

THE 15th COLLOQUY ON EUROPEAN LAW

Prof. Dr. Yılmaz ALTUĞ

The 15th Colloquy on European Law organised by the Council of Europe at the invitation of the Ecole Nationale de la Magistrature was held from Monday 17 June 1985 at the headquarters of the Ecole in Bordeaux.

Inaugural speeches were delivered by Mme M.D.Wiederkehr, Head of Division, representing the Secretary General of the Council of Europe; Mr. P.Lyon-Caen Charge'de Mission representing the Minister of justice and Mr.R. Exertier, Director of the Ecole Nationale de la Magistrature.

Mr.L.Bloom-Cooper Q.C.London, on June 17, presented the report on judicial Power and Public Liability for judicial acts.

The term "independence of the judiciary" carries two meanings: the independence of individual judges in the exercise of their judicial functions, and the independence of the judiciary as a body. The former is composed of two elements - (a) in the process of decision-making and in exercising their incidental official duties, they owe allegiance to the law and to no other authority; and (b) that their term of office and tenure are adequately secured. Interference with the independence of individual judges is regarded as highly reprehensible. Interference with the independence of the judiciary as a body has additionally an impact on individual judges in the discharge of their duties. The traditions and corporate responsibility which

Prof. Dr. Yılmaz ALTUĞ was the rapporteur of the Legal Affairs Committee of the Council of Europe at the 15th Colloquy on European Law.

the institution of the judiciary inspires in the individual judges reinforce their individual independence. The resistance of the judiciary to governmental incursions upon that discrete function in the administration of justice is as crucial to judges as is their detachment from political considerations of the individual decision-making process.

The primary provision designed to secure the independence of judges in both senses is judicial tenure. Historically in England Parliament was less motivated by a commitment to judicial independence than by the political considerations of curbing the powers of the Sovereign. Whether the motive the legislation had in establishing the judicial oath, which provided that judges should swear that they need not receive any fee or present from any party to a case before the courts, except from the Sovereign who paid their salaries, played a vital role in both improving judicial standards as well as reducing the influence of the Sovereign over the judges and the judicial process.

Ultimately in the second half of the 17th century the judges were decreed by the Act of Settlement in 1688 to hold office "*quamdiu se bene gesserint*". Apart from the power of removal from office by resolution of both Houses of Parliament, which has not occurred in modern times, the judges of the High Court are quasi-irremovable. Although the judges of the two lower rungs of the judicial ladder - the Crown Court judges and the Magistracy - are removable in certain legislatively defined circumstances, there is still a high degree of security of tenure. Since the lower judiciary, in general, functions subject to the control and supervision of the higher judiciary, there is less need for quasi-irremovability of the former. Judicial promotion in England is viewed as being inconsistent with judicial independence. Decisions by a judge are said to be influenced by the expectation that those favourable to government will induce official preferment.

Mr. Bloom-Cooper later explained the judicial profession (Magistrature) in France, he spoke about the inelegance, not to say impropriety of electing judges to office (best seen in the United States.)

He said that the Judicial Studies Board which is in existence for last 7-8 years in not training judges in United Kingdom.

As a general rule the conduct of judges cannot be discussed in Parliament unless upon a substantive motion which admits a distinct vote of the House. Likewise matters that are currently proceeding in the Courts are sub judice and cannot be debated in Parliament until they are concluded.

He said there is a tension today between judges and Parliament a decision can not be repealed but an act of Parliament can be repealed during the discussions the French participants criticized him saying that the information given in the report about French judicial profession was not up to date.

Prof. Dr. F. Kübler, professor at Johann Wolfgang Goethe University presented a Report an "The Role of the judge in a changing Society". He said that his report is centred on the nation of "Verrechtlichung" which can only be translated by "législation" or "juridification" in a very inadequate way. "Verrechtlichung" means more that the permanent increase of law a change in quantity it includes the continuing penetration of social institution by law a process which changes the quality of not only the legal system but also of the human relations which become affected.

The report was divided into four parts. The first part covers the identification of some major elements of social change stimulating "Verrechtlichung" such as technical revolution, the economic development, the political environment of modern legal systems and the cultural change. In the second part the rapporteur indicates how these changes affect the regulatory functions of the legal system, the emphasis is laid on the diversification of rule making powers. In the third part Dr. Külber answers the question what is the function of the judiciary in such a system. This transformation of the legal system from a simple and static structure granting legal stability to a complicated machi-

nery designed for the purpose of securing and promoting stable social development by legal change has deeply affected the role of the judge: the courts had to step in with rule making of their own in order to fill the gaps left open by the inevitable shortcomings of a much more complex regulatory process. In the fourth and the last part Dr. Kübler explains how these changes actually or potentially affect the mechanisms of judicial accountability.

There are mechanisms as the appeal system which works inside the judiciary and mechanisms or measures such as disciplinary proceedings, the selection and promotion of judges outside the judiciary. Also growing interest of the public. Here the emphasis has moved from more legal to more political forms of control. Mr. F. Morozzo della Rocca, Deputy to the Procureur Général at the Court of Cassation (Roma) presented on June 18 his report on "the different forms of personal liability of the judge". The report was on the different forms of personal liability of the judge for acts done and words spoken in the exercise of his (or her) functions also for behaviour when not exercising judicial functions which might adversely affect the honour and dignity of the profession.

The rapporteur points out that nowhere the limits of the liability of the judge amount to a complete immunity. Some offences are specifically connected by the exercise of judicial functions, so that they can only be committed by a judge, abuse of one's functions is usually regarded as an aggravating circumstance in the case of ordinary offences articles 127, 183 and 185 of the French criminal code article 328 of the Italian criminal code article 334 and 336 of the criminal code of the Federal Republic of Germany, articles 351-385 of the Spanish criminal code are cited.

As to civil liability it is impossible to speak of a judge's liability with respect to acts performed lawfully and without fault although they may be objectively unjust.

The solution which legal experience has suggested may be classified as follows:

As regards substantive law:

- a) there is no provision for liability or liability is limited to civil effects of a possible criminal conviction
- b) liability is only provided for harm intentionally caused to the parties
- c) liability also covers faults arising out of the judge's negligence or ignorance
as regards the person liable :
 - a) the judge alone is liable to the injured litigant
 - b) official liability exists alongside that of the judge'
 - c) the state is directly liable for the judge's faults subject to an action in indemnity against the judge.
as regards procedure
 - a) no special form is provided and the procedure is governed by the general rules
 - b) previous authorisation is necessary
 - c) the jurisdiction and procedure are governed by special rules.

Beside criminal and civil liabilities there is also disciplinary control which seems to be incompatible with the principle of independence. However, the European tradition either to sanction misconduct by members of the association who are judged by their peers or with the object of enabling the professions to work out specific rules of professional conduct. The judge is disciplinary control can not be defended by a lawyer but by another judge. Mr. Della Rocca is against non publicity of the debates. He says that even The Court of Human Rights decided the publicity of the audience.

In the end of his report Mr. Della Rocca asks the following questions :

In it desirable that the state should accept the civil liability in the faults of judges when the tendency of the judiciary is to establish complete separation?

Is the judge's personal liability perhaps the price he must pay in his independence?

Does disciplinary control within the judiciary itself favour the establishment of the judiciary as a separate body?

What is the effect of the absence of statutorily defined punishable offences on the independence of a judge, in relation on the judiciary?

On June 19 Mr. J. Velu advocate general attached to The Court de Cassation (Brussels), also professor at the Free University of Brussels, presented his Report on "Essential elements for a legal regime governing public liability for judicial acts."

Mr. Velu, in his report pointed out the concept of public liability for judicial act which is the obligation of the public authorities to make good, damage caused by judicial acts. This system therefore has nothing to do with the personal liability (criminal disciplinary or civil) which may be incurred by officials who have performed judicial acts causing damage and which may arise either from the principal actions brought by the victim himself or from an action for indemnity brought by a public authority.

The concept of judicial acts is not easy to determine, it can be defined as "any action or omission of a judicial nature occurring in the administration of justice by all the public bodies Constitutionally entrusted therewith".

Later, he exposed the rules of traditional international law in liability for judicial acts.

The state to whom an act unlawful in international law is imputable must make reparation to the State against whom this act has been committed. The damage for which reparation is due is the harm caused either to a national of the State or to the State itself or to both.

The international liability arises from any internationally unlawful act of State which implies first conduct consisting of an act or omission attributable to the State under International Law (imputability) and secondly that this conduct amounts to a violation of an international obligation of the State (unlawfulness).

Later Mr. Velu, studied the rules of liability for judicial acts in the law of international instruments relating to human rights.

These instruments are European Convention on Human Rights, Protocol and the International Covenant on Civil and Political Rights.

Right of reparation is created in case of an unlawful act.

Right to indemnification is created in case of a judicial error. In the conclusion, Mr. Velu proposes five principles by which the member States of the Council of Europe could be guided in their law and practice.

Principle I

Reparation for damage caused by a judicial act due to the fault of the person (or body) performing the act should be guaranteed in the following cases :

- a. When as the result of a judicial act a person has suffered damage because he has been arrested or detained in conditions contrary to the provisions of Article 5 (1) to (4) of the European Convention on Human Rights;
- b. When a decision of the European Court of Human Rights or the Committee of Ministers of the Council of Europe under Articles 50 or 32 of the European Convention on Human Rights has declared that a judicial act was entirely or partially incompatible with the obligations contained in that convention and the other domestic remedies or the nature of the violation only make it possible to make good the damage caused by this act to a limited extent;
- c. When the damage caused by a judicial act, other than a judgement in contentious proceedings, arises out of an intentional fault or gross negligence of the person (or body) performing the act;
- d. When the damage caused by a judgement in contentious proceedings which has been withdrawn, codified or set aside by a final decision because it violated an

established legal rule arises either from the intentional fault of the person (or body) performing the act or in a failure by the person (or body) performing the act to comply with a provision of the European Convention on Human Rights other than Article 5 (1) to (4) which in the circumstances constitutes gross negligence.

Principle II

Even in the absence of the faults referred to in Principle I the reparation of the damage caused by a judicial act should be guaranteed in the following cases :

- a. When the damage arises from detention on remand not followed by a conviction and it would be manifestly unjust if the victim were left to bear the damage alone.
- b. When the damage arises from a sentence served as a result of a final conviction and this conviction has later been set aside or a pardon granted because new facts or newly revealed facts proved that there has been a miscarriage of justice, unless it is proved that the failure to disclose the unknown fact in time is due in whole or in part to the fault of the convicted person.

Principle III

If the victim has contributed to the damage the reparation may be reduced or refused.

Principle IV

The reparation provided for in Principle I should be complete, the heads of damage and the nature and type of reparation being a matter for domestic law.

The reparation provided for in Principle II may cover part of the damage only, as may be required by equitable principles.

Principle V

The victim's rights deriving from the rules on public liability for judicial acts should be guaranteed without any

discrimination based (inter alia) on sex, race, colour, language, religion, political or any other opinions, national or social origin, membership of a national minority, wealth, birth or any other situation.

Prof. Eric Agositini, Professor at the Law Faculty of Bordeaux, and Director of the Institute of the Comparative Law, was Rapporteur General of the Colloquy, he summed up the reports and comments in an excellent way. The full reports and comments will be published by the Council of Europe.