Association Européenne des Magistrats
Groupe Régional de l'Union Internationale des Magistrats

European Association of Judges
Regional Group of the International Association of Judges

Palazzo di Giustizia - Piazza Cavour - 00193 Roma - Italia

EAJ Working Group on the Situation of Member Associations
1st annual ZOOM-meeting on 28th May 2021

Progress Report (May 2020 to May 2021)

1 Introduction

The ordinary meeting in Porto (May 2020) was postponed to February 2021 and was then finally cancelled. There was no physical meeting of the EAJ since Kazakhstan in autumn 2019. However, there was an informal ZOOM-Meeting of the EAJ instead of the cancelled annual meeting in Porto (Portugal) *on* 29th May2021. The last report of the WG covered the period of October 2019 to May 2020**.** Therefore, this report covers the time between **May 2020 to May2021** (next formal ZOOM Meeting of the EAJ on May 28th 2021).

Since the Informal Video-Meeting of the EAJ of May2020 the WG was active in many ways:

- in 2020 it drafted the contribution of the EAJ to the annual **Rule of Law report 2021** for the attention of the European Commission;
- it prepared a report for the attention of the UN Special rapporteur Mr Sayan, concerning the actual critical situation of the Judiciary in the European Regional Group;
- finally, it drafted opinions and letters to authorities on request of several EAJ member associations (Albania, North Macedonia, Poland, Luxemburg, Serbia, Greece and Luxemburg).

2 RESPONSE to the CONSULTATION QUESTIONNAIRE by the EU COMMISSION for the preparation of the REPORT on the RULE OF LAW 2021

As in 2020, in response to a questionnaire, the working group drafted a report for the attention of the European Commission for its Rule of Law Report 2021. In order to complete its response, the EAJ requested its member associations in the Member States of the European Union to respond to the questionnaire. It has then prepared the summary of the responses. In its presentation of the "horizontal developments" the report pointed out that the time which elapsed since the delivering of the last EAJ - contribution to the EU Rule of Law Report 2020 has been overshadowed by the Covid 19 pandemic. The pandemic has confronted the judiciary with new challenges to master over and above their already existing tasks and has resulted in additional workload and new types of cases:

"Due to health reasons physical contact has been restricted, which has consequently slowed down non-urgent cases, prolonged procedural deadlines and produced some backlogs; but in several states these were not as large as expected due to the enormous dedication and engagement of judges and court staff. On the other hand, the use of IT-facilities has intensified, which has given an incentive for a new wave of technological progress in many countries…

In some countries the balance of power between the three branches of state was put in jeopardy. Using the argument that speedy reaction to the epidemic was necessary, governments acted and the legislature was only involved *ex post facto*. Sometimes this was based on an existing state of emergency regime, sometimes it was an *ad hoc* arrangement. So far as concerns the judiciary, questions came up that concerned the independence of the judge and an undue influence of the administration…

Regrettably, some governments have tried to take advantage of the concern and involvement of the general public with the problems caused by the pandemic in order to proceed with their agenda of increasing their control of the judiciary. In the first line of attack were the Councils for the Judiciary (Poland, Spain, Hungary, Bulgaria), by changing the system for selecting members or by altering the composition of the Council. Training institutions were concerned by such a plan (France). But there was also direct pressure on judges by unwarranted disciplinary measures or intended amendments to the disciplinary procedure (Poland, Romania, Bulgaria) …

The most dangerous development, which it is very worrying to observe, was that certain governments refused to implement decisions of the Court of Justice of the EU or the European Court of Human Rights. (Poland, Hungary) …" (for the full text see **appendix 1**).

3 Report for the attention of Diego García-Sayán, Special Rapporteur on the independence of judges and lawyers to the UN High Commissioner for Human Rights (2020)

The report stated that the European Association of Judges (EAJ) noted several developments which heavily jeopardized judicial independence. In the report the EAJ's contribution to the EU Rule of Law report and the situation **of Hungary** and **Poland** were highlighted**.**

4 Albania

In the aftermath of the request of Albania's Judges' Association the WG drafted a letter, for the attention of the President of EAJ, to the President of the Republic, the Prime Minister and the MoJ.

In the letter the EAJ started that it "has been alerted by its Albanian member association - the *Union of Judges of Albania* to the constitutional crisis in Albania which it is feared may lead to a breakdown of the Albanian judicial system and the rule of law in Albania…" (for the full text see **appendix II).**

5 North Macedonia

In the aftermath of the request of the Association of Judges of North Macedonia, the WG drafted a letter, for the attention of the President of EAJ, to the Prime Minister of the Republic. In it, the EAJ expressed its concern about a reduction of the salaries of the Judges. According to the information it received, the North Macedonian judges would get a reduction in their remuneration of almost 80% for the months of April and May 2020, "thus, to be derogated on the level of the minimum rate of wages in the country. This measure was taken in the framework of combatting the corona virus pandemic (COVID-19 disease resp.)". The EAJ considers this to be a drastic reduction in remuneration " and stresses the importance of compliance with the international and European standards of judicial independence which are laid down in various of international statements (guaranteeing the financial independence of judges) …The European Association of judges calls the Government of North Macedonia to guarantee judges' salaries as they are fixed in the law, i.e., as on the pre-crisis level" (for the full text see **appendix III).**

6 Poland

For the attention of the President of the EAJ, the Working Group drafted a letter to Mrs. Ursula von der Leyen, President of the Commission of the European Union regarding the rule of law situation in Poland.

The Polish government's strategy of undermining the rule of law and the independence of the Polish judiciary has involved many facets which are all well known to the European Commission. The letter points at another, new aspect. It says: "The most immediately pressing concern for the EAJ at this particular moment is the Polish government's flagrant disregard of the interim or provisional order made by the Court of Justice of the European Union (Grand Chamber) on 8 April 2020 in Case C-791/19 R European Commission v Republic of Poland and the subsequent failure of the Commission to take steps to secure compliance… those proceedings concerned the establishment by Poland of a new "Disciplinary Chamber" (Izba Dyscyplinarna) as part of the Supreme Court to deal with disciplinary proceedings brought against judges…those proceedings concerned the establishment by Poland of a new "Disciplinary Chamber" (Izba Dyscyplinarna) as part of the Supreme Court to deal with disciplinary proceedings brought against judges. The establishment of the Disciplinary Chamber was held by the Polish Supreme Court to be unconstitutional; its membership is unlawfully appointed and lacks any semblance of the independence necessary to constitute a legitimate tribunal. In its order of 8 April 2020, the Court of Justice ordered the Republic of Poland, pending final judgment in the case, immediately to suspend the application of the provisions establishing the jurisdiction of the Disciplinary Chamber… Notwithstanding the plain terms of the Order of the Court of Justice, the members of the Disciplinary Chamber have continued to exercise their purported jurisdiction…" The EAJ expresses its deep concerns "to the judiciary of Poland struggling to maintain their independence…" But even more concerned is the EAJ by the failure of the Commission "to take steps to secure compliance by the Polish government with the clear order of the Court of Justice." The letter ends with the firm request to the Commission to take immediately all the necessary measures to have sanctions and penalties imposed upon the Republic of Poland and offers the EAJ's support (for the full text see **appendix IV).**

On 11.1.2021 the President of the Commisssion of the EU answered and listed the activities which the Commission has undertaken so far. However, without addressing the new challenges and the envisaged measures of the Commission for the near future."

7 Luxembourg

In January 2020 the EAJ and the WG received a letter of the « Groupement des Magistrats Luxembourgeois (« GML »). The letter points to a proposal introduced in the context of a current project of a (total) revision of the constitution. The GML (Associatiuon of Judges) criticizes two points in the preliminary draft constitution:

- the lack of anchoring in the Constitution the envisaged constitutional article concerning the independence of the prosecutor's office (cf. **para 93 draft Constitution**; le défaut de consacrer l'indépendance du Ministère public »),
- and the lack of anchoring the judicial power in the new Luxemburg Constitution) (cf. **para 99 II draft Const**. ; « et le défaut d'ancrer le pouvoir judiciaire dans la Constitution luxembourgeoise. « .

By this letter, the GML only wanted to inform the EAJ with the aim to assist the Luxemburg Association to re-establish paragraphs 93 and 99 II of the revised constitutional draft in its initial version, but no concrete further request was added.

The WG will be informed of further steps of the GML. **(**for the full text see **appendix V).**

8 Serbia

In the aftermath of the request (letter of 22 April 2021of the Association of Judges of Serbia "JAS" (Drustvo sudija Srbije), the WG drafted an OPINION of the EUROPEAN ASSOCIATION of JUDGES. The question which came up in Serbia is, if there is an incompatibility of the membership in a Council for the Judiciary and membership or being an office holder in an association of judges. The opinion concludes that such an incompatibility does not exist." (cf. appendix VI)

9 Slovakia

The EAJ - Working Group *On the Situation of Member Associations* was mandated to deal with a request sent by the president of the Slovak Association of judges (letter to the EAJ of 09/11/2020). As the request was not clear the WG had asked the Slovak Association for more information which the WG got only by letter dated of 16th March 2021. Even then, the content of the request was not clearly expressed. So the WG drafted a letter with some thoughts (in the sense of a possible opinion) on the situation of the Judiciary regarding the actual revision of the constitution. The letter was sent by the president of the EAJ.

The following is an excerpt from the letter and states: "… For a long time, the EAJ has been following closely the situation in Slovakia. We were informed that the country was affected by a system of corruption among high-ranking officials including some judges. The trust of the population in the state institutions, including the courts, is not very high.

Politicians call for reform of the judiciary. There is the danger of throwing out the baby with the bath. Indeed, the recent amendments of the Constitution do include some elements which could be seen as conflicting with European standards. In a letter to me on March 11th 2020 you challenged these amendments…

[In a new letter] you claim that the challenged constitutional provisions meanwhile were adopted and infringe the independence of the judiciary and you criticise the intention of the government to change the court system (judicial map), which you again see as an attack on the independence of the judiciary and the rule of law…

I am worried about your warning that the developments in Slovakia may lead in similar direction as in Hungary and Poland. It would be of outmost interest to learn which indicators you identify in this aspect. Which measures infringe which EU or Council of Europe´s provisions and endanger the independence and the rule of law. In you documents you quote decisions of the Constitutional Court, the references in our assessment should primarily be the European standards and not national ones but the reference points in our assessments should primarily be not the national but the common values recognized at European level.

Regarding the obvious problems which can be identified in the material, which you put forward so far a first preliminary assessment may be as follows:

- The draft amendments of the Constitution, which in the meanwhile were adopted, had already been examined by the Bureau of the CCJE. In its Opinion CCJE-BU (2020) 3 of 9-12-2020 the CCJE found that the possibility to revoke the president and the members of the Council prematurely before the end of their tenure of office without motivation clearly contradicts European standards and endangers the independence of the judiciary. It also warned that the changes in the immunity of judges and the abolishment of their protection by the Constitutional Court, will weaken the independence of judges and it and it called to mind the conditions which due to European standards should be fulfilled if a judge is transferred

without his/her consent on basis of a reform of the courts system. The EAJ fully agrees with this assessment.

- As far as the proposal to change the judicial system is concerned, the documents presented cannot give a final verdict, especially since the organisation of courts is mainly a problem to be solved by the national authorities. The EAJ cannot comment on the two reports of CEPEJ which include some proposals for reform steps. It is also not evident if and how far they had been considered in the changes, which the government now proposes.
- However, it should be pointed out that such important reforms of the justice system need an intense and substantial involvement of the judiciary, which in itself is part of the European standards. Reforms like that should not be implemented hastily, but require intensive examination. They should increase efficiency and improve the access to justice, and not the opposite. They cannot be a means of dismantling corruption networks that have been discovered – these should be eliminated with existing anti-corruption tools.

These are some initial thoughts on the issues raised. The EAJ is ready to provide further support if the ZSS deems necessary. However, this requires further information and exchange of views with our Working Group *On the Situation of Member Associations* - and concrete proposals for further action, that you consider helpful. In any case, I think Slovakia should be an item on the agenda of the next EAJ Plenary Meeting in June."

10 Greece (Request of the Association of Greek Judges and Prosecutors of 12 March 2021 to the President of the EAJ)

In a letter dated 12th March 2021 the Greek Judges' Association made two different requests. On the one hand it requested an opinion "on appropriateness of public statement of judges' association in a particular case, respectively particular kinds of cases."

On the other hand, the Association asked for "support and immediate intervention of EAJ at the Greek MoJ to enable Greek Association to share their views in intended reform of the judicial system."

Regarding the second concern, the WG drafted a letter of the EAJ to the Greek minister of Justice (the first concern is still in consultation). " In the letter reference was made that all European standards provide that associations of judges should be heard and involved in projects which intent to change the judicial system (judicial map)." (see appendix VII).

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Binningen/Basel, Switzerland, 16.05/2021

Stephan Gass
Chair EAJ-WG On the Situation of Member Associations

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Appendix I

EUROPEAN ASSOCIATION OF JUDGES ASSOCIATION EUROPEENNE DES MAGISTRATS

RESPONSE to the CONSULTATION QUESTIONNAIRE by the EU COMMISSION for the preparation of the REPORT on the RULE OF LAW 2021 (excerpt)

(I) HORIZONTAL DEVELOPMENTS

The European Association of Judges (EAJ) is honoured to respond to this Stakeholder- Consultation.

In order better to inform its response the EAJ requested its member associations in the Member States of the European Union to respond to the questionnaire and has prepared the summary of the responses set out below. The EAJ, which has 44 member associations, regularly receives reports from its member associations on the state of the rule of law in their respective European countries and may be asked by member associations for support in their endeavours to resist infringements of the independence of the judiciary and the rule of law in their country.

The period since the delivering of our contribution to last year´s Rule of Law Report has been overshadowed by the Covid 19 pandemic. The pandemic has presented the judiciary with new challenges to master over and above their already existing tasks and has resulted in additional workload and new types of cases. As early as April 2020 the EAJ-President, José Igreja Matos, published an article in this regard "Being a Judge in times of a pandemic". Subsequently the members were asked to report on their experiences in their respective justice systems. Meanwhile some general observations can be made.

Due to health reasons physical contact has been restricted, which has consequently slowed down non-urgent cases, prolonged procedural deadlines and produced some backlogs; but in several states these were not as large as expected due to the enormous dedication and engagement of judges and court staff. On the other hand, the use of IT-facilities has intensified, which has given an incentive for a new wave of technological progress in many countries.

In some countries the balance of power between the three branches of state was put in jeopardy. Using the argument that speedy reaction to the epidemic was necessary, governments acted and the legislature was only involved *ex post facto*. Sometimes this was based on an existing state of emergency regime, sometimes it was an *ad hoc* arrangement. So far as concerns the judiciary, questions came up that concerned the independence of the judge and an undue influence of the administration.

The use of electronic means for conducting litigation raised questions of access to justice and other rights of parties and the ability of the public to observe the working of the justice system. Only a few states were prepared for such a situation. One lesson learned is that legislation should adopt a legal framework for such situations in advance.

Regrettably, some governments have tried to take advantage of the concern and involvement of the general public with the problems caused by the pandemic in order to proceed with their agenda of increasing their control of the judiciary. In the first line of attack were the Councils for the Judiciary (Poland, Spain, Hungary, Bulgaria), by changing the system for selecting members or by altering the composition of the Council. Training institutions were concerned by such a plan (France). But there was also direct pressure on judges by unwarranted disciplinary measures or intended amendments to the disciplinary procedure (Poland, Romania, Bulgaria).

The most dangerous development, which it is very worrying to observe, was that certain governments refused to implement decisions of the Court of Justice of the EU or the European Court of Human Rights. (Poland, Hungary). If such behaviour is not met by prompt condemnation and effective sanctions from the European Institutions, not only will people in the Member States concerned lose trust in those institutions but also the standing and the work of both of those courts is likely to be seriously hampered.

In short, the problems briefly summarised above are the principal and most common problems which our members have had to address and those which have principally dictated the activities of our office holders.

(II) SUMMARY of ANSWERS to the QUESTIONNAIRE

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Appendix II

To the President of the Republic of Albania
His Excellency
Ilir META
President of the Republic of Albania
Presidenca e Republikes
1000 Bulevardi Deshmoret e Kombit
Tirane
Albania

Dear Mr. President,

I am writing in my capacity as President of the European Association of Judges ("EAJ"), which is an association of the judges' associations in 44 European countries and which has as one of its principal goals the maintenance of judicial independence and the rule of law.

The EAJ has been alerted by its Albanian member association - the *Union of Judges of Albania* - to the constitutional crisis in Albania which it is feared may lead to a breakdown of the Albanian judicial system and the rule of law in Albania.

The crisis has, I understand, been caused by an interplay of several factors including :

- The examination procedure, or vetting of judges, which is carried out by the judicial qualifications commission has had far more wide-ranging effects than originally foreseen; in particular, because of that comprehensive vetting procedure both the High Court and the Constitutional Court have been rendered dysfunctional.
- A fundamental deadlock in relations between the Government and Parliament on the one hand and the Presidency on the other which seems to be difficult to resolve (given amongst other matters the on-going impeachment procedure against yourself as president and the pending criminal charges brought against members of government and the parliament).
- As a result of the prolonged inactivity of the Justice Appointment Council (JAC) during 2017/2018 a large number of judicial posts have been left unfilled. This has led to those who are responsible for appointing or electing members of the Constitutional Court having very few suitable candidates from whom to make their choice.
- Moreover, the manner in which the JAC operated in 2019 is open to serious question.
- The problems of giving effect to the sometimes unclear provisions of the Constitution have been aggravated by the lack of a functioning Constitutional Court able to give definitive rulings; and in consequence the procedure for making judicial appointments has become the subject of dispute between the Government and Parliament and the President.

The vetting procedure has in the end led to a disastrous shortage of judges available to sit in the courts and therefore to a paralysis of the judiciary and its ability to deliver justice.

That paralysis stems from the fact that out of the 234 judges (which amounts to 28% of all judges), who have undergone vetting in the period up to the beginning of March - among them also the most high ranking judges - only 90 judges successfully passed the vetting procedure. Of those who failed, the overwhelming majority were rejected under the criterion "*unjustified assets*". While it is not opposed to the vetting procedure as such, the Union of Judges of Albania considers that the requirement of producing proof of the origin of assets within the stipulated time limits is very problematic especially in the case of assets acquired a long time in the past and gives scope for arbitrariness.

The provisions of Article 179 of the Constitution, which deal with the sequence in which each of the three appointing bodies (the President, the Parliament and the Supreme Court) should appoint a member of the Constitutional Court and which seemingly lack clear default mechanisms, have apparently given rise to serious differences between the government and yourself as president. As you will of course be aware, Mr President, this has led to the situation that it is not possible to convene regular and proper sittings of the Constitutional Court and the High Court thus preventing these courts from exercising their functions. A large number of questions await decision by the Constitutional Court.

The European Association of Judges therefore urges all of the Albanian institutions and authorities concerned to work together -

1.) To find a speedy solution to the current problem of appointing judges to the Constitutional Court. For its part the EAJ would favour an interpretation by which the sequencing of appointments reflects the underlying principle that the three organs of state - President, Parliament and Supreme Court - should have the same weight in the election of members of the Constitutional Court, as is the case in several other countries.

2.) To press the Supreme Court - which, following the appointment of new judges, is now operational again after a long period of inaction - to proceed as soon as possible to select the members of the Constitutional Court whose appointment is reserved for the decision of the Supreme Court.

3.) To reconsider the criteria and time frames of the vetting procedure and its application based on the experiences and results so far. In that regard I would add that the EAJ remains of the view previously expressed that lustration or vetting of those holding judicial office is not appropriate in countries where there is been no radical change in the political system.

I hope that you share our concerns and I am sure that in the interest of the Albanian people and the Albanian judiciary the problems mentioned above could be quickly remedied.

I am sending a copy of this letter to the Prime Minister and the Minister of Justice in order that they too be aware of the EAJ's serious concern for the current state of the administration of justice in Albania and the need for the relevant authorities to work to resolve the situation.

Yours sincerely

Jose Igreja Matos

Appendix III

To Mr. Prime Minister

Republic of North Macedonia

Dear Prime Minister,

The European Association of Judges became informed about a reduction of the salaries of the Judges. According to this information North Macedonian judges got a reduction in their remuneration of almost 80% for the months of April and May 2020, thus, to be derogated on the level of the minimum rate of wages in the country. This measure was taken in the framework of combatting the corona virus pandemic (COVID-19 disease resp.)[1]

The European Association of Judges expresses concern at this drastic measure and stresses the importance of compliance with the international and European standards of judicial independence which are laid down in various of international statements (guaranteeing the financial independence of judges), such as

- **Recommendation CM/Rec(2010)12** of the Committee of Ministers of the Council of Europe holds: The principal rules of the system of remuneration for professional judges should be laid down by law " (para 53). Moreover "Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions …" (para 54).
- **Paragraph 35 of the Opinion No 18 (2015) of the Consultative Council** of European Judges (CCJE): "The full recognition of the basic safeguards of judicial independence, such as ... sufficient remuneration... is a prerequisite for any satisfactory discussions between the three powers of the state." The CCJE points out that: „remuneration of judges must fall under the responsibility of the legislature" (para 51).

[1] It is also not immediately obvious why a few days later Government of N.Macedonia amended the decree of salaries' reduction of holders of public offices by ambassadors and consuls general, but reduced their salaries only by 20 % , and not by 80% like it was decreed for judges salaries.

- **Principle 6.1** of the **European Charter on the Status of Judges**: „Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.“
- Article 13 of the **Universal Charter of the Judge** adopted by the International Association of Judges: „The judges must receive sufficient remuneration to secure true economic independence. “
- Paragraph 8 of the **Judges Charter in Europe**: „Judicial salaries must be adequate to ensure that the judge has true economic independence and must not be cut at any stage of a judge's service “.

The European Association of Judges is gravely concerned with the non-compliance of the April 07th 2020 Decree No 44-2867/1 with above mentioned principles resulting in the undermining of the role of judges and infringing on the principle of separation of powers. A credible separation of powers may only be obtained by the provision of a proper remuneration. Minimum salary is not commensurate with the profession of a judge and with the responsibilities of his or her duty.

Article 60 (2) of the Law on Courts of North Macedonia says: «The salary of the judge during the exercise of the judicial office cannot be decreased, except in the cases determined by law.“ The European Association of Judges deems it crucial to uphold the rule of law and

its fundamental principles also in times of crisis. A global pandemic cannot be an excuse to deviate from generally accepted principles of separations of powers and integrity of judicial power.

The European Association of judges calls the Government of North Macedonia to guarantee judges' salaries as they are fixed in the law, i.e. as on the pre-crisis level.

With kind regards

EAJ

The President

Appendix IV

Mrs Ursula von der Leyen,

President of the Commission of the European Union,

Dear Madam President,

As the Commission is aware, the European Association of Judges (EAJ) – an association of judges' associations in 44 European countries, including all the Member States of the European Union – is deeply concerned about the continuing and determined efforts of the government of the Republic of Poland to destroy the independence of the judiciary in Poland and to subordinate it totally to its executive power. In recent times the EAJ has received many representations from judges from across Europe voicing their fears not only for the position of individual judges in Poland but also for the damage being done beyond Poland to the mutual trust in the legal systems of the Member States which is fundamental to the working of the European legal order.

The Polish government's strategy of undermining the rule of law and the independence of the Polish judiciary has involved many steps which I think it unnecessary to rehearse in detail since they are well known to the Commission. The most immediately pressing concern for the EAJ at this particular moment is the Polish government's flagrant disregard of the interim or provisional order made by the Court of Justice of the European Union (Grand Chamber) on 8 April 2020 in Case C-791/19 R European Commission v Republic of Poland and the subsequent failure of the Commission to take steps to secure compliance.

As you are no doubt aware, Madam President, those proceedings concerned the establishment by Poland of a new "Disciplinary Chamber" (*Izba Dyscyplinarna)* as part of the Supreme Court to deal with disciplinary proceedings brought against judges. The establishment of the Disciplinary Chamber was held by the Polish Supreme Court to be unconstitutional; its membership is unlawfully appointed and lacks any semblance of the independence necessary to constitute a legitimate tribunal.

In its order of 8 April 2020, the Court of Justice ordered the Republic of Poland, pending final judgment in the case, immediately to suspend the application of the provisions establishing the jurisdiction of the Disciplinary Chamber[2]. As is made plain in the Order (see paragraphs 44, 47 and 110), the effect of that suspension is that the members of the Disciplinary Chamber have no competence whatever to entertain any application or to take any decision.

Notwithstanding the plain terms of the Order of the Court of Justice, the members of the Disciplinary Chamber have continued to exercise their purported jurisdiction and to receive and decide applications against individual judges. They have been permitted to do so by the Polish government in blatant disobedience to the clear order of the Court of Justice.

The Disciplinary Chamber has thus entertained applications to waive judicial immunity from proceedings in respect of acts performed by a judge in the exercise of the judge's judicial function and to impose further disciplinary sanctions on the judge concerned such as suspending the judge from office and reducing or removing the judge's salary. The particular cases of Judge Igor Tuleya and Beata Morawiek have received publicity which has surely come to the attention of the Commission; but the EAJ is aware of many other instances in which the Disciplinary Chamber continues to exercise its activity.

The personal consequences for these individual judges are of course immediate and severe. But of wider and deeper concern to the judiciary of Poland struggling to maintain their independence, and to the wider European judiciary and citizenry, is the failure of the Commission to take steps to secure compliance by the Polish government with the clear order of the Court of Justice. They naturally look to the Commission as the guardian of the Treaties to react promptly and with vigour when faced with such a flagrant failure by a Member State to obtemper a clear and immediate requirement imposed by the Court of Justice.

Accordingly, Madam President, on behalf of the EAJ and, particularly the Polish judiciary, I ask in the strongest terms that you instruct the relevant departments of the Commission immediately to take all necessary steps to have sanctions and penalties imposed upon the Republic of Poland.

Naturally, if the EAJ can assist in this – or in any other aspect such as the need rapidly to progress proceedings instituted on 29 April 2020 respecting the "muzzle" law[3] - we will be very willing to do so.

Yours sincerely

President of the EAJ

Appendix V

GROUPEMENT DES MAGISTRATS LUXEMBOURGEOIS

Association Européenne des Magistrats a.m.

Luxembourg, le 28 mai 2020

Monsieur José Igreia Matos

Concerne : Révision de la Constitution luxembourgeoise

Chers collègues,
Le Groupement des Magistrats Luxembourgeois (ci-après « GML ») dénonce la proposition actuelle du projet relative à l'instauration d'une nouvelle Constitution telle qu'arrêté par la Commission des Institutions le 14 janvier 2020. Les doléances du GML portent sur deux points, à savoir le défaut de consacrer l'indépendance du Ministère public et le défaut d'ancrer le pouvoir judiciaire dans la Constitution luxembourgeoise. L'article 93 de la proposition de révision portant instauration d'une nouvelle Constitution prévoyait dans une version antérieure que «Le pouvoir judiciaire est exercé par les juridictions, qui comprennent les magistrats du siège et ceux du Ministère

public » et l'article 99, paragraphe 2, de la proposition de révision prévoyait que «Le Ministère public exerce l'action publique et requiert l'application de la loi. Il est indépendant dans l'exercice de ces fonctions ». Dans le cadre de l'instauration d'une nouvelle Constitution, les magistrats luxembourgeois ont espéré que l'indépendance de la justice serait consacrée dans la Constitution du Luxembourg. En effet, l'indépendance des magistrats du siège et du Ministère public était inscrite dans toutes les propositions de texte de révision de la Constitution actuelle depuis la première proposition de révision présentée en l'an 2009 jusqu' au texte de révision constitutionnelle proposé par la Commission des Institutions et de la révision constitutionnelle en date du 6 juin 2018. Le GML s'est félicité de cette réforme de la Constitution qui aurait permis d'entériner dans la plus haute norme nationale le fonctionnement de la justice tel qu il existe en pratique depuis de longues années. La séparation des pouvoirs est de l'essence-même d'un Etat de droit et cette réforme aurait enfin permis de répondre aux critiques répétées adressées au Luxembourg par des organisations internationales. La Commission des Institutions de la Chambre des Députés vient cependant de se mettre d'accord de ne pas retenir dans la Constitution révisée l'article 99, paragraphe 2, ni l'article 93 de cette même proposition. Cette décision a pour conséquence que la Constitution luxembourgeoise ne respecte plus sur ce point les standards des Constitutions de la France et de la Belgique, qui sont les pays dont le statut du Ministère public a été repris par notre droit. En France, l'article 64 de la Constitution consacre l'indépendance des magistrats du Ministère public^ En Belgique, l'article 151 de la Constitution, consacre cette même indépendance. Cette décision aura encore pour conséquence que le Luxembourg ne respectera pas les standards définis par la Commission européenne pour la démocratie par le droit (Commission de Venise) qui, sans nécessairement imposer une totale indépendance du Ministère public, exige toutefois à titre de critère d'un Etat de droit que le Ministère public doit se faire garantir une autonomie suffisante pour le protéger contre toute influence politique indue^, qui risque notamment de se manifester par des instructions dans les affaires individuelles^. Dans son récent Avis sur la proposition de révision de la Constitution luxembourgeoise de 2019, la Commission de Venise a pris acte de l'indépendance du Ministère public qui avait été inscrite dans la proposition de révision de la Constitution pour conclure que le texte qui lui avait été soumis est conforme aux valeurs fondamentales du Conseil de l'Europe"*. Cette décision a également pour conséquence que le Luxembourg ne respecte plus ses obligations internationales en matière de prévention de corruption. Le Groupe d'Etats contre la corruption (GRECO), soucieux notamment d'éviter les risques de considérations indues dans les dossiers individuels, avait retenu en 2013 que la consécration de l'indépendance du Ministère public dans la Constitution était un développement essentiel allant dans le bon sens qui devait être soutenu^. Il avait dès lors recommandé de mener ce projet à terme^. Evaluant le suivi de sa recommandation, le GRECO avait considéré en 2019 qu'il était «particulièrement positif de voir qu'il est prévu que le Ministère public n'exerce plus ses pouvoirs sous l'autorité du Ministre de la Justice [et que ce dernier] ne ' Conseil constitutionnel français, 8décembre 2017, Union syndicale des magistrats, décision n° 2017-680 QPC, point 9 ; Cour de justice de l'Union européenne, 12décembre 2019.affairesjointes C-566/19 PPU et C-625/19 PPU, J.R. et Y.C, ECLI:EU:C:2019:1077, point 54. 2Commission de Venise, Liste des critères de l'Etat de droit. Etude n° 711/2013, CDL-AD(2016)007, publié le 18 mars 2016, n° 91, page 23. ' Commission de Venise, Rapport sur les normes européennes relatives à l'indépendance du système judiciaire - Partie 11 : Le Ministère public. Etude n° 494/2008, CDL-AD(2010)040, publié le3janvier 2011. voir notamment les points 26, 30, 42 et 85. ^Commission de Venise, Luxembourg - Avis sur la proposition de révision de la Constitution, Avis n° 934/2018, CDL-AD(2019)003, publié le 18mars 2019, points 102 et 127. ' GRECO, Quatrième cycle d'évaluation. Prévention de la corruption des parlementaires, des juges et des procureurs. Rapport d'évaluation Luxembourg, Greco Eval IV Rep(2012)9F, publié le 1erjuillet 2013, n° 147, page 48. ^ Idem, loc.cit. et Recommandation xiii. pourrait pas ordonner des poursuites [...] ». Eu égard à cette réforme, il avait conclu que sa recommandation avait été partiellement mise en œuvre. L'abandon pur et simple de la réforme rend cette conclusion obsolète. Cette modification de texte rend encore incohérent le projet de loi sur le nouveau Conseil national de la Justice. En effet, d'après l'exposé des motifs du projet de loi n°7323, Le Conseil suprême de la justice aura une double mission. Il sera le garant tant de l'indépendance des juges dans l'exercice des fonctions juridictionnelles que de l'indépendance du ministère public dans l'exercice de l'action publique et la réquisition de l'application de la loi. Il veillera au bon fonctionnement de la justice ». Or, le projet de loi prévoit que ce Conseil national de la justice sera composé de 6 magistrats du siège et du parquet et de 3 membres de la société civile. Cette composition basée sur une majorité de magistrats indépendants a été unanimement approuvée dans tous les avis sur le projet de loi. Si toutefois l'indépendance opérationnelle des magistrats du parquet était simplement rayée des propositions de texte dans le cadre de la réforme constitutionnelle, tout l'équilibre de ce projet de loi s'en trouverait menacé. Etant donné que le Conseil national de la Justice doit être le garant de l'indépendance de tous les magistrats, il aura aussi l'obligation de veiller au bon fonctionnement de la justice. A cet effet, il sera doté des compétences et pouvoirs nécessaires. Il n'existe aucune raison de vouloir mettre une partie de la magistrature sous le contrôle additionnel de l'exécutif, lequel ne sera soumis à aucune limitation. La Constitution ne contiendra ainsi aucune garantie contre d'éventuels abus. Le revirement abrupt de la Commission des Institutions n'a jusqu'à présent pas été motivé. Il est donc difficile d'en saisir les raisons et d'en mesurer la portée. Mettant soudainement fin au consensus qui avait supporté la solution contraire, qui se limitait en fait à consacrer une pratique séculaire, il pourrait être compris comme un blanc-seing accordé par le Pouvoir constituant au Pouvoir exécutif d'intervenir sans retenue dans l'exercice des fonctions du Ministère public, y compris dans le traitement des dossiers individuels. Quelle que soit l'intention

ayant guidé les auteurs de ce revirement, le refus par le Pouvoir constituant de définir la moindre limite à l'emprise possible du Pouvoir exécutif sur le Ministère public donne de ce point de vue carte blanche à tout législateur futur. L'actualité internationale récente fournit de nombreux exemples des abus possibles qu'une intervention sans limite du Pouvoir exécutif sur le Ministère public et par ce biais sur le Pouvoir judiciaire dans son ensemble est susceptible d'engendrer. La révision de la Constitution aurait été l'occasion de tracer de telles limites. L'abandon pur et simple de celles définies par la proposition de révision de la Constitution, sans même envisager leur remplacement par des limites alternatives, ouvre la porte à tous les abus. A se référer aux déclarations de l'un des Rapporteurs actuels de la proposition de révision, membre d'un parti politique de l'opposition relatées dans la Presse, l'intention ayant guidé la Commission des Institutions dans sa récente décision n'aurait pas été de permettre au Pouvoir exécutif d'intervenir dans les poursuites pénales individuelles traitées par le ' GRECO, Quatrième cycle d'évaluation, Prévention de la corruption des parlementaires, des juges et des procureurs. Rapport de conformité intérimaire Luxembourg, GrecoRC4(2019)4, publié le 26mars 2019, point 53,page 10. ®Idem, point 54.Ministère public, mais de sauvegarder la possibilité pour le Ministre de la Justice de donner en cas de besoin des directives d'ordre général au Ministère public^. Il est à remarquer dans cet ordre d'idée que la révision de la Constitution ne peut se réaliser qu'avec l'accord des 2/3 des députés. La présente est transmise à l'Association Européenne des Magistrats aux fins d'assister le GML pour voir rétablir l'article 93 et la deuxième phrase de l'article 99 du projet de révision constitutionnelle

Georges Everlin

Appendix VI

OPINION of the EUROPEAN ASSOCIATION of JUDGES

The issue

The European Association of Judges has been asked by one of its members, the Judges Association of Serbia – "JAS" - (Drustvo sudija Srbije), by letter of 22 April 2021 for advice on a question which has recently arisen in Serbia.

Under the constitution of Serbia, the High Judicial Council - "HJC"- is an independent and autonomous body whose functions include guaranteeing the independence and autonomy of the courts and judges. The HJC is composed of 11 members, three of whom are members by virtue of office, namely the President of the Supreme Court of Cassation, the Minister of Justice and the Chair of the competent Committee of the National Assembly. The other eight members are appointed by the National Assembly on proposals from authorised nominators as follows – (a) six members are elected by the judges with permanent tenure of office and then nominated by the HJC; (b) one member is nominated by the Bar; and (c) one member, an academic, is nominated by the deans of the law faculties of universities in Serbia.

In the course of a recent procedure for selecting members of the HJC from the rank of judges, the president of JAS - Judge Snežana Bjelogrlić -and two other members of JAS were duly elected on 7 December 2020. Underlining the fact that there were no objections or complaints in the election process, both in terms of the election procedure itself, and in terms of voting results, the HJC forwarded the names of all the elected judges to the National Assembly with a motion to appoint these judges as members of the HJC. On 23 December 2020 the National Assembly appointed all the nominated judges. The new appointed members took office on 6 April 2021.

Within the HJC the question thereafter arose whether holding office as an elected member of the HJC was compatible with membership of a professional association. A member of the HJC who had been newly elected from the rank of judges resigned from the JAS and in writing called upon other HJC members who were also members of JAS or another judicial association not only to resign from holding any office in the association but also to resign their membership of the association. This has given rise to a debate in the media on the alleged incompatibility of membership of the HJC with membership of a professional association of judges.

Discussion

As requested by the JAS, the European Association of Judges –"EAJ"- has given consideration to the question whether being a member of a professional association of judges may be incompatible with membership of a judicial council such as the HJC.

On examining existing European standards and the practice followed in the other European countries, the EAJ could not discern any possible reasons for which membership of an association of judges, or holding an office in such an association of judges, might be seen as incompatible with being a member of a council for the judiciary. Nor has the EAJ been able to discover any rule or regulation in force in any other European jurisdiction which prevents a member or an office holder of an association of judges from holding office as a member of a council for the judiciary. If anything, the contrary is the case.

Rules of incompatibility are laid down in order to avoid conflicts of interest. Where no such conflict may be expected, any rule which requires a member of one body or association to renounce or refrain from membership or holding any function in another body or association amounts to arbitrary treatment or unjustified discrimination.

The main objectives of councils for the judiciary are to protect the independence of judges and the judiciary[i]. These objectives coincide or run in parallel with the objectives of associations of judges.[ii] Accordingly, the EAJ not only considers that exclusion of members of associations of judges or office holders of association of judges from being members of a council for the judiciary is discriminatory but also considers that it is counterproductive in that it negates against a combined effort to attain what are common objectives.

This accords entirely with the views clearly expressed by the CCJE. In its Opinion 10 on Councils for the Judiciary at Service of the Society 1 and in its Opinion 23 on Association of Judges Supporting Judicial Independence, the CCJE underlined the importance of close co-operation between councils for the judiciary and associations of judges.2 In particular, the CCJE explicitly welcomed engagement by associations of judges in proposing and recommending candidates for membership of the council for the judiciary.[iii]3

European standards thus clearly foresee that members, including officer holders, of an association of judges may also be member of councils for the judiciary.

Moreover, examination of how councils for the judiciary in other European countries are actually composed shows that there is no prohibition on a person being a member or office holder of an association of judges while also being a member of the council for the judiciary. Many councils for the judiciary have members who are also members of an association of judges. This is the case in Azerbaijan, Bulgaria, Croatia. France, Hungary, Italy, North Macedonia, Norway, Romania, Slovakia, Slovenia and Spain. Further, in some councils for the judiciary – for example France, Hungary and Slovenia – the members also include those holding office in their respective professional association of judges.

In short, a study of practice in other European countries shows that such practice contradicts the idea that members or office holders of an association of judges should on that account be ineligible for holding a position as a member of the council for the judiciary.

Conclusion

The European Association of Judges therefore concludes:

There is no good reason to exclude members or office holders of associations of judges from holding office as a member of a council for the judiciary. Such a prohibition would be discriminatory. It would also prevent associations of judges, with their rich practical experience, from contributing to the common goal of both associations and councils of fostering the independence of the judiciary and of judges and the rule of law.

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[1] CCJE Opinion No.10 (2007) on the Councils for the Judiciary at the service of society para 8 "The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges." And CM Recommendation (2010) 12 para 26. "Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system."

[2] CCJE Opinion No. 23 (2020) on the Role of Associations of Judges in Supporting Judicial Independence paras 16-18, "16. Judges are basic cornerstones within States built on democracy, the rule of law and human rights. It is a

logical consequence of this role that the above-mentioned European standard-setting documents envisage, and the statutes of many associations of judges express as central goals, two overriding objectives: 1) establishing and defending the independence of the judiciary; 2) fostering and improving the rule of law. Both objectives foster the effective enjoyment of the fundamental right to a fair trial by an independent and impartial tribunal set forth in Article 6 of the ECHR."

[3] CCJE Opinion No 10 para 28 "28. Although the roles and tasks of professional associations of judges and of the Council for the Judiciary differ, it is independence of the judiciary that underpins the interests of both. Sometimes professional organisations are in the best position to contribute to discussions about judicial policy…." and CCJE Opinion No 23 paras 25 – 28.

Appendix VII

"To the Minister of Justice of Greece, Mr. Konstantinos Tsiaras

Participation of Associations of Judges in Legislation concerning their Profession

Excellency,

I am writing to you in my capacity as President of the European Association of Judges ("EAJ"), which is an association of the judges' associations in 44 European countries and which has as one of its principal goals the maintenance of judicial independence and the rule of law.

Our association has been made aware that the Greek government, represented in this case by yourself as Minister of Justice, intends to proceed with legislation concerning the official status of judges in prosecutors in Greece. More specifically, the proposed legislation would include issues related to the promotion, assessment and disciplinary control of judges and prosecutors.

Further, the EAJ has also been advised that your aim is to proceed with that legislation rapidly without giving the associations of judges and prosecutors in Greece any opportunity to present their views formally within the legislative process, such as by establishing a legislative drafting committee.

The EAJ is deeply concerned about these intentions. Any legislative process which concerns the professional status of judges and prosecutors without involving their professional associations would constitute a breach of international values which are recognized as a common European standard. For example, we would refer you to some of the most basic of those international standards-:

CCJE Opinion No. 23 (6 November 2020), paragraph 41:

The CCJE endorses the participation of associations of judges in the legislative procedure in the case of draft laws regarding the justice field which are put forward by the executive power. When reform commissions or similar strategic project groups are established, representatives of associations of judges nominated by their association should be involved. More generally, the opinion of associations of judges should be requested and considered by the executive power at all levels in respect of judicial reforms and projects including budgetary issues and the allocation of resources, working conditions and all aspects of the status of judges.

OSCE / Venice Commission / Council of Europe, Guidelines on Freedom of Association (2015), paragraphs 183 and 184:

183. In a participatory democracy with an open and transparent law making process, associations should be able to participate in the development of law and policy at all levels, whether local, national, regional or international.

184. This participation should be facilitated by the establishment of mechanisms that enable associations to engage in dialogue with, and to be consulted by, public authorities at various levels of government.

The CCJE refers to these standards in its Opinion No. 23, paragraph 48.

What is more, we should like to draw your attention to the following statements from the 2020 Rule of Law Report of the European Commission:

Improving the inclusiveness and quality of the legislative process is important for structural reforms (p. 22).

Excessive use of accelerated and emergency legislation can give rise to concerns over the rule of law (ibid.).

The adoption of legislation based on initiatives introduced directly by members of Parliament, without going through the normal preparatory processes and consultation of stakeholders, is also a risk from a rule of law perspective (p. 22-23).

The Rule of Law is one of the common standards on which the European Union is founded (Art. 2 TEU). Therefore, if legal reforms touch upon the core issues of the professional status of judges and prosecutors – such as promotion, evaluation and disciplinary control –, we consider it to be the legal duty of any member state of the European Union formally to involve professional associations of judges and prosecutors in the legislative process. Failure to comply with these basic standards within a legislative process may thus be regarded a breach of the principle of the Rule of Law. This is all the more so as changes in the legal norms on the promotion and evaluation of judges, and even more their disciplinary control, may be a threat to judicial independence.

On behalf of the EAJ, I therefore call upon the Government of the Hellenic Republic to ensure effectively and immediately that the associations of judges and prosecutors in Greece are involved without exception in any legislative process that concerns the judiciary in Greece, especially the professional status of judges and prosecutors.

Yours sincerely,
José Manuel Igreja Matosi
President of the European Association of Judges