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**“THE INDEPENDENCE OF JUDGES AND PROSECUTORS:
PERSPECTIVES AND CHALLENGES”**

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JUDICIARY AND MEDIA

by

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1. A judge or a prosecutor is entitled to certain rights, but also subject to some legal and ethical rules in his/her relationships with the media; these rules may even touch upon some fundamental rights that are usually not subject to restrictions for other citizens, such as the freedom of expression or the freedom of association.
2. Indeed, freedoms of the judge or the prosecutor as a person and a citizen interact with the duties and obligations that are typical of his/her office; such duties and obligations may stem from compliance with general criminal law (e.g. secrecy), but also from disciplinary rules or purely ethical requirements.
3. The overlapping between these multiple levels of dealing with our topic will only allow a general survey of it.
4. For the sake of brevity, aspects concerning ethics, freedom of association, as well as behaviour of judges and public prosecutors in their private lives will be omitted.
5. A first viewing angle from which one can consider the issue of ethical and legal requirements for judges and prosecutors in dealing with mass communication concerns **the need that the judiciary may know (investigate, or adjudicate) the facts submitted to it without any "undue external influence"**.
6. This is exactly the formula employed in paragraph 2 of the UN Basic Principles on the Independence of the Judiciary of 1985 (*"The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason"*).
7. It was also the scope of Principle I (2) (d) of Council of Europe Recommendation No R (94) 12 of 13 October 1994 (*"In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner"*). This recommendation has now been replaced by Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states *"on judges: independence, efficiency and responsibilities"*, adopted by the Committee of Ministers on 17 November 2010. Art. 3 of the new Recommendation contains the same concept.
8. To problematise our analysis, we can now pass to address another point of view, i.e. the conflict between the need to preserve judicial activity from **"undue" external influences** and the protection of the **right to information**. Remaining at the level of international law, **Article 10 of the European Convention of Human Rights**, while at paragraph 1 ensures for *"Everyone ... the right to freedom of expression"*, including *"freedom ... to receive and impart information and ideas without interference by public authority and regardless of frontiers"*, at paragraph 2 provides that *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society"* – among other reasons – **"for maintaining the authority and impartiality of the judiciary"**.
9. Another point of view from which our topic may be addressed concerns – is should be clear by now - the **guarantee of the authority and impartiality of the judiciary**, on which the **activity of mass media** has a relevant impact. The rule coming from Article 19 of Recommendation n. 12 of 2010 is very clear: *"Judicial proceedings and matters*

*concerning the administration of justice are of public interest. **The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence.***

10. Continuing our review, it may worth be mentioning that the European Court of Human Rights has dealt with the topic of **press campaigns** concerning court cases. Such campaigns are related, on one side, to the keen interest of members of the media for legal proceedings, and, on the other side, to the undoubted interest of the public to receive information about them. Considering this, the Court states that notion of "authority and impartiality" of the judiciary, a value that must be reconciled with the right to information, has to be interpreted in the light of the Convention. *"For this purpose, account must be taken of the **central position occupied in this context by Article 6**, which reflects the fundamental principle of the rule of law."* *"The term "judiciary" ("pouvoir judiciaire") comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity. The phrase "authority of the judiciary" includes, in particular, the notion that **the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function.**"*¹
11. The protection afforded by Art. 10 of the ECHR to freedom of information may therefore be in **conflict** with the guarantee of an impartial judge, as provided by Art. 6, since media attention to court cases can cause undue influence on judges, be they professional or lay judges.
12. According to the Court, consequences of an attack (or an apparent attack) on impartiality may also include an impairment of the authority of the court. The Court holds that *"**if the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes**"*.²
13. Let us consider now the point of view of the **presumption of innocence**. According to the Court, *"the presumption of innocence may be infringed not only by a judge or court but also by other public authorities."* However, *"**Article 6 para. 2 cannot ... prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.**"*
14. The Court in Strasbourg argues that, if media attention as such does not deprive the defendant of the procedural safeguards of Article 6 ECHR (e.g. right of defense and equality of arms), dissemination of news, guaranteed by Article 10, may be nonetheless in conflict with the presumption of innocence guaranteed by Article. 6, **if such dissemination creates the expectation in the public opinion of a decision of conviction.**
15. As the Court states, the presumption of innocence **is not only a guarantee of a formal nature**, requiring e.g. that in giving information one must clearly distinguish between those who are merely suspected of having committed a crime, those who are defendants in trial,

¹ ECHR, 26.4.1979, *Sunday Times v. UK No 1*, 55. Documents of the Council of Europe and the European Court of Human Rights are available through a special link in the website www.coe.int.

² *Idem*, 64.

and those who are convicted, even in first instance; but it **is also a guarantee of a substantive nature, which is made concrete in the obligation for any public authority** (the judge and the prosecutor, the police, but also any other member of public bodies) **not to present someone as guilty before a final determination of responsibility.**³

16. States must therefore seek a balance, that should not impair the role of a free press in a democratic society, to reconcile the freedom of the press and the protection of the authority and impartiality of the judiciary.
17. The Strasbourg Court recognizes that the press plays a prominent role in a State governed by the rule of law. If the press should not exceed certain limits especially for the protection of reputation of persons, its obligation and responsibility is nevertheless to impart information and ideas on political and other issues of general interest. These issues no doubt include those concerning the administration of justice, an institution essential to any democratic society. **The press is in fact one of the means available to policy makers and the public to ensure that judges (and prosecutors) carry out their high responsibilities in accordance with the purpose of the functions that are assigned to them** ("watch dog"). Yet one must take into account the particular task of the judiciary in society. As guarantors of justice, a fundamental value in the rule of law, **their action has to be performed in public confidence.** It may be necessary to protect their action against destructive attacks without serious foundation, especially where a duty of reserve prohibits the judge to react.⁴
18. We will come back later on the issue of protection of the judiciary in its relation to external attacks, whereby the media are sometimes promoters of campaigns, sometimes just vehicles of attacks coming from members of public powers or private individuals. As to the balance to be struck between the right to information, protection of the presumption of innocence and guarantee of the authority and independence of the judiciary, recalling that according to the ECHR public officials must refrain from presenting a person as guilty before judicial determination of liability, we may now clarify that **media personnel must refrain from disseminating the story in a way which, intentionally or otherwise, may be likely to be detrimental to the serenity of the judge and the defense of the accused.** In the framework of the exercise of freedom of the press, the objective indication of the charges, as well as elements that are not covered by confidentiality of investigation, that parties of the trial have offered in public to support their views, are to be allowed, provided that these elements are of such a nature that the public will understand that they are mere positions in the trial, and that it belongs to the court to evaluate them.
19. As regards the possible infringement of the presumption of innocence, it is worth noting that one must take account of the **involvement in the dissemination of news that the accused or his/her defense has had.** So, if the presentation of items likely to lead the public to an opinion of guilt was balanced by the presentation of the theses of the defense, within an adequate journalistic approach making the public understand that the final decision rests with the judge, no infringement exists.
20. As for actions likely to jeopardise impartiality (objective or subjective impartiality) of the courts, the Strasbourg Court uses **different "standards" according to whether the case is adjudicated by professional judges or by a jury,** as the former, unlike the latter, must

³ See e.g..ECHR 10.2.1995, *Allenet de Ribemont vs. France*, 35-41; 15.11.2001, *Papon v. France*.

⁴ ECHR, 26.4.1995, *Prager and Oberschlick vs. Austria*, 34. The balance mentioned in the text is far from being reached, especially in national case laws. The Second European Conference of Judges of the Council of Europe, Krakow, 25-26 April 2005, consequently expressed the hope of a promotion by the same Council of Europe of a study in this direction (see conclusions of the Conference, 3).

be especially trained and able to cope with external influences, so that influence of media on the decisions of juries is assessed more rigorously.⁵

21. It is now worth dwelling on the sanctions for violations of the provisions of the European Convention on Human Rights concerning the relationships between justice and the media: **the State**, as provided for by the Convention, **may be directly called to appear before the ECHR in Strasbourg if the violation is the result of damaging statements or actions by its leaders** - including judges and prosecutors -, the press, or the spread of harmful information from third parties, but by means of information channels under the supervision of the State.
22. Conversely, **the state cannot be held accountable** for violations attributable to **private entities** not subject to state control, including e.g. private information agencies, private parties in the trials, etc.,⁶ **with the exception** of the case in which - at the request of the victim - the administrative authority and, above all, **the court system have not provided an adequate relief to the violation occurred.**
23. A number of suggestions on this subject, as regards the specific role of the judge, was provided by the **Consultative Council of European Judges** established within the Council of Europe. Recalling the **obligation of reserve** of courts vis-à-vis the press, the Council stressed the need that the judge preserves its independence and its impartiality and avoids any possible use of his/her personal relationships with journalists, and any improper comment on the procedures being dealt with.
24. This consideration – we may now note - introduces another point of view: the need to avoid the establishment of **privileged press relationships**, for private use of the court, to the benefit of judges and/or prosecutors, and to the advantage of the journalists vis-à-vis their competitors. The CCJE, given the right to information guaranteed by Article 10 of the ECHR, felt that the court had an obligation to meet the legitimate expectations of citizens, so that it is convenient that decisions are accompanied by a summary or a statement explaining the merits or specifying the meaning of decisions for the public.
25. As for the countries in which the court intervenes in the conduct or control of criminal investigations, is necessary under the CCJE's Opinion that the court, in a similar way to what is expected from prosecutors, reconciles the obligation of secrecy on the proceedings with the right to information; by this balancing the court must be able to freely perform its task without fear of any pressures that may be exercised by the media. The Consultative Council has noted with interest the current practice in some countries, where the task of communicating to the press the issues of public interest is entrusted to a judge responsible for communications or to a **spokesman**. The suggestion has been accepted in Recommendation n° 12 of 2010; Article 19 in fact provides that "*The establishment of courts' spokespersons or press and communication services under the responsibility of the courts or under councils for the judiciary or other independent authorities is encouraged. Judges should exercise restraint in their relations with the media*".
26. As to the conflictual relationship between the duty of self-restraint from reactions of judges (and prosecutors) vis-à-vis unwarranted attacks coming from the press or amplified through it, in view of the need for protection of the judicial and prosecutorial functions, in a number of documents the Consultative Council of European Judges has recommended

⁵ In this direction, noting the need of the protection of judges from undue external influence in accordance with the provisions of the text, the Consultative Council of European Judges (CCJE) at the Council of Europe stated that "*Judges must accept that they are public figures and must not be too susceptible or of too fragile constitution*", in relation to the necessity to balance the protection of the judicial process from "*distortion or pressure*" and "*the interests of open discussion of matters of public interest in public life and in a free press*" (Opinion No. 1 (2001) CCJE to the Committee of Ministers of the Council of Europe, paragraph 63).

⁶ Cfr. e.g. ECHR, 15.11.2001, *Papon vs. France*, cit.

that **reactions may come from a specific body in charge with the protection of independence.**⁷ Recommendation n° 12 of 2010, cit., has enshrined this principle in Article 8: “*Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy*”.

27. Concerning specifically comments on decisions coming from politicians, the subject has been dealt with in Article 18 of the Recommendation: “***If commenting on judges’ decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges’ decisions, other than stating their intention to appeal.***”

⁷ E.g. Article 13 of the Magna Carta of Judges, adopted by the Consultative Council of European Judges on 17.11.2010, provides that , in order “*to ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their statute as well as the organisation, the functioning and the image of judicial institutions*” (emphasis added).