

A new idea of impartiality is haunting Europe: the many faces of the attack on the freedom of speech and association of the members of the judiciary¹

From the *muzzle law* in Poland to the (so far rejected) draft of *gag amendment* in France: in the European scenario the freedom of speech of magistrates is being restricted and further restrictions are on the way. By accusing the *Associazione Nazionale dei Magistrati* (ANM) of undue interference for intervening in the debate on judicial reform, and by accusing individual judges and prosecutors of political activism for the decisions taken in specific cases while discharging their professional duties, the attack on judicial associationism and on the values of judicial independence passes - in our country as well - a new threshold.

France, June 8th. During the sitting devoted to the review of the bill aimed at making the judiciary “open, modern and accountable”, senators approve an amendment introducing a framework for the exercise of the magistrates’ freedom of association, ruling that this should take place “*in accordance with the principle of impartiality that applies to members of the judiciary*”². The author of the amendment, Philippe Bonnacarrère, stressed in his speech that independence and impartiality are both crucial aspects when it comes to justice. But while full freedom of expression should certainly be ensured to associations, including judicial ones, the idea of impartiality must, however, permeate not only the individual activities of magistrates but also their collective action. In saying so, he sounds reassuring: “we do not believe that the concept of impartiality can be seen as an obstacle to magistrates’ collective freedom of expression”.

The origin and the meaning of the amendment become more clear in the words of Agnès Canayer: the purpose of this provision is to reaffirm that the right of magistrates to engage in associational activity must be compatible with the duty of impartiality intrinsic in their status since “if it can be acknowledged that the principle of impartiality exists, it is not superfluous to enshrine it in law, as the recent incidents in Mayotte have shown”³.

Mayotte. In March and April, the *Syndicat de la Magistrature*⁴ took a public position on the public security and anti-illegal immigration operation called *Wuambushu*, implemented on the island of Mayotte. By claiming the right and the “democratic necessity” to participate in the debate on issues concerning the

¹ English version of the article published in *Questione Giustizia* on 27/07/2023

<https://www.questionegiustizia.it/articolo/polonia-ungheria-francia>

² https://www.senat.fr/amendements/2022-2023/662/Amdt_38.html

³ https://www.senat.fr/seances/s202306/s20230608/s20230608001.html#Niv1_SOM1

⁴ This association of judges and prosecutors, established in 1968, is one of the founding members of MEDEL.

values of the rule of law, the *Syndicat* had echoed the concern - also expressed by numerous international observers (*Défenseur des droits*, UNICEF, CNCDH, Council of Europe) - about the implications for fundamental rights and for the effectiveness of judicial protection of the methods applied during the massive and spectacular eviction of the persons living in the *bidonvilles*⁵.

The attacks and criticism in the media on the magistrates' freedom of expression and on the local court judge – a former vice-president of the *Syndicat* who decided on the emergency suspension of the eviction - escalated to the point of producing a clear statement by the Superior Council of the Judiciary: "in a democratic state governed by the rule of law, criticism of a judicial decision must never be expressed through individual attacks on the judge who issued it"; "freedom of association is granted to members of the judiciary" and "the positions taken by an association cannot be used as a basis for questioning the impartiality of a judge on the sole ground of membership in that organisation"⁶. In this context also came the initiative of Justice Minister Eric Dupond-Moretti, who requested the Council to give an opinion on the limits of the magistrates' right to enjoy freedom of expression.

The French judiciary took strong action in defence of the right of speech and association. As reported in the document *Gagging the Judiciary: a step backwards for democracy* promoted by the *Syndicat de la magistrature*, which quickly received the support of many associations and cultural figures, the aim of the amendment was to concretise the idea that a judge engaged in an associative activity is necessarily biased in the exercise of his/her jurisdictional functions. This vision promotes eventually an actual restriction on the freedom of thought and speech ordinarily enjoyed by individuals as such and by associations, as well as an inroad into the judicial function, that is suddenly undermined by the discrediting of any decision made by a judge or a public prosecutor for the sole fact of his/her being a member of a certain association.⁷

In its statement dated 13 June, MEDEL reiterated that the attempt to restrict freedom of expression appears even more serious when the positions taken by the judiciary are specifically targeted at stressing the role of courts in protecting fundamental rights, which is part of the mission of the judiciary in any democratic society, and the independence that it must enjoy for this same reason⁸

⁵ <https://www.syndicat-magistrature.fr/component/tags/tag/mayotte.html>

⁶ <https://rassemblementnational.fr/communiqués/le-syndicat-de-la-magistrature-contre-linteret-des-mahorais>
The MP elected in Mayotte for *Les Républicains*, Mansour Kamardine, in a press release denounced "the judicial harassment orchestrated by associations 'droitdelbommist', hand in hand with biased judges" (https://www.zinfos974.com/Wuambushu-Mansour-Kamardine-parle-de-harcelement-judiciaire-orchestre-par-des-associations_a195255.html)

<http://www.conseil-superieur-magistrature.fr/publications/avis-et-communiqués/communication-du-4-mai-2023>

⁷ <https://www.syndicat-magistrature.fr/notre-action/defense-des-libertes/liberte-d-expression/2601-tribune-baillonner-la-magistrature-une-regression-democratique.html>

⁸ <https://medelnet.eu/after-poland-and-hungary-france>

Remarkable coincidences and what is actually at stake.

The parliamentary procedure to approve the *loi organique* on the status of the judiciary has not yet been definitively completed, but the amendment was, however, already rejected in the 18th July vote by the National Assembly. The alarm has - for the moment – receded but has not ended. And a worrying sign remains: everywhere the freedom of expression of magistrates and their associations is under trial.

This French case tells us how deep-rooted and widespread is the intolerance for the idea of a judiciary that 'takes the floor', and how fast is spreading the language of those who bring this intolerance into the political and public debate.

Any overlap between the judge's impartiality, i.e. an essential guarantee for due process and for the equality of citizens before the law, and the limits to its freedom of expression is misleading. In the background of such overlap lies the idea of a silent judiciary, a bureaucratic body detached from society, excluded from public confrontation and democratic debate. This is a model of a magistrate secluded on himself and his/her "paperwork", unable to elaborate and express collective positions other than wage and career claims. This is the vision of a judiciary that, as Stefano Rodotà wrote, avoids the difficult confrontation with reality indeed by invoking the role of guarantee proper of adjudication, but thus shutting itself behind the high walls of its separateness.

We heard the echo of the French debate when our Minister, who announces and promotes important justice reforms, including constitutional ones, accused the ANM of "*interference*" in connection with views expressed in the public debate about such issues⁹. It is difficult to take this accusation as an innocuous statement because, as always, the persuasive force that a message released into the public debate can acquire is unrelated to its actual value.

In the public debate, the minister's warning about such "trespass" was shared and echoed by statements mentioning the occurrence of an institutional derailment, allegedly triggered by the way in which magistrates - as individuals or through the ANM - express their thoughts violating the separation and balance of powers and, moreover, by a democratic distortion allegedly caused by a ANM acting as an entity claiming a sovereign authority. And also, from this debate came the unfortunate reference to

⁹ <https://www.ilsole24ore.com/art/nordio-contro-l-anm-loro-interferenze-l-associazione-magistrati-hanno-diritto-dover-parlare-AEtzVrjD>

impartiality as a limitation to magistrates' right to speak when engaged in the democratic debate on issues related to justice and the rule of law¹⁰.

These are remarkable coincidences, which in our context are part of a new era of hostility against the judiciary and the judicial function.

Once a reform of the judiciary is launched in the name of the need to intervene in order to put an end to the abuses of a 'partisan' judiciary, politicised and deliberately exploited by the political opposition, what can be expected is that the next of these reforms will be feathered by removing the legitimacy of any criticisms made by magistrates, both individually and through their associations.

The frontline is dangerously moving closer to the core of the judicial power. Following the allegation of *interference* waged with public statements against a judiciary seen as an obstacle to the reform course, the following step was blaming judges and prosecutors for pursuing political aims with their decisions in trials and investigations. The recent serious statements originating from the government about the role of 'political opposition' allegedly played by the judiciary in proceedings involving members of political offices clearly show what may be the next stake: the role of the judge and its legitimacy. And the warning, this time from the ANM, about the consequences for the separation of powers and for the prerogatives of an independent judiciary, did not meet an equal amount of attention, not even from the body in charge of protecting the independence of the judiciary¹¹.

A glimpse of Europe. As often occurs, the debate on justice and the judiciary's status – in certain national contexts and particularly in Italy - takes directions opposite to those that the experience and the comparison at European level would suggest, as well as to those imposed by the developments of the 'European crisis' of the rule of law. In Poland, hence within the borders of the EU, the democratic decline has resulted in the subjugation of the entire judicial system to the executive power. The Superior Council

¹⁰ <https://www.ildubbio.news/interviste/cassese-cosi-lanm-rischia-di-violare-la-separazione-dei-poteri-o6yscdsn>.

https://www.corriere.it/economia/lavoro/23_luglio_09/violante-governo-accerchiato-sindrome-diffusa-ma-dall-anm-toni-sbagliati-7066f8aa-1e8b-11ee-9790-534f50182f9e.shtml

¹¹<https://www.associazionemagistrati.it/doc/3999/rispettare-le-prerogative-della-giurisdizione.htm>;

<https://www.associazionemagistrati.it/doc/4000/lessenziale-ruolo-dellanm.htm>

of the Magistracy (KRS) instead of acting as a guarantee of the judiciary was actively involved in the demolition of the independence of judges and courts¹². The Constitutional Court now clearly challenges not only the supremacy of EU law but also the ECHR system. Disciplinary and criminal sanctions are applied against judges and prosecutors who dared to raise their voice against the justice reforms enacted to overturn the principle of separation of powers.

In Turkey, the axe of the most severe authoritarian repression, which has struck democracy to death, has fallen on the judiciary, on the entire system of judicial safeguards, and on single magistrates too - as well as on lawyers and human rights defenders - through the imprisonment and the final convictions of those who have publicly stood up for the independence of the judiciary and the values of democracy. Murat Arslan, President of Yarsav - an association of Turkish judges and prosecutors that is part of Medel, dissolved on the basis of emergency legislation after the coup attempted in July 2016 - was the active witness of the end of the rule of law in Turkey. He is imprisoned since October 2016 and, after a trial in breach of all fundamental due process standards, has been sentenced to ten years imprisonment. Murat has personally been paying the price for his dedication to rights and independent justice.

Given this context, specifically regarding the magistrate's participation in public debate, there is now an acknowledgement that judges have the duty to speak out when democracy, the rule of law and fundamental rights are at risk (this is what was also pointed out by the Network of Councils for the Judiciary in the Athens Declaration of June 2022 and by the Consultative Council of European Judges in its opinion of December 2022 on the judges' freedom of expression)¹³.

Two important rulings of the European Courts have recently addressed freedom of speech and freedom of association.

On 6th June, the European Court of Human Rights ruled that Turkey had breached Article 10 (freedom of expression) of the ECHR for the disciplinary sanction imposed by the Council of Judges and Prosecutors on the applicant magistrate, at the time secretary general of the judges' union, as a result of an interview published in a national newspaper in which she expressed her criticism on the effects of the reform to the High Council of Judges and Prosecutors (HCJP) introduced by the constitutional amendments. The ECtHR clearly states that - while there is a duty of discretion and restraint inherent in the role of a magistrate - the role of secretary general of a magistrates' union is an actor of civil society.

¹² See the proposal of the executive board of the ENCJ to expel KRS, <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/EGA%20Vilnius%202021/ENCJ%20EB%20proposals%20to%20expel%20KRS%20.pdf>

¹³ <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%2022/ENCJ%20Athens%20Declaration%202022.pdf>; <https://rm.coe.int/opinion-no-25-2022-final/1680a973ef%0A%0A>

The applicant, therefore, had the right and the duty to express her opinion on constitutional reforms that could have an impact on the judiciary and the independence of the judiciary¹⁴.

On 5th June, the European Court of Justice ruled in favour of the EU Commission in the case against Poland, thus rejecting the so-called “muzzle law”¹⁵. This was a reform, enacted in 2019, by which Poland once again set itself on a collision route with rule of law principles and the supremacy of EU law. Besides provisions to enable the disciplinary sanctioning of judges for their criticism of reforms and those called on to verify compliance with the fundamental requirements for effective judicial protection, as enshrined in EU law, and to ensure its supremacy, the law also imposed on judges the duty to report information on their activities as members of associations or foundations, as well as any previous political affiliation, and required the publication of such information.

Poland argued in defence of the reform before the ECtHR that the aim of these measures was to strengthen the judges' political neutrality and impartiality, as well as to allow the parties to be notified about the previous political activities of the judges and of any possible bias in the judge's objectivity in a given case.

Again, the issue of impartiality comes up, a passe-partout at every latitude by which authoritarian restrictions can be imposed on the magistrates' freedom of thought and association.

We are not in Poland or in Turkey. But, as always, looking at what is happening beyond our borders helps us to gain awareness about the changes that foreshadow the start of dangerous involutions that can hardly be stopped. And to understand the risks that we run when we find ourselves dealing with distortions aiming at jeopardising the principles that protect the independence of the judiciary and those that are the basis of its legitimacy.

¹⁴ [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-225022%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-225022%22]})

¹⁵ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-06/cp230089en.pdf>