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Fifth session - morning - Ethics

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Ethics and the Judiciary in a few cases from the Court of Human Rights, 'lectio magistralis' from the coordinator.

1. Today we address the issue of judicial ethics. In fact, already yesterday, during the fourth session, you had the opportunity to tackle ethical issues when dealing with the use of social media by members of the judiciary.

We speak about judicial ethics at a time in which the judiciary of the country hosting this meeting, the Italian one, is still in a storm, following the scandal caused by the revelations on the ways in which they were taken, within of the Superior Council of the Judiciary (CSM), decisions on important appointments in the judicial sector. A few years after the outbreak of the scandal, one could say that the judiciary is still struggling to recover full trust from the civil society.

2. However, I believe it would be wrong to think that the discredit that has undoubtedly fallen on judges is a problem of the judiciary alone. A credible, autonomous and independent justice system is a pre-condition for the existence of a modern liberal democracy, which is the form of government established by the constitutions of all our countries and in which, until proven otherwise, we want to live. This is not an exclusively national value. On the contrary, sixty-five years of jurisprudence of the European Court of Human Rights, whose sentences are addressed to 46 European states, demonstrate that the European project is built starting from the value of liberal democracy, an essential condition of which is an autonomous justice, independent and credible. An eloquent confirmation of this is found in the appropriation of this jurisprudence by the Court of Justice of the European Union, as seen with the series of sentences relating to the recent reforms of the Polish judicial system, with which the judges of Luxembourg have reiterated the indispensability, for the construction of Europe, of justice of the quality that I have indicated.

3. It would be truly short-sighted, at least on the part of those who have the good functioning of democracy at heart, to rejoice in the moment of difficulty of the judicial institution, perhaps thinking, even in good faith, that a weakened judiciary favours a better and more efficient exercise of political action.

4. The indissoluble link between the European system of protection of human rights set up with the European Convention on Human Rights, signed in Rome on 4 November 1950 and "effective" democracy has been underlined several times in the jurisprudence of the Court of Strasbourg, which, in doing so, insisted, as for example, in an emblematic way, in the *Handyside v. United Kingdom*, on the centrality of justice as an essential safeguard of every sincerely democratic regime[1].

5. Questions concerning the functioning of justice, an "essential institution for every democratic society", are therefore the object of particular attention by the European Court. It is necessary to take into account, says the Court, the particular mission of the judiciary in society. As a guarantor of justice, a fundamental value in a rule of law, his action needs the trust of citizens in order to be fully implemented.

In this connection, standards of judicial behaviour have been considered by the European Court of Human Rights.

6. The topic was explored in particular with regard to freedom of expression, a pillar of the Convention, but which requires particular treatment in matters of justice. The jurisprudence may therefore deem it necessary to protect justice against unfounded attacks, but assuming the ethical duty of magistrates to maintain confidentiality and therefore not react (*Prager and Oberschlick v. Austria*[2]).

7. The expression "judicial authority" primarily reflects the idea that the courts are the bodies responsible for resolving legal disputes and ruling on the guilt or innocence of accused persons in criminal matters, which members consider them as such and that their ability to carry out this function arouses in them "respect and trust" (*Worm v. Austria* [3]). This affects the consideration that the courts of a democratic society must enjoy[4] not only among users of justice, but also among public opinion (*Kudechkina v. Russia*[5]; *Fey v. Austria*[6]). In particular, the Court says, magistrates must be expected to

[1] ECtHR, *Handyside v. United Kingdom* (Pl.), 7 December 1976.
[2] ECtHR, *Prager and Oberschlick v. Austria*, 26 April 1995.
[3] ECtHR, *Worm v. Austria*, 29 August 1997.
[4] It is worth recalling the famous citation from Lord Chief Justice Hewart, *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233): "….[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."
[5] ECtHR, *Kudechkina v. Russia*, 26 February 2009.
[6] ECtHR, *Fey v. Austria*, 24 February 1993.

use their freedom of expression with restraint whenever the authority and impartiality of the judiciary are at risk (*Wille v. Liechtenstein*[7]).

8. The issue of the trust that the courts must enjoy so that the rule of law functions regularly, and therefore the objectives of the Convention are adequately achieved, also embraces that of the professionalism of the magistrate, always keeping in mind that this need concerns not only those who are directly exposed to a judicial decision, i.e. the users of justice, but also the society in general. This is evidently a more relevant topic in the framework of the "fair trial" protected by Article 6 of the Convention, but it transcends this provision, rising to the rank of the fundamental principles that underpin the protection system set up by the European Convention.

9. Regarding professionalism and its guarantee, the jurisprudence of the Court has also had the opportunity to express itself starting from the theme of freedom of expression, excluding that certain measures, aimed at the legitimate control of the professionalism of the magistrate and his or her ability to exercise judicial functions, could be classified as an interference with freedom of expression.

10. Therefore, if it cannot be said that the jurisprudence of the European Court of Human Rights has dealt *ex professo* with the deontology and professionalism of the judges, important indications can be drawn especially from the Court's decisions on freedom of expression. The jurisprudence on fair trial, relating to Article 6 of the European Convention, is also relevant.

11. Regarding professionalism, the Strasbourg Court said that measures aimed at preserving and controlling the professionalism of judges do not constitute interference with freedom of expression, protected by Article 10 of the Convention. For example, in the case of *Harabin v. Slovakia*[8], the Court considered that the defendant Government's determination to remove the applicant from his duties as President of the Supreme Court, on the basis of a report from the Ministry of Justice, essentially concerned the ability of the applicant to exercise his duties. That is, it involved the appreciation of his professional skills and personal qualities in the context of his activities and behaviour concerning the administration of the Supreme Court. The Ministry of Justice report mentioned in particular, among other charges, the fact that the applicant had not initiated dismissal proceedings against a Supreme Court judge who had attacked an official of the Ministry of Justice and, furthermore, the accusation of not applying professional criteria in the exercise of his duties in the context of the selection of candidates for the post of member of the Supreme Court. Even if it emerged from the proceedings that the applicant had commented on a draft constitutional amendment expressing concerns regarding respect for the principle of separation of

[7] ECtHR, *Wille v. Liechtenstein*, (GC), 28 October 1999.
[8] ECtHR, *Harabin v. Slovakia*, 20 November 2012.

powers and the independence of justice, the documents in the Court's possession did not allow it to establish that the proposal to remove him from its functions had been "solely or primarily motivated by these comments". Likewise, it was the applicant's conduct in the administration of justice that constituted the essential aspect of the case. The disciplinary procedure that had been initiated against the applicant, after his refusal to allow officials of the Ministry of Finance to carry out an audit which in his opinion should have been the responsibility of the Court of Auditors, concerned the manner in which Judge Harabin exercised his function as President of the Supreme Court and therefore belonged to the sphere of his employment in the public service. Furthermore, the disciplinary infringement for which he had been held responsible did not refer to statements or opinions expressed in the context of a public debate. Therefore, the Court concluded that the measure complained of did not constitute an interference with the exercise of the right guaranteed by the Article 10 of the Convention, and therefore declared the application manifestly unfounded.

12. The Court returned to the issue more recently in a well-known case, that of Mrs Kovesi, who had been removed from her position as Anti-Corruption Prosecutor in Romania. The Court ruled in the case *Kovesi v. Romania* in May 2020. In this case, in which the violation of freedom of expression was also highlighted, the concerned Government argued that the dismissal of Mrs. Kovesi was due to professional reasons. The Court, while reiterating the principle expressed in the *Harabin* decision, held that in this case there was a lack of proof of the Government's assertion that the measure suffered by the applicant should be considered the consequence of her professional behaviour, was rather linked to the exercise of her freedom of expression[9].

13. On the subject of freedom of expression, and expressing itself in general on the public function, the Court admitted that it is legitimate for the State to impose on officials, due to their *status*, a duty of confidentiality, but it also said that the protection of Article 10 of the Convention does not exclude this category of people (*Vogt v. Germany*[10], *Guja v. Moldova*[11]). In these cases, therefore, the Court must, taking into account the specific circumstances of each case, assess whether a fair balance has been respected between the individual's fundamental right to freedom of expression and the legitimate interest of a democratic State in ensuring that the public function operates for the purposes set out in the second paragraph of Article 10, i.e. national security, territorial integrity and public safety, the prevention of disorder and crime, the protection of health and morals, the protection of the reputation or rights of others, for the prevention of the dissemination of confidential information or for maintaining the authority and impartiality of the judiciary. In exercising this control, the Court must

[9] ECtHR, *Kovesi v. Romania*, 5 May 2020, §§ 189-190.
[10] ECtHR, *Vogt v. Germany* (GC), 26 September 1995.
[11] ECtHR, *Guja v. Moldova* (GC), 12 February 2008.

take into account the fact that, when the freedom of expression of officials is at stake, the "duties and responsibilities" also evoked by the second paragraph of Article 10 are of particular importance, which justifies the recognition that the national authorities have a margin of appreciation to judge whether the reported interference is proportionate to the purpose (*Vogt,* cit., and *Albayrak v. Turkey*[12]).

14. As regards specifically the judiciary, the Court specifies that, taking into account the eminent place of this institution in a democratic society, this approach also applies in the case of restrictions relating to the freedom of expression of a judge in the exercise of his functions, even if magistrates do not belong, strictly speaking, to the administration (*Albayrak*, cit.).

15. The jurisprudence of the Strasbourg Court recognizes that magistrates can be expected to make moderate use ("*avec retenue*") of their freedom of expression when the authority and impartiality of the judiciary can be called into question (*Wille*, cit., *Kayasu v. Turkey*[13], *Kudechkina*, cit., and *Di Giovanni v. Italy*[14]). The disclosure of certain information, even if accurate, must be done with moderation and discretion (*Kudechkina*). On several occasions the Court has underlined the particular role of the judicial power in society: as a guarantor of justice, a fundamental value in a rule of law, it, as I was saying, must enjoy the trust of citizens to fully carry out its mission. Therefore, in the exercise of the judicial function, the greatest discretion is imposed on the judicial authorities when they are called upon to render justice, in order to guarantee their image as impartial judges (*Olujić v. Croatia*[15]).

16. At the same time, the Strasbourg Court underlined that with regard to the intervention of magistrates in the debate on justice, the growing importance attributed to the separation of powers and the need to preserve the independence of justice requires it to examine with the utmost attention any interference with the freedom of expression of a judge who finds himself in such a situation (*Harabin*, cited and *Baka v. Hungary*[16]). Furthermore, issues relating to the functioning of justice are of general interest and therefore enjoy high protection under Article 10 (*Kudechkina*, cit., and *Morice v. France*[17]. Although a debate has political implications, this in itself is not sufficient to prohibit a judge from expressing himself or herself on the matter. In a democratic society, questions relating to the division of powers may concern very important matters about which the public has a legitimate interest in being informed.

[12] ECtHR, *Albayrak v. Turkey*, 31 January 2008.
[13] ECtHR, *Kayasu v . Turkey*, 13 November 2008.
[14] ECtHR, *Di Giovanni v. Italy*, 9 July 2013.
[15] ECtHR, *Olujić v. Croatia*, 5 February 2009.
[16] ECtHR, *Baka v. Hungary* (GC), 23 June 2016.
[17] ECtHR, *Morice v. France* (GC), 23 April 2015.

17. I would like to mention in particular a case in which, taking into account the assessments of the national disciplinary bodies, which had sanctioned a magistrate for some statements made to a daily newspaper, the Court of Strasbourg considered, in the judgment of proportionality as to the justifiability of the interference with the freedom of expression of the magistrate, that the protection of the magistrate's ethical duties should prevail over the protection of his right to freedom of expression.

18. This is a case that affects Italy, namely the application *Di Giovanni c. Italy*, decided by the European Court with a ruling of July 2013, which I have already mentioned[18] and which it is perhaps appropriate to look at a little more closely.

19. In this case the facts were as follows. In January 2003, a public competition for the hiring of magistrates took place in Italy. Subsequently, a criminal investigation was launched against a member of the competition commission, accused of having falsified the results with the aim of favouring a candidate.

20. On 28 May 2003 the newspaper *Libero* published an interview given by the applicant, who was a judge, in which she stated the following:

«The common reader might wonder why, if the aim of the ANM (National Association of Magistrates) is to safeguard the integrity of the sacrosanct principles of justice and its officials, there are five ideological factions in strong disagreement on how to achieve this aim. They are structured on the model of political parties: the red robes in Naples, the green robes in Milan. We witness a loss of pluralism when the hegemony of a minority transcends the interest of the majority and uses associative activity to safeguard its power and interests. In recent days, we have learned the extremely serious news of the intervention of a member of the commission of the last competition for access to the judiciary in favour of the family member of a well-known Neapolitan magistrate, naturally already a member of the CSM (Superior Council of the Judiciary) and, even more naturally, current authoritative member of the ANM.»

21. On 4 June 2003, fifteen members of the Superior Council of the Judiciary (the «CSM») sent a note to the Presidential Committee, the content of which was as follows:

«Request to open a case. In the newspaper *Libero* of 28 May 2003, Dr. Di Giovanni declared: In recent days, we have learned the extremely serious news of the intervention of a member of the commission of the latest competition for access to the judiciary in favour of the family member of a well-known Neapolitan magistrate, naturally already a member of the CSM and, even more naturally, a current authoritative member of the ANM. With respect to this declaration, the undersigned councillors ask that a file be opened in order to verify whether this is actual information and, following the outcome of the checks, to adopt the necessary measures."

22. On 12 June 2003 the newspaper *Libero* published a second interview with the applicant in which she clarified her previous statements. The article contained the following passages:

[18] ECtHR, *Di Giovanni v. Italy*, cit.

«I'm sorry that the statements contained in *Libero*'s recent article may have offended the sensitivity of some colleagues. It's clear that I didn't express myself clearly. I was referring to a new journalism, which is different from objective data (...). The reference to the probable active and passive subjects involved in the facts was at least generic (in this regard I could mention a whole series of colleagues who can fall into the indicated typology) and had to be read in the context of my statements, regarding the stigmatization of a possible convergence of interests between the ANM and the CSM. My initiative and my statements are aimed at highlighting the existence of probable centres of power that risk tarnishing the image of the autonomous and independent judge that we defend daily in our professional activity."

23. Following these interviews, other articles were published in the press which associated the person of E.F., a Neapolitan magistrate, with the criminal facts linked to the public competition of January 2003.

24. The Attorney General of the Court of Cassation initiated disciplinary proceedings, which ended with the affirmation of the disciplinary responsibility of the applicant, on whom the sanction of a warning (*ammonimento*) was imposed. Her appeal to the United Sections of the Court of Cassation was rejected.

25. The Disciplinary Section of the CSM considered first of all the applicant's criticisms relating to the activity and functioning of the CSM and the ANM, and came to the conclusion that these constituted the free expression of a personal belief, which as such could not be the subject of sanctions. Conversely, the applicant's statements targeting one of her colleagues, presented all the elements of a disciplinary offence. According to the Section, the details provided by the applicant undoubtedly referred to the person of E.F., the only former magistrate of the CSM and current prominent member of the ANM whose daughter had participated in the competition for the hiring of magistrates in question. The contested statements therefore tended to confirm in public opinion baseless defamatory rumours regarding a colleague. The disciplinary section stated that the applicant had failed in her duty of discretion inherent to her duties as a magistrate and in her duty of loyalty and respect towards a colleague. Finally, the section considered that the fact that the contested statements fell within a more general context nevertheless allowed only a warning to be imposed, i.e. the least serious sanction.

26. It is of some interest to note the reasoning used by the Court to exclude the violation of Article 10 in this case. After having recalled the fundamental principles regarding the freedom of expression of magistrates, principles which I have already evoked and which ultimately require that magistrates make use of their freedom of expression with discretion whenever the authority and impartiality of the judiciary may be called into question (*Wille*, cit.), the Court recalls that its task is not to replace national judges, but verify from the point of view of Article 10 the decisions that the latter have issued by virtue of their discretionary power. For this reason it must consider the "interference" at issue in the light of the whole case to establish whether it was "based on imperative

social needs" and whether the reasons invoked by the national authorities to justify it appear "relevant and sufficient" (*Laranjeira Marques da Silva v. Portugal*[19]), also taking into account the severity of the sanction imposed (*Ceylan v. Turkey* [GC], of 1999[20]; *Tammer v. Estonia*[21]; *Skałka v. Poland*[22]; *Lešník v. Slovakia*[23]; *Perna v. Italy*[24]).

27. Having said all this, underlining that maximum discretion is appropriate for magistrates, the Court recalls that this discretion must lead them not to use the press, not even to respond to provocations. This is what the higher imperatives of justice and the importance of the judicial function require (*Buscemi v. Italy*[25]; *Kayasu,* cit., and *Poyraz v. Turkey*[26]).

28. The statements in question referred to serious crimes allegedly committed by a fellow magistrate. The applicant did not dispute that the rumours of illicit manoeuvres by E.F. had not been confirmed by any objective evidence. The Court recalled the importance for magistrates to benefit from public trust in the exercise of their functions (*Poyraz,* cit.).

29. The Court then recalled that in cases, such as the one we are talking about, in which it is necessary, among other things, to find a balance between the right to respect for private life, in this case from the aspect of reputation, and the right to freedom of expression, the outcome of the application cannot, in principle, vary depending on whether the application was brought by the person who was the subject of statements deemed defamatory by the Court, in terms of Article 8 of the Convention, or by the author of the same statements, in terms of Article 10. In fact, these rights deserve equal respect *a priori*.

30. In these circumstances, the Court considered that the reasons invoked by the disciplinary section to justify the sanction were both relevant and sufficient. Furthermore, this sanction was the lightest among those provided for by national law, i.e. a warning. Therefore, it could not be considered disproportionate[27].

31. It is not without significance, then, that at the end of the sentence the Court of Strasbourg wanted to distinguish this Italian case from that of *Kudechkina v. Russia*, in which it had concluded for the violation of Article 10 of the Convention. Indeed, unlike the applicant in the Italian case, Ms Kudechkina, a judge of the Moscow Court,

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[19] ECtHR, *Laranjeira Marques da Silva v. Portugal,* 19 January 2010.
[20] ECtHR, *Ceylan v. Turkey* (GC), 8 July 1999.
[21] ECtHR, *Tammer v. Estonia*, 6 February 2001.
[22] ECtHR, *Skałka v. Poland,* 27 May 2003.
[23] ECtHR, *Lešník v. Slovakia*, 11 March 2003.
[24] ECtHR, *Perna v. Italy* (GC), 6 May 2003.
[25] ECtHR, *Buscemi v. Italy*, 16 September 1999.
[26] ECtHR, *Poyraz v. Turkey*, 7 December 2010.
[27] ECtHR, *Di Giovanni v. Italy*, cit., §§ 78-83.

who had stood for the general elections to the Duma, had been sanctioned for having expressed, as part of her electoral campaign, criticism on the functioning of Moscow courts and the judicial system. The facts that she had attributed to identified or identifiable individuals (in particular, the President of the Moscow court) were part of her direct experience and had been partly confirmed by some witnesses. Furthermore, the sanction imposed on Ms Koudechkina had resulted in her losing her job and any possibility of exercising her role as a judge.

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32. As I said, there is no detailed examination of judicial ethics in the jurisprudence of the European Court of Human Rights, but it appears from the case-law that I have tried to highlight the great concern of the Strasbourg institution for the credibility of justice, i.e. the trust it must enjoy, both among its users and among the general public. In its perspective that credibility is an indispensable component of the "effective democracy", which in turn is an essential premise of the conventional system.

The Italian case we talked about is emblematic, in which the Court made the ethical requirements that accompany the judicial function prevail even over the right of freedom of expression, which many commentators consider the one dearest to it.

Incidentally, it is worth noting that the European Court of Human Rights, aware that the issue of the credibility and authoritativeness of the judicial function also concerns itself, has made a point of developing a code of ethics, the Resolution on Judicial Ethics, adopted in 2008 and revised in 2021.

33. This approach of the Strasbourg Court certainly implies the duty of States to act effectively in order to protect the two pillars on which the credibility of the judicial function rests, on the one hand the professionalism and on the other the absolute integrity of those who are called to administer the justice.

34. It hardly seems necessary to add that a State in which citizens have confidence in the judicial system is not only a State that respects its international obligations, but is a State where people live better.

35. Regardless of the international obligations of our countries, it is evidently a common interest of all democratic states to have a judiciary that enjoys the trust of the civil society. This is an objective that can be achieved with the commitment of the magistrates. So, we are all concerned.

36. Several ethical codes have been adopted, nationally and internationally, and you have been invited to consult quite a few of these important texts. The European Court

of Human Rights itself has adopted a Resolution on Judicial Ethics in 2008, and then updated it in 2021.

When it comes to Italy, the ethical code that the Italian judiciary has adopted through the National Association of Magistrates (ANM) comes into play. The Code of Ethics for Magistrates in force today was approved on 13 November 2010, replacing the previous version of 7 May 1994. Both documents have a legal basis, the first in the art. 58 bis of Legislative Decree no. 29/1993 and the second in art. 54 of Legislative Decree no. 165/2001 as amended by art. 1 paragraph 44 of law no. 190/2012. However, this does not mean that these are legally binding rules, even if a mechanism has been created within the ANM, entrusted to a board of arbitrators (*Collegio dei Probiviri*), responsible for verifying compliance with the code.

In fact, the application of associative sanctions cannot be the means to build the trust that the judiciary needs to operate with authority. It is necessary for magistrates to be aware of the ethical principles that are specific to the jurisdiction, and also that this awareness be recognized externally.

37. A prominent and very respected colleague, Gabriella Luccioli, observed that ethical principles are not imposed in themselves in a normative way, but are consolidated in "a way of being, a style of behaviour based on awareness of the role, on cultural choices, behavioural examples, consolidated virtuous practices, on the maturation of an individual and collective ethical conscience"[28].

38. Ultimately, detailed ethical codes would not even be necessary, because an adequate ethical conscience could also be based on just two simple concepts: *respect* and *humility*, as the hallmark of the judge's action. These are concepts that, if they are followed with coherence and honesty, are sufficient to guide the judge's conduct, in and out of office, in accordance with the highest ethical standards. External recognition of the adherence of at least the majority of magistrates to these concepts remains essential.

39. The result of conquering (or regaining) the trust of citizens will be achieved all the more easily if the magistrates are able to truly internalize the ethical codes that they themselves develop and, even more importantly, if this internalization is recognized from those who are outside our world.

[28] M. G. Luccioli, in *"La regolamentazione attuale nell'ordinamento italiano: il codice etico del 1994 e lo Statuto dell'Associazione Nazionale Magistrati tra aspetti sostanziali e procedimentali"* in *L'etica giudiziaria*, Quaderno n.17 della Scuola superiore della magistratura, Roma, 2022. The same ideas had already been pointed out by G. Barbagallo, *I codici etici delle magistrature*, in *Foro italiano*, 1996, III, 36.