

"Fair Trial and Judicial Independence - Can one live without the other?"

It represents for me a great honour to be present in Athens for the Congress of the Greek Judges Association.

In the troubled times we are living, nothing would be more crucial to redefine our essential priorities, our definitive strategies, than to listen and learn from our civilizational fathers, the Greek people, in the city that embodies the cradle of Democracy.

The modern concept of Rule of Law began with Aristotle more than two thousand and three hundred years ago and his remarkable lessons remain powerful, opposing the Rule of Law to the rule of men, the last based on arbitrariness and on the sheer supremacy of the strongest.

As president of the European Association of Judges for five years and now, since September 11, as president of the International Association of Judges, allow me to testify about the strong commitment of the Greek Association towards our activities.

You, Greek Judges, have been always present on the frontline to uphold judicial independence in Europe.

Your continuous work in defence of Rule of Law and Democracy - and there is no better place to praise democracy than here, in this mythical soil - your commitment to help us on an international level is immensely valuable; IAJ is grateful to all of you, Greek colleagues.

A particular word must be shown to your representatives in IAJ/EAJ and to the President of Greek Association, always active, always committed, always cooperative.

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

My main argument on the present speech will be an answer to the question that originates the title of this Conference.

"Fair Trial and Judicial Independence - can one live without the other?"

The answer is, in my opinion, absolutely negative.

No, it cannot exist a fair trial, if the courts are not independent!

Going further: 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 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 all our fellow citizens.

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All of you are, for sure, conscious 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 80 countries. Governments have responded 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 Yarsav, the Turkish member of IAJ/EAJ. 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.

Since the ground-breaking “Portuguese judges” ruling, ECJ developed a case law that details on how the independence of national courts (which may apply EU law) should be safeguarded and how decisive is to guarantee a “fair trial” to our fellow citizens.

Therefore, today, judicial independence is not a vague concept, a general principle widely open to any interpretation.

The rulings of the European Court of Justice, but also a stable jurisprudence of the European Court of Human Rights, have densified this crucial concept. Mostly because of

Poland, the European Court of Justice is behind a genuine enrichment of European commitment towards the rule of law, a long-established value and basic principle of EU law stated on article 2° of the Treaty.

Therefore, to comply with the fundamental requisite of judicial independence implies practical - I would dare to say, detailed - consequences that profoundly mark judicial careers - appointment, promotion, transfer, security of tenure, disciplinary procedures - but also the structure and the activities of Judicial Councils and even the management of courts performed by judges/court presidents.

Allow me to present what could be seen as a minor issue in the management of courts unimportant for such a structural topic as judicial independence: transfer of judges. Even in such matter, in a case that affected an individual Polish judge, the ECJ took a clear stand, a few weeks ago (October 6) stating that the requirement of judicial independence means that the rules applicable to transfer without the consent of judges, like the rules governing disciplinary matters, must have the necessary guarantees to prevent any risk of that independence being jeopardised by direct or indirect external interventions.

In particular, the European Court of Human Rights has been playing a significant role for years, 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.

The same European Court of Human Rights stepped in issuing a ruling related to the unlawfully composed ‘Constitutional Tribunal’ of Poland: judgment of 7 May 2021, Xero Flor case. It was decided that the bench which heard the case regarding the applicant to ECoHR included an individual unlawfully elected to the Constitutional Tribunal on the back of repeated illegal actions by the Polish President and the then Polish Prime Minister. As a

result, the bench which tried this case was not a tribunal established by law and thus in violation of Article 6 ECHR.

The recent rulings of this fake constitutional court endorsing blunt disobediences to EU law are again clear evidences on how profoundly the ECoHR was on the right direction.

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 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, like Laurent Pech and Dimitry Kochenov 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.

On the other side of the spectrum, in recent weeks, the rulings of the so-called Constitutional Tribunal of Poland (a biased and political institution) along with the confrontational attitude by the national Government was seen by many has a clear indication for a future Poliexit.

Let me be very clear on this regard.

We do not want the “Poliexit” - we absolutely want and need that the brave Polish judges - the vast majority independent and impartial colleagues - remain with us being Poland a full member of European Union.

This is the best option to preserve an independent judiciary shield by the membership of a Union based on Democracy and Rule of Law.

But knowing that judicial independence is an essential prerequisite for a fair trial, European Union authorities - like Europe as a whole - must be determined in defending these essential values.

Speaking about the economic crisis caused by the pandemic, the President of European Commission powerfully appealed to a “massive investment in the form of a Marshall Plan for Europe.” The European judges would like to perceive the same “Marshall Plan” levels of determination to solve economic problems being employed for the crucial topic of Rule of Law.

Rule of Law and Judicial Independence in the terms outlined by EU Treaties are not negotiable or voluntary; they represent the “genetical code” of judges.

Yours Excellencies

Dear Colleagues

Esteemed Friends

It is time to finish.

These are not the times for hesitation or doubt. Quoting a phrase attributed to Dante: “The hottest places in hell are reserved for those who in time of crisis preserve their neutrality.”

IAJ will continue to be on the front-line of this battle to uphold an independent judiciary; make no doubt about it. I am certain that European judges will continue serenely, but firmly, reiterating our concerns like we had done, time and again, in the previous years.

Today it is more clear than ever than a fair trial, impartial courts and, in general, Rule of Law depend on judicial independence.

Because like Aristotle - an eternal reference for those who pursue Justice - taught us: Humans can be the best of species; but if they are separated from law and justice, we can be dealing with the worst of all.