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COLLECTIVE ORGANISATIONS OF JUDGES AND PROFESSIONAL CONDUCT

A REVIVED APPROACH TO JUDICIAL ETHICS

TEAM FRANCE N°5

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INTRODUCTION

« The gathering of citizens in organisations, movements, associations, trade unions is a necessary condition to the functioning of any well-structured civilised society. » Vaclav Havel[5].

Questioning the compatibility of a judge's membership of a collective organisation with judicial ethics raises the more general issue of a judge's distinctive citizenship, as well as the integration of the judiciary in the workings of society. It also reveals contemporary doubts about the effectiveness of the separation of powers.

The right for judges to join a collective organisation is guaranteed by several, more or less legally binding, international norms, such as article 12 of the Universal Charter of the Judge: "*the right of a judge to belong to a professional association must be recognised in order to permit the judges to be consulted, (...)and in order to permit them to defend their legitimate interests*". The Council of Europe also drafted a "European Charter on the statute for judges" on July 10th 1998. Article 1.7 enounces "*Professional organisations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them*" and article 1.8 "*Judges are associated through their representatives and their professional organisations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.*" Recently, the Council also adopted recommendation (2010)12 which not only acknowledges the right for judges to form and join professional organisations, but also asserts that the mission of these organisations is to safeguard their independence, protect their interests and promote the rule of law (article 25). This right to form and join a collective organisation is also guaranteed by the Bangalore principles of judicial conduct (4.6 and 4.13) drafted by the United Nations Judicial Group on Strengthening Judicial Integrity in 2001.

International standards confer the right to form and join collective organisations on judges. For the purpose of this report, “collective organisations of judges” will characterise associations and trade unions whose members are judges, whilst “collective organisation” will refer to the process by which members of the judiciary organise themselves within professional bodies. As for the terms “association” and “trade union”, the former will be defined as an organised group of judges who share a common

[5] Vaclav Havel in *Letní přemítání*, 1991 — (en) *Summer Meditations.*

purpose, whereas the latter will be more specifically identified as professional bodies of judges established to protect their interests and improve their work conditions. These two forms of collective organisation have different legal statuses. Trade unions are provided with increased resources and capacities of action, such as work release (a reduced workload for union representatives) or local offices within courts. Lastly, the term "magistrate" will be used for countries where there is a common statute for judges and prosecutors. In other cases, we will focus exclusively on members of the judiciary in the European sense, meaning judges.

Modes of collective organisation vary within European judiciaries. Notwithstanding the fact that Spanish judges are prohibited from being members of trade unions and that France is the only country where trade unions have been formally established within the judiciary, most European associations of judges carry out action that is similar to trade union activities. In some cases, associations have even acquired greater legitimacy than trade unions in representing judges, as is the case with the *Deutscher Richterbund* (German Federation of judges – DRB) in Germany. On the contrary, in England, Wales and Switzerland, the ambitions of such associations are more limited. The reluctance to form trade unions, or to be designated as such, seems to find its roots in the perceived limits of political involvement inherent to judicial office. Unionisation would potentially raise conflicts of interests and weaken judicial restraint, therefore undermining the ethical principles of independence and impartiality.

According to the European Court of Human Rights (hereafter "ECHR"), « independent » under article 6 of the Convention refers to independence *vis-à-vis* the executive and legislative powers (Beaumartin v. France, § 38) and also *vis-à-vis* the parties (Sramek v. Austria, §42)[6]. This objective independence entails the existence of procedural safeguards to separate the judiciary from other powers. Subjective independence, on the other hand, refers to the absence of any kind of pressure on judges. Moreover, the Court defines impartiality as the absence of prejudice or bias. Impartiality has to be both subjective, as regards the personal beliefs and behaviour of the judge, and objective, meaning national judicial systems need to offer sufficient guarantees to exclude any reasonable doubt in the court's impartiality. The "appearance of impartiality" has become a key standard to assess respect of Article 6 of the Convention. Judicial restraint, as a component of dignity, is also at the core of judicial ethics. According to the French *Conseil Supérieur de la Magistrature* (High Judicial Council - hereafter "CSM"), restraint is a

[6]Article 6 of the European Convention on Human Rights: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

safeguard against public statements that might compromise the trust and respect that the judicial function must inspire.

Yet this perceived incompatibility must not be caricatured. In many countries, such as Turkey, France, Portugal or Italy, and within international associations, collective organisation of the judiciary, on the contrary, appears as an appropriate means to renew judicial ethics, through actions in favour of the rule of law and analysis of judicial practice.

How can the different conceptions of collective organisation in judiciaries across Europe be explained? Are judicial ethics an obstacle or a purpose for collective organisation? To what extent can an ambitious vision of collective organisation be coherent with judicial ethics and professional conduct?

After explaining how cultural backgrounds have an impact on the way we perceive judges and have traditionally provided a restrictive conception of collective organisation within the judiciary, (**I**), we will show the extent to which more ambitious organisations could contribute to renewing judicial ethics. This analysis will enable us to make recommendations for renewed international standards on this matter (**II**).

I. CULTURAL BACKGROUNDS TO A TRADITIONALLY RESTRICTIVE CONCEPTION OF COLLECTIVE ORGANISATION WITHIN THE JUDICIARY: FROM PROHIBITION TO STANDARDS FOR A MINIMAL DEGREE OF ORGANISATION

Given the specificity of their mission, members of the judiciary have derogatory statuses and, as a result, their unionisation may be controversial (A), although minimal forms of collective organisation appear to be common ground (B).

A. National paradigms at the root of a restrictive conception of judicial unionisation

Even in countries that put forward a restrictive view of judicial unionisation in order to safeguard judicial ethics (1), some minimal degree of professional organisation is established (2).

1. The prohibitive view as a safeguard for judicial ethics

The limited view of judicial collective organisation is commonly justified by ethical reasons. The core ethical duties of a judge, namely impartiality, independence and judicial restraint, are considered to be incompatible with judicial collective organisation. This can either lead to a legal prohibition of unions

(the Spanish exception) or to a cultural reluctance towards such organisations (Switzerland, England and Wales).

a) Legal prohibition of judges' unions : a Spanish exception

Spain is the only country within Europe to legally prohibit the creation of judges' unions. Belonging to a trade union is considered to be a disciplinary fault. Indeed, the Spanish Constitution provides in article 127: « *Judges and Magistrates, as well as Public Prosecutors, whist actively in office, may not hold other public office or belong to political parties or trade unions. The law shall lay down the system and methods of professional association for Judges, Magistrates and Prosecutors.*[7] » This prohibition of trade union membership for judges was the result of a heated parliamentary debate in 1978 that revealed different conceptions of the judicial branch[8].

The communist group, or *el Grupe comunista*, considered that denying judges their right to belong to a union was incompatible with the substantial mission of the judge, namely the protection of people's fundamental rights and liberties. Unionisation is therefore not seen as a danger to judicial ethics, but as a powerful means to help the judiciary in its core mission.

The socialist parliamentary group argued in favour of restricted access to unions for judges, from a pragmatic point of view. Like the communist group, the Socialists were confident in judges' integrity and did not regard complete prohibition as a way to adequately safeguard judicial ethics. In this sense, they disputed the mythical idea of an "empty shell judge", advocated, according to them, by the centrist group.

The centrist group, whose opinion prevailed in the debate, underlined the specificity of the judicial body, arguing that the main justification for prohibition lies precisely in the prestige of the judicial function. Centrists argued that the creation of judges' unions was likely to induce a lack of trust in the judiciary within society, and would necessarily lead to a politicisation of judges. They considered that judges must appear as neutral as possible and therefore remain strictly apolitical. Ultimately, the precautionary principle advocated by the centrist group prevailed, in order to guarantee both absolute independence and strict impartiality within the judicial branch. As a result of this non-consensual parliamentary debate, the constitutional law recognised trade union freedom for all workers, including civil servants, but denied such freedom to judges.

[7] Spanish Constitution, 27 December 1978
[8] Fernando J. Sanz Llorente, professor in trade union law, Escuela Universitaria de Estudios Sociales: « *La libertad sindical de los jueces, magistrados y fiscales* ».

Despite this constitutional prohibition, judges' professional associations were authorised, providing that they could promote judges' professional interests and work for the public service of Justice. The law therefore frames the scope of their action: they can neither carry out political activities, nor can they have any connection to political parties or unions. These limits are quite consensual and still allow for an array of different missions. This conducive compromise might explain the lack of mobilisation of Spanish judges to obtain the right to organise unions.

b) Cultural barriers to collective organisation of judges

In other European countries, there is no legal prohibition for a judge to be a union member, yet members of the judiciary themselves consider it unethical to be part of a trade union.

In Switzerland, reasons pertaining to the source of judicial legitimacy are at the very basis of an ethical objection to collective organisation. The absence of judges' unions in Switzerland lies in the fact that judges are elected either by the Federal or cantonal parliaments, or by the people themselves. Pascal Mahon, Professor in Constitutional Law and President of the *Académie Suisse de la Magistrature* (Swiss Academy of Judges and Prosecutors), explains that as members of political parties and, more importantly, as people's representatives, judges do not belong to any institutional body[9]. As a result, organisations which would aim at defending professional interests would be incompatible with this status, in the same way as it would be unethical for Members of Parliament to establish unions. Collective organisation is all the more unnecessary for Swiss judges in that their election confers them with democratic legitimacy and therefore renders them somewhat indifferent to processes of legitimisation and identity building. In light of the above, it appears that judicial collective organisation does not belong in Swiss culture, although, as in Spain and the jurisdiction of England and Wales, professional associations exist to a minimal degree.

In England and Wales, the hostility is also cultural more than legal. Contrary to prosecutors who are civil servants, and magistrates who are laymen trained to judge basic cases in criminal and civil matters, and both of whom are usually politically active and adhere to unions, English and Welsh judges do not organise collectively in union-like associations. As a result of both tradition and self-regulation, and despite a legal vacuum on this topic, there are no unions of judges but only very loose associations. This is due to a deeply rooted perception that unions are incompatible with judicial ethics. The term « union » itself is intrinsically associated with blue-collar workers' unions, which are - for the most part - affiliated to the Labour Party. Consequently, creating judges' unions could lead to a dangerous semantic confusion

[9] Interview with Pascal Mahon, Professor in Constitutional Law and President of the *Académie suisse de la magistrature*.

between politically-affiliated workers' unions and strictly professional organisations of judges, inducing an appearance of bias and partiality.

The *Guide to Judicial Conduct* of England and Wales reveals a conception of the judge as a magnified figure, who ought to appear as neutral as possible. In some sense, the judge should remain outside the City and indifferent to political matters[10]. The separation of powers, as theorised by Montesquieu and Blackstone, is strictly observed to the point that judges benefit from some sort of « splendid isolation » : « *care should [...] be taken about the place at which and the occasion on which a judge speaks so as not to cause the public to associate the judge with a particular organisation, group or cause*[11]".

Aside from these ethical reasons, pragmatic reasons can also explain the hostility towards collective organisation within the judiciary.

2. Restrictive approaches to collective organisation as the result of pragmatic considerations

The minimal degree of judicial collective organisation might also be due to purely practical reasons, such as the absence of a unified judicial body or specific recruitment policies.

a) The effect of a fragmented judicial body

As a result of the federal nature of the Swiss political system, its judiciary is highly segmented. There are federal courts as well as cantonal courts, hence twenty-six different judicial organisations, each of them being autonomous from the others[12]. Such localised organisation makes it difficult to set up collective organisations at federal level, each canton having its specificities.

A similar situation can be observed in England and Wales, where the variety of judges' associations results from the lack of unity within the English/Welsh judiciary. The judiciary in England and Wales is structured by levels of seniority. Considering that judges of different levels have different preoccupations, there is little perceived interest in thinking collectively. As a matter of fact, there are five associations of English and Welsh judges, organised on a horizontal basis between judges of the

[10] Antoine Garapon underlines that the English elite, of which judges are a part of, has always presented a high level of mobility, particularly since the Tudors. Historically, the elite was strongly involved in political and economic affairs, and forged an alliance with the people so as to control the King. For instance, Charles the 1st, a particularly authoritarian King, was executed according to a legal procedure devised thanks to this alliance. On the contrary, in France, an alliance was sealed between the King and the people during the Revolution against the elected Parliaments, as judicial authority of the pre-Revolutionnary regime. This, in turn, contributed to undermining the French judicial authority, whose appetency for collective organisations still answers to a real need to ascertain its legitimacy. This historical background permeates the organisation, or lack thereof, of the judicial branch until today.

[11] Judiciary of England and Wales, Guide to Judicial Conduct, March 2013, article 8.2.2.

[12] Benjamin Suter, attorney at law, submitted as part of the LLM programme at Victoria University of Wellington : «*Appointment, discipline and removal of judges : a comparison of the Swiss and New Zealand judiciaries*»

same hierarchical level, in total contradiction with the unifying dynamic that operates in other countries[13]. The UK Association of Women Judges is the only vertical association, in that it includes judges from all levels of seniority and, most notably, 80% of women judges. This association is not as controversial as one might expect, considering that women are still a minority in the British judiciary and that men are equally allowed to be members of the association. Apart from this specific association, English and Welsh professional organisations are segmented, making it hard to speak of « collective organisation » as such.

b) The effect of recruitment based on prior careers

Moreover, the hostility towards any form of unionisation of the judiciary can also be drawn from the recruitment process. Considering that English and Welsh judges have necessarily worked at least five years, often more, as solicitors or barristers, their self-employment culture is significant. Indeed, judicial office under the Crown is seen as only part of a career, and not a full career, making collective organisation all the more irrelevant. In this respect, it is interesting to draw a parallel with the French system in which the recruitment process is radically different because historically based on a state national exam. According to Jean-Pierre Mounier, the process of judges' unionisation in France is partly due to the diversification of judges' social trajectories.[14] New forms of recruitment were progressively set up which diversified the judicial body and made it more heterogeneous, creating identity disturbance. In the 1970s, the instigators of judges' unionisation were mostly young and lower court judges, whereas experienced judges were more conservative and attached to the traditional acceptance of judicial restraint, expressing their disagreement only internally. The English/Welsh judicial body, composed of end-of-career professionals, did not go through the same process of diversification, which might explain why no reformist organisations emerged.

However, even in countries for which judicial ethics are considered to be incompatible with a judge's membership of a union, either on ethical or practical grounds, some forms of association exist that enable a minimal degree of professional organisation.

B. The necessity of a minimal level of collective organisation within the judiciary

Recent approval of European standards regarding such organisations is symptomatic of a general trend towards the de-sacralisation of the judiciary. In this case, the ideological debate is

[13] The Magistrates Association, the Association of District Judges, the Council of Circuit Judges, the Association of High Court Judges and the UK Association of Women Judges
[14] Jean-Pierre Mounier, 1986, « *Du corps judiciaire à la crise de la magistrature* ».

set aside, the stakes being either the protection of statutory or material welfare of the judiciary (1) or the defence of purely individual interests (2).

1. Defence of collective interests within the judiciary: the traditional role of professional bodies

a) European standards for a minimal degree of collective organisation

Despite the fact that judicial bodies are most often subject to derogatory clauses regarding membership of professional organisations, common standards have been set up in Europe in order to ensure that judges may at least collectively protect the occupational interests of their profession.

The European Charter on a Statute for Judges puts forward this restrictive conception of the role of judicial organisations as a possible common denominator for judicial systems across Europe[15]. The drafters of this text underline that these associations do not have exclusive responsibility for defending judges' statutory rights or material means, but that their contribution before the authorities involved in decisions affecting judges must, at the least, be recognised and respected.

Likewise, the right of all professions to a minimal degree of collective organisation has been sanctioned by the ECHR, based on article 11 of the Convention. In a 2008 Grand Chamber judgement, the Court consecrated that the right to bargain collectively with an employer is *"one of the essential elements"* of the right of association (§154, Demir and Baykara v. Turkey, 2008)[16]. More recently, the ECHR ruled that even the military could not be deprived of this right (Matelly v. France, 2014). In this seminal decision, the Court holds that an absolute prohibition may not be imposed on trade unions, even in the armed forces and notwithstanding the particularities of their mission. The ECHR specifies that restrictions may indeed be placed on the exercise of freedom of association according to the specific nature of certain occupations, but only in so far as these restrictions do not concern the essence of the right itself. By analogy, and considering that judges' missions also require that trade union activity be adapted, the Matelly decision must be applied to judicial bodies.

b) Bargaining and corporatism: accepted in some countries, only in its infancy in others

Collective defence of statutory and material rights is one of the core activities of professional organisations and, as such, is barely disputed on theoretical grounds.

[15] Council of Europe, European Charter on the Statute for Judges, Strasbourg, 8-10 July 1998 (DAJ/DOC (98)
[16] Demir and Baykara v. Turkey, 12 November 2008 (Grand Chamber)

The ASJP (Portuguese Union of Judges) writes in the third article of its Statute that the object of the union is to "*a) promote the dignity of the judicial function by defending and ensuring the effective independence of judges and fostering the creation of structures to ensure it"* and *"b) ensure the representation and defence of social, cultural, moral, professional and economic interests of Judges*[17]. Similarly, in Italy the ANM (National Association of Magistrates) professes that the *"protection of the moral and economic interests of the judiciary and the prestige and respect of the judicial function"* is one of its main objectives[18]. Thus, unions and associations of judges seem to have consistently taken up one of the traditional roles of professional organisations, namely the defence of sectional interests, such as wages, work conditions, social welfare, retirement schemes or the protection of statutory rights.

In France, the case of the *Union Syndicale des Magistrats* (Union of Judges and Prosecutors – hereafter "USM") is particularly illustrative of this shift towards explicit corporatism, as this union constructed its very identity around a corporatist programme. The USM (then "UFM" for Federal Association of Magistrates) was founded in 1945 as the first association to undertake the defence of the moral and material interests of the judicial profession[19]. The UFM favoured, for example, the creation of a school for magistrates or the transparency of grading. More generally, its strategy was to portray the figure of a judge working for the State and who was thus recipient of the rights and advantages available to other State officials. As such, they claimed, for example, the establishment of a minimum wage for judges equal to 250% of the minimum applicable to other state officials, or the upgrading of career progression guarantees[20]. The transformation of the UFM into a union was then undertaken in 1975, despite some internal opposition, so as to increase the resources and capacity of action of the organisation. Similarly, the ANM in Italy considers its most significant accomplishment in recent years to be its struggle against legal dispositions aiming at strengthening the civil liability of judges.

Yet, despite European standards, the role played by associations in defending statutory and material rights remains somewhat limited in countries which are reluctant towards judicial organisation in general. As explained above, in England and Wales, judges' preoccupations are very different according to their level of seniority. District Judges have an increasingly significant pay differential with Circuit Judges and High Court Judges, although they also have increasing responsibilities. Nonetheless, the Lord Chief Justice suggested a 3% raise for High Court Judges for 2016, and only a 0.5% raise for District Judges. As this example shows, judges have no perceived interest in thinking collectively and

[17] Statutes of Portuguese ASJP available at: http://www.asjp.pt/2010/03/17/estatutos/ - (on May 24th 2016)
[18]Objectives of Italian ANM available at: http://www.associazionemagistrati.it/statuto - (on May 24th 2016)
[19]Its leaders were concerned about the degradation of the image of magistrates in France, and collective action was therefore explicitly designed as a tool to restore the pre-eminence of the judiciary.
[20] Review « Pouvoir judiciaire », n°19, septembre-octobre 1947 ;

associations do not play an active part in defending their particular sectorial interests. In fact, judges' salaries are negotiated by an independent body, the Senior Salaries Review Body. Although associations can make submissions to this body, the consultation process is informal and, considering that there are no judges attached to the Ministry of Justice, the influence of the judiciary over the executive branch remains rather low. Given the restrictive role in terms of corporatism, English judges admit with pragmatism that membership of an association is motivated first and foremost by the desire to be part of a network, rather than by a will to defend collective interests of the profession.

2. The role of collective organisations from an individual perspective

a) Unions and associations as national networks

Another traditional mission of unions, and perhaps a less controversial one, consists in offering counsel, support and resources to its members on an interpersonal level. This can take the form of internal publications, guidebooks, online forums to discuss problems or provide help, or even legal counsel in front of disciplinary bodies. This networking aspect of professional associations is purely internal and is, as such, unanimously accepted from a legal perspective.

This networking aim is made more or less explicit by associations. In countries where collective organisation remains marginal, the need for mutual assistance between judges is the prevailing argument to set up or simply adhere to such an organisation, and judges are approximately all members of the association. The Statute of the Swiss Association of Magistrates, for its part, explicitly asserts *"friendship between judges »* as one of its core missions, as does the Sheriffs' Association in Scotland.

In France, notwithstanding the objectives set out by the USM, which represents around 60% of unionised magistrates, some members of the judiciary believe that the intentions of young colleagues when adhering to this union, is mostly career-oriented. A more recent union, *FO-Magistrats* displays a different set of priorities. This union focuses mainly on "individual defence", meaning assisting judges before disciplinary bodies and, more generally, on breaking with the extreme individualism that exists within the judiciary.

b) Associations as international networks

The same purpose drives the International Association of Judges, founded in 1953 and explicitly opposed to trade union status. According to its statute, the association aspires to fulfil its missions by *"the establishment of cultural relations, promoting and enhancing friendly relations between Judges of different countries, furthering mutual assistance between national associations and groups, encouraging exchange of information and facilitating professional and vacational visits by Judges to*

other countries"[21]. The dynamic of the association is clearly based on an interpersonal approach. As an example, the EAJ recently approved a resolution on the case of Turkish judges who had been imprisoned simply for doing their duty as judges[22]. It is also the *ratio legis* of the European Union Judges and Prosecutors Association, an association created in 2004 around two axes: information for its members on current issues through newsletters, and other publications, and exchanges between European magistrates through meetings, seminars and conferences[23].

In fact, as Joël Ficet, lecturer at the European Studies Institute, explains about the SM in France, associations within European judiciaries have a common purpose, which is to undermine the solitude and personal difficulties that judges might face, by multiplying "horizontal" meeting opportunities outside the official frame[24].

If a minimal degree of collective organisation is guaranteed by European standards and seems well established today, more ambitious approaches to such organisation have emerged, aspiring to reinforce judicial ethics.

II. THE ADVANTAGES AND PITFALLS OF A MORE AMBITIOUS CONCEPTION OF COLLECTIVE ORGANISATION: THE NEED FOR RENEWED STANDARDS

Judges are not isolated from the rest of the world. Just as the law threads multiple relationships with politics, morale, and history, so does the judge's personal trajectory. His isolation is, in this regard, a myth and may even be detrimental to judicial ethics. Collective organisations, by breaking the myth of a perfectly detached judge, can contribute to strengthening the rule of law (A). However, a clear definition of the scope of their action is necessary in order to maintain a judge's appearance of impartiality (B).

[21]http://www.iaj-uim.org/mission-and-values/
[22]See the following resolution:http://www.iaj-uim.org/iuw/wp-content/uploads/2015/05/informative-report-arrest-and-detention-turkish-judges1.pdf
[23] http://www.amue-ejpa.org/index.php?lang=fr&categ=53
[24] "Recompositions identitaires et mobilisation professionnelle de la magistrature française, Le rôle du syndicalisme judiciaire 1945-2005 », *Communication au Colloque international « Identifier, s'identifier »,* Université de Lausanne, 30/11/06 – 01/12/06

A. Collective organisation of judges as a potential means to reinforce the rule of law and renew judicial ethics

Group action held by associations and trade unions contributes to strengthening the separation of powers (1) and improving judicial practice through a renewed perspective of judicial ethics (2).

1. Group action to preserve the separation of powers

a) A confrontational approach

Group action such as public statements, meetings, conferences, reports and publications may enable judges to be truly independent, by conveying a more practical and enriched view of judicial ethics.

In Turkey, for example, the association of judges, YARSAV (the Turkish Association of Judges and Prosecutors), is an effective counterweight that endeavours to protect judicial independence. Through media exposure and public statements, they attempt to throw light on the pressuring of judges and prosecutors. In other words, they fight for the subjective independence of judges. Although there are two associations of judges in Turkey, the YBD (*Yargida Birlik Dernegi*, the Association of judicial unity) and YARSAV, the latter appears to be the only independent one. The YBD was created by the executive in 2014 only to promote candidates supporting the government in elections at the HSYK (*Hâkimler ve Savcılar Yüksek Kurulu*, the Supreme Board of Judges and Prosecutors)[25]. Given that the YBD obtained the majority at the HSYK, the body in charge of judicial nominations, the executive now indirectly controls the judiciary. In this context, an independent association such as YARSAV is a means to strengthen judicial independence. The speaker of YARSAV explains: "*Without associations you cannot speak or share your struggles publicly. It creates a direct way of communication with society, the public. (...) Our association has made the public aware of what is happening in the judicial system.*"[26] This public action in favour of independence is also led internationally. YARSAV considers its most important contribution to be the establishment of "*strong connections and bridges with the international community*." According to its speaker, YARSAV has become the voice of the Turkish judiciary in the international arena.

Indeed, international associations and other national collective organisations provide support against institutional pressure. As far as international associations are concerned, the IAJ-UIM (International

[25] It was named the Platform of Judicial Unity in 2014 and has evolved to become the Association of Judicial Unity on March 27, 2015.

[26] Over the past few years in Turkey, eighty judges have been dismissed temporarily and sixteen judges and prosecutors were removed permanently from their profession. Thousands of judges have been assigned to different parts of the country without their consent, for disciplinary matters or for their lack of performance. « It has been a completely arbitrary use of authority by judicial administration » denounces the YARSAV speaker interviewed. Moreover, many judges are under investigation because of their judicial decisions and the performing of their judicial duties.

Association of Judges[27]) is one of several international platforms that YARSAV is part of[28]. The four regional groups of the IAJ usually meet twice a year and pass resolutions either on general issues affecting the judiciary or on specific cases. *Ad hoc* missions and reports are also organised in particular cases[29]. For instance, the EAJ adopted several resolutions in 2015 to denounce the lack of independence in the judiciary[30]. Resolutions aim at raising awareness about the violation of international standards of judicial independence. Aside from the EAJ, the AMUE (*Association des Magistrats de l'Union Européenne*) and the MEDEL also take part in some form of lobbying through reports, congresses and seminars at European level, in the interest of judiciaries. Therefore, international associations are not only useful on an interpersonal perspective, but can potentially contribute to reinforcing effective judicial independence.

b) A collaborative approach

The protection of the separation of powers and thus of the rule of law is not necessarily confrontational, as is the case in Turkey. Be it a tradition or an official procedure, most European collective organisations of judges take part in some form of dialogue with the executive and legislative branches.

In Germany, for example, the consultation process is systematic: the *Deutscher Richterbund* is consulted by the Ministry before any legislative reform that could have an impact on the judiciary[31]. Similarly, in Switzerland, the ASM (*Association suisse des Magistrats de l'ordre judiciaire*, Swiss Association of Magistrates of the Judiciary) is consulted before the government adopts a bill and presents it to Parliament. This procedure was formalised in the federal law on the consultation process of March 18th 2005[32]. In a more informal manner, the ANM in Italy also takes part in the legislative process by making concrete proposals to both the executive and legislative branches. For instance, in 2014, the ANM published and communicated its « proposals for Justice ». This cooperative conception of the separation of powers may establish mutual respect as a foundation for judicial independence.

By participating and even fostering democratic dialogue, judicial group action contributes to reinforcing both objective and subjective independence, from which all principles of judicial ethics derive.

[27]URL http://www.iaj-uim.org/
[28]The YARSAV is also a member of the MEDEL.
[29]The EAJ's activities are very close to the Venice Commission's. See for more details : http://www.venice.coe.int/webforms/events/default.aspx?lang=en
[30]See for Turkey and http://www.iaj-uim.org/iuw/wp-content/uploads/2015/10/ResTurkey2015IAJEN.pdf For France : http://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/AEM-resolution-on-France-2008-eng.pdf, For Ukraine : http://www.iaj-uim.org/iuw/wp-content/uploads/2015/12/ResUkraine2015IAJEN.pdf ; etc.
[31] URL: http://www.drb.de/ - (on May 24th 2016)
[32] The law is available following the link https://www.admin.ch/opc/fr/classified-compilation/20032737/201604010000/172.061.pdf - (on May 24th 2016)

2. Democratic group action as a way of improving judicial ethics

a) Professional organisations as sources of identity renewal

Collective organisations of judges forge identity types and participate, whether consciously or not, in the transformation of the way judges not only perceive themselves but also of the way public opinion perceives judges.

Jean de Maillard, permanent member of FO-Magistrat (French union known as « workers' strength »), underlines the fact that unions can be designated as arenas where judges reinvigorate the body's professional models of excellence. According to him, « *the model of the apolitical judge, weighted, reserved, ascetic, rigorist... has been challenged, since the Second World War, by new models of excellence* ». He sees the FO dialogue arena as a way for judges to become conscious and understand their own limits. It "*prevents them from being dependent on pre-established concepts that determine their action* ». He adds that a union is the place where judges can think, propose, reflect upon judgecraft and speak about what must be done for and by the judiciary. Jean de Maillard also considers that public policies only focus on trying to find short term solutions to problems, whereas the union proposes to analyse their roots in order to find durable solutions.Taking some critical distance with judgecraft enables judicial ethics to penetrate the professional identity of those who participate in debates and conferences. In this sense, being a member of an association is a source of « ethical healing ».

b) Professional organisations: a renewed conception of judicial restraint

On the other hand, this new identity has also influenced the way judges want to be perceived, namely, as full members of society. In Portugal for instance, the ASJP[33], has chosen to focus on restoring trust between judges and Portuguese society since 2000 through initiatives such as « Courtroom open days ». Its aim is to raise awareness, among students, of the daily actions of judges and the ways in which they contribute to the rule of law.

In France, Matthieu Bonduelle, former President of the SM, considers that asking a judge not to partake in politics maintains the image of an "empty shell" in an ivory tower. According to him, the perfectly neutral judge is a myth, as the judge has his own personal trajectory, feelings and beliefs. Encouraging a fictional image of judges is detrimental to the effectiveness of ethical principles. Indeed, behaviour such as coldness, lack of empathy or listening skills and impatience conveys an appearance of partiality. Conversely, promoting a more humanised vision of judges as figures that are integrated into society would help the judge to accept his subjectivity and thus to be conscious of his potential biases.

[33] URL : http://www.asjp.pt/

Surpassing judicial restraint can, to some extent, enhance transparency and accountability and thus strengthen judicial ethics as well as the rule of law.

However, the de-sacralisation of the judge and his increasing participation in the public debate can also be diverted and have unwanted consequences. Safeguards must therefore be devised in order to limit the infringements on basic principles of judicial ethics.

B. The safeguards against the pitfalls of judges' collective organisation

Recent scandals within the French judiciary have shown that professional organisations of judges can, in some cases, jeopardise the balance between respect of judicial conduct and the right to freely associate (1), hence the need for more ambitious European standards in order to prevent such organisations from degrading the image of the judiciary (2).

1. The limits of judges' collective organisation: the French scandals

a) *From politicisation…*

The most obvious risk that arises from the unionisation of the judiciary is an excessive politicisation of its members. Indeed, granting judges a voice in the public debate poses the threat of reducing their obligation to self-restraint to a meaningless principle. In France, the perceived politicisation of judges has stirred numerous controversies in recent decades and undeniably contributed to the deterioration of the image of the judiciary. Recently, in the wake of the "Wall of Idiots" scandal, the *Syndicat de la Magistrature*, overtly left-wing, was greatly discredited.[34] The scandal provided an opportunity for numerous public figures to denounce the drawback of judicial unionisation, namely the politicisation of judges. Even though members of the executive committee of the SM put forward the fact that the panel was designed as a strictly private and ludicrous outlet within the union's private headquarters, the spread of the video tarnished the appearance of impartiality of the judges involved and henceforth, of the entire judicial body. The SM caused further uproar in 2012 when calling for a vote against the outgoing President, Nicolas Sarkozy. Such an open and direct political statement, made in complete violation of required neutrality, undermined the judiciary.[35] On a slightly different note, FO-Magistrat, given its affiliation to a confederation of unions historically linked to the French communist and

[34] In April 2013, a journalist from the right-leaning newspaper *Atlantico* captured a video of the headquarters of the SM revealing a panel named "le Mur des Cons" (the Wall of Idiots) on which pictures of mostly right-wing intellectuals and politicians, as well as the fathers of murdered young ladies who had struggled for a criminal law reform, were displayed.

[35] The controversy was reignited when President Sarkozy was then put under investigation by a judge who had previously been a member of the SM. Criticism does not only centre on the SM. The USM, which asserts its non-partisan leanings as a key element of its identity, has also been condemned by some as unreasonably political, after the publication of a report in April 2012 denouncing the government's approach to judicial issues. The union abundantly communicated this report, entitled *"Les heures sombres"*, meaning "the dark era", in the press, on social networks and internally.

socialist parties as well as the very connotation of its name, can induce an appearance of partiality, particularly in matters of labour law.[36]

If there is also a risk of partiality for judges that are not unionised, the enhanced fragility of the balance between judicial restraint and unionisation lies in the fact that the very purpose of such organisations is to represent the profession as a whole. As such, union statements and actions engage the whole judicial body.

b) <u>... to excessive corporatism</u>

Furthermore, and perhaps more insidiously, unionisation could also lead to an emotional over-investment in a union, be it in countries where membership is almost automatic (Italy, Germany) or, on the contrary, where unions represent a counter-culture (the SM in France, YARSAV in Turkey). Indeed, as Joel Ficet suggests in his articles[37], the bond of this subjective community can, in some cases, be emotional. Meetings organised by a union at local or national level constitute arenas where a number of judges are given the opportunity to express their feelings of disharmony between their ideals and the reality of their work conditions. They also provide platforms for mutual support. Considering these elements, there is a risk of introversion and excessive corporatism that would render the judicial body impervious to society's legitimate expectations. The SM, for example, has supported magistrates who suffered censorship by their superiors. The "Dujardin" case has shown that judges, whose behaviour is disputable on disciplinary grounds, find symbolic and emotional gratification in the emotional community they are a part of.[38]

Considering that judges' membership of professional organisations can, in some cases, be a threat to the preservation of strong judicial ethics, it is crucial to provide a *modus operandi* on this matter, establish ambitious standards at a supra-national level and provide the means to ensure that these standards are duly respected.

2. Recommendations regarding judges' collective organisations

a) <u>Recommended prohibitions regarding judges' collective organisations</u>

***i.* The right to form and join a union of judges must be acknowledged in all European countries**

[36] A judge, member of FO-Magistrat, was recently asked to withdraw from a case which opposed a supermarket and members of another union affiliated to the FO confederation.

[37] Joël FICET, « Regard sur la naissance d'un militantisme identitaire : syndicalisme judiciaire, identités professionnelles et rapport au politique dans la magistrature française. 1945-1986 », *Droit et société 3/2009* (n°73), p. 703-723; URLwww.cairn.info/revue-droit-et-societe-2009-3-page-703.htm.

[38] A French newspaper published an article dealing with the daily work of an investigating judge. To be more realistic, the journalist followed Mr Dujardin in his daily office work during three days. As a consequence, the High Judicial Council discharged him of his office as investigating judge, considering the confidentiality of investigations had been violated.

The Spanish prohibition of judges' unions does not seem to guarantee the absolute independence and impartiality sought by the Centrists, as professional associations have a large scope of action while not identified as union-like organisations. It seems even counter-productive to deny the judge the right to belong to a union, given that it is a sign of mistrust of the judicial integrity and isolates the judge from society. We do not consider that hostility to judges' collective organisation, whether it be formal and legally provided for or merely interiorised, contributes to promoting judicial ethics. On the contrary, judges' collective organisations enable a reinforcement of the rule of law and the promotion of judicial ethics.

***iii*. A clear distinction must be made between ordinary union/association members and representatives of collective organisations:**

- ***An ordinary member should not be considered as a participant in group action;***

If a collective organisation enters the political arena and participates in public debates - by publicly criticising the government or other high-profile personalities - a basic union/association member judge must not be held responsible for statements he/she has not taken part into. However, if such a member individually participates in public debates, his violation of judicial ethics should be sanctioned.

- ***The recusal of a union/association representative must be made easier when public figures, political movements or parties criticised by the union/association are litigants in the case that this judge must adjudicate;***

Impartiality may be questioned in cases that he or she must adjudicate, as it was the case for President Sarkozy with the SM. Therefore, the judge should recuse himself in a case involving a public figure who has been openly criticised by the organisation he belongs to. Besides, a recusal procedure should be systematically initiated for the litigant if the judge does not remove himself from the case.

b) Recommended improvements regarding judges' collective organisations

***i*. Enhance the connection between courts and society in order to strengthen the democratic legitimacy of the judicial branch;**

Open days organised by unions or associations in partnership with schools and universities could be generalised at European level, with the creation of a "European Day for Justice" during which judges would have the opportunity to explain their activities, through make-believe trials or conferences.

***ii*. Formalise legal consultation procedures with unions/associations of judges, in order to legitimise and frame cooperation between the legislative, the executive and the judiciary;**

A formalised and systematic consultation procedure would enhance the transparency and therefore the legitimacy of such procedures. It would also enable to frame the scope of intervention of judicial

organisations in the public debate, so as to better ensure the respect of judicial restraint. More generally, it would guarantee the principle of "checks and balances" and equilibrium between the three branches.

***iii*. Encourage group action as a mean for judges to reflect upon the purpose of their office, harmonise their practice and improve the predictability of their decisions;**

Active headquarters should organise meetings so as to enable judges to reflect upon their practice and develop solidarity between them. Not only would these local chapters allow for judges to improve the compatibility of their practice with judicial ethics, but it must help to standardise jurisprudence within a court, through an efficient dialogue between judges.

***iv*. Establish specific judicial training for association or union representatives**

We believe that leadership of professional organisations is a specific mission, which calls for particular training on matters of judicial ethics and professional conduct, in order for them to better achieve their missions and to find the necessary equilibrium between their involvement and judicial ethics.

***v*. Strengthen European associations**

Heightened visibility of European associations of judges seems necessary. It would firstly contribute to the promotion of European standards for judges' collective organisation. More importantly, it would enable European countries to go beyond national conceptions of the judiciary in order to promote a common and consensual idea of judicial ethics. By strengthening the role of European associations, cooperation and understanding between European judges would be reinforced, and common standards regarding judicial ethics more readily accepted.

CONCLUSION

Collective organisation, in the judiciary as in other professions, is the sign of a dynamic democratic society and is a guarantee of transparency and dialogue. Indeed, associations and unions of judges contribute to the renewal of judicial ethics, by breaking with the traditional image of judges in their ivory tower and by instigating an internal dialogue aimed at improving the quality of their decision-making. However, considering their statutory specificity, judges' membership in professional bodies must also answer to more ambitious standards, especially as the drawbacks of such organisations have found some practical illustrations. We believe the above recommendations and the enhanced visibility of European associations would contribute to reinforce the positive impact of collective organisation, whilst limiting the risk of excessive corporatism or politicisation.

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