

The rule of law and the independence of the judiciary in Europe, taking particular account of the situation in Poland and Hungary

It represents for me a distinction and an honour to be present in this Conference of Appellate Court Presidents being now, besides of President of the International Association of Judges, particularly President of the Court of Appeal of Porto, Portugal.

Founded in 1582, the “Tribunal da Relação do Porto” has a sustained history, a rich past and an exciting future. Located in the historical city centre of Porto, in a Palace equipped with dozens of master’s pieces, from Portuguese painters and sculptors, including a Statue of Justice, at the entrance, seven meters tall, the Appellate Court of Porto signifies like, many others institutions of the judiciary, one of the best traditions Europe proudly has to offer.

I will be pleased to welcome you in our premises, with wonderful views to the Douro River; the invitation envisages to learn together more about the defying challenges of modern societies.

Allow me also to vividly applaud the organizers of this Conference in the person of Dr. Klaus Schröder, President of the Court of Appeal of Innsbruck.

Distinguished Colleague, your excellent initiative should be publicly praised for three main reasons:

The first has to do with the decisiveness of reenacting a close partnership between Presidents of Appellate Courts. In the context of the European Union, it is of the utmost importance the opportunity, enhanced by this event, of bringing to the appellate courts the pivotal role already attributed by the different judicial systems and that, concomitantly, is clearly defined by the legal regimes in force in our countries.

The second motive relates, exactly, with the topic of this speech and later one I will detail it on this significance.

Finally the third reason has to do with the future, our common future, as EU judges.

Let us agree that this event functions as the embryo of a Network of Court of Appeals Presidents. There are solid motives to initiate such an endeavor emulating the already existing Network of Supreme Court Presidents. This envisaged cooperative network would be an important instrument to judges working in Appeal Courts to develop a better knowledge of European Union Law, of the challenges faced in this specific jurisdiction and of the juridical questions posed in our daily work, particularly the ones related with international law. To

have periodical meetings between ourselves imply, for sure, a decisive impetus to start a structured and organized institutional cooperation between our Courts.

Therefore, let's not allow that this conference end up being an on-off act with no developments. Quite the opposite, let's transform the audacity of this important step on a strong inspiration for the stages to be followed. to bring us closer by encouraging mutual dialogue and the exchange of ideas and proposals.

I leave you with this friendly challenge believing that soon we will be working together again.

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Judicial independence - we all are well aware - is a cornerstone of Rule of Law.

My main argument on the present discourse will be an answer to a simple question, a fundamental one.

"Judge a man by his questions, rather than his answers," - taught us French writer Voltaire.

So, the question is:

"Can one be called a judge without being a member of an independent judiciary?"

The answer is, in my opinion, absolutely negative.

In my perspective, if a State deprives a judge of his/her independence, one cannot be considered a judge anymore; we could probably be mentioned as a very qualified expert, skilled on Legal Sciences. We can even eventually enjoy an easier daily work not challenging any litigants that are powerful or politically protected – but, in the end of the day, we will not be judges, will not be at the service of our fellow citizens.

We are, for sure, very aware of the present Rule of Law crisis, unsurprisingly, aggravated by the pandemic.

Since the coronavirus outbreak began, the condition of democracy and human rights has grown worse in around 80 countries. Some governments have chosen in the past years to answer to different emergencies by engaging in abuses of power, silencing their critics, and weakening or shuttering important institutions.

The terrible case of Turkey remains unspeakably painful: after the detention of several thousands of judges, including the Vaclav Havel Prize winner, Murat Arslan, President of Yarsay, the Turkish member of IAJ. The persecuted Turkish judges, fighting for daily survival along with their families, will never, never be forgotten.

Regarding EU State Members, the Hungarian case also speaks for itself. The pandemic laws granted a discretionary power to the government to freely rule by decree without a

“sunset clause”, without any acceptable time limit. There is no provision to guarantee that the parliament and, in particular, the courts would exercise their role of a minimally effective oversight.

Also, in Poland, the so-called “judicial reforms” caused a devastation on judicial independence. Only the courageous resilience of judges, prosecutors, lawyers and civil society, combined with the support of international community, circumvented greater damages; but we need to continue this battle to avoid the danger of a total annihilation of an independent judiciary. Not running the risk of leaving alone our brave Polish Colleagues, it would be possible to restore an independent judiciary in the country, maintaining Poland as a proud member of European Union.

In this difficult scenario, the European Court of Justice (ECJ) has been able to raise to the occasion.

In a landmark decision of 27 February 2018, case C-64/16, the European Court of Justice stated that Member States must ensure that courts, in the fields covered by EU law, meet the requirements of effective judicial independence.

Therefore, today, judicial independence is not a vague concept, a general principle widely open to any interpretation. To interpret the concept of independence, the Court reached to the case law developed under Art. 47 of the Charter although the point of reference remained Art. 19, para. 1, of the Treaty of European Union. In particular, the Court of Justice held that an independent court is one that exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint and without taking orders from anyone, enjoying protection against any external interventions and pressures. In an effort that must be much welcomed, the ECJ is now presenting in several rulings’ concrete examples of these external pressures that, in the end, endangered judicial independence on a way that clearly contradict the EU law.

As the recently deceased Professor Joseph Raz wrote more than forty years ago: “The rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the way of fixing their salaries, and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the rule of law.”

But also, the European Court of Human Rights has been playing a significant role as far as the aspects of judicial independence and self-governance are concerned.

The Court of Justice could in fact be inspired by its Strasbourg homologue in framing the issue analysing the strict rules imposed by the Court on judicial self-governance and its strengthening of the right to a tribunal established by law, which encompasses the emerging notion of ‘internal judicial independence’, including the requirements for judges “to be free from directives of pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in a court”

As the European Court of Human Rights put it in the Icelandic Judges case, there is a “common thread running through the institutional requirements of Article 6 §, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers” – only their joint and proactive enforcement will prevent the proliferation of fake courts and fake judges within the EU legal order.

Due to ECJ recent decisions the EU countries have now a specific guide on how to substantiate judicial independence. To compel judicial decisions through disciplinary procedures, hierarchical instructions or (in)formal pressures emanated from political appointed bodies, obedient to the momentary ruling Government, are practices condemned by ECJ and undisputed violations of the founding Treaties of European Union. But perhaps the most aggressive form of threat to Judicial Independence is to interfere directly on the content of judicial decisions.

If the intrusion is materialized on punishing the use of a mechanism devoted to uphold the EU law – the reference for a preliminary ruling by an EU court – the violation of the most basic standards for Rule of Law could not be more manifest.

In my perspective, the debacle of Rule of Law in some EU countries must be taken by those who defend our fundamental values, has a crucial combat for the near future.

The absence of dialogue by autocratic politicians proves how indispensable has become a resolute involvement by EU authorities but also by State Members and, decisively, by national courts and judges.

Vis-à-vis the judiciary, the execution of European arrest warrants or other demands on human rights issues put forward by undemocratic and illiberal Member States such as Poland or Hungary is likely to prove an unbearable decision for national courts in EU countries; “mutual trust” cannot endure without judicial independence as characterized by EU Law and jurisprudence.

The fair trial imposed by article 6° of ECHR might not be safeguarded in Poland and Hungary and this appraisal should be taken in proper account by national judges when dealing with judicial cooperation within the EU.

As EU Law experts have been emphasizing, if the process of regression of Rule of Law, to use the ECJ's expression, continues, it will become increasingly inaccurate to praise the EU as a safe haven for democracies.

Without a strong commitment from all public authorities, citizens should rightly start to seriously question what happened with the "raison d'être" of the EU.

Speaking about the economic crisis caused by the pandemic, the President of European Commission understandably appealed to a "massive investment in the form of a Marshall Plan for Europe." The same "Marshall Plan" levels of determination to solve financial problems being employed for the crucial topic of Rule of Law should exist, in my opinion, to uphold judicial independence.

Rule of Law in the terms outlined by EU Treaties is not negotiable or voluntary; they signify, at the judicial system level, the "genetical code" of judges.

To defend Rule of Law within EU Members is yet another fundamental reason to continue this effort now initiated. The European values, our civilizational principles are at stake; in name of the citizens, we sworn to serve, it is our duty to preserve those ideals, no matter what. The recent invasion of Ukraine represents yet another example about the present disdain of autocracies and their blatant contempt towards fundamental rules of international public law established, with prudence and wisdom, in the aftermath of a world war with its horrifying trail of despair and violence.

Yours Excellencies

Dear Colleagues

It is time to conclude.

Around two years ago, along with several other colleagues of EU countries, I had the most unexpected experience of my judicial career that I fostered to be - like any other individual judge - discrete, sober and out of public spotlight. Side by side with around 30000 citizens, with judges from more of two dozen of European countries, we marched at the streets of Warsaw during the 1000 Robes March. Speaking in front of Polish Parliament and quoting a phrase attributed to Dante my appeal was firm: "the hottest places in hell are reserved for those who in time of crisis preserve their neutrality. "The European authorities must listen to the voice, humble but resilient, serene but determined, of the Polish Judges,

of the European Judges. We, judges, who defend on each day, in each court, the Rule of Law instead of the Rule by Law. We who apply the Rule of Law and not the Rule of Men.”

Because, at the end of the day, knowing the requirement for us, judges, for an absolute pledge towards judicial integrity in their different components, all lies on the warning of a President of United States, Andrew Jackson, emphasized two centuries ago: “All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except if guaranteed by an independent and virtuous Judiciary.”

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