THEMIS COMPETITION

SEMI-FINAL D: JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

THE INDEPENDENCE OF THE JUDICIARY IN THE DEMOCRATIC BALANCE OF THE 21ST CENTURY

JOÃO MIGUEL, JOSÉ RAMOS, SARA DOMINGOS

TUTOR: RUI CARDOSO

BUDAPEST, HUNGARY

2018

Introduction

As VERGÍLIO FERREIRA, a famous Portuguese author, once wrote, «[the exercise of *freedom*] *has to be in the name of what is indisputable to us, that is, of that in relation to which one is not free. Freedom only has meaning against something that opposes to us. But what we do not always think is that it only makes sense to be* against, *if we are* in the name of»[1].

Present times provide us with endless *trials* regarding the *boundaries* of freedom to adjudicate (and, in general, to exercise the judicial power), comprised in the *independence of the judiciary*: particularly, the challenges imposed by the social changes of the 21st century, productivity obligations and illegitimate interventions by the legislative and executive powers.

In this context, in order for judicial *independence* to overcome the status of mere abstract proclamation of *devoir-être,* it is of utmost importance to affirm the need to entrust courts with the preservation of both fundamental rights and the core of judicial independence, which is «*the key to upholding the rule of law in a free and democratic society*»[2], as values *in the name of* which independence is exerted.

I.1. The concept of independence

From a semantic point of view, the concept of independence comprises a positive aspect of discretion and a negative aspect related with the state of not being under control or influence from others. In the judicial sense, discretion/autonomy is ultimately limited by the *rule of law.*

However, the concept of judicial independence is highly indeterminate. In order to define it, one should begin with an overview of legal provisions on the matter. In regard to international conventions, Article 10 of the Universal Declaration of Human Rights provides that «e*veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal* (…)»*;* Article 14(1) of the International Covenant on Civil and Political Rights (1996) states that «(…)*everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.»*; the EU Charter of Fundamental Rights, under Article 47(2), determines that *«everyone is entitled to a fair and public hearing within a reasonable*

[1] VERGÍLIO FERREIRA (1992), p. 34.
[2] ANN POWER (2012), p. 1.

time by an independent and impartial tribunal previously established by law»; according to Article 6 (1) of 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 (...)*».

From the normative elements enunciated, it immediately follows that the concept of independence appears usually associated with the provision of the *fair trial*, that it, as a fundamental *right of the citizens.* [3] [4] However, judicial independence involves more than what is read at first glance in these legal texts. Worthy of account is what is provided for in the *Bangalore Principles of Judicial Conduct*[5], which define independence, primarily, as a value: «*judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects*»; thus, the value is distinguished from the *ought* (*devoir-être*).

I.2. The value – corollary of the rule of law

Judicial independence, more than a mere *individual* right, is rendered as a true corollary of the democratic *rule of law*, as courts are sovereign bodies with power to administer justice in the name of the people and it falls to them to defend the rights and legal interests of the citizens, restrain breaches of the law and to resolve conflicts of private or public interests.

«*Independence is - must be - the essential status of a true court and a true judge, for it is only on the basis of it and through it that the intention to truth and justice that is structurally inherent in the activity of the courts - of each court - is susceptible to be achieved. Only with regard to it there is a guarantee that the judicial decision can be valid as an emanation of the law and not simply as a decision-making act of the State*».[6]

In this sense, judicial independence is a guarantee of the equality of citizens[7] and *individual* freedom towards political power[8]. This reasoning provides for an increased

[3] Cfr. LABORINHO LÚCIO (2000), p. 34.

[4] Cfr. Judgments of the ECtHR *Baka v. Hungary* (2016), *Procola v. Luxembourg* (1995), *McGonnell v. UK* (2000), *Findlay v. UK* (1997), par. 52 and *R(Brooke) v. Parole Board* (2008), par. 78-80.

[5] Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

[6] JORGE MIRANDA/RUI MEDEIROS (2007), p. 37.

[7] ORLANDO AFONSO (2017), p. 45.

importance of the independence of the judiciary, not only at state level, but also at the level of the European Union.

Unequivocally, the independence of the judiciary is a *conditio sine qua non* of the maintenance of the democratic rule of law and, therefore, one of the pillars of the European Union (Article 2 TEU).

Going deeper, taking into account the fact that the national courts are the first line of interpretation and application of European Union law (Articles 4 (3) and 19 (1) TEU), in addition to the obligation upon the Member States concerning judicial cooperation and the establishment of a common area of freedom, security and justice, based on reciprocal trust, one quickly realizes that ensuring the existence of effective judicial independence within each of the Member States is, after all, part of the *guarantees* of the European Union and «*inherent in the task of adjudication*»[9].

Recently, the CJEU reflected this view in its judgment of 27-02-2018, Case C-64/16. Citing the judgment in question, *«the very existence of effective judicial review to ensure compliance with Union law is inherent in the rule of law* (…).

It follows that any Member State must ensure that bodies which, as a 'court or tribunal' within the meaning of Union law, form part of its system of remedies in areas covered by Union law satisfy the requirements of judicial protection effective».

Furthermore, «*the independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence*».

The view taken by the CJEU on judicial independence may also lead to future infringement proceedings brought by the Commission against Member States for breaching the principle of the independence of the judiciary, either on its own initiative, or even, and this would be an innovative solution, by another Member State.

I.3. The *ought* – independence in action

[8] JOSÉ PASCUA (2007), p. 60.
[9] Cfr. judgment of 27-02-2018, Case C-64/16, of the CJEU, par. 42.

Ought means direction towards *something* - the value being that *something* and ought being the *modus essendi* of the value[10]. In that sense, the value of independence is pursued through ethical norms as well as through institutional guarantees, defending judges, the judicial system and, as mentioned before, democratic rule of law.

Separation of powers,[11] freedom of hierarchical constraint or subordination[12] and exclusive submission to law[13] are usually seen as the prime elements of independence. Indeed, judges should be «*able to act without any restriction, improper influence, pressure, threat or fear of interference, direct or indirect, from any authority, including authorities internal to the judiciary*»[14] in order to deliver binding judgments impervious to modification by a non-judicial authority, which is also an element of the independence of the judiciary, as held by the ECtHR in *Van de Hurk v. the Netherlands.*[15]

Also, immunity and non-liability resulting from decisions, prohibition to initiate proceedings *ex officio*, reasonable remuneration[16], stability of tenure, irremovability by the executive[17], a sole body of judges, the principle of natural justice (or establishment of a tribunal by law) [18] and selection of new judges under objective criteria account for the adequate exercise of the function entrusted to the judiciary.

One of the vital institutional preconditions for independence lies on the provisions regarding appointment, discipline and removal of judges and, specifically, the independence of the entity in charge of that activity[19] [20]. Indeed, this point is of the utmost importance, constituting a benchmark of democracy. In this respect, AROCA

[10] JOHANNES HESSEN (1974), pp. 86, 87.

[11] Cfr. ECtHR judgment, *Campbell and Fell v. the United Kingdom* (28 June 1984).

[12] Cfr. judgment of 27-02-2018, Case C-64/16, of the CJEU, par. 42; ORLANDO AFONSO (2017), p. 45.

[13] JUAN AROCA (1990), p. 120; the author refers that the judicial branch should ultimately only be subject to the Constitution, accepting ordinary law in the terms of a constitutional delegation.

[14] ANN POWER (2012), p. 3.

[15] Cfr. ECtHR judgment *Van de Hurk v. the Netherlands*, (19 April 1994).

[16] Cfr. judgment of 27-02-2018, Case C-64/16, of the CJEU, par. 17; SHIMON SHETREET (2013), pp. 156, 164

[17] Cfr. ECtHR judgment *Henryk Urban and Ryszard Urban v. Poland* (30 November, 2010).

[18] Marcuccio v Commission (Case C-528/08 P)

[19] «*These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge*», cfr. preamble of the *Bangalore Principles of judicial conduct.*

[20] Regarding the independence of the self-government body that appoints, promotes, removes, transfers and regulates judges, two views appear to be acceptable: the «strict» version, demanding total separation from other branches in order to inhibit interferences and contamination; the «harmonic» version, admitting members from outside the judiciary, to prevent an isolated, reckless body with no connection to society and other institutions, cfr. CONSIGLIO SUPERIORE DELLA MAGISTRATURA (2001), p. 121-122.

provides a bold statement: «*in this context, it seems obvious that the guardian of independence of others must be itself independent. If it were not so, we would be before the Absurd*»[21].

Furthermore, the public prosecution office must also enjoy a considerable degree of independence from the executive power[22] – given that it is responsible for channeling charges into the courts, otherwise rendering judiciary's independence, in certain cases, useless.

From an ethical perspective, there are rules usually imposed on judges: the inability to perform other professional activities, the obligation to refrain from political connections, to not give opinions on ongoing cases, the prohibition of accepting gifts or favours[23], among other norms. It is a duty of the judiciary to behave in a certain manner, undoubtedly in their personal life, but especially whilst rendering decisions.

The *Bangalore Principles* point out, in Article 1.1., that «*a judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason*».

It should also be noted that independence in action must be guided by the goals it aims to achieve. «O*ne of the most appropriate ways to define the ethical model of a judge*, (…) *is to return to the general principles. And the general nuclear principle is none other than that which consists in observing the duties of the judge from the point of view of the aims of the judicial function. According these aims, if what is asked of the judge is that he applies the law in a fair and lawful manner, this aim of legal justice must be present in all his acts, throughout his life, because the best way to be just in the application of the law is striving to obtain an ideal of justice in all his works*».[24]

II. The 21st century as a new challenge for the judiciary

«*The role of courts in society is not static; it is in a continuous process of change and transition*»[25]

[21] JUAN AROCA (1990), p. 125.
[22] CARLO GUARNIERI (1981), p. 229.
[23] Cfr. *Bangalore Principles of Judicial Conduct*, 4.14.
[24] LORENZO DEL RÍO FERNÁNDEZ (2009), p. 117.
[25] SHIMON SHETREET (1988), p. 467.

European society is becoming more diverse and intricate, with law having to face challenges such as multiculturalism, specialized crime, the explosion of mass litigation and new forms of trade.

Moreover, due to the growth of inequalities and feeling of injustice, Europeans seem to be losing their confidence in institutions, on which «*depends the very survival of States and societies, and more specifically the satisfactory functioning of the systems of political democracy*».[26] ROUSSEAU, in *The Social Contract*, affirmed that the damage of collective references and the breach of social bonds may lead to law following private interest, which is negative for the collectivity.[27] In that same sense, the danger for the community, that senses the forfeiture of sovereignty, derives from the fact that «*States and politicians* de facto *'answer to the markets', that is, to powers which are anonymous, global and distant, but at the same time local and pervasive*»[28].

Furthermore, governments and parliaments enact new regulations, often technical and specific, create diverse institutional responses and prescribe vectors of action for courts in addition to traditional judgment while struggling to deal with the current hyper-complex[29] system of society.

Thus, in 21st century democracies, judicial *redress* is sought to solve issues where administrative and political institutions have either failed or refrained to deal with (avoiding its electoral downside), witnessing the growth of judicial intervention, resolving «*disputes that are economic or political in nature*»[30] and shielding the expansive tendency of the content of fundamental rights[31].

Further engagement of the judicial system in contemporary democracy must safeguard human dignity, equality and non-discrimination of minorities, new fundamental rights such as informational self-determination[32] and the confidence in democratic rule of law.

The judge must therefore come to terms with these transformations and manage to preserve a neutral position in society, while capturing the mentality and values of the

[26] GIAMPIERO BORDINO (2014), p. 1.
[27] JEAN-JACQUES ROUSSEAU (2010), p. 103.
[28] GIAMPIERO BORDINO (2014), p. 1.
[29] «*Hyper-complexity is a system that is poorly hierarchized, multipolar, more dominated by strategic and heuristic skills, more dependent on intercommunication, more subjected to disorder, to noise, to error*», cfr. EDGAR MORIN (1973), p. 115.
[30] SHIMON SHETREET (2013), p. 19.
[31] GUARNIERI/PEDERZOLI (1996), p. 150.
[32] CATARINA BOTELHO (2018), p. 122.

era he lives in, and maintaining independence while taking decisions that delve in new issues or that may be considered against the popular will.

II.1. The Stranger and The Enemy

The refugee crisis, the - unavoidable[33] - arrival of people of the developing world and the growth of minorities[34] (including gender and sexual minorities) are becoming targets of the public eye, producing new layers of social diversity and creating difficulties for integration; these groups become the *Stranger*[35], the unfamiliar element of the community, comprising «*alien styles of life*»[36].

On the other hand, terrorism fears, aggravated by the recent attacks in the heart of Europe, have not only led to increased communitarian security accompanied by the tightening of fundamental freedoms, but to the complicated issues of the Criminal Law of the Enemy (*Feindstrafrecht*) and the clash between the protection of public interest and human rights.[37]

Despite the fact unfamiliarity or terror will lead to *rejection* based upon fear by the majority (resulting in less tolerant political choices or in the risk of judges being overtaken by their own emotions), the courts must embody the balance that democratic rule of law requires and ensure the respect for human rights, with UN Human Rights Council reiterating the importance of the independence of the judiciary towards this matter.[38]

It must be asserted that, at times, the courts will lay a counter-majoritarian[39] decision and that decision will remain democratic[40], because if the holder of a right «*has no way to enforce it, the right resembles the concept as it exists in an authoritarian regime*».[41]

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[33] NADIA URBINATI (2017), *passim.*

[34] Cf. ECtHR judgment *D.H. and Others v. Czech Republic* (2007).

[35] ZYGMUNT BAUMAN (1991), *passim.*

[36] ZYGMUNT BAUMAN (1998), p. 11.

[37] Opinion no 8 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on "the role of judges in the protection of the rule of law and human rights in the context of terrorism".

[38] Cfr. Report of the Special Rapporteur on the independence of judges and lawyers (2017).

[39] GUARNIERI/PEDERZOLI (1996), p. 150.

[40] Cfr. JOSÉ PASCUA (2007), p. 46; ORLANDO AFONSO (2004), p. 61, «only the truth of the judicial formulations and the freedom of the citizens constitute the source of legitimacy of the jurisdiction. Truth and freedom (from personal freedom to freedom of thought, from rights of defense to political freedoms) have to be guaranteed by a power that is not tied to the interests of the majority».

[41] BURT NEUBORNE (1988), p. 190.

BURT NEUBORNE defends that majorities can be as unfair as authoritarian elites towards weak and unpopular groups or subjects, devaluing minorities. «*Even at its best, political democracy risks overvaluing the needs of the 'ins' and undervaluing the interest of the 'outs', especially when the outs are despised or feared*»[42], rendering the legal treatment of minorities «*one of the principal tests of how far respect for human rights and the rule of law is observed*».[43]

Currently, the task laid upon the judge gains crucial importance amidst globalization and, particularly, an European Union of 28 different countries; integration and the single *market* broaden the group of addressees of a legal framework[44] that makes national courts true guardians of fundamental rights of a diversified population.

Besides, in this cooperation context, a new duty to acquire foreign language skills might be envisioned in order to eliminate obstacles and intermediaries that may obstruct the immediacy favoured in the *decision* of the case. In this sense, the judge must exert independence while becoming accountable before a larger audience and subject to pressure from foreign authorities, guaranteeing, on one side, mutual recognition and steady assistance, and, on the other, individual freedoms and procedural rights of nationals and foreigners.

Therefore, the European judiciary must be aware of *difference* and be the first to learn how to cope with the Stranger and to deal with the Enemy in order to secure the individual rights and freedoms in a globalized background.

II.2. Judges *on trial* - confidence *in* independence

Mass *media* is one of the most recognized characteristics of our time, penetrating all aspects of contemporary life[45]. It is set on real time, by countless operators, providing an accelerated, yet inconsistent, stream of information.[46]

Although it has become one of the main instruments for external scrutiny of judicial proceedings[47], traditional and social media tend to hold one-sided views, fragmented references and biased constructions of those references[48], more often perceived as an entertainment product channeled to please the shallow curiosity of

[42] BURT NEUBORNE (1988), p. 190.
[43] PETER ASHMAN (1993), p. 3.
[44] For example, the European Arrest Warrant or the European Investigation Order.
[45] MARK DEUZE (2011), p. 137.
[46] JEAN BAUDRILLARD (1991), p. 103-4.
[47] The right to a fair trial enshrined in Article 6 of the ECHR includes *media coverage* – cfr. CHRISTOPH GRABENWARTER (2014), p. 145.
[48] HENRIQUES GASPAR (2010), p. 168-9.

audiences rather than a platform providing for content relevant to legitimate public interest.

SHIMON SHETREET and SOPHIE TURENNE hold that public scrutiny is perhaps the most important of the checks on the judiciary, and should therefore be welcomed, as judicial activity is of public interest at all times, and, ultimately, *public property*. SHETREET and TURENNE consider that, notwithstanding the increasing powerlessness of law to prevent comments or press *leaks* concerning proceedings under judicial *secrecy*,[49] limits to scrutiny should be provided for, given the threat to judicial independence caused by *immoderate* media or governmental censure.[50]

In fact, the opposition to attacks against the independence of the judiciary will be stronger if there is a fierce public debate and a free press.[51] In that sense, the judiciary must not give up its role as regards the media, given that judges are also part of the democratic dialogue[52] and have the responsibility to share their constitutional viewpoint with citizens. The trust of the public in the judiciary and, particularly, in its independence, constitutes a safeguard of that same independence.

Albeit exposure by judges and prosecutors while expressing their opinions might compromise their independent outlook (by revealing their standing on certain matters taken to their judgment or otherwise leading to a generalization of that viewpoint to the whole body at the eyes of the community), the courts must find an adequate way to broadcast the execution of the judicial power.

The independence of the judiciary requires the courts to communicate on their own terms and to be cautious before adopting the media's methods, pace and framework. Nevertheless, the courts are bound to the duty of informing and updating the public opinion which is, as KARL POPPER stressed in 1987, extremely powerful, and «*constitutes a de-responsabilised power that can be adapted, staged and strategically planned*».[53] Accordingly, the judicial system plays a role in protecting free speech in society, as democracy depends not only on the right to vote but on the diffusion of information and opinion to the citizens.

The broadcasting of judiciary's message does not mean a distortion of institutions, but, at most, the start of a «*constitutional mutation*» claimed by the new

[49] A. T. H. SMITH (2000), p. 127.
[50] SHIMON SHETREET (2013), p. 382.
[51] SALVATORE SENESE (2008), p. 30.
[52] NORMAN REDLICH (1988), p. 156.
[53] KARL POPPER (1992), p. 144-45.

information society[54], by means of a new democratic form of control and accountability, enhanced by digital sources providing permanently accessible information.

In fact, this accountability means that the courts must play their role not only independently, but while creating an *appearance* of independence. As the Strasbourg Court stresses, in accordance with the concept of independence enshrined in Article 6 (1) ECHR, it must not be ignored that citizens are entitled to be kept from objectively justified doubts on independence[55].*«In the exercise of their judicial functions, judges shall* (…) *avoid any situation that may affect confidence in their independence*»[56].

Therefore, the courts have the obligation to shape public opinion, within the boundaries of truth, so as to enhance their legitimacy among a *polymorphic* audience subject to media distortion and defend themselves against attempts to undermine their independence, in order for the latter to be taken as a chief priority by citizens.

II.3 Writing the truth with independence

In the present day, the judge is more than just a law technician: he is a social therapist, a minister of equity[57], a conciliator, a solution finder, a pacifier. However, in an age where boundaries of knowledge stretch and access to information is widespread, the judge has become *la bouche de la verité.*

Currently, the judiciary operates in an age of alternative facts and fake news that are planted in public opinion – the «*disillusionment with institutional structures has led to a point in which people don't believe in facts anymore*»[58]. Furthermore, there is a growing challenge concerning the trust in the correspondence of conveyed knowledge and reality.[59]

The courts, in dealing with the cases brought before them with independence, providing rigorous treatment of facts within fair proceedings, have the ability to take on a new position in society as creators of *negative entropy*[60], becoming a safe reference for citizens. If immune to the interests that support media, the judicial proceedings enable the gathering of information through independent investigation beyond open

[54] VICTOR SOUZA (2016), p. 76.
[55] Cfr. ECtHR judgments *Campbell and Fell v. the United Kingdom* (28 June 1984), *Langborger v. Sweden* (22 June 1989), *Procola v. Luxembourg* (28 September 1995) and *McGonnell v. the United Kingdom* (8 February 2000).
[56] Cfr. *Resolution on Judicial Ethics*, ECtHR, 2008.
[57] HENRIQUES GASPAR (2010), p. 23.
[58] Cfr. NOAM CHOMSKY (2018).
[59] Correspondence theory of truth, cfr. IMMANUEL KANT (2008), p. 197.
[60] ERWIN SCHRÖDINGER (1944), p. 24.

sources available to the regular citizen; the adversarial or *inter partes* procedures allow all the parties to be heard; and thoroughness in evidentiary analysis provide superior reliability than the constant urge of information exposure[61].

Evidently, courts are not able to answer every question or address every subject that the community would consider itself entitled to be informed of, neither will they provide conclusions at the pace that the media does; conversely, in an era of loss of references and breach of reliance, independence from political or economic influences renders courts a trustworthy institution for one of contemporary society's scarcities: truth.

III. Procedural independence: a concrete case *upstream* the decision

III.1. Productivity as a quality standard

As stated above, the judiciary is confronted today with requirements that go beyond the exercise of its traditional role and that may *limit* its content. It is necessary that «*the independence of the judiciary is not only related to the act of adjudicating, because it implies its presence upstream and downstream of the decision, and requires the creation of organizational models of the judicial system that allow the affirmation, exercise and exposure of independence, not only of each judge in particular, but of the judiciary itself as a whole*» [62]

In the same sense, the constitutionalisation of fundamental rights does not end at the material level. It also takes on an unequivocal organizational, procedural dimension – e.g., the right to access to justice, the right to effective judicial protection, cfr. Article 6(1) ECHR.

Consider, for example, the requirements provided for in the law regarding the increase in productivity within the judiciary. The judicial system is being treated as a public service which must meet quantitative levels within necessarily scarce resources, summoning a demand and supply approach to justice[63] which renders judges employees of the state.

This criterion allows the definition of results *a priori* and an evaluation *a posteriori*, establishing a comparative relation between the proposed objective and the objective achieved. This type of evaluation is only possible if there is a standardization

[61] ANTOINE GARAPON, (2001), p. 280.
[62] ORLANDO AFONSO (2004), p. 78.
[63] SHIMON SHETREET (2013), p. 10.

of the activity assessed, which occurs in the field of industrial production process (evaluation of the production process of various goods with the same exact characteristics and nature).

The pursuit of efficiency in the administration of justice only apparently seems to be compatible (and even desirable) with the independence of the judiciary. Indeed, the view of subjecting the judiciary to *production* rate is, at least, flawed[64].

Typically, the determination of the level of efficiency is associated with a quantitative criterion, based on speed. The faster the process leading to the final result, the more efficient the activity will be.

However, efficiency measured on the basis of promptness, which results in a quantification of the judicial activity (number of decisions, progress of the proceedings, etc.) is neither possible nor compatible with the independence requirements of the judicial power.

In fact, the jurisdictional activity is characterized precisely by the solution of concrete disputes, assuming distinct *shapes and forms* from each other. The individuality of the dispute to be tried requires different methods in the exercise of the judicial power (case study, analyzing case law and doctrine, collaboration with entities outside the court, international judicial cooperation).

The aforementioned reasons demonstrate that the blind quantification of objectives and evaluation of the activity of the judiciary (based on speed and not on the content of *justice*) has no logical nor teleological support, since it can only find a place in the economy, being left out of the performance of a function associated with sovereignty.

In comparison to the other sovereign powers, the definition of quantitative objectives for the legislative and executive powers (e.g. setting the objective of approving 200 enactments during a session) would hardly be considered as acceptable. By the same reason, this perception should apply in regards to the judicial system since the «*quality of justice should not be understood as a synonym for mere productivity of the judicial system*»[65].

In particular, as regards these efficiency requirements, it should be noted that «*reorganizing the judiciary is not putting it on a quantitatively high (but costly)*

[64] ORLANDO AFONSO (2017), p. 106.

[65] Opinion no. 6 (2004) of the Consultative Council of European Judges (CCJE) on fair trial with a reasonable time.

production line of dubious quality: it is not to make it work within the time-limits dictated by a globalized economy but rather to restore it to the effectiveness of the reasonable time».[66]

Therefore, efficiency will have to be assessed according to the concrete outlines of the activity carried out by each judge and not by an illusory standardization, otherwise imposing a judicial culture of speed, resulting in thoughtless decisions (or lacking reflection) and stagnation of legal thinking.

III.2. Prevalence of *justice*: fair decision in reasonable time

The conscience and will of the judge[67] shall lead them, inherently, to pursue justice in a thoughtful way and according to the best interpretation of the law, rejecting an instantaneous and *low cost* justice, made at the expense of a mature study, adapted to the case.

In fact, since it deeply conflicts with the concept of independence, the judiciary must reject the application of quantitative criteria that belong to the economy and management fields, because it seems incompatible with its idiosyncrasy and design. As seen under Article 6(1) ECHR, the delay of the proceedings, must be assessed according to the specific circumstances of the case[68].

On the other hand, the use of language related to the business world contributes to the deterioration and adulteration of the image of Justice, associating it with the world of the ephemeral and of the slavery of profit, far from its public purpose, better translated by «*suum cuique tribuere*» (ULPIANUS).

The timings of Justice will never be the timings of the economy, since Justice is not translatable into numbers, but only through the concepts of *right* and *wrong*, while perceiving the peculiarities of the case.

What was set out above must not, however, dispel the search for efficiency and speed in the judicial sphere, but rather to base that assessment on criteria suitable to the jurisdictional activity. In respect to this drive for efficiency, «*a balance must be struck between the value of efficiency in the administration of justice and the value of*

[66] ORLANDO AFONSO (2004), pp. 196.

[67] CARLO GUARNIERI (1981), p. 104, mentions that acting according to one's own conscience is a product of independence.

[68] CHRISTOPH GRABENWARTER (2014), p. 141-2.

procedural fairness, a balance necessary to sustain the public confidence in the courts».[69]

It should also be noted that, in order to approach those timings, the judiciary shall be equipped with material means suitable to achieve its purpose[70]; the judiciary shall not be subject to pressures disguised in numbers or graphics without correspondence with the *content* of justice of a proceeding or decision.

In a similar approach, the Magna Carta of Judges[71] (Fundamental Principles) prescribes that «*following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system*».

IV. Overcoming Montesquieu: creativity as an ethical imperative

«Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi»

- MONTESQUIEU, *De L'esprit des Loix*[72]

Interpretation and application of the law is not a univocal question, as MONTESQUIEU intended. GUASTINI points out that «*jurists and judges actually disagree about the meanings of most statutory and constitutional sentences. In other words, most legal provisions are in fact interpreted, at least diachronically, in different ways.* (…) *Therefore most legal provisions are liable to different and competing interpretations.* (…) *Nevertheless, no truth-criterion is available for meaning-ascribing sentences – at least, nobody was able to identify and defend a convincing criterion.* (…) *As a consequence, any interpretive decision – i.e., any act of interpretation accomplished by subjects, such as judges, who apply the law – supposes a choice between competing possibilities. This amounts to saying that interpretation is not an act of knowledge but rather an 'act of will', which always implies discretion*».[73]

At this point, the purely literal application of the law appears as possible, but not as a necessarily adequate solution. Although it is true that interpretation and application

[69] SHIMON SHETREET (2013), p. 95.
[70] As prescribed in Recommendation no. R (94) 12 of the committee of ministers to member states on the independence, efficiency and role of judges.
[71] CCEJ, 2010.
[72] Cf. MONTESQUIEU (1817), p. 136.
[73] RICCARDO GUASTINI (2005), p. 139.

must be distinguished from the *creation* of law (in accordance with the principle of separation of powers) – meaning the creation of new *statutes*–, it must also be noted that a legal sentence admits a varied number of interpretations[74], assigning the judge a certain interpretative discretion within the framework of possible interpretations.

In this particular point, there is no method to establish, *a priori*, a hierarchy between the various semantic contents that can be extracted from a statute (and the *literal* meaning does not necessarily prevail on other options)[75]. «*In a sense, interpretation is the very source of legal rules, since 'it is only words that the legislature utters', and legal texts 'do not interpret themselves'. I mean that law-giving authorities issue not meanings (rules), but just sentences, whose normative meaning contents – i.e., the expressed rules – are to be detected by means of interpretation. This is not to say that legal sentences have no meaning at all before interpretation.* (…)»[76]

To the ambiguity of language in law is added the possibility of conflicts between rules and the fact that there are cases that do not fit under any existing valid norm.[77] [78]

Indeed, if it is true that *courts are independent and are subject to the law*, it does not follow that judges apply all statutes uncritically. «*From the very principle of the separation of powers derives only, in what concerns this matter, that the constitutional holders of the legislative power have a monopoly over the approval of legislative acts; it does not follow that they have a monopolistic role on the creation of the law. In a word: if it is true that the independence of the courts* (…) *is affirmed in principle through obedience to the law, the truth is that respect for the dignity of the human being and for the requirements of the rule of law allow courts to act beyond the law or even against the law*»[79].

It might be questioned if what was mentioned undermines the ideal of the rule of law, in the form of *legal certainty*. As noted, the margin of uncertainty and ambiguity is in the very nature of the Law[80], imposing reasons for the decision. In this context, it seems that the court is required to justify the legal conclusions it reaches, but is not unconditionally bound to the will of the legislature or the whims of political institutions,

[74] MARTIN LOUGHLIN (2000), p. 91.
[75] HANS KELSEN (2008), p. 381.
[76] RICCARDO GUASTINI (2005), p. 141.
[77] ALEXY (2001), p. 17.
[78] Reminding that law is mostly a *semi*-finished work, cfr. HENRIQUES GASPAR (2007), p. 23.
[79] RUI MEDEIROS/JORGE MIRANDA (2007), pp. 39-40.
[80] MARTIN LOUGHLIN (2000), p. 92.

becoming the formalist «*operator of a giant syllogism machine*»[81]. That is, the antithesis is merely apparent.[82]

Considering that the legal system contains uncertainty and contradiction and the judge is bound by the law, it seems that an effort is required of the judge to examine the possible meanings of the law in coherence with the essential principles of the system. In this respect, and with particular reference to safeguarding the fundamental principles of the democratic rule of law in crisis, it is particularly important to adopt a teleological perspective, based on the aims of the system. In fact, the legislator's political rationality does not always coincide with the *reasoning* of the jurisdiction[83] and an efficient system of judicial review is totally incompatible with an *antilibertarian, absolute, dictatorial regime*, as is amply proven by historical experience[84].

This perspective, in the light of what has been referred in the previous sections, is essential to safeguarding the ultimate values of the system. Furthermore, since, in accordance with the rule of law, higher norms limit *discretion* on the exercise of powers, «*courts tend to appear as a cornerstone of the rule of law: norms' hierarchy does not become effective if it is not judicially sanctioned and fundamental rights are not ensured if there are no independent judges to guarantee their protection*»[85] . Judicial review[86], whether of the constitutionality of statutes and other normative acts, or of the legality of administrative acts, becomes an essential characteristic of the rule of law.

The margin of discretion in determining the rule of the case or the prevailing norm, associated with the allocation of reasons for deciding is, thus, also a manifestation of judicial independence and not an obstacle to the separation of powers. It is within this margin of interpretative discretion, associated with the *duty to* give reasons for the decision, that the judge is required to apply the normative content that, *in casu*, is best suited to the equitable solution of the case. The existence of this margin of discretion must be assumed and considered as an *instrument* aiming at the best decision,

[81] VITALIUS TUMONIS (2012), p. 137.

[82] NEIL MACCORMICK (2005), p. 254.

[83] Stressing the differences between *legal reasoning* and *political reasoning*, cfr. CHRISTOPH MOLLERS (2012), p. 7.

[84] MAURO CAPPELLETTI (1988), p. 85.

[85] ORLANDO AFONSO (2004), p. 19.

[86] As MAURO CAPPELLETTI (1988), p. 90, states that *«(i) judicial review of legislation is necessary if one wants to have a serious chance of making a constitution effective as an enforceable law superior to, and binding upon, the political branches. And yet, (ii) the review power, to be effective, can be entrusted only to judges, i.e., to persons and bodies (relatively) unaccountable to the political power*».

and above all to ensure an equitable solution of the case. «*The judge is not an absolute power, but a power responsible to provide for justice in conflictual relations*»[87].

«*Judges, at the present time, tend to present themselves as true political actors*» as judicial decisions are also part of the process of determining *individual rights.* «*The conflict that exists today in contemporary societies, the type of controversial legal relationships arising from scientific and technological development, postulate the existence of a judiciary capable of delivering effective responses in an increasingly unanswered political context*»[88]. In fact, the judiciary must not give *dead answers to living questions*[89].

In this context, *discretion* conferred by law still seems to be an ideal way to make the law more flexible, allowing for a fair decision in the specific case. For this reason, an active search for the *best* law possible, which is more suited to the case, is required – that is, the judge is required to create law, which is more in line with the values independence aims to ensure: dignity of the human person, fundamental rights and democratic rule of law. In this sense, the contemporary profile of the judge is the «*guardian judge*»[90].

Jurisprudential creativity is a largely acknowledged phenomenon[91] and a constitutive element of contemporary democratic societies, not only linked to cultural mutations such as «*the anti-formalist revolt*» - or in other words the criticism towards a positivist theory of law interpretation – but also a deep transformation of the relation between the state and society.[92] The judicial creativity at stake doesn't mean a misappropriation of power[93], since, as BENJAMIN CARDOZO mentions, «*the Law that results from that operation is discovered, not created*».[94] [95]

If submission to law is a central element of independence, it is an ethical duty, given the context of frailties listed above, to apply the *best possible law*, in conscience and with an active approach. In this sense, creativity must be assumed as a *virtue of the good judge.*

[87] MIGUEL YÁÑEZ (2009), p. 221.
[88] ORLANDO AFONSO (2004), p. 82.
[89] ORLANDO AFONSO (2004), p. 186.
[90] GUARNIERI/PEDERZOLI (1996), p. 71.
[91] On this matter, cfr. HART (2007), p. 335.
[92] GUARNIERI/PEDERZOLI (1996), p. 148.
[93] CATARINA BOTELHO (2018), p. 121.
[94] BENJAMIN CARDOZO (2004), p. 84.
[95] Also, CATARINA BOTELHO (2018), p. 121, claims that *judicial activism* is a round and plastic concept devoid of methodological criticism to the adjudicative role, depending, most of the times, on the agreement our disagreement towards the decision.

V. Conclusion: a *duty of resistance*

The 21st century judge is compelled to adopt a role as the last stronghold of democratic rule of law, seizing the content of *freedom* conferred by the institutional prerogative of *independence* – as part of his «genetic code»[96].

To be effective, *independence* must be total, and affirmed as an *absolute* value. The limitation, however partial, of independence implies the denial of the freedom it conveys.

Therefore, interventions in the fundamental principle of *independence of the judiciary*, must not limit its content[97], given that *«there is a* '*static, absolute and insurmountable barrier to aggressive intervention by the legislator*(…)'»[98] that the courts shall ultimately take as their own responsibility.

This *ethical* duty is enshrined in the TEU and national constitutions[99] which impose the exercise of the judicial power with independence. Thus, it is legitimate to disapply norms which have the potential to call into question the essential content of the jurisdictional function, that may even be considered as a misuse of legislative power.[100]

The aforementioned premises entail the need to affirm an ethical duty of *resistance* to safeguard the useful content of independence. In fact, as CALAMANDREI mentions, there is no other function «*which, more than that of a judge, requires from whom exercises it, that he has a strong sense of dignity; a sense that imposes a search in one's conscience, more than in the opinions of others, of the justification of the function*»[101].

The proclamation of independence, sheltered by sophisticated legal instruments, will be of no avail if its main guardian does not nurture it as a *personal attitude,*[102] standing on trial before the inner court of judgment – his conscience.[103]

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[96] HENRIQUES GASPAR (2018), p. 5.

[97] The intangibility of the essential content is a conceptual instrument of protection of the respective right in the face of the legislator – cf. JORGE MIRANDA/RUI MEDEIROS (2010), p. 397.

[98] JORGE MIRANDA/RUI MEDEIROS (2010), p. 396.

[99] In this sense, the fundamental principles regarding judicial Independence are enunciated in the constitution. Cfr. Opinion no. 1 (2001) of the of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges.

[100] Cfr. HART (2007), p. 81, stating that legislative acts infringing the core of fundamental rights are *ultra vires* acts.

[101] PIERO CALAMANDREI (2009), p. 143.

[102] GARCIA MARQUES (2006), p. 34.

[103] IMMANUEL KANT (2005), p. 328.

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