

## OSCE Online Event

October 14<sup>th</sup>

### Challenges and Good Practices on Judicial Independence and Integrity

Thank you for the invitation – it is an honour to be here!

First of all, allow me to join you on the celebration of the Thirty Anniversary of the Copenhagen Document.

In point 5.12 of the Copenhagen Document it was stated, lucidly:

The independence of judges and the impartial operation of the public judicial service will be ensured.

Hailed at the time by a responsible of the negotiating team as “a new European constitution”, the *Copenhagen Document* contains an abundance of unprecedented provisions, but perhaps the ones that marks its uniqueness as a document of a security organization is the human rights commitment to a system of government that must be democratic and founded on the rule of law.

Today, in 2020, this document never has been so modern – instead of aging, it gained in recent years a dramatic resurgence.

Let us be clear. Rule of Law is not an ideology; Rule of Law is not a political concept; it is our only guarantee against autocracies or totalitarianism, it is the best possible way that humankind established to take care of each and every one of us, regardless of any authority, power or control.

The situation in the world, in times of autocratic and populist regimes, is of concern, even of anguish, on a dark setting of a growing crisis for democracy now aggravated by the dystopian temptations fuelled by the pandemic.

Since the coronavirus outbreak began, the condition of democracy and human rights has grown worse in 80 countries, according to the latest research from Freedom House.

In these difficult moments all international organizations who uphold the values of Rule of Law need, more than ever, to achieve confidence-building solutions and to tackle the current problems on a substantial, coordinated and harmonic basis.

Acting with patience but with resilient determination.

The Copenhagen Document's understanding of the rule of law is defiant and ambitious.

It goes beyond a formal legality; aims for justice based on the recognition of the supreme value of human dignity.

In this context, judicial independence is – as everybody knows - a cornerstone for Rule of Law.

As President of the European Association of Judges, composed by national associations from 44 countries, and in many meetings with representatives of international or national institutions as an international expert, it was always perceptible that the "domestication" of independent judges by political regimes is a fundamental tool, used since the very beginning, to take control, promoting impunity and disregarding accountability.

One pressing topic is, for example, the system of appointment for Judicial Councils and/or Superior Courts.

Judicial Councils were shaped to be the guardians of judicial independence in order to assure that individual judges decide their cases on an impartial manner. The politicization of the appointment procedures and therefore of the composition of Judicial Councils (or Supreme Courts or Constitutional Tribunals) confront judiciaries with the worst of two evils:

- Judicial independence is endangered causing that individual judges cannot rely on their top institutions;
- Judicial integrity is damaged by the internal opacity of those bodies acting at the service of particular interests, sometimes with corporativism, disdaining of transparency rules and not providing accountability to their actions.

In many situations, the members of those judicial councils are judges – although in some cases of recent extraction – and formally they are duly appointed by a political elected majority.

In 2019 11,000 judges responded to a survey organized by the European Network of Councils for the Judiciary. For the whole of Europe, the judges identified as one of the three most problematic issues precisely the selection and promotion of judges, in particular for Supreme Court.

67% of the recommendations issued by GRECO (on their final report for the 4<sup>o</sup> Evaluation), in line with OSCE/ODIHR reiterated concerns, are about integrity issues; the move of judges from (and to) the political arena is reputed to be highly divisive for the doubts on real, and perceived, independence.

As a worrisome background, corruption is the fastest growing threat to judicial independence as pointed out by Diego García-Sayán, the Special Rapporteur on the independence of judges and lawyers.

And make no mistake: all these subjects are intrinsically connected.

## II - What can be done?

Firstly, to underline the leading role of international institutions in defence of the values of rule of law.

The globalisation of problems (transnational criminal networks, autocratic regimes, extreme nationalisms arising in different regions of the world) requires global answers that counteract, I would say, the “genetic” solitude of judges

who have to decide their cases, alone, counting only on the law and their consciences.

Besides that, transparency emerges today as the new objectivity; there is a strong evidence that a judicial system with a (traditionally) high degree of transparency is the best safeguard against corruption.

Allow me to address the most urgent challenges advancing with some concrete solutions in form of possible recommendations.

In general, the best ways to proceed must concentrate on leading by example sharing common standards and best practices.

There is in several countries a strong evidence that governance by judges through judicial councils, even with a majority of judges, does not imply for itself the absence of undue influences or unethical behaviour on the very “heart” of the Judiciary.

In a recent OSCE draft paper from my colleague Kees Sterk “A culture of accountability for judicial councils” this problem was correctly highlighted.

The loss of integrity of top judicial bodies in recent years should makes us focus on the problem of judicial accountability - the other face of the same coin - together with judicial independence.

Going to the detail:

The Councils for the Judiciary must, in general, abstain of any interference on the procedural handling of judicial cases, its substantive assessment or the court decisions.

It is also crucial to enforce the conduct of members of councils or superior courts developing uniformed ethical rules. Functional immunity of members of councils should be limited to speeches and votes in council meetings.

The process of appointment of judges must provide that the list of nominees is public and likewise the list of candidates. The policy for judicial appointments

must be available online along with the decisions. They should be openly discussed and commented in courts.

It is possibly advisable, in the present context, to limit court chairpersons, or presidents of courts, to serve only for a single term or mandate.

On another troublesome area - disciplinary proceedings - a very dangerous path is in place.

National laws governing the disciplinary responsibility of judges should uphold a basic requirement: having a legal definition of the acts or omissions which constitute disciplinary offences. Vague and broadly-worded provisions may have a chilling effect on independent and impartial conduct of judges and may also be abused to exert undue pressure.

In this sense, it would be recommendable to produce model tests of what constitutes a judicial misconduct.

Regarding the freedom of association of judges, it must be accepted that judges cannot be obliged to disclose their membership of an association of judges.

On yet a matter of concern, it is recommended that the prosecution services of participating States develop and strengthen a culture of functional independence at all levels.

The judiciary must take steps to build and increase the level of public trust, addressing a meaningful dialogue with civil society.

The elaboration of alliances to promote compliance with international standards of judicial independence and also of protocols to denounce attacks on judicial independence should be put in place.

A determined effort must be taken on public education designed for a concrete understanding on how judicial independence is currently being undermined through deceptively named “judicial reforms”.

The fight against corruption in the judiciary is yet another sensitive area that requires the best of our efforts. Measures like requiring judges to declare assets and incomes, to have efficient integrity bodies or to ensure that judicial immunity is not applicable in cases of corruption are certainly ways forward.

The ongoing review of the Kyiv Recommendations, an important reference for the judiciaries, should aim to improve the standards and practices of accountability.

Thus, guidelines on Accountability Procedures within the governing bodies of the judiciary should be encouraged.

The world is facing again, as did the ancient Greeks, the problem of oligarchies (the Greek word means rightly “the rule of a few”). There are limits imposed by democratic rules that cannot be surpassed.

We should be proud of the strong guidance we get from institutions such as OSCE and its continuous work on the field of Rule of Law. International institutions must have a firmer and more powerful voice; coordinating efforts, working together, we must be more effective, explaining to political bodies and citizens in general how essential are their findings and how crucial is its subsequent implementation.

The Copenhagen Document represents a landmark for modern civilizations. Thirty years ago, like today, to quote Eisenhower, the lessons learned are clear: “the world no longer has a choice between force and law; if civilization is to survive, it must choose the rule of law.”