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Privacy and ethics

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For a number of years, France has witnessed a veritable craze for deontological ethics. It is the fruit of a long gestation rooted in history but the renewal of which is influenced by the common-law and Scandinavian countries and related to a national context marked by "scandals" and a quest for "transparency in public life".

Long associated in mainland France with the regulated professions, since its introduction under that title in 1845 (1), deontological ethics now extends to an ever-growing number of representatives of public-interest activities or those necessary to democracy, from journalists to members of administrative courts, including elected representatives and political leaders. No sooner do scandals come to tarnish new spheres than the word "ethics" is put forward as the appropriate remedy. It is then deemed necessary that members of the failing "profession" be subject to "*a morally- and ethically-inspired collection of principles and rules of conduct, of empirical extraction, which suggest responsible behaviour by which the professional community is identified to ensure a climate of integrity and an activity that is both respectful of the general interest and conducive to retaining public confidence*". The product of the combination of two Greek words: *deon* (that which is proper) and *logos* (knowledge), deontological ethics does indeed correspond to "knowledge", on the part of members of a given group, "of what is right or proper" (2). More exactly, it is a method of regulation, inspired by morality and law, which is nonetheless distinct from the latter two due to the concern for going beyond the traditional binary contrasts of "good vs evil" and "allowed vs forbidden", in order to foster a preventive approach to "doing better", thus setting aside the notion of punishment (3). According to the Supreme Court of Canada, "[e]thical rules are meant to aim for perfection" (4).

The fact that this "*passion for deontology and ethics*" (5) has got the better of the political sphere is symptomatic of a trend that some would characterise as "invasive". Indeed, up until recently, popular legitimacy – as compared with the divine unction of monarchs under the *Ancien Régime* – appeared to make such a breakthrough unlikely. It has nevertheless gone very far as, in early 2014, when the gossip magazine *Closer* revealed his affair. The French press has been an arena for political point-scoring and jostling for position, sometimes to defend the private lives of heads of state, sometimes to demand full transparency of the same (6), and this under the gaze of a British and American media shocked by this French hereditary *"mystère du pouvoir royal"* (mystery of royal power) exception. Thus, *The Guardian* published an article titled "*A very British scandal about a very French affair*", sub-titled "*Now, France's tradition of privacy and discretion is under pressure from the global celebrity media*" (7).

Quite aside the facts, this news illustrates the conflict between two principles. The first is the right to private life, a relatively recent fundamental right, the constitutional value of which was recognised by France's Constitutional Council on the basis of Article 2 of the 1789 Declaration (8)

and the respect of which is ensured by the European Court of Human Rights (ECHR) in light of Article 8 of the 1950 Convention. The second is deontological ethics (defined above) which, while having a formal constitutional basis *vis-à-vis* judicial magistrates only pursuant to Article 65 of the 1958 Constitution, appears to be part of the very essence of a Constitution. In Bentham's posthumous publication, *Deontology or the Science of Morality* (1834), which gave birth to the concept, deontology was perceived as a new theory of duties in society, with the quest for individual and collective happiness as its ultimate purpose (9). What seems to foreshadow a genuine "deontology of the citizen" here concerned precisely that of the President of the Republic in the abovementioned affair, for which Article 68 of the Constitution makes reference to "*a breach of his duties patently incompatible with his continuing in office*" and that of the journalists responsible for revealing it, for whom the 1971 Declaration of the Duties and Rights of Journalists (known as the Munich Charter) features among the duties that it sets down, "*feeling obliged to respect the private life of people*". A professional who is subject to a code of ethics shall thus be bound either by a duty of exemplarity in their private life, or by a duty to respect that of others.

Starting from the basic consideration that deontological or ethical rules and principles are, as has already been stated, inspired by morality and ethics, and that they become legal rules and principles owing to their incorporation into law, it is possible to wonder to what the extent such a regulatory method interacts with private life, when it is supposed to offer an alternative to the previous two but proves in reality to be a corollary of the same, and particularly of the law governing the sanctions thereof. Do the concerns, on public interest grounds, of a professional who is ethically irreproachable in his private life, and respectful of that of the persons forming the subject of his activity, run the risk of ultimately becoming a potential channel for invasions of privacy, in the name of that self-same public interest? Indeed, an examination of the relationship between ethics and private life leads us to view the former as an extrinsic vector for restricting the private life of the professional falling within its remit (section I), together with a relative guarantee against professionals interfering in the private lives of others (section II).

I – Ethics, extrinsic vector for restricting the private lives of professionals

The proper exercise of a professional activity justifies the consideration given to ethical requirements within the "official" private lives of the individuals concerned, in a broader approach based on self-discipline (section A). However, the profession's desire to avoid "scandal" is reflected in the invasions of privacy by a disciplinary scheme occasionally tainted by morality (section B).

A – The submission of professionals to a code of ethics in their private lives

Persons entrusted with public interest missions – at the forefront of which number we find elected representatives, political leaders and public officials – are inextricably bound to the activities that they perform. As explained by Christian Vigouroux, President of the Home Affairs Section of the *Conseil d'Etat*: *"[a]n official is no longer viewed as someone simply doing a job but, in some sense, as the bearer of a position which involves the Administration's "reputation", which is to say the confidence it can inspire in a service user*" (10). He is an integral part of the Administration, thus blurring the distinction between the function and its holder. Such an approach necessarily has an impact on the behaviour that the official must adopt in his private life. This was especially well highlighted by the *Commission de réflexion sur l'éthique dans la magistrature* in its 2003 Report, with regards to members of the judiciary, in respect of whom citizens have the highest

expectations. Having recalled that a judge is first of all a citizen who benefits, in that capacity, from rights and freedoms recognised in national and international law, the Commission noted that "*his behaviour is necessarily restricted by the duty of impartiality which must not only be observed subjectively internally, but also appear objectively as such in the eyes of litigants. Part of a judge's life belongs only to him; it is inexorably private. But what cannot be ignored is the fact that part of his existence is subject to scrutiny (which the European Court of Human Rights expresses in the adage inherited from French law: "not only must justice be done; it must also be seen to be done"* (11). This concern for transparency therefore implies the regulation of private life.

A misunderstanding must however be avoided as to the perimeter of such regulation. The European Court of Human Rights, cited by the "Cabannes" Commission, had incidentally given an indication on the subject, in its decision in *Özpinar v Turkey* of 19 January 2011 concerning ethics, stressing that: "*professional life often overlaps with private life in the strict sense of the word, in such a way that it is not always easy to identify the capacity in which the individual acts at a given time*" (12). Thus ethical regulation concerns that area corresponding to the "official" private life of the state official, in such a way that it supposes "*a proper delimitation between that which falls exclusively within the scope of private life and that which, whilst being private, may bring about professional consequences*" (13). Without multiplying the examples here, there is one put forward by the 2010 *Recueil des obligations déontologiques des magistrats* (France's collection of judicial ethics) which is worth mentioning, insofar as it gives consideration to the relationship between private life and the personal approach towards various behavioural requirements. Point A.20 on independence states that: *"[t]he judge has, like any other citizen, the right to respect for private life. However, he shall abstain from displaying relationships or adopting public behaviour of such a nature as to give rise to doubt as to his independence in his functions*" (14). Equally, Point C.22 on integrity provides that: *"[i]n his private life, the judge remains subject to a strict duty of probity, which includes delicacy. He is bound to show discernment and prudence in his social life, his choice of relationships, the conduct of his personal activities and his participation in public events*" (15). In order for the extra-professional behaviour of an official to be reproved by his profession's code of ethics, that behaviour must be of a public nature and attain a certain degree of gravity. The European Court of Human Rights emphasised the same in the abovementioned decision, asserting that: "*a judge's ethical duties may impinge on his private life when, through his behaviour, though it be private, the judge damages the judiciary's image or reputation*" (16).

B – Ethics, vector for a discipline's interference in private life

Submitting professionals to ethical principles and rules even in their private life thus appears as a tool for avoiding "scandal", which may damage the image of the institution to which those professionals belong. However, once that has been noted, an examination of the means usually implemented to put an end to such failures leads us to identify within those codes of ethics a danger for private life, the former appearing to be a discipline's "Trojan horse" infiltrating the latter. While the *Conseil supérieur de la magistrature* (CSM – France's High Council for the Judiciary) considers that: "*demonstrations in a judge's private life do not ipso facto fall within the remit of disciplinary action*" (17), First Presiding Judge Charvet observed that "*the entry point for ethics in our country remains the discipline itself and the search for judicial responsibility*" (18).

This situation – which is not specific to France – is linked, first of all, to the need to separate those bodies responsible for dealing with ethical and disciplinary failures. In its Opinion n° 3 of 2002,

regarding the private lives of judges, the Consultative Council of European Judges (CCJE) "*encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge*" (19). In France, the *Conseil d'État* in particular has subscribed to this approach, entrusting a *Collège de déontologie* with the task of shedding light for any and all interested parties on the restrictions contained in the 2011 *Charte de déontologie* (or Ethical Charter) for members of administrative courts. Conversely, consulted by the Minister of Justice in the *Mur des cons* case, the CSM sitting in plenary session, duly empowered by Article 65 of the Constitution to give opinions on issues relative to the judicial code of ethics, was compelled to decline jurisdiction in the matter. Evoking a possible conflict in light of Article 6 (1) of the ECHR on the right to a fair trial, the CSM considered that its composition, shared in part with its disciplinary formations, would incidentally lead it to step out of "*the field of ethics and into the sphere of discipline*" (20).

From the moment when such a separation is lacking, the risk that submitting professionals to a code of ethics extending as far as their private lives will have disciplinary implications is all the greater as the degree of precision of the requirements in the field is either too great or too little. The CCJE thus warns that "*the standards applying to judges' behaviour in their private lives cannot be laid down too precisely*" (21). The danger would effectively be that of indulging in the same excesses seen in the judicial systems of the federated States in the US, where the judiciary is "*subject to extremely detailed codes of ethics and sanctions that go so far as to include costs and fines, which had led some commentators to assert that it 'is accepted in the United States that the state judiciary is not a judiciary that enjoys guaranteed independence'*" (22). Conversely, it is possible to wonder whether it would be appropriate to see, in a disciplinary sanction based on legislation governing an overly imprecise code of ethics, an invasion of privacy not provided by law, and thus contrary to Article 8 ECHR (23). This was the position defended by Judge Sajó in a separate opinion in *Özpinar v Turkey*. The ECHR, no doubt in order to remain consistent with the opinion of the CCJE, preferred to approve the initial stage in its review, and held that the sanction was not proportionate to the legitimate aim pursued, on the grounds that "*in cases relating to a functionary's private life, the latter must be able to foresee, to some extent, the consequences of his private actions and, where applicable, benefit from sufficient guarantees*" (24).

II – Ethics, relative guarantee against professional life interfering with private life

The proper exercise of a professional activity also rests on voluntary restraint on the part of professionals, who must safeguard the private lives of persons concerned by that activity (section A). Nonetheless, this ethical ban is likely to give way when the same right allows or orders such an infringement on the basis of an overriding reason in the public interest, or even where ethics has become that overriding reason and commands as much itself so as to protect the image of a given profession (section B).

A – Ethics as a guarantee of "voluntary restraint" on the part of professionals in private life

With a view to safeguarding integrity and public confidence *vis-à-vis* a given profession, the normative instruments that govern its members' code of ethics are likely to contain one or several principles concerning respect for the private life of those persons concerned by the activity in question. In some fairly rare and belated texts, a general principle of "voluntary restraint" is set down; this belatedness relates to the date on which the respect for private life became a subjective

right, i.e. with the Law of 17 July 1970. The same can be said regarding security and the provision of services. The most explicit affirmation is linked to employees of La Poste. The Decree of 10 November 1993 provides that the employee's professional oath is subject to an undertaking signed with a second paragraph drafted as follows: "*I hereby undertake to respect scrupulously… the due confidentiality of correspondence, information concerning private life of which I may become aware in the performance of my duties*" (25). Much more recently, the *Code de déontologie de la police nationale et de la gendarmerie nationale* (National Police and National Gendarmerie Code of Ethics), which was included in the regulatory section of the *Code de la sécurité interne* (French Internal Security Code) and came into force in 2014, provides at Article R. 434-21, paragraph 1, that: "*the police officer or gendarme shall protect the privacy of persons, particularly during administrative or judicial investigations*". The *Code de déontologie de la police nationale* previously in force and, as its title indicates, applicable only to police officers, focused solely on respect for professional confidentiality (26).

For other professionals, the texts regulating their code of ethics mainly focus on the latter confidentiality requirement. This appears to be rooted in Article 378 of the old Penal Code, which provided: "*Doctors, surgeons and other health officials, together with pharmacists, midwives and any other persons who, through their state, profession or temporary or permanent functions, are custodians of the confidential matters entrusted to them… who have disclosed said confidential matters, shall be punished*". This provision was subsequently adopted by Article 226-13 of the new Penal Code, without specific reference to this or that profession. This is why the Decree of 12 July 2005 on the rules of conduct for the legal profession warns members of the Bar against any breach of client confidentiality (27).

B – Submitting codes of ethics to general interest requirements

The ethical principles and rules of conduct that call on members of a given profession to respect the private life of persons concerned by their activity are not, however, absolute and must give way in the face of overriding requirements demanded by the general interest. In this respect, the right to respect for private life and ethical requirements come up against the principle identified by the Constitutional Council in its 1985 "*Etat d'urgence en Nouvelle Calédonie*" decision, according to which it falls to the legislature, pursuant to Article 34 for the Constitution, "*to take the necessary steps to reconcile respect for freedoms and the safeguarding of public order without which the exercise of such freedoms cannot be guaranteed*" (28). Without going over Council case law on privacy restrictions, it is possible to see that the abovementioned legislation governing professional ethics usually carries with it a number of conditions. Article R. 434-21, paragraph 1 of the Internal Security Code subjects respect for private life to the proviso "without prejudice to requirements linked to the performance of their mission". Equally, Article 226-14 of the new Penal Code adds a qualification to the application of client confidentiality, and particularly when "the law requires or authorises disclosure".

However, while the ethical principles and rules of conduct that protect privacy can falter when confronted with general interest requirements, the ethical requirement may itself feature amongst them. Far from being a purely hypothetical case, it is in fact precisely what has been seen in recent years in France, in the context of the fight against conflicts of interest in the public sphere. Firstly, ethics is becoming tougher. As the National Assembly's ethics officer, Noëlle Lenoir, wrote in early 2014: "*The Organic Law and Law of 11 October 2013 on transparency in public life, in founding*

the fight against conflicts of interest on a mechanism that was no longer solely preventive but also punitive, reinforce the ethical principles and practices instituted by the National Assembly… the parliamentary code of ethics has changed paradigms. A collection of 'hard law' rules has broadly come to replace a 'soft law' mechanism" (29). Next, the code of ethics permeates the various layers of private life. In its 2011 Report, the Sauvé Commission warned the legislature against an "absolutist quest for transparency, with little concern for the private lives of public figures". The Report consequently recommended that the institution of a mechanism for declaring interests ought to cover "*only those jobs entailing responsibilities of particular importance*" (30). However, two years later, the Bill of 17 July 2013 on ethics and the rights and obligations of civil servants provided for an extension of the *rationae personae* field for such declarations, although with the caveat "*of not having an excessive adverse impact on the rights of officials subject to this new obligation to respect for their private life*" (31). There was doubtless something prophetic about the latter stipulation as, in the two decisions handed down three months later on transparency in public life, the Constitutional Council emphasised several times that the submission of such declarations "*containing personal data concerning private life, together with the publicity that may surround such declarations, infringe the right to respect for private life; that, in order to be constitutional, such infringements must be justified on grounds of general interest and implemented in an adequate way that is proportionate to that objective*". While the Council ruled that the objective intended to "*reinforce the guarantees for probity and integrity [of the interested parties], for preventing conflicts of interest and combatting the same*" does indeed constitute grounds of general interest, the fact remains that the measure selected for implementing such an ethical requirement by law does not constitute an disproportionate infringement of the right to respect for private life (32).

Notes:

(1) M. Simon, *Déontologie médicale ou des droits et devoirs des médecins dans l'état actuel de la civilisation*, J.B. Baillière, 1845, 590 p.

(2) Bentham, J., & In Bowring, J. (1834). *Deontology: Or, The science of morality: in which the harmony and co-incidence of duty and self-interest, virtue and felicity, prudence and benevolence, are explained and exemplified*. London: Longman, Rees, Orme, Browne, Green,and Longman; published in French as *Déontologie ou science de la morale*, translated by B. Laroche, vol. 1, Charpentier, 1834, 394 p.

(3) Y.-M. Morissette, *Comment concilier déontologie et indépendance judiciaire ?*, McGill Law Journal, vol. 48, 2003, p. 310-311

(4) Supreme Court of Canada, *Ruffo v Conseil supérieur de la magistrature* [1995] 4 R.C.S. 267, § 110.

(5) Y.-M. Morissette, cited by L. Desjardins, « *Miroir, miroir…* », Synthèse du colloque sur l'éthique et les codes de déontologie des tribunaux administratifs (Summary of the conference on ethics and thedeontological codes of administrative courts), *Journal du Barreau du Québec*, vol. 31, n° 2,1999, www.barreau.qc.ca

(6) A. Duhamel, *Plaidoyer pour la vie privée des Présidents*, Libération, 22 January 2014; E. Pierrat, *Les affaires privées des personnalités politiques font partie de la vie publique*, Le Monde, 27 January 2014.

(7) A. Poirier, *François Hollande, Julie Gayet…and a very British scandal about a very French affair*, The Guardian, 12 January 2014.

(8) CC, Decision n° 99-416 DC of 23 July 1999, Rec. p. 100, recital 45.

(9) Bentham, J., & In Bowring, J. (1834). *Deontology: Or, The science of morality*, *op. cit.*, 394 p.
(10) C. Vigouroux, *Déontologie des fonctions publiques*, Dalloz, Dalloz référence, 2nd ed., 2012, p. 416.
(11) J. Cabannes (chair), *Commission de réflexion sur l'éthique dans la magistrature, Rapport final*, La documentation française, 2003, p. 12.
(12) ECHR, *Özpinar v Turkey*, Application n° 20999/04, 19 January 2011, para. 76.
(13) C. Vigouroux, *Déontologie…*, *op. cit.*, p. 415.
(14) CSM, *Recueil des obligations déontologiques des magistrats*, Dalloz, 2010, 67 p.
(15) *Ibid.*, p. 18.
(16) *Özpinar v Turkey, op. cit.*, para. 71.
(17) CSM, Decision of 27 June 1996, cited by par G. Canivet, J. Jolie-Hurard, *La déontologie du magistrat*, Dalloz, Connaissance du droit, 2nd ed., 2009, p. 121.
(18) Cited par G. Canivet, J. Jolie-Hurard, *La déontologie…*, *op. cit*, p. 2.
(19) Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, https://wcd.coe.int/ int, para. 29.
(20) CSM, Formation plénière, Avis du 16 mai 2013, www.conseil-superieur-magistrature.fr
(21) Opinion no. 3 of the Consultative Council of European Judges (CCJE), *op. cit.*, para. 29.
(22) A. Lajoie, *L'indépendance du judiciaire : le contrôle interne*, *in* British Institute of International and Comparative Law, Institut des hautes études sur la justice, Société de législation comparée, *Rendre compte de la qualité de la justice*, Actes du colloque franco-britannique des 14 et 15 novembre 2003, www.courdecassation.fr
(23) *Özpinar v Turkey*, *op. cit.*, para. 25-26.
(24) *Özpinar v Turkey*, *op. cit.*, para. 76 and 79.
(25) *Décret n° 93-1229 du 10 novembre 1993 relatif au serment professionnel prêté par les personnels de La Poste*, JORF du 13 novembre 1993, p. 15 688. (Decree n° 93-1229 of 10 November 1993 on the professional oath sworn by employees of La Poste, JORF of 13 November 1993, p. 15 688).
(26) Decree n° 86-592 of 18 March 1986, JORF of 19 March 1986, p. 4586-4587.
(27) Decree n° 2005-1790 of 12 July 2005, JORF of 16 July 2005, Text 22.
(28) Conseil cons., Decision n° 85-187 DC of 25 January 1985, Rec. p. 43, recital 3.
(29) N. Lenoir, *La déontologie parlementaire à l'aune de la jurisprudence du Conseil constitutionnel*, Constitutions, n° 1, janvier-février 2014, p. 8.
(30) J.-M. Sauvé (chair), Commission de réflexion pour la prévention des conflits d'intérêts dans la vie publique, *Pour une nouvelle déontologie de la vie publique*, La documentation française, 2011, p. 9 and 73.
(31) Bill n° 1278 du 17 July 2013, National Assembly, p. 7.
(32) Conseil cons., Decision n° 2013-675 DC of 9 October 2013, Rec. p. 956, recitals 6, 26 and 28; Conseil cons., Decision n° 2013-676 DC of 9 October 2013, Rec. p. 972, recitals 13 and 14.