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The Emerging Global Judicial Ethics: Issues and Problems

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***Abstract*—**In many states around the world, actions to improve judicial ethics are developing significantly through the production of professional standards for judges. The quest to improve the ethics of judges is legitimate. However, as this development tends to be very important at the moment, some risks it presents must be highlighted. Indeed, if the objective of improving Judges' Ethics is legitimate, it can also lead to banalization of justice, reinforcement of criticism against the judiciary and to broach incidentally the question of the limits of judgment, which is most perilous for the independence of the judiciary. This research, based on case studies, interviews with judges and an analysis of the literature on this topic (mainly from the United States of America and European Union Member States), tends to draw attention to the fact that the result of the development of these professional standards is that the ethical requirements of judges become ethical requirements of justice, which is an undesirable effect of which we must be aware, in order to prevent it.

***Keywords*—**Judicial Ethics, Codes of conduct, Independence, Limits of Judgment.

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I. Introduction

IMPROVING the ethics of judges is a normal expectation of society. Various examples can demonstrate the need for such an improvement and we can hope by formalizing and disseminating ethical standards that judges become aware of this need and reflect on their own ethical behavior.

Such professional standards have been developing for several years around the world. However, the risks of such a development are not negligible and must be explained: increasing criticism against the Judiciary, broaching the question of the limits of the judgments and lead to the banalization of Justice.

This analysis on the issues and problems of the emerging global judicial ethics is based on case studies, interviews with judges and reading of the literature on this topic (mainly from the United States of America and EU Member States). In addition, the author is member of a research project called « *Handle with care: assessing and designing methods for evaluation and development of the quality of justice* » funded by the Directorate-General for Justice and Consumers of the European Commission. This project focuses on the many criteria of the quality of justice, including Judge's Ethics and tends to know how it can be evaluated and promoted without risk for the independence of Justice. Indeed, as indicated by the name chosen for the project, the issue of improving the quality of justice, notably by improving judicial ethics, must be handled with care.

II. Issues

While some risks may be feared, the legitimacy of such a quest for ethics of judges is nevertheless legitimate (A). It's really important to improve this ethic (B) and to better understand how to do it (C).

A. The Legitimacy of Improving Judges' Ethics

There is an obvious need to improve the Judges' Ethics. A judge, for example, should not declare that a candidate in presidential elections is not up [1]; a judge should not tweet during a hearing. In France, the behavior of judges who tweeted comments during a hearing provoked a scandal, one of the judge having written: "Did we have the right to slap a witness?" [2]. These two examples are clearly breaches of Judicial Ethics.

Moreover, improving Judges' Ethics is one of the opportunities to resolve the crisis of confidence towards Justice. This crisis clearly exists [3] even if the tools to assess it are not so easy [4].

B. Improving Judges' Ethics

As a result of these problems, ethical standards have been adopted worldwide and "*the various sources of judicial ethics converge in the expression of similar, if not identical, fundamental principles*" [5]: they recall traditional ethical principles of justice, such as independence, impartiality or respect for the law, but sometimes also incorporate more specific recommendations (such as not accepting gifts for example).

However, some questions are not resolved about Judges' Ethics. A number of doubts still remain on the nature of the ethical norms that are based on very different forms (codes, charters, guidelines, principles, collection of ethical obligations) and one may particularly question the legal value of these ethical standards. Are they soft law, without risk to the independence of the judiciary but any efficiency or, are they hard law at the risk of calling into question the independence of justice if these rules lead to question more often the judges' liability?

Moreover, their content does not address all the ethical issues that should be resolved, particularly the question of the existence of the judicial power. An American judge recalls the

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example of German judges during the Nazi regime who have been criticized for having applied the anti-Jewish laws, and who justified themselves in declaring they just had applied the law. The American judge asks whether the ethical rules necessary to reject such an unfair law have been adopted today in the United States of America, but notes that it is not the case and that the Ethical guides do not solve this problem yet [6]. One can wonder why such ethical rules are not yet addressed and resolved.

On the contrary, the trend in recent years is for a number of professional standards to call for a detachment of judges from extra-legal considerations. For example, the 2006 English Guide outlines the judges' relationship with the media and their participation in public debates, even before their commercial activities or their involvement in community organizations. One can wonder if it is not revealing the well-known fear of a political power of justice or the so-called "Government of Judges" [7]? If the benefits of judicial independence to the collective well-being have been considered and supported [8], it appears that the positions are now more moderated [9]. More and more, criticisms are expressed about the lack of limits on the power of judges and are reflected by the content of some of these new ethical tools [10].

C. How to Improve Judges Ethics?

The number of ethical instruments should be broadened and not be limited to standards that sometimes lead to a repressive tool for judges, be it professional liability or criminal liability. Preventive tools such as consultative bodies should be developed. A deontological counselor can be created [11] but also a collegial body. The collegial body is often considered preferable because more independent and more effective [12]. In France, for example, a "deontological council" of the Administrative Justice was established in 2012. This is an interesting example in many ways: the composition (current members are retired judges and not serving judges, which is protecting for their independence), they serve a renewable three-year term (even if a longer but not renewable term would be better for their independence [13]), any judge can submit any ethical questions regarding her or him personally, but more general ethical questions can also be asked by the presidents of any courts [13]. The council's opinions are made public, after anonymisation. It also makes recommendations on its own initiative to complete the Ethical rules concerning the French Administrative Judges.

These preventive tools must be developed because they correspond to a casuistic approach, better suited to Independence of Justice than professional or criminal liability [14]. Nevertheless, these repressive tools must be maintained too, on condition of the respect of the principle of independence of judges. As explained by the Consultative Council of European Judges in its opinion n° 3:

> "*In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which cannot be posited simply because there has been a failure to observe professional standards set out in guidelines*" [15].

Regarding the nature of the body responsible for judging the professional conduct, the Bangalore Principles of Judicial Conduct, adopted under the auspices of the United Nations in 2002, state that the professional liability should be evaluated by an independent commission.

The professional tool is important, but others are also necessary, particularly institutional and cultural tools.

Among the institutional tools, the decentralization of judicial management is currently a key issue: management handled by the Executive is often the sign of a reduction of Judicial Independence. Self-regulation appears to be the most appropriate way of guaranteeing Judicial Ethics, which requires judicial management by an independent body and/or integral management by each court. For instance, in the Netherlands, according to the Law on the Organization of the Judicial System of 2001, the High Council of Justice must prepare its budget and the budget of the courts, and each court is responsible for its own management. There are, however, many questions about the competences that such a management body could be granted: in addition to the budgetary allocation to the courts, should it be responsible for the discipline, the recruitment and the career of judges? Insofar as such important powers are conferred on this body, what are the appropriate methods of appointment in it, so as to guarantee independence and not to allow a form of corporatism? Should its members be elected by the judges, appointed by the executive and ratified by parliament [16]? Should not external personalities be integrated into it?

Cultural tools also appear necessary, particularly to support the preventive tools and diminish the recourse to the repressive tools. A culture of Ethics must be developed. In this respect, a broad consultation of judges in the elaboration of ethical standards is of a nature to guarantee their legitimacy and to widely disseminate these standards to these professionals, and also to establish an ethical reflex. Integrating ethics into initial and continuing education also contributes to the dissemination of a culture of ethics. Creating a profession of ethics counselor or ethics committees follows the same logic. As stated in the opinion n° 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality:

> « *47. The CCJE considers that the preparation of such statements is to be encouraged in each country, even though they are not the only way of disseminating rules of professional conduct, since: - appropriate basic and further training should play a part in the preparation and dissemination of rules of professional conduct; - in States where they exist, judicial inspectorates, on the basis of their observations of judges' behaviour, could contribute to the development of ethical thinking; their views could be made known through their annual reports; - through its decisions, the independent authority described in the European Charter on the Statute for Judges, if it is involved in disciplinary proceedings, outlines judges' duties and obligations; if these decisions were published*

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in an appropriate form, awareness of the values underlying them could be raised more effectively; - high-level groups, consisting of representatives of different interests involved in the administration of justice, could be set up to consider ethical issues and their conclusions disseminated; - professional associations should act as forums for the discussion of judges' responsibilities and deontology; they should provide wide dissemination of rules of conduct within judicial circles. » [14].

The assessment of the state of ethics in a country can also have an important cultural purpose, which in turn implies the citizens for whom these ethical standards are developed. There are several methods. In Europe, the ethical performance of justice is most often evaluated from the number of disciplinary proceedings, which seem not sufficiently relevant [17]. In the USA, the Ethisphere Institute publishes an annual honor roll of legal practitioners and prosecutors that "count" for their ethical practice [17]. It is possible also to conduct surveys. The method of the World Justice Project is quite interesting on this point because it uses two data sources: a survey of a general population sample and the responses of people qualified in law [17].

But the problems raised by the Emerging Global Judicial Ethics must also be explained.

III. Problems

One can particularly distinguish three major problems: the risk of strengthening the criticism against the Judiciary (A), the risk of broaching incidentally the question of the limits of judgment (B) and the risk of banalization of Justice (C).

A. The Risk of Strengthening the Criticism Against the Judiciary

If the goal to improve Judicial Ethics is legitimate, it can also result in strengthening the criticism against the Judiciary. One cannot deny that the recent development of Conducts Guides had the effect of introducing greater requirements on the Judicial's way of thinking itself. This is why the people who fear the regulation of the behavior of judges suggest to talk about Judges Ethics rather than Judicial Ethics. In Australia, for example,

« *the Guide deliberately avoids the expression "judicial ethics". It does so on the ground that, while it is possible to identify principles or standards of conduct appropriate to judicial office, their application to particular issues may sometimes reasonably give rise to different answers by different judges* » [18].

Some judges have expressed their fears about ethical rules when codification was activated from the nineties. In Canada, for example, an author evokes the "resistances that sparked off the construction of the Principles of Judicial Ethics of 1998" [14, p. 309], and the Principles themselves provide that they "*do not constitute a code or a list of prohibited behaviors and should not be used as such*".

Each judge must be free of her or his ethical convictions. On the contrary, we can observe that the judges are increasingly required to decide or to justify on their ethical positions. For example, in the USA, when they are candidates for judicial elections. Public financing of judicial elections was envisaged to overcome this difficulty [19].

B. The Risk of Broaching Incidentally the Question of the Limits of Judgment

Some "codes of ethics" call the judges not to adopt political decisions or not to take in account extra-legal considerations. For example, Article 16 of China's Code of Conduct states that

"*judges should not get influenced inappropriately by the media and public opinion, and should not do, in public or in the media, comments that could undermine the seriousness and authority of res judicata*".

Breaches by judges of this code of conduct are sanctioned [20]. In Hungary, the president of the Supreme Court was recently dismissed for publicly challenging the government's reforms. Andras Baka was punished in 2012, "in a remarkably short time", because he had dared consider the lowering of the retirement age of judges, reduced from 70 to 62 years, as a disguised purge of the Judiciary and an attempt to bring justice to heel. He also criticized various legislative reforms between February and November 2011 [21]. It should be pointed out that as president of the National Council of Justice, he had a legal obligation to speak on any bill affecting the Judiciary. The European Court of Human Rights upheld the case and found several breaches of the principle of immovability of the judges, the independence of the judiciary and the right to challenge his dismissal before the courts of his country. It also considered that the national authorities had not questioned his ability to perform his duties or his professional conduct.

Through the expansion of the ethical standards, has reemerged the question of the limits of judicial decisions. Through this requirement, we can note a slipping from a recommendation to behave ethically to a recommendation to judge ethically, which has also obvious implications for the principle of independence. This is for this reason that the 2002 Bangalore Principles state that it is primarily the Judiciary's responsibility to promote and maintain high standards of Ethics in each country.

As a writer had noticed about the American judge:

« *Judges are not evenly drawn from all segments of society and, however well motivated they may be, they are likely to bring to their work the perceptions of an upper middle class, educated, largely male, and largely white elite* » [22].

There is no doubt that the issue of "decisional independence", which "*refers to a judge's ability to render decisions free from political or popular influence based solely on the individual facts and applicable law*" [23], is particularly important because the judge is certainly a cultural subject, with her or his own morals and her or his own convictions, and consequently her or his own prejudices. Nevertheless, the codification of ethical standards should not be an opportunity to reduce the independence of the judiciary.

If the adoption of ethical standards proves to be necessary, one can perceive a certain pressure on judges through these standards which require a kind of detachment, an asceticism,

which seems difficult to apply in practice. Moreover, one can also object to the idea of detachment that it is simply not an ethical position. As explained by a US judge, some detachment is necessary but also a bit of utilitarianism is necessary too [24]. If the judges who decide only on the basis of utilitarianism, consequentialism or instrumentalism, regardless of the case, does not adopt an ethical behavior, those who judge and enforce the law indiscriminately, as the law can possibly be unfair, do not behave ethically either [24]. One can recall the example of German judges during the Nazi regime.

C. The Risk of Banalization of Justice

One may also fear the risk of banalization of Justice, because through these professional standards, we accept a judicial checking from pretty similar standards to those of other public servants.

It is meaningful that this ethical approach has been introduced during a significant era of judicial systems reforms and in the context of the implementation of new management methods focused on efficiency and effectiveness in Public Administrations.

The discourse about Judicial Ethics evoked widely divergent dimensions, ones supported by political institutions trying to lead the judicial functioning to an administrative normality and others, supported by the judiciary, trying to take away Justice of productivist drift and to question the independence of the judiciary. Some judges took advantage of the drawing of these guides to mention the duty of listening to citizens, their fear being that productivity leads them to judge faster but worse. This was the case of the French judges commissioned by Parliament to draw up a collection of Judges' Ethical Obligations in 2008 [25].

IV. Conclusion

While there is still a need to improve the ethics of some judges, particularly in countries where they cannot be independent from an individual or an institutional perspective, it would also be important to clarify in the standards that the judges are free to not apply unfair laws. An international convention should be adopted on this subject, which will specify what an unjust law is and when a judge may not apply it. This may seem very ambitious, but it is a major issue of our time in which democracies seem to be shaky.

References

[1] Liptak, A., « Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term », New York Times, July 10, 2016. See https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html.

[2] Le Monde, 29 avril 2014. See http://lemonde.fr/societe/article/2014/04/29/pour-le-csm-un-magistrat-ne-doit-pas-tweeter-en-plein-proces

[3] Coulon, J.-M., Soulez-Larivière, D. (2002), *La Crise de la justice*, Ed. O. Jacob.

[4] Jackson, J., Bradford, B., Hough, M., Kuha, J., Stares, S., Widdop, S., Fitzgerald, R., Yordanova, M. & Galev, T. (2011). « *Developing European indicators of trust in justice* ». European Journal of Criminology, 8(4), pp. 267-285.

[5] Huppé, L. (2004). « *Les fondements de la déontologie judiciaire* ». Les Cahiers de droit, vol. 45, n° 1, p. 122.

[6] Kozinski, A. (2004), « *The Real Issues of Judicial Ethics* », Hofstra Law Review: Vol. 32: Iss. 4, Article 1.

[7] Davis, M. H., « *A Government of Judges: An Historical Review* ». The American Journal of Comparative Law, Vol. 35, No. 3 (Summer, 1987), pp. 559-580.

[8] William L. Landes W. & Richard A. Posner, « *The Independent Judiciary in an Interest Group Perspective* », Journal of Law & Economics, 18, 1975, 875.

[9] « *Judicial independence does not guarantee that judicial decisions will serve the public interest* » according to R. A. Epstein, « *The Independence of Judges: The Uses and Limitations of Public Choice Theory* », Brigham Young University Law Review, 1990, 828.

[10] Foulquier, C. (2011), « *L'indépendance de la Justice : une notion indépendante ?* », Actes de la journée d'études *L'indépendance de la justice*, 19 novembre 2010, Presses universitaires de Sceaux.

[11] Judge Irving R. Kaufman, « *Lions or jackals: the function of a code of Judicial Ethics* », 35 *Law and Contemporary Problems* 3-8 (Winter 1970), 6.

[12] Cynthia Gray, Advisory « *Committees Let Judges Look Befor They Leap* », 42 Judges' Journal 29 (2003), 29.

[13] Mamoudy, O. « Les avis et recommandations du collège de déontologie de la juridiction administrative », *RFDA* 2015, 368.

[14] Morissette, Y.-M., « Comment concilier déontologie et indépendance judiciaires ? », *Mc Gill Law Journal*, June 1, 2003, 297.

[15] CCJE (2002) Op. N° 3.

[16] Benyekhlef, K., Lavarone-Turcotte, C., Vermeys, N., « Comparative Analysis of Key Characteristics of Court Administration Systems », Canadian Judicial Council, 2011.

[17] Alt E., Le Theule, M.-A., « La justice aux prises avec l'éthique et la performance », *Pyramides*, 22/2011, p. 137-159.

[18] Ronald Sackville, « Judicial Ethics and Judicial Misbehaviour: two sides of the one coin? », The Journal of Law and Social Justice, Vol. 3 (2009), 8.

[19] Public financing of judicial elections was envisaged to overcome this difficulty. See Miner, R. J. (2004), « *Judicial Ethics in the Twenty-First Century: Tracing the Trends* », *Hofstra Law Review*: Vol. 32: Iss. 4, Article 2, 1110.

[20] Li Yuwen, « L'éthique professionnelle des juges chinois: un nouvel enjeu dans le paysage des pratiques judiciaires », Perspectives chinoises, n°76, 2003.

[21] Le Monde, 27 juillet 2016, http://lemonde.fr/europe/article/2016/07/27/hongrie-le-juge-qui-a-dit-non-a-viktor-orban_4975348_3214.html.

[22] Ferejohn, J. « *Independent judges, Dependent Judiciary: Explaining Judicial Independence* », *Southern California Law Review*, Vol. 72.353, 1999, 369.

[23] American Judiciature Society, « What is Judicial Independence? », http://www.ajs.org/cji/cji_whatisji.asp

[24] Swisher, K. (2007) « *The unethical Judicial Ethics of Instrumentalism and Detachment in American Legal Thought* », Willamette Law Review, 588-593.

[25] http://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/recueil_des_obligations_deontologiques_des_magistrats_fr.pdf, visited on April 25, 2017.

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