

2nd European Conference of Judges

JUSTICE AND THE MEDIA

Krakow, 25-26 April 2005

STATEMENT BY

Prof. Luigi Berlinguer

Chairman, European Network of Councils for the Judiciary (ENCJ)

Member, High Council for the Judiciary (CSM), Italy;

1. A key aspect of the relationships between justice and the media lies in the way media convey the essential value of the judges' role in society. This aspect is of specific relevance as media sometimes contribute in deteriorating the perception of the role of judges in the public opinion, and this may happen even if information professionals do not violate any rule of their ethical codes.

The reasons behind this phenomenon are to be traced back to the pressures being exerted on the political context in present times, as well as to the conflicts between the several understandings of the role of judges in modern society. These pressures and conflicts are more or less relevant and visible, depending on contingencies of public debate.

2. Confusion becomes even higher in view of the growing tendency of law-makers to legislate by way of "principles", which compels judges to give concrete meanings to the mere orientation provided by law makers, through the individualisation of a rule applying to a single episode of life.

In this framework judges take their decisions by way of interpretation of a rule, which is not punctual. This scenario spreads the fear of trespasses by the judiciary into the territories reserved to political actors.

This is self-evident if one considers new interests, that become relevant in society long before legislators have the opportunity to provide an adequate protection or to even decide that a legislative protection is not appropriate.

The themes of euthanasia, and in general of bioethical conflicts, may be viewed as good examples to gain an insight on how some issues, when dealt with by the judiciary, may easily give rise to criticisms.

3. The reasons so far discussed behind the deterioration of the image of justice in society have been known in several western countries, in which the role of the judiciary, the expansion of their tasks, and the relationships between justice and politics have formed the subject of public debate.

In Italy an additional and more specific factor influencing the phenomenon may be indicated: such factor may also be viewed as the reason for the animosity of many - indeed too many - public statements going far beyond criticism of judicial decisions, and representing open challenges to a particular judge.

For many years relationships between politics and justice in Italy have been worn out by the lack of a serious and rigorous reflection on what happened during the so-called "Kickback Town" period, that is of the period when the judiciary, in the early 1990's, intensified their action in the field of corruption, this being one of the reasons of the deep crisis of a whole political class.

Since then, a wearying public debate is carried out about alleged excesses of the judiciary. Such a debate is nourished by empty turns of phrases and stereotypes invoking respect for the primacy of politics and popular sovereignty, a sovereignty that - within a rediscovery of favour for plebiscites - would be expressed only through the electoral mechanism.

These unsolved problems in the rearrangement of public life - through mutual recognition of the function of the judiciary as guarantor, and of the political class as manager of collective needs - are in the background when "raids" against some members of the judiciary are carried out.

Of course mass media operate with the aim of forming a public opinion on facts of institutional life: but in the described framework they end up with amplifying and propagating such vehement aggressions and harsh confrontations in detriment, in turn, of a particular judge.

Thus criticism of some judicial decision becomes the occasion to launch accusations against the judiciary at large. The media diffusion of such campaigns makes them acquire the power to jeopardise even the democratic legitimacy of the judiciary.

When the objective of the aggression attains a public and institutional dimension, one is no longer dealing only with an offence to the professional reputation and dignity of a particular judge. Consequently, a possible action in redress by the same particular judges is totally insufficient.

The situation is even more complex if one considers that such an aggression through the media almost always touches upon a trial in progress. The judge involved would not guarantee the

tranquil management of the trial, as a reaction on his/her part (necessarily at the same level of diffusion as the aggression) would alter the perception of the judge's impartiality in the public's consideration.

Therefore this phenomenon adversely affects also private citizens' interests, as citizens should rely on the orderly and tranquil carrying out of the trial to which they are part as a prerequisite for the effective protection of their rights.

4. On the basis of the above considerations, in the years Italy's High Council for the Judiciary (CSM) has been carrying out its task of protecting independence of judges and the judiciary in its entirety, also by way of interventions reacting to media attacks. Resolutions taken contribute to restating the constitutional framework in which judicial activity is inscribed, as well as to reaffirming that criticism is not mockery and that democratic control on what judges do cannot translate into continuous denigration.

Such actions by the Italian High Council for the Judiciary, that events have caused to be recurrent, have been contested by some observers as lacking a legal base. The objections are that no specific norm provides for such interventions of the High Council, and that the so called "protective declarations" (It. "*pratiche a tutela*") issued by the High Council are a form of unwarranted public statement which introduces an anomaly in the Italian institutional system, giving the High Council an undue political role.

This criticism is based on a restrictive reading of the competences of the High Council, neglecting the consideration that full independence of the Council and the representative role that it plays on behalf of the entire judiciary have as a consequence that implied powers are vested in the Council, with reference to all the powers that may make effective the essential function of protection of the independence of the judiciary.

The practice of "protective declarations" therefore aims at a double goal:

- to preserve democratic legitimacy of the judiciary, representing not an expression of popular sovereignty, but of the limits within which popular sovereignty is to be realised in a State characterised by the rule of law; such limits to be found, essentially, by "guarantor" authorities;
- to restore the conditions for a correct exercise of judicial powers in the single cases in which, from time to time, sudden disturbances take place as a consequence of attacks through the media.

The CCJE has very well dealt – in its opinions – with the themes of independence, career, training, discipline and ethics of European judges, underlining the role that Higher Councils for the judiciary or Courts Services may play in these areas.

In order to sum up the several ideas European systems have developed, I believe that the CCJE and the Council of Europe could launch a future judicial Conference on the role of High Councils for justice or Court Services. I am sure that such a Conference – for which the Council of Europe already has background documents – would translate into a successful event, such this conference in Krakow, for which I wish to express my deep gratitude.

I am also sure that the European Network of the Councils for the Judiciary – which connects the judicial independent bodies of the EU countries, that I have the honour of serving as Chairman - would be happy to co-operate in organising such a conference.