

## European Judiciary – a tragedy unfolds?

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*“Ask for me tomorrow, and you shall find me a grave man.”*

William Shakespeare

Romeo and Juliet

(Act 3, Scene 1)

Was the year 1844: the first President of the Portuguese Supreme Court, confronted with a new Decree that largely facilitated the removal of judges, boldly decided to write a formal letter to the Queen Mary II: “Your Majesty, judicial independence is not a privilege of Judges; it is a fundamental right of citizens.” Shortly after he was dismissed.

In the previous century, Prussian King Frederick enjoyed a bright summer in his palace at Sans Souci, near Potsdam. A nearby windmill disturbed his fantastic view; therefore the King demanded to buy it in order to demolish this barrier. The humble miller owner refused to sell it to the King, who then threatened to take the windmill by the force. The miller responded with the legendary phrase that has left its mark in History each time we discuss Judicial Independence: “Sorry, your Majesty, but the answer continues to be no. There are still judges in Berlin”. Unfortunately the grandeur of this answer is challenged by the historical facts.

Surely not by accident these examples often quoted to illustrate judicial independence are old – around 200 years –, are controversial and are European.

Having labored as a judiciary expert in many European countries, I am here mainly in the capacity of President of the European Association of Judges, a branch of the International Association of Judges. National associations from 43 countries in Europe presently comprise EAJ. We are proud to be, by far, the biggest and most representative association of the judiciary in the Old Continent.

Symbolically, we decided to maintain a 44th member: YARSAV, the Turkish Association of Judges and Prosecutors which was dissolved by the Government in tragic circumstances whilst Turkey is converted in the biggest penitentiary for judges and prosecutors in the world.

YARSAV President, Murat Arslan was awarded, in 2017, the Vaclav Havel Price, granted by the Parliamentary Assembly of Council of Europe. This prestigious award

does not constrain the Turkish authorities to condemn him few weeks ago after a partial and unlawful trial: 10 years of prison.

Nothing compares with the terrible ordeal of thousands of our Turkish Colleagues.

Nevertheless the situation of judiciary in Europe, in general, degraded in the perception of our representatives.

A survey conducted three years ago by EAJ amongst its 43 countries shows that around 50% of the associations declared that the situation of Justice has worsened in the past 5 years and only 10% detected an improvement; I am convinced that, today, these numbers are clearly worse.

In the past years, in an unparalleled level, new threats to the independence of judges and lawyers in light of the current content of the UN Basic Principles on the Independence of the Judiciary emerged in Europe.

Democracy is based on two major pillars: elections providing legitimacy but also the values assembled by the “Rule of Law”, as opposite of rule of men, in which the principles of separation of powers and judicial independence are vital prerequisites.

The arrival of so-called illiberal democracies has, since the early stages, instigated an immediate and vigorous attack on the independence of the judiciary propelled by surgical legislative reforms in the area of Justice with the pivotal cases of Hungary and Poland. Therefore, in these countries, the second pillar of democracy is neglected, if not dethroned.

But the threats in Europe are various and extensive.

Allow me to provide some eloquent examples trying to link them to the Basic Principles of UN in particular general safeguards, selection of judges, conditions of service and tenure, discipline and removal and freedom of association.

Hungary, like, although in a lower level, Poland, experiences today an undeniable rejection of liberal democracy. The strategy is unconcealed: to abandon the principle of separation of powers in order to soothe the judiciary. The general safeguard of UN Principles imposing that each State must uphold judicial independence is comprehensibly snubbed; the control is exercised mostly on the appointment of judges, particularly in Supreme and Constitutional Courts, and in the selection of empowered Court Presidents.

In Poland the dismantlement of Constitutional Court and the legal reforms of Supreme Court and Judicial Council along with the new appointment criteria for Court Presidents are only illustrations of a policy to dismantle judicial independence. Judges who have requested preliminary rulings to the CJEU have been summoned by the

political controlled High Judicial Council to give written statements within pre-disciplinary proceedings.

In Hungary, only weeks ago, a reform on Administrative Courts with a selection of judges destined to ensure a new sort of judiciary totally obedient to the political power was approved by the Parliament. Presidents of Courts are carefully chosen in order to provide an internal controlled mechanism to decide on the key foundations of judicial careers: selection, appointment, promotion, transfers and evaluation. Judges who are currently sitting judges of administrative or labor cases will be taken over to the new administrative tribunals and to the Highest Administrative Court. The Minister of Justice will administer administrative courts centrally. The same Minister of Justice selects the presidents of Courts revitalizing the traditionally strong political link.

International documents namely from Venice Commission emphasized that in every system the prosecutor is expected to act in a judicial manner; the qualities required of a prosecutor are similar to those of a judge. Judicial independence is closely related with the autonomy of Prosecutors. In the populist drift displayed in Europe, Prosecutor Services are seen as a representative of the Government. In Poland, for instance, the Prosecutor General is so close of the Ministry of Justice that, in fact, they are the one and same person.

A worrisome situation is also the one lived by the Bulgarian judiciary particularly on the item “freedom of association”. Several amendments to the Bulgarian Judicial System Act were adopted in haste, without any public discussion, not even with the Bulgarian judiciary; the purpose was to enforce the provision requiring the judges and prosecutors to declare to the Parliament their membership in professional organizations.

The interference of Secret Services in collecting information in disciplinary cases of judges could be mentioned as one example of undue interferences in judicial careers observed in Romania. Slovakia is also a country of mounting concern regarding judicial independence.

The politicization of Judicial Councils is another threat dispersed in several countries. In Spain, only two months ago, the judges went on strike to demand judicial independence to be protected strongly objecting the selection of members for Spanish Judicial Council; strikes were conducted also in Portugal motivated by possible menaces to judicial independence and by the continuous degradation of work conditions including salaries.

The lack of financial and human resources by the judiciaries are an additional pressing problem in countries like France, Belgium or UK.

In Serbia the proposed amendment to the national Constitution was condemned by several European institutions, including EAJ, representing an attack on judicial independence in the area of removal of judges or the functioning of High Judicial Council.

Having in mind recurrent problems with internal independence materialized in reforms addressing the judicial systems managed by Judicial Councils the revised version of Universal Charter of the Judges approved in Santiago de Chile in 2017 directly tackled those issues. The article 2, n° 3 of the Charter indicates that Judicial Councils must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation and, symptomatically, regulates that such members cannot be politicians. “No member of the Government or of the Parliament can be at the same time member of the Council for the Judiciary.” On a different framework but trying also to endorse the principles of judicial independence when focusing in the role of Judicial Councils, the European Network of Councils of Judiciary drastically decided to suspend the Judicial Councils of Poland and Turkey.

Depending on the electoral success of populist proposals, politicians from several other European countries are eager to undermine democratic societies seen as archaic and fragile.

In this alarming scenario a pertinent question arises: how these portrayed abuses are being dealt by the Basic Principles?

The answer must be found through our discussions. But let me only introduce three concise notes:

Firstly, there is an institutional attitude of indifference, if not steer opposition, towards soft law rules envisaging Rule of Law and judicial independence. This situation imposes a reaffirmation of the Principles even in the outdated manner they were put forward more than thirty years ago.

In second place the attacks from those who are not loyal to Judicial Independence have dramatically increased. But the most remarkable aspect of these attacks is the new refined level of subtlety and deceitfulness particularly on countries belonging, or wanting to belong, to European Union mostly because of the constraints imposed by the Treaty of European Union specially the article 2 (“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”)

In this sense the Basic Principles should be more substantiated in order to obstruct the imaginative interpretation of its commandments normally collecting disperse

and not comparable fragments of different jurisdictions where Rule of Law is observed to convince international organizations about an artificial compliance.

But if the devil is in the details it is now time to exorcise them.

Therefore the amendment of the Principles should include:

- The principles relating to the organization of justice and internal independence of the judiciary; the guarantees on remuneration and retirement of judges; the creation of bodies – namely Judicial Councils - responsible for the recruitment, appointment, promotion and discipline of judges which are composed or constituted in a manner such as to secure their independence; the clarification of the ethical requirements placed on judges.

Let me emphasize that judicial integrity closely connected with the fight against corruption must clearly be a central concern for the future. The Global Judicial Integrity Network of United Nations (UNODC), the biggest current project for the judiciary worldwide, should be prioritized as a fundamental tool to improve the fight against corruption. The updating of the Basic Principles should be defined in strict partnership with this UN project created by judges, managed by judges and designed to enhance confidence in judicial systems, building trust through a comprehensive and operative ethical commitment by the judiciary.

Finally a third and last note: the revision of the Principles should occur in strict accordance with a permanent and thorough risk assessment avoiding that the final result of this process ends by endangering the fundamental rules contained on its present form; extreme caution and awareness are mandatory having in mind the precarious political geography we are suffering.

It is time to conclude.

I know only too well that the present description of the situation of Europe is notably somber; in EAJ the expression “dark clouds” when referring to judiciary has become a persistent image.

In detailing the five features that defined Europe, Steiner points out the cafés, the landscape on a human scale, in counterpoint to the empire of automobiles in American metropolises, the toponymy of cities reflected by the names of scientists, writers, artists revered by our History and the double civilizational heritage, Athens and Jerusalem. But the fifth characteristic identified by Steiner is symptomatically our recurring eschatological apprehension for an ultimate chapter.

The best manner to surmount this European sense of tragedy, terribly confirmed by a devastating war in the recent past, could be inspired quoting an American author, James Baldwin:

“Europe has what we do not have yet, a sense of the mysterious and inexorable limits of life, a sense, in a word, of tragedy. And we, the Americans, have what they sorely need: a sense of life's possibilities.”

The American continent where we are today is the right place to decide on these possibilities affirming judicial independence. Despite the tiredness of democracy, despite the irruption of populism, despite the cruel indifference of too many.

This is the right moment; let's rise to the occasion.