, and finally diligence were the principles put forth.

Our working proposal for next year is to continue our research so as to specifically define judicial professional ethics in Europe. We would like to submit our wish to participate in the drafting of **a declaration of professional conduct principles²** to the general assembly, as recommended in the CCEJ’s verdict No. 3, because it is our position that professional ethics, understood in the sense of judicial duties, strengthen the public’s trust in our systems.

Participants:

**Belgique , Danemark , Espagne , France (coordination), Italie, Lithuanie ,
Nederland , Tchèque , Roumanie, Pologne**

²Consultative Commission of European Judges (CCJE) verdict No.3 (2002) for the attention of the European Council of Ministers.