



Notes on the Independence of the Judiciary

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The conditions under which these notes were prepared reflect the little time that could be devoted to their preparation. Circumstances inherent to my position drastically limited my availability to do better. This explains the erratic tone of my considerations, which I have not had time to organise and systematise properly. Added to this, of course, is the fact that I am not a professional judge, which makes it difficult to have a correct perception of the scale of the problem of the independence of judges, not because I am not aware of its decisive importance, but because I do not have the essential field experience.

The same circumstances explain why I have not been able to include a precise indication of sources in the appropriate places in these notes. I have used mainly documents from the European Commission, the Consultative Council of European Judges, Amnesty International and articles published in the *Journal of International and European Law*, to which I have added news from various European media. I ask your indulgence for any inaccuracies or errors resulting from possible cursory readings and hasty conclusions.

Taking article 203 of the Constitution of the Portuguese Republic (“CPR”) as a starting point to approach judicial power, I will begin by stating that “courts are independent and subject only to the law”. Our Fundamental Law is not limited to this proclamation; the main provision guaranteeing the independence of judges is the provision of article 216(1):

“Judges are irremovable and cannot be transferred, suspended, retired or dismissed except in cases laid down by the law”.

Note that this reference to law refers, under the terms of Article 164(m), to the concept of parliament-made law, that is, to laws enacted by the Portuguese Parliament (“*Assembleia da República*”).

This proclamation of the independence of the courts, accompanied by its main guarantee, is far from being an originality of the CPR. Choosing three countries whose legal systems are close to ours, we find very similar constitutional formulations - two prior to our Constitution and one subsequent. Article 117(1) and (2) of the Spanish Constitution of 1978 also emphasises the independence, subjection to the law and irremovability of judges. The same is true of the Bonn Basic Law, which also guarantees in Article 97 the independence, subjection to the law and irremovability of judges. For its part, Articles 101 and 107 of the Constitution of the Italian Republic of 1947 also emphasise judges’ exclusive subjection to the law and their irremovability.

If this sample is representative of the European situation (and legal and constitutional tradition), as I believe it is, we may safely conclude that the independence of the judiciary, which is a fundamental guarantee of the rule of law, covers, as far as judges are concerned,

three main vectors: their independence, their exclusive subjection to the law and their irremovability.

Let us discern these concepts. Independence should be taken to mean the judge's ability to decide freely - that is, based on his or her convictions, knowledge and experience - on all matters within his or her jurisdiction, not forgetting, of course, that the judge may not abstain from judging, which would constitute a denial of justice. The implementation of this freedom requires, on the one hand, that the judge is not subject to any kind of pressure, "suggestions" or threats - in short, interferences - from anyone, notably from the other powers of the State. On the other hand, it requires judges' immunity from criminal or civil proceedings aimed at holding them liable for decisions taken.

In this regard, the common practice of the Polish Supreme Court's Disciplinary Chamber to lift the immunity of judges in order to allow criminal proceedings to be brought against them is a regrettable method of trying to influence their decisions, and therefore worthy of criticism.

Independence is also jeopardised when state officials promote or allow repeated attacks in the media against judges and their decisions. This has been happening in Hungary, and also happened in Portugal not long ago, when constitutional judges were threatened with "legal sanctions" by members of the government and members of parliament at the time and by the press behind the coalition that supported them, for having decided to invalidate decisions taken by the government during the Troika's intervention in Portugal.¹

The independence of judges is also undermined when a legislative amendment in Slovakia introduces the possibility of holding a judge liable for having issued a "legal opinion expressed in a decision unless a criminal offense has been committed thereby" - whatever this means, which is not clear from the English translation. In any case, the articulation of this norm with the one that defines the new crime of "bending the law" - which determines that this "bending of the law" occurs when the judge supposedly "applies the law arbitrarily" - creates a space of imprecision and doubt that one cannot but criticize. A more obtuse and obscure way of eroding the independence of judges could hardly be discovered.

It is further undermined when intrusive information about judges, particularly about their political past, is made public with the aim of discrediting them for having allegedly collaborated with an authoritarian regime, as is the case in Poland.

The independence of judges is once again impaired when a politically appointed body systematically contradicts a representative body of magistrates, as is the case in Hungary, in the context of the conflict between the National Judicial Office, linked to the government, and the National Judicial Council, an independent body, over the selection

¹ The threat of "legal sanctions", which was quoted in the press at the time, was generally understood, including by myself, to refer to disciplinary sanctions. This is understandable, since, within the framework of the national legal system, no matter how great the imagination and legal ignorance of the authors of the threat, other types of legal sanctions would certainly not be at issue: criminal sanctions (there was no criminal conduct in question), administrative sanctions (there was no administrative offence), political sanctions (motion of censure against the Government), sanctions under international law (retaliation, boycott of imports, freezing of bank deposits, etc.), financial sanctions (compensation responsibility), civil sanctions (compulsory measures).

of court presidents. It should be noted that the President of the National Judicial Office consistently overrules the selection of presidents promoted by the National Judicial Council and appoints interim presidents for the courts, who then remain in office.

The second criteria of independence - subjection to the law - implies that judges must respect and apply the legal norms in force, from different sources, deciding autonomously and in accordance with the principles and rules of interpretation and gap-filling in force in their legal system and with their conscience. We legal professionals know how common it is to diverge in the interpretation of the law. In Portugal, we say that “if you put three lawyers together in a room to discuss the interpretation of a norm, you will obtain four opinions”.

A judge’s autonomy to decide the applicable law is inseparable from his independence - and from his lack of liability. In countries which do not have binding precedents (as is the case in common law countries), however, there are admissible and legitimate instruments which, in the name of legal security and certainty in the application of the law, seek to reduce the divergent interpretations of judges by establishing the “good law”. However, such mechanisms should be contained within the perimeter of the judiciary and, as far as possible, should not offend the autonomy of lower courts (appeals for the standardisation of jurisprudence, in Portugal).

The third criterion - the irremovability of judges - has several facets.

First, it entails that judges may not be transferred from one court to another except in cases expressly laid down by the law. Irremovability is disrespected when the composition of existing judicial panels is changed, as has been or is still being done in Poland, or when judges are unilaterally and compulsorily transferred from one court to another, as in Slovakia.

Second, irremovability implies that judges may not be suspended other than in cases laid down by the law, in particular for disciplinary reasons discovered during a due process procedure, which implies, at the very least, in addition to respect for the adversary procedure and the presumption of innocence, the possibility of appeal.

Third, it implies that judges may not be retired other than for reasons of age or certified health reasons, as established by law, or as a result of disciplinary misconduct for which they are convicted, after completion of a due process procedure.

Lastly, it implies that judges may only be removed from office for disciplinary reasons, also determined according to due process.

It should be noted that this requirement of due process in proceedings likely to affect the work of a judge is not always respected, as seems to be the case in proceedings before the Polish Supreme Court’s Disciplinary Chamber.

In cases where a judge performs his or her duties for a predetermined period of time, the end of the term of office may not be brought forward except in cases laid down by the law. Bringing forward the end of the term of office for reasons of political expediency or convenience seriously jeopardises the judge’s irremovability. This seems to be the situation in Slovakia after the last constitutional amendment.

My understanding of the legal framework of the independence of the judiciary - or the courts, or the judges, depending on one’s preferred wording – leads me to make four other recommendations.

First, judges should not be appointed by, or with any intervention from, the Government, and should advance in their careers on the basis of merit, duly assessed by other judges or by a body on which they are represented.

Second, presidents of higher courts should be chosen by their peers, without any intervention from another sovereign body.

Third, the judiciary should have its own governing bodies.

Lastly, these bodies should not have the majority of their members appointed by the Government or according to political criteria. Regrettably, the latter seems to be occurring in Poland.

By way of an epilogue, I would like to leave a message to judges. To ensure their independence, in my view, judges should maintain a cautious distance from those who influence public opinion and should keep their opinions to themselves. I am not particularly fond of judges appearing on prime-time television answering journalists' questions on court problems. When a judge takes on the role of a commentator in the media or on social media, he is endangering his or her independence. The duty to inform the public should be performed in an institutional manner, by the appropriate governing bodies of the judiciary or by associations representing magistrates, and should not be used to feed gossip or satisfy morbid curiosity².

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² When I wrote these lines, I was not yet aware of the work, which subsequently came into my hands, “Portuguese Judges’ Pledge of Ethics, Principles for Quality and Responsibility”, authored by the Portuguese Judges’ Trade Union Association and published in Lisbon in 2009. It includes, on page 53, a principle which demonstrates that Portuguese judges are aware of this problem. This principle, relating to the duty of confidentiality, states that “judges shall refuse to make statements or comments which imply value judgements with regard to judicial or investigative proceedings, including on matters which it is reasonable to foresee may be the subject of proceedings”.