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"THE INDEPENDENCE OF JUDGES AND PROSECUTORS:

PERSPECTIVES AND CHALLENGES"

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THE CHALLENGE OF EFFICIENCY AND QUALITY OF THE WORK OF JUDGES AND PROSECUTORS

by
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1. Judicial Power and the system of Justice. 2. The citizen and the system of Justice. 3. The work of Judges and Public Prosecutors: parameters of quality. 4. The efficiency of the System as a value: external and internal assessment. 5. Conclusions.

1. Judicial Power and the System of Justice

In the organisation of the Contemporary States there are, as a common political structure, the Legislative, the Executive and the Judicial Powers, side by side with the presidential power.

Such different powers or organs of sovereignty should respect the attributions and the institutional limits of the other power in accordance with the famous Montesquieu theory of the ***division of powers***, meaning the independency of the powers.

Another principle related to the division of powers - ***principle of interdependence -*** means that the different powers should apply "institutional solidarity" (or the "***concert between the State's powers***", as Montesquieu said).

On each one of these State Powers is incumbent a specific attribution: the **legislative** power elaborates the law, as this is the result of the general will of the people, expressed by the elected representatives; and **the executive** power has the task to implement the general policies, executing an action programme.

The judicial power administrates justice, applying the law, in order to resolve conflicts and to establish social peace.

As a guarantee of the independence of the Judges and Courts, mechanisms of "self-government" - the High Judicial Councils - are established.

With the High Council for Public Prosecutors, the same is established for the Public Prosecution Service, mainly in the States where such Service is not submitted to or under the jurisdiction of the Executive or Legislative Powers.

Generally, these High Councils have the mission to carry out the management of the activity of the Judiciary (Judges and Public Prosecutors), namely,

(i) the assessment of the Judges and Public prosecutors,
(ii) the evaluation of the work (performance), and
(iii) the disciplinary action.

However, other areas or components of general management of the judicial activity are incumbent on the Ministry of Justice.

Indeed, falling under the competence of the Executive are areas relating to decisions about

(i) the budget of Justice,
(ii) the management of technical equipment,
(iii) the facilities,
(iv) the definition and management of human resources of the Courts (staff), and
(v) the management of the police

All these mentioned areas have, or may have, a positive or a negative impact on the service offered by Justice to the citizen.

Bearing this in mind, we can say that the Judicial System receives contributions of the Judicial Power and of the Executive.

Otherwise, in their activity the Courts do apply the law, but they do not create it. The law is a tool

of the Judiciary, but the competency to approve it is of the Legislative power.

So, to reach a result – the judicial decision – there is a convergence of three Powers: Legislative, Executive and Judicial.

2. The citizen and the System of Justice

In medieval society all the state functions were managed by the same institution – the royal power – and by the same person – the King or the Queen.

Some centuries ago, some steps were taken towards a progressive differentiation of the various functions, even if the final decision belonged to the King!

Indeed, it was in that time that the first "Assemblies" took place, meeting of the different social classes: Noblesse, members of Church and People. These Assemblies had some power (power supervised by the King) to pronounce on issues of general interest to the kingdom.

It was also the age when, around and under the King/Queen, some jobs/professions were created with the task of resolving conflicts – in a way similar to today's courts - on behalf of the King. These professions were exercised by the first persons acting as Judges or as Prosecutors.

Only after the first written Constitutions (XVIII Century), the principles of the separation of powers and the independence of the judicial power became clearly understood, in accordance with the theories defended by Locke and Montesquieu. In this context I should recall some Solemn Declarations, as in the Constitution of the State of Virginia, in the USA (XVIII century) or the French declaration of the Man and the Citizen, of 1789.

Today, the Constitutions of democratic states establish the Rule of Law. What does this general rule mean ?

In a State governed by the Rule of Law, the citizens **know and they have the guarantee** that all relationships, public or private, should respect **the law,** approved by the competent body of the State (Parliament or Government), as an emanation of the collective will and representing general interests.

Furthermore, the citizen knows that he or she has the right to accede to a Court asking for justice, when someone has violated a legitimate interest, protected by the law.

The existence of an objective, impartial and independent Court on which it is incumbent to resolve the conflict of interests, is a guarantee for the citizen.

Other factors contribute to defining a State governed by the Rule of Law, but the existence of impartial and independent Courts and judges is one of the most important in modern societies.

Indeed, a State governed by the the Rule of Law is a guarantee of a free justice, not subordinated to interests, powers or "*raison d´État*". The independence comes as a guarantee of impartiality of the Judge and criteria of a fair trial.

There is not one unique model of Justice, in the perspective of organisation, composition, attributions or supervision.
Nowadays different systems exist together, side by side:
(i) systems where the appointment of Judges and Public Prosecutors is of the exclusive competence of the Judicial Power;
(ii) systems where Judges and Public Prosecutors are elected or
(iii) systems where the professionals are directly appointed by the elected powers, Parliament and Government.

The first model does not have an electoral and direct legitimacy, but this comes directly from the Constitution, as in the Portuguese case, according to which "**The Courts administrate the Justice on behalf of the People**".

In this way, the **legitimating source is the People**. **Simultaneously, the People are the final receivers** of the judicial action, as the citizens are the true reason for the existence of the Courts.

3. The work of Judges and Public Prosecutors: parameters of quality.

A citizen asks the judicial system when he or she needs protection for his or her rights or legitimate interests.

When he or she appeals to the system – in a civil, criminal, labour or administrative issue – or when he or she is asked by the same system, **the citizen trusts that justice will be done, meaning that the Judge or the Public Prosecutor will decide well**.

But, what is a "**good decision**"?

In a judicial case there are two parts, normally on opposite sides (author [party commencing the proceedings] and defendant). In this framework, is it, or not, presumed that one will win and will be satisfied, and the other will lose, unsatisfied?

Or, in other words: the same decision is "good" for one and "bad" for the other?

Taking this into account, we should debate whether it is possible to take a decision which could be considered a good decision by both parts, according to its inherent quality.

Should the judicial decisions conform to certain **parameters of quality**? Which ones?
Let us analyse some characteristics that will contribute to establishing a good decision.

a) First, the judicial decision should be **clear** and **understandable** to the receivers, meaning, to the common citizens.
The technical language of the Courts tends to be ciphered, based on confusing rules and concepts, difficult to interpret by the common citizen.

It is urged to decode that confused language, and it is necessary to draft the decision in a common language, even if with the safeguard of the requisite accuracy.
The author and the defendant, in this way, will be able to understand the grounds justifying the victory for one and the defeat for the other.

b) Second, the decision must be **objective,** meaning that it should analyse every one of the arguments of the two parts, it should consider these arguments in juridical terms and it must explain the reasons for accepting some and rejecting the other arguments.

This principle of objectivity is linked to the **contradictory principle (the adversarial principle),** meaning that each person has the right to be heard by the judicial authority, before a decision against him or her can be taken.

c) Third, the taking of the decision must be done with no concession to any interest of the Judge or Public Prosecutor; it must be **impartial.**

In his or her action, the judge should avoid all interests, in the sense that only **the conviction** may be present in the judgment of a specific case, ***based on the analyses of the facts and on perception/interpretation of the Law***.

The judge should have no interest in the solution of the conflict, in order to solve the question only subject to the facts and the law.

This means that the judge or the Public Prosecutor must avoid any individual, collective, economic, social, and religious, race, gender, cultural, familiar or any other interest.

d) Fourth: the decision must be **fair,** giving to the case a solution based on the Law, in an **equitable** manner, even if, sometimes, without direct support of the positive law.

Indeed, in several cases the application of an equitable criterion is required, more than the simple application of the law rule, in order to satisfy a legitimate interest, as in juvenile justice.

e) Fifth: the decision should be **"legal",** based on the law, even if, as I said, sometimes this law should, eventually, be avoided to give place to justice based on **equality.**

T**he principle that no one should be above the Law and the equality of all citizens before the law are values of modern societies, and they express the Rule of Law.**

However, the principle does not mean that all citizens should be considered in the same way. Different things must be considered in a different manner and the same things must be considered in the same way, as our Constitutional Court says in the case law, expressing the principle in a material dimension.

f) Sixth: the decision must be taken **without delay**. The **European Court of Human Rights** shows great concern about the issue and the **European Convention on Human Rights** establishes a rule on the right to a decision within a reasonable time.

When a citizen asks for justice, this means that he or she is asking a Court to solve his or her problem. However, in several cases, the problem is not solved and it is aggravated by the delay!

A decision should be taken on time to be fair!

The system of justice is under great criticism by public opinion, and one of the greatest criticisms is is delay. In this sense, the professionals have a main duty to avoid time contributing in a negative way to the resolution of the case.

g) Seventh: the decision must be **effective** in the sense that it must solve the real problem and not only the "proceeding"! The decision should be based on the merits of the case more than on the form, it must decide the substance of the issue and it should be not only interested in ending the proceeding.

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If a decision contains all these elements, I am sure that it will be considered a good decision.

4. The efficiency as a value: internal and external assessment

The goal of the judicial system is to offer a service to the citizen, in order to resolve conflicts and to establish social peace.

Like other public organisations that offer services to the public, the justice system, too, may be evaluated with respect to individual performance and with respect to the satisfaction of the citizen as a collective structure:

a) When the evaluation is with respect to the collective structure, as a global service, the objective is to know if it is efficient, taking into account the satisfaction with the results, according to some standards, such as the speed and the capacity of a global answer.
b) When the evaluation is with respect to individual work, this is based on a case by case perspective, in order to determine whether the judge or public prosecutor has decided well, whether he or she has decided in a fair way.

These two kinds of evaluation are the two sides of the same service offered to the citizen. So, the mechanisms of this evaluation are different. But the goal is the same: to analyse the quality of the decisions and the efficiency of the global system, from the point of view of the citizen, as the final beneficiary of that system.

I have pointed out that judges and Public Prosecutors have a self-government, materialised in the HJC.

These HJCs have the competence to evaluate individual and professional performance. Or, in other words: they have the competence to analyse how good the work is, the extent to which the results show or do not show quality and how these results can contribute to a positive evalutation of the whole system, in terms of efficiency.

It is incumbent on these Councils to carry out the general management of magistrates (judges and Prosecutors) and exercise disciplinary tasks.
In the context of this self-government, incumbent on and exercised by the High Judicial Councils, these main tasks are, in a common way, developed by them in relation to Judges and Public Prosecutors:
- to assess/evaluate the performance;
- to carry out general management: to appoint, to promote and to move;
- to exercise disciplinary action or to supervise in general the activity of judges and public prosecutors.

For example, and concerning Public Prosecutors, and according to the relevant Statute, the High Council of the Public Prosecution Service is competent: *"To appoint, assign, transfer, promote, dismiss or remove from office, consider the professional merit, take disciplinary action and carry out, in general, all acts of an identical nature with regard to the Public Prosecutors, except for the Prosecutor General"* and *" To approve the annual plan of inspections and to order the carrying out of inspections, investigations and inquiries"*

Assessment criteria and effects
The Prosecutors are assessed by the High Council of the Public Prosecution Service.
The assessment must consider the manner in which the Public Prosecutors carry out their duties, the caseload and the difficulties encountered, the working conditions, their technical training, intellectual abilities, any legal works published and civic aptitude.
Each year the High Council approves a plan of inspections, including inspections to assess the professional merit of the Prosecutors and to determine how this or that judicial circumscription or service is operating, from the perspective of the Prosecutorial obligations.

Disciplinary liability
One of the most important competences and tasks of the High Council is the exercise of **disciplinary action.**
Effectively, the Public Prosecutors are subject to disciplinary measures under the terms of the Statute.
The law determines that the disciplinary offences consists of those acts committed by Public Prosecutors in breach of their professional duties, as well as those acts and omissions of their public life – or which have a consequence on them – that are incompatible with the decorum and dignity necessary to the performance of their duties.

Professional deontology
Another set of powers granted to the High Council concerns **professional deontology** and supervision. Within these powers, the Council proposes to the Prosecutor General the issuing of directives on how the Prosecutors should hold their office and with which the Prosecutors are to comply.
On the other hand, the High Council is entrusted with the supervision of the Prosecutors' conduct and the improvement of both the Public Prosecution operation and the judicial agencies.

This internal evaluation, in the field of work or related to disciplinary action, is focused on the individual person. However this internal evaluation is under an important criticism of corporate.

Side by side with this internal perspective, we may say that there is an external view on the system. However I cannot say that there exists a real external evaluation in a systemic and institutionalized way. Indeed this external view represents the idea that common people or specialised observers have on the role and functioning of Justice, normally, from the perspective of the delays, the quality of judicial decisions, the relationship with citizens, the impartiality of judges and the efficiency of the system.

There are different external perspectives of the system.
- First, public opinion: public opinion today has a critical view of all systems, mainly of the professionals. Even if this "evaluation" can be considered a legitimate one, it is based more on extrapolations of specific negative cases than on global and real data;
- Second, the opinion makers: the voice of these is not in favour of the status quo, criticising the current situation.
- Third, objective studies on the judicial systems are carried out by international organizations, namely the Council of Europe. But, these studies apply some parameters that do not have links with the local reality.

These mechanisms give an external view of the system. However, there are other mechanisms that allow another perspective on the work of the professionals and on the efficiency of the system.

This afternoon we will have opportunity to analyse how the duty of the accountability of the System is accepted as a normal rule, nowadays, both in the perspective of a System that offers services to the citizen and as accountability in an individual way.

I do not want to anticipate, now, the workshop…but I would like to stress three ideas:

1. **The duty of accountability of the system to the Community is based, first, on the reason that the judicial power is exercised on behalf of the people and, in this way, accountability should be to the people; second, because this duty corresponds to a fundamental right of the citizen.**

2. The system will tend to become better (higher quality, more efficient) in resolving the

problems, if it is under a public and permanent scrutiny.

3. Justice is one of the pillars of democracy, as it resolves the social or individual conflicts and it is a safeguard of fundamental rights. So, a more efficient system will contribute to a better Democracy.

5. CONCLUSIONS: some important challenges of the judicial system, nowadays…

A. More than in any other age, Justice is the "focus" of the most important discussions by professionals (Judges, Public Prosecutors, Lawyers…), academics, politicians, analysts (sociologists, journalists…) and common citizens!

B. Several factors contribute to this situation:

1. A political factor: in the sense that the politicians or the politic powers want to "influence" (on) justice. I am not saying that they interfere in or influence a specific case. No, they interfere in the system as a whole. This ideology has some bases in the French Revolution, according to which the elected political power (legislative/executive) is the legitimate power and the judicial power (not elected) should be under/subordinate to them!

2. A civic right/duty, as another factor: today there is a modern vision or supervision of the state functions by the citizen. This citizen is well informed; he or she acts in social networks and uses the new technologies every day. The citizen has a proactive perspective and asks for better answers of public organisations. Concerning Justice, the modern citizen is asking for more quality in the decisions, for better results of the global system – namely in the field of criminal investigations – for more possibilities to appeal, for a system that is not so expensive, and so on….

3. An economic factor: the criticism goes to the global system, mainly to the delays in taking final decisions. This is considered a negative contribution to the economy, because – it is argued – international investments are not made in the country and investors are afraid that the related judicial case could run for many years in the Courts!

C. How can the judicial system and individual professionals answer the questions referred to above?

1. Justice and professionals should modernise in general (new technologies, new languages, new methods of work….)
2. Justice and professionals should become more and more "professional": it is necessary to enhance training, teamwork, etc.
3. Professionals should draft decisions with high quality (with the characteristics I have mentioned…)
4. The system should draft global, objective and systemic instruments to carry out an annual evaluation on the results achieved!

These are some of the main challenges of the Judges, Public Prosecutors and of the Judicial System, and the answers to them should be able to satisfy the citizen, who is the source of the Judicial Power and, at the same time, its beneficiary.