CONSULTATIVE COUNCIL OF EUROPEAN JUDGES

(CCJE)

"HOW TO BETTER ORGANISE THE RELATIONS BETWEEN JUDGES AND LAWYERS IN ORDER TO IMPROVE THE PROVISION OF JUSTICE"

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Is a joint training appropriate?

Report

by

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1. The information and the points of view I will present are, of course, characterized by my position and experience as a judge in one of the member States of the Council of Europe, Italy, and by some other specific experiences: I served as a member of training team for judges and prosecutors in my country; I was an expert of the Council of Europe – among other positions, within the Lisbon Network - in an era in which a number of Schools for the Judiciary were set up in a number of new democracies; I cooperated – just like some of my colleagues in this conference hall – in the drafting of Opinion no. 4 of the Consultative Council of European Judges (CCJE), concerning judicial training; I am now a member of the Board of the School set up in my own country. Having said this, I declared my possible bias, and I apologize for it.

2. With the two main exceptions of the Anglo-Saxon model and of the Germanic model, I would say that common training among judges and prosecutors, on one side, and defence lawyers, on the other side, is, at present, a quite limited phenomenon in Europe.

We used to have, in the Roman law tradition, a widespread practice of common professional training. But this has disappeared in many countries.

In order to reflect on such loss of an experience of a common professional training, which are a legacy of our legal history, we should investigate too many aspects of the legal professions in Europe. To simplify, let us just reflect on different judicial recruitment systems. In countries such as the United Kingdom and Ireland, where judges are recruited among experienced lawyers, common training is a fact, not because there are relevant structural diversities in training structures or training models between those countries and other countries, but because most of the training (especially what we would call, in the Napoleonic model, initial training) is administered there when the future judges are still defence lawyers; so, it is the profession which is common, not the training as such.

Mutatis mutandis, a similar concept applies to the Germanic model: if all jurists have to pass a common procedure of training and selection, of a relevant duration, they naturally develop the awareness of belonging to a common professional root; therefore, in countries in which training is still, in a significant part, administered by ministries of justice, beneficiaries may be indifferently defence lawyers or judges and prosecutors, and concepts are much closer.

On the contrary, in countries that have inherited the Napoleonic model, in which the judge and the prosecutor are seen as "*fonctionnaires*", and notwithstanding the fact that this role has changed over the years, judges and prosecutors ("*magistrats*"), on one side, and defence lawyers ("*avocats*"), on the other side, are separated soon after leaving the pews of university: their different, isolationist recruitment and initial training systems make it impossible for society to consider them, and for them to consider themselves, as a unified profession. This is true even at the level of colloquial language, where the same word ("*lawyer*") may be employed in the first group of countries to include both groups of professionals, whereas in the other countries, if one does not want to resort to nowadays obscure words ("*juriste*"), one has necessarily to distinguish among "*magistrats*" and "*avocats*".

3. Having mentioned – in a few words – the difficult subject of the relationship between models of common recruitment and models of joint – at least initial – training, the picture should be clearer as to the historical framework. I may now address the core point: the fact that joint training is, today, in my opinion, a necessity; I would even say an institutional necessity, in order to recover at least in part the lost unity; a political necessity, insofar as we, as judges or prosecutors or defence lawyers, understand what politics is; and today, this, too, is difficult.

The Consultative Councils of European Judges (CCJE) and of European Prosecutors (CCPE), the Venice Commission, the Lisbon Network have been long recommending joint training of judges and

prosecutors; synergies are usually held to be self-evident. Similar considerations related to synergies of joint training may be drawn from European documents underlining the need that such training be done for judges and prosecutors, on one side, and court administrative staff, on the other.

But who "advocates that advocates" be also included in this effort of joint training? One may be surprised, but some positive voices have been heard in official "fora". We, at the CCJE, have a good conscience on this topic. Let us read, for example, paragraph 10 of the Bordeaux declaration, adopted in 2009 and used as a foreword to Opinion No. 12 (2009) of the Consultative Council of European Judges (CCJE) and of Opinion No. 4 (2009) of the Consultative Council of European Prosecutors (CCPE), representing a single joint Opinion on "Judges and prosecutors in a democratic society". Defence lawyers were not materially included in that process, but they were not absent in the spirit of Bordeaux.

Here is paragraph 10: "*The sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice. Training, including management training, is a right as well as a duty for judges and public prosecutors. Such training should be organised on an impartial basis and regularly and objectively evaluated for its effectiveness. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality*."

The reference to quality of justice is, in my view, quite important.

Paragraphs 45-47 of the Joint Opinion go further, by stating that: "*This common training should make possible the creation of a basis for a common legal culture*" and that "*lawyers' and academic contributions are essential to avoid taking a narrow-minded approach."*

Opinion no. 4 of the CCJE, dating to 2003, and specifically addressing the issue of the training of judges, deals with our subjects from the visual angle of the relationships between professions. Let us read paragraph 29: "*The CCJE recommends the practice of providing for a period of training common to the various legal and judicial professions (for instance, lawyers and prosecutors in countries where they perform duties separate from those of judges). This practice is likely to foster better knowledge and reciprocal understanding between judges and other professions.*" And paragraph 30 goes further, by suggesting that this reciprocal understanding, if it did not develop by being a member of the bar before getting to the bench, because several national laws do not "*make access to judicial posts conditional upon prior professional experience*", should be encouraged during initial training: "*it is important that the period of initial training should include, in the case of candidates who have come straight from university, substantial training periods in a professional environment (lawyers' practices, companies, etc).".*

Joint training, from the visual angle of the judge, is therefore considered to be an antidote to unilateral visions of both procedural needs and substantive law interpretations.

We should also emphasize the fact that "openness" in training is believed to be an inherent feature of the judicial role: it is not just any other document saying this, since we find it in Recommendation no. CM/Rec (2010) 12, stating at paragraph 57 that "*initial and in-service training programmes* [should] *meet the requirements of openness, competence and impartiality inherent in judicial office*". Common training with lawyers is not explicitly mentioned, but the picture is clear.

4. My introduction to our discussion would not be complete if I did not mention the practice of joint training in my own country, again from the visual angle of the judge.

As far as initial training of judges and prosecutors is concerned (let us not forget that in Italy they belong to a common profession and – with some nowadays restrictive limitations – may interchange from one post to the other), until recently there was no provision that judicial trainees should spend a period of their training after recruitment in a lawyer's office. Now the law provides that initial training should include

internships outside the judiciary, although without a specific mention of lawyer's offices as a privileged place where such internships should take place. The School for the Judiciary discussed this possibility with a delegation of the national Bar Organization and – I must be clear – some doubts arose, in the bar delegation itself, as to being such an experience a significant one. The consideration that the presence of a judicial trainee in a lawyer's office for just a few weeks – and this was already an organizational effort, in a country in which the period of initial training totals 18 months – would not allow any relevant possibility of presenting the "core business" to the trainee, and having him or her understand at least part of the problems that a defence lawyers faces every day, suggested to wait better times to provide for such internships, and/or to devise different ways to get to the result.

Joint training is, on the contrary, a reality in in-service training of judges and prosecutors in my country. Lawyers have been accepted as participants to practically all events organised at the local and at the national level with training programmes; this policy will be continued by the newly established School for the Judiciary, having among its goals, set by the law, the one of fostering joint training. Our law provides for a role of the national Bar Organization in even suggesting training initiatives that should take place at the School. The limitation, of course, is linked to financial constraints: at present, the Bar can send only an average of two lawyers in each course, a number that, in my opinion, should be increased. The most important legal provision concerning our School, however, is the one providing that on the School's Board we have defence lawyers and law professors, the latter also being frequently defence lawyers themselves. One may see that we have a fully integrated training environment.

From the teaching side, joint training also means that lawyers should have a role as rapporteurs and interveners in judicial training. This happens very frequently in my country; we even devised a teaching method, called the "debate course", in which it is mandatory to have two rapporteurs, one from the bar and one from the bench, on each topic, so that pluralism may become "physically" evident to participants.

5. A final remark I should address to the topic of the point of view of judges concerning the situation of advocates' training activities, insofar as they associate judges in their initiatives. In my country judges are almost always invited as speakers in training sessions that involve points of law and general practice; they are less involved in discussions concerning the internal developments of the advocates' profession, and not involved at all in devising training initiatives, in the sense that they are not part of training managing bodies, both at the local and at the national level. As one may easily notice, some problems of unilateral openness exist.

6. A few possible conclusions, or rather open questions, may be formulated as follows:

- should we try to work out arrangements, even on a flexible basis, to have not just each profession open its training to the other (which is the current meaning we give to the expression "joint training"), but to develop common programmes, common initiatives, within a common training planning framework?

- should we wish that all training initiatives organized in Europe for the benefit of one profession be open, in principle, to other professions?

- should we face financial constraints linked to such growing training needs with a realistic approach, cutting unnecessary costs, and investing on e-learning and other electronic co-operative tools?

- should we wish that such "innovative" points be included in the future Opinion that CCJE is going to issue, mentioning that these items were discussed in this Conference?

- should we, finally, imagine to support – in the Opinion and outside of it - what I would call a "philosophical" reflection on the concept of common judicial culture, and through such reflection – to be developed by a team of European experts – to try to gain unity, which as we said once existed and now is – at least partially – lost?