The Professional Discipline of Supreme Court Judges
Synthesis Report

Guy Canivet
Premier président de la Cour de cassation (France)

Introduction

As already dealt with, with respect to the relations between the Supreme Court and the Executive Branch, the issue of the disciplinary aspect of the judiciary in so far as, in particular, Supreme Court judges are concerned, refers to the implementation of a guarantee for the Independence of the Judiciary. As such, it is a wider scope than the restricting choice between two extreme positions, the former consisting in endowing the Supreme Judicial Courts with all powers in disciplinary matters, the latter, in preventing them from being empowered and directed to deal with in this respect.

If a study were launched on these variations, one should first be mindful of the quality of the questions which were addressed to each Supreme Court in so far as, in particular, said questions fostered on three different themes and a pre-requisite.

Pre-requisite

The pre-requisite allowed to raise the issue of equal treatment, in the application of the Judicial Discipline Regulations to both Supreme Court judges and judges of ordinary Courts.

It then appears in the majority of cases that the Judicial Discipline Regulations applying to the members of Supreme Courts do not, subject to minor adjustments, differ from those applying to the other judges.

Concerning such obligations as arising by these Judicial Discipline Regulations, all the countries which were asked to share their opinions, with the exception of Poland, where judges are subject to rules of professional ethics included in a code of conduct, have more or less explicitly indicated that the ethics applying to Supreme Court judges are in substance quite akin to those applying to the other judges.

As far as proceedings are concerned, thirteen countries out of twenty-eight, have responded that in the absence of specific code provisions, the same proceedings apply to the members of Supreme Courts. Such is the case of Bulgaria, Cyprius, Denmark, Spain, France, Italy, Latvia, Lituania, Luxembourg, Malta, Norway, the Czech Republic and Romania.

In some other countries, such as Estonia, Greece, Hungary, Portugal and the Czech Republic, differences do exist though they are not of specific importance. They mainly arise out of the status of the persons who can either file the proceedings or conduct the disciplinary enquiry.

In a Federal State like Germany, judges are subject to the Disciplinary Tribunal, sitting in each Lander, and are granted the possibility to appeal to the Federal Disciplinary Tribunal.

In most cases, inferior courts are allocated work of the same nature as that tried at Disciplinary Tribunal, that is at original jurisdiction level. Appeals from these courts lie to the Supreme Court, except in the case of Austria, Netherlands and Poland where cases involving superior judges are tried at Supreme Court level.

Apparently, Sweden has not endorsed such possibility of appealing against judicial decisions by State Disciplinary Councils.

In the United-Kingdom, practising judges of inferior courts can be removed from office without a decision of the Parliament.

In Belgium, the provisions of the Judicial Discipline Regulations, seem to have vocation to enhance the role of the senior judges. The Premier président of the Cour de cassation can thus launch and carry out disciplinary proceedings involving first Presidents of Courts of Appeal and of labour courts, while the latter can do so reguarding members of their courts, Presidents of trial courts or of commercial and labour courts, as well as part-time judges.

Principal Themes

If we were to study whether how should be analysed in comparative terms the Judicial Discipline Regulations we are subject to, attention should be firstly paid to the ethical obligations governing our judicial practice, and then, the proceedings through which any failure to comply with these regulations are applied. The next two chapters will therefore provide a double approach to the principles governing Professional Discipline and to the rules guaranteeing their implementation.

I- Ethical Obligations

These matters relate to the question as to whether ethics do exist for Supreme Court judges and to what extent they are implemented.

A distinction has been made between the countries endowed with a code of professional ethics and the countries which have no such code.

Codified Principles

A code of professional ethics applying to judges was made enforceable in ten countries, including Bulgaria, Estonia, Hungury, Italy, Latvia, Malta, Poland, Romania, Slovenia and Slovakia, while Adirectives on the conduct of practising judges@are being drafted in Norway. However, as the term of code is not systematically used in all countries, such code takes on a variety of other names.

Though the issue of the origins of these ethical prescriptions be of high importance, in so far as they proceed from the Judiciary itself or include in their definition the obligations that are incumbent on judges and/or proceed from other jurisdictions, all the countries concerned have not deemed necessary to reveal the name of the Institution through which these codes were enforced, or to describe their contents and statutory powers.

After comparing the different answers that were addressed to us on the above matters, our attention has been drawn on the fact that these codes were either adopted by the Supreme Court (such is the case of Bulgaria, Romania and Slovakia), or by the practising judges themselves within the context of a National Association, or on the occasion of a General Assembly (in reference to Italy and Slovenia), or through a Conference or Specialized Committee (in reference to Latvia and Malta).

The contents of these codes stress importance of the necessity to provide practising judges with directives (in reference to Bulgaria), or recommendations (in reference to Estonia), so that they should satisfy the requirement of a reasonable conduct outside the sphere of their judicial functions. They also stress value of Independence, Impartiality, Dignity, Honour and professionalism.

The question as to whether the violation of ethical principles constitutes a breach of procedural disciplinary by a judge or falls within a specific category of sanctions, has been of high importance. In this respect, only the report on Bulgaria touches upon the implementation of the rules of professional ethics within the context of a Disciplinary Evaluation. In most other cases, the link between ethics and discipline has not been explicitly mentioned, with the exception of the report on Slovenia, which reveals us that such violation does not incur any official consequence, of any kind whatsoever.

Absence of Codified Principles

Among the countries having not made enforceable a code of professional ethics, a new distinction can be made. On the one hand, shall be mentioned the countries having acquired a reasonable level of legal knowledge in so far as, in particular, written provisions and provisions of judge made origin relating to the obligations incumbent on judges, are concerned. Such is the case of Austria, Belgium, Slovenia and the Czech Republic. On the second hand, shall be mentioned the countries which only have rather vague provisions, often subject to construction and mainly applying to civil servants as a whole.

It should also be judicious to quote Estonia, Italy and Slovenia as examples of countries in which judges are subject both to statutes and their code of professional ethics.

II- Disciplinary Proceedings

In this respect, questions arise as to the launching of such proceedings, the status of the persons in charge of the enquiry, the body in charge of the decisions and the involvement of the Executive in the implementation of the Judicial Disciplinary Regulations

The Launching of the Disciplinary Proceedings

Reguarding these matters, questions arise as to whether any individual can file a complaint against a Supreme Court judge, and, in the event that it might be so, whether such complaint can be brought before a Court, in so far as subsidiary proceedings through which disciplinary cases are examined do exist.

In the majority of cases, that is, in twenty-four countries out of twenty-eight, any individual can file a complaint against a Supreme Court judge. Except in the case of Germany, France, Hungary, Luxembourg and Sweden, this rule applies.

In Germany, complaints are made by the Federal Minister of Justice. In Hungary and Luxembourg, the President of the Supreme Court is endowed with the same powers whereas in France, the Presidents of Courts of Appeal and the Minister of Justice are respectively directed to exert this function. In Sweden, these powers are respectively allocated to the Ombudsman and the Minister of Justice.

Out of the twenty-four countries in which any individual is entitled to file a complaint, eight of them have acknowledged that such complaints could be heard by the Disciplinary Tribunal, without any screening process. Such is the case of Germany, Spain, Hungria, Malta, Portugal, the Czech republic, Romania and Slovenia.

In the other sixteen countries, there is a admission procedure. The President may either sit alone (Austria, Bulgaria, Cyprus, Scotland, Latvia, Slovakia), or together with another Authority (represented by the Minister of Justice in Britain, the Ombudsman in Estonia, the Council for the Judiciary in Lituania and the Disciplinary Tribunal in Denmark).

Otherwise, complaints against judges must be brought before the Minister of Justice in Greece, the Minister of Justice or Ombudsman in Finland, the Minister of Justice or Prosecutor- General of the Supreme Court in Italy.

Said complaints are brought before the Prosecutor- General of the Supreme Court in the Netherlands, the Spokesman of the Authority in charge of disciplinary matters in Poland.

In Norway, complaints made against judges may be filed with a great number of authorities such as the Minister of Justice, the President of the Supreme Court, the Norwegian Bar Association. However, it does not prevent a direct complaint to the Disciplinary Tribunal.

In Luxembourg, the President of the Supreme Court gives notice to the Prosecutor-General if he receives information which suggests that a disciplinary enquiry might be justified.

The Enquiry

Which Body launches the disciplinary enquiry? What is the status of the persons in charge of the enquiry?

Doubts remain on whether the answers on the above matter should be subject to construction.

In accordance with the position of France, the initial enquiry and the disciplinary enquiry itelf should remain separate in principle. The term of initial enquiry refers to the enquiry whose launching precedes the institution of the actual disciplinary proceedings, that is, the bringing of the matter before the disciplinary body, and whose purpose is to take note of any conduct inappropriate for a judge. Through this enquiry, not only has the judge under investigation no right to file a pleading of defense, but he also has no title to legal aid and the communication of his file. This enquiry can be respectively instituted by the President of the Court and by the Minister of Justice. The disciplinary enquiry proper is conducted by the Conseil Supérieur de la Magistrature which is the disciplinary body.The person in charge thereof, known as the ARapporteur@, must be a member of the Conseil Supérieur de la Magistrature and judges are then entitled to require legal aid and the communication of their files. We admit, on behalf of most of the countries which have been studied, one sole definition of the term of disciplinary enquiry as it is provided above.

We have not therefore considered as a surprise the fact that, in a great number of cases, that is, in fourteen countries out of the twenty-eight which have been studied, the initiative of the disciplinary enquiry is incumbent on the disciplinary body itself. Such is the case of Belgium, Bulgaria, Denmark, Spain, Finland, France, Hungary, Malta, Norway, Portugal, the Czech Republic, Romania, Slovenia and Sweden.

Countries like Germany, Scotland and Latvia are in a quasi identical situation, in so far as the initiative of the disciplinary enquiry is incumbent on the President of the Supreme Court, who may either sit alone for cases of less substantial nature (in reference to Germany and Scotland), or preside over the disciplinary board (in reference to Latvia).

In three other countries, the initiative of the disciplinary enquiry is shared by the President of the Supreme Court and another Authority. Such is the case of the Ombudsman in Estonia, of the Council for the Judiciary in Lituania and of the Judiciary Board in Slovakia.

The initiative of the disciplinary enquiry is incumbent on the Prosecutor- General of the Supreme Court in Austria, Italy, Luxembourg and the Netherlands, on the Spokesman of the Authority in charge of disciplinary matters in Poland and on the Minister of Justice in Greece.

In Britain, a specific Body, known as the Office for Judicial Complaints (OJC), is entrusted with launching the enquiry.

Now we have a clear idea of the Body in charge of such initiative, a question still arises as to whether both the status and the identity of the persons in charge of the disciplinary enquiry can equally be defined.

In most cases, the conduct of the disciplinary enquiry is incumbent on the Disciplinary Board or at least on one or several of its members. Such is the case of Belgium, Bulgaria, Cyprus, Denmark, Spain, Finland, France, Hungary, Malta, Norway , Portugal, the Czech Republic, Britain and Slovenia.

In other countries, the person or authority in charge of the launching of the disciplinary enquiry has also to be involved in the conduct thereof (namely Estonia, Italy, Latvia, the Netherlands, Poland).

As it might also be the case in Austria, Scotland, Greece, Lituania, Luxembourg, Romania and Slovakia, such enquiries may be conducted by specific persons or authorities.

Decisions about the Sanction

Which Body is in charge of examining the disciplinary cases and decides about the sanction?

In the greatest number of cases, the Body both in charge of examining the disciplinary cases and of making decisions about any sanction is either the Supreme Court itself, or a Body composed of at least several members thereof. Such is the case of Estonia, Hungary, Luxembourg, the Netherlands, Poland and Sweden, of Austria and Belgium, in so far as judges of the Supreme Court are liable to major sanctions and of Bulgaria, Cyprus and Scotland for cases of less substantial nature.
In a certain number of other countries like Germany, Denmark, Finland, Greece, Italy, Latvia, Lituania, Malta, the Czech Republic, Slovenia and Slovakia, there exists a specific Body in charge of examining the disciplinary cases and of making decisions about the sanction.

In truth, it is not easy to always determine whether such Body distinguishes itself from the Superior Council for the Judiciary.

Such Superior Council for the Judiciary is without contest the competent Body which deals with disciplinary cases in France and in Spain and also in Portugal and Romania; still, in relation to disciplinary proceedings, its jurisdiction is not exclusive since the Minister of Justice is both empowered and directed to apply sanctions to a Prosecutor.

In Scotland, as far as the removal of Judges is concerned, the Parliament ratifies the decision which the Prime Minister has recommended to the Queen.

In England and Wales, the decision as to any proposed sanction is taken by the Lord Chief Justice and the Lord Chancellor jointly.

Remedies

In most cases, the sanction has the effect of a judicial decision for which the Law offers no remedy. However, in certain limited circumstances, the Supreme court retains the power to overrule the sanction. Such is the case in Belgium. In countries like Bulgaria, Denmark, Estonia, Hungary, Poland, the Czech Republic, Slovenia and Slovakia, such restrictions do not exist, thereby rendering possible any appeal to the Supreme Court. The situation in France is quite different from that existing in other countries, since despite the existence of the separation of powers, the State Council, that is, the Superior Administrative Tribunal, is given exclusive jurisdiction in respect of appeals in disciplinary actions.

The Role of the Executive

Last question : is the Executive party to the disciplinary proceedings and involved in the decision against a Supreme Court judge?

Most countries have purely and simply answered back in the negative; such is the case of Austria, Bulgaria, Cyprus, Denmark, Scotland, Spain, Estonia, Hungary, Lituania, Norway, the

Netherlands, Poland, Portugal, the Czech Republic, Britain, Slovenia and Sweden.

In other countries, the situation is somewhat a similar one, in so far as importance is given to the fact that the issue under discussion exclusively fosters on the hearing and the sanction.

Accordingly, the decision of both Malta and Slovakia to answer back positively, is founded on the involvement of the Executive in all stages of the appointment process concerning certain members of the Disciplinary Board (which is equally the case in France, where one of the members of the Superior Council for the Judiciary is appointed by the President of the Republic).

The Executive is not excluded from all participation in the disciplinary hearings in so far as it can either offer advice as to a possible sanction, or act as the prosecuting party. Such is the case of France, Latvia and Romania.

It can occasionally appeal against decisions ordered by Disciplinary Boards (in reference to Italy and Slovakia).

In Scotland, as far as removal of a judge from office is concerned, any decision by the Crown to remove a judge from office must be preceded by Parliament=s ratification of the decision the Prime Minister has recommended to the Queen.

In France and Belgium, the Executive imposes the sanctions applying to the prosecutors.

Conclusions

The study of the respective situation of our Courts regarding the Judicial Discipline Regulations reveals some distinctions, as reported in the conclusions. In none of the countries under study, these regulations require implementation by the total control of the Executive or by the limitation of its authority. The issue of the discipline of judges should thus be examined in so far as each court interprets its terms in light of national professional tradition, thereby helping bringing about significant changes in the way it is applied. With regard to the case of France, there is no doubt that the functions carried out by the Minister of Justice, in regard to initiating disciplinary proceedings and monitoring disciplinary investigations, shall have to be amended in light of the principle of the independence of the Judiciary. At any rate, this has been noted by the Superior Council for the Judiciary, which is entrusted by the Constitution with ensuring the observance of this principle.

A related issue is the efficiency of these judicial discipline regulations. Do they help exercise control over the conduct of judges in so far as these are both in contact with the public and the Executive? Do they permit an authentic governance of our Judicial Systems, meant to ensure the respect of each citizen and the struggle against any form of corruption and base action that may involve judges? The question raised by the public opinion is of equal importance.