

## **CONTRIBUTION TO THE “REPORT ON JUDICIAL INDEPENDENCE AND IMPARTIALITY IN THE COUNCIL OF EUROPE MEMBER STATES”**

*MEDEL – Magistrats Européens pour la Démocratie et les Libertés*, in its quality of observer of the CCJE and following the request sent on April 15<sup>th</sup>, hereby presents its contribution to the “*Report on Judicial Independence and Impartiality in the Council of Europe Member States*” after 2017, to be published by the Bureau of the CCJE.

*MEDEL – Magistrats Européens pour la Démocratie et les Libertés* is an European NGO that currently gathers 24 associations of Judges and Prosecutors, coming from 16 European countries.

In this contribution we will not cover all the aspects of concern in all the countries, but only those who have been brought to our attention by our member associations as the most worrying ones.

Seen the specific request made by the Bureau of the CCJE, we will be as synthetic as possible. Should the CCJE need any clarification, we are fully available to give any further contribution.

### **A.**

#### **Situation in Turkey**

A special reference must be made to the situation in Turkey, which has suffered such a strong and quick degradation that cannot be addressed in the specific topics sent by the Bureau of the CCJE.

The situation in Turkey is well known to the Council of Europe and to the CCJE, who in the recent past have adopted opinions and attitudes of clear rejection of the unprecedented attack against the independence of the Judiciary that has been going on in that member State since the attempted *Coup d’État* of July 15<sup>th</sup>, 2016. In the timeframe of the report to be prepared (since 2017), the situation has reached a totally unacceptable point.

Until now, *circa* 4500 Judges and Prosecutors were either dismissed or suspended, without any procedural or defence rights whatsoever. Most of them were arrested based on charges supported by no clear evidences. New magistrates have been appointed, most of them connected to the ruling party. The institutions of the Judiciary have been put under control of the Executive, as the *European Network of Councils for the Judiciary* has clearly stated in its December 8<sup>th</sup>, 2016 decision of suspending the Turkish High Judicial Council (HSYK): “*the actions and decisions of the HSYK, and therefore the HSYK as an institution cannot be seen to be in compliance with European Standards for Councils for the Judiciary. Therefore, the HSYK does not currently comply with the ENCJ Statutes and is no longer an institution which is independent of the executive and legislature ensuring the final responsibility for the support of the judiciary in the independent delivery of justice.*”

In its March 2018 “*Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East - January – December 2017*” ([https://www.ohchr.org/Documents/Countries/TR/2018-03-19\\_Second\\_OHCHR\\_Turkey\\_Report.pdf](https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf)), the *Office of the United Nations High Commissioner for Human Rights* has clearly stated, referring to the Council of Judges and Prosecutors, that “*because of the Council’s key role of overseeing the*

*appointment, promotion and dismissal of judges and public prosecutors, the President's control over it effectively extends to the whole judiciary branch. The United Nations Human Rights Committee has noted that a situation where the executive is able to control or direct the judiciary is incompatible with the notion of an independent tribunal".*

On January 18<sup>th</sup>, 2019, Murat Arslan, the President of YARSAV (the Turkish Judges and Prosecutors association member of MEDEL), unlawfully accused and persecuted by the Turkish authorities and arrested since October 19<sup>th</sup>, 2016), was sentenced to 10 years of imprisonment. The whole procedure before the Turkish courts was not transparent and didn't meet the criteria of a due process of law. Monthly reviews of pre-trial detention were made only on paper, and the detention was automatically extended without any Court hearing, in accordance with emergency legislation. Files had been classified, and lawyers didn't have access to them before the trial. Murat Arslan has been punished by the prison authorities, with no visiting rights for a month, for having written a letter to his wife criticising the situation. The judge presiding to the hearing has changed four times and (with the exception of the first change) no explanation of the motives for those changes has been given. Requests from the defence to hear all the witnesses again (so that the same judge would hear them all) were rejected by the court. During the hearings, a witness has been heard by a different court, without knowledge or presence from Murat Arslan's defence. More, the identity of that witness has not been disclosed to the defence and a request to hear this witness again was rejected. A lot of witnesses testified in favour of Murat. Some witnesses who had previously charged him did not confirm the charges before the court – they said that they had not been able to read their deposition when they were interrogated in prison or that they were in a stressful situation. Some witnesses charged Murat in the hearings of the court but were not able to give details. After each hearing, the defence asked to release Murat, but the court always rejected it, although nothing concrete was proved, and many witnesses did not confirm what they said before. During the hearing, new charges based on facts never before mentioned were brought against Murat Arslan. A new indictment has been brought against him because of the letter he wrote to his wife.

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In October 2017, the Parliamentary Assembly of the Council of Europe awarded Murat Arslan the Vaclav Havel Prize for Human Rights.

**THE SITUATION IN TURKEY HAS REACHED A POINT WHERE IT CAN NO LONGER BE SAID THAT THERE IS AN INDEPENDENT JUDICIARY, AND THEREFORE, TURKEY IS IN CONSTANT AND SERIOUS BREACH OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.**

**MEDEL URGES THE CCJE TO CLEARLY AND EXPRESSLY STATE IT IN ITS REPORT.**

## **B.**

### **Situation in Poland**

Also the situation in Poland must be addressed in a more generic way, seen the broad and intense attack suffered by the Judiciary in that country.

There are many worrying points about the Polish judiciary, which the CCJE is aware of. Just to sum up, we list the most striking events and threats weakening the judicial independence in Poland:

1. The factual elimination of the Constitutional Court;

2. The total control over prosecutors by the government (the Minister of Justice is also the Prosecutor General, with absolute power in any proceeding);
3. The “reforms” of the National Judicial Council, causing dependence of this institution to the executive (the subject of a preliminary ruling procedure brought in front of the ECJ by the European Commission);
4. The “reforms” of the Supreme Court, lowering the retirement age (the subject of the ongoing infringement procedure - [http://europa.eu/rapid/press-release\\_IP-18-4341\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4341_en.htm)), constructing two new chambers: The Public Affairs Chamber and The Disciplinary Chamber (with judges appointed by the new politically dependent Judicial Council);
5. The new law on the disciplinary procedure (the subject of another ongoing infringement procedure - [http://europa.eu/rapid/press-release\\_IP-19-1957\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1957_en.htm));

The "reforms" of the Polish judicial system were the subject of many statements by MEDEL, to which we hereby refer:

- <https://www.medelnet.eu/index.php/activities/an-independent-judiciary/507-medel-statement-on-the-new-infringement-procedure-against-poland>
- <https://www.medelnet.eu/index.php/news/europe/496-medel-letter-to-frans-timmermans-about-the-disciplinar-proceedings-against-judges-in-poland>
- <https://www.medelnet.eu/index.php/news/europe/473-medel-sofia-statement>
- <https://www.medelnet.eu/index.php/news/europe/467-medel-statement-on-the-eu-commission-s-decision-of-bringing-poland-to-the-ecj>
- <https://www.medelnet.eu/index.php/news/europe/460-medel-statement-on-the-suspension-of-the-polish-judiciary-council-by-the-encj>
- <https://www.medelnet.eu/index.php/news/europe/457-solidarity-with-the-judges-of-the-polish-supreme-court>
- <https://www.medelnet.eu/index.php/news/europe/408-krakow-declaration>
- <https://www.medelnet.eu/index.php/news/europe/397-medel-statement-on-the-reform-of-the-supreme-court-in-poland-keep-the-rule-of-law-in-poland>
- <https://www.medelnet.eu/index.php/news/europe/383-medel-communique-on-the-situation-of-the-constitutional-court-in-poland>
- <https://www.medelnet.eu/index.php/news/europe/367-medel-declaration-on-reforms-of-the-judiciary-in-poland>

**MEDEL URGES THE CCJE TO CLEARLY AND EXPRESSLY STATE IT IN ITS REPORT:**

- **THAT THE POLISH JUDICIARY IS CURRENTLY UNDER A MAJOR THREAT OF BEING PUT UNDER TOTAL CONTROL OF THE EXECUTIVE, THUS LEADING TO A TOTAL LOSS OF INDEPENDENCE;**
- **THAT THE DISCIPLINARY PROCEDURES CURRENTLY PENDING AGAINST JUDGES ARE BEING USED AS A WAY OF THREATENING AND PUNISHING THOSE WHO RESIST AND FIGHT FOR THE INDEPENDENCE OF THE JUDICIARY IN POLAND.**

C.

Specific topics

***1. Functional independence: appointment and security of tenure of judges.***

***Bulgaria***

The president of the Bulgarian Supreme Court of Cassation in public speeches raised serious concerns about the independence of Judges and Rule of Law in Bulgaria. As a result, he was declared an “enemy of the status quo” and has been suffering recurrent pressure from the Supreme Judicial Council / interrogations to justify his allegations / an investigation by the Anticorruption Commission, insults and slander in media. These actions seem intended to lead the way for his pre-term removal from office. This campaign against the President of the Supreme Court of Cassation is conducted with a clear awareness of the preventive and intimidating effect on other judges.

The level of threats Mr. Lozan Panov has been subjected to is very serious and he addressed MEDEL the letter you can find in attachment, explaining the situation in detail, document to which we ask your full attention.

***France***

While the conditions for the appointment of French judges offer real guarantees (entrance examination to the National School of the Judiciary, need for the assent of the Higher Council of the Judiciary / CSM for any appointment to a judicial post, direct appointment by the CSM of heads of courts and magistrates to the Court of Cassation), their functional independence remains weakened by the lack of recognition of the principle of the natural judge in French law.

Thus, apart from the specialized functions (investigating judge, juvenile judge, judge for the enforcement of sentences, judge of freedoms and judge for protection litigation), the assignment of litigation and even files to individual judges remains a discretionary competence of the head of court. More seriously, he can just as arbitrarily dismiss a judge, specialized or not, from a particular case.

This trend was aggravated by the law of 21 March 2019, which abolished district courts in order to allow the head of court to assign other tasks to the judges who sat there and thus constitute "centres of competence" by choosing at his discretion the persons to be assigned to them.

***Romania***

MEDEL sees with much concern the revision of the three basic laws of the Judiciary (the Statutes of Judges and Prosecutors, the organisation of Courts and of the Prosecution Service and the organisation of the Superior Council of Magistracy) – that came into force between July and October 2018 – and the proposed changes of the criminal and criminal procedure. As Vice-President Frans Timmermans said in the European Parliament on October 3<sup>rd</sup>, 2018, these changes put at serious risk the independence and effectiveness of the Judiciary, especially in the fight against corruption.

The changes undertaken since 2017 that affect the most the Rule of Law were clearly described in the March 2018 report of GRECO and in the Venice Commission's opinions of October 20<sup>th</sup>, 2018 (927/2018 and 930/2018), and were reaffirmed in the European Commission's report of the Cooperation and Verification Mechanism (CVM), issued on November 13<sup>th</sup>, 2018: the rules of appointment and revocation of high ranking prosecutors and the increase of powers of the Minister of Justice (risks already confirmed in last year's dismissal of the Prosecutor charged with investigating corruption); the rules limiting freedom of speech of magistrates, especially towards the other powers of the State; the rules concerning the possibility of dismissal of elected members of the Superior Council of Magistracy.

The Romanian government insists in its intention of changing the rules of the Judiciary, doing it through emergency ordinances. In our view, the repeated changes of the statute and of the law of judicial organization are likely to lead to weakening the judge's independence and affect its statute.

### ***Serbia***

The ongoing process of reform of the Constitution of the Republic of Serbia is raising serious concerns in what regards the independence of the Judiciary.

MEDEL accompanies the CCJE in its Opinion of December 21<sup>st</sup>, 2018, stressing that the following points of the intended changes of the Constitution are not in line with the safeguard of functional independence:

- The provision providing that a judge shall rule *taking into account the case law* is problematic and should not be included in the Constitution;
- The manner in which the grounds for dismissal of judges are formulated violates the principle of judicial permanency and is potentially very dangerous for judicial independence;
- Political influence over the initial appointment of judges is enabled by prescribing the completion of training at the Judicial Academy as a special condition for the initial selection of judges;
- Non-transferability of judges, as one of the guarantees for their independence is insufficiently defined, as it does not contain the safeguard that a judge cannot be temporary relocated to another court without the judge's consent, nor a provision defining a legal remedy in this case.

## **II. Organizational independence: Councils for the Judiciary and the administration of courts.**

### ***Bulgaria***

The Judges' Chamber of the Supreme Judicial Council consists of 14 members and includes the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court, six members elected directly by the judges, and six members elected by the Parliament. Currently, the judges elected by their peers are only 6 of the 14 members of that body. This structure stands in violation of European standards providing that at least a substantial majority of members of a Council for the Judiciary should be composed of judges chosen by their peers from all levels.

Elections of members of the judges' chamber by the parliament carry a risk of politicization. The process of nominating members of the parliamentary quota is not transparent. There is a strong suspicion that these members during the mandate continue to maintain ties with the parties that nominated them.

The Judges' Chamber of the Supreme Judicial Council in general fails to meet the expectations of judges and society to safeguard the independence of the judiciary and of individual judges. The Judges' Chamber adopted on 23.10.2018 Standards for the independence of the judiciary. This is a positive development, but it is too early to evaluate the impact of this document.

There is no direct dialogue between the Judges' Chamber and ordinary judges (recently the Judges' Chamber refused to listen openly to eight judges from Blagoevgrad district court who wanted to talk before the chamber about significant problems in their court).

The Judges' Chamber often elects court presidents, who have failed to receive the endorsement of the general assemblies of judges in their courts. In fact, it is almost a rule for the chamber to ignore the opinion of judges in a court about their future president. We saw this approach in the elections of the presidents of Sofia City Court and Sofia Court of Appeals.

### ***France***

Since 2008, the CSM has only been composed of a minority of judges when it examines draft appointments. In addition, external members are appointed without any guarantee of independence or competence by the President of the Republic, the President of the National Assembly and the President of the Senate, but after consulting a parliamentary committee which may oppose it by a qualified three-fifth majority.

The administrative management of the courts is in principle entrusted to the heads of courts. However, except in the case of administrative courts, the executive branch retains full control over the budget and the allocation of judges and clerks in the courts. Court presidents are therefore, in reality, very dependent on the Ministry of Justice in the administration of their courts.

### ***Portugal***

An extensive reform on the administration of courts has come into force in 2014, granting extended competences to Court Presidents and to the Superior Council (CSM). Many concerns were since then expressed by judges about the possibility of interference in their independence via managerial decisions.

On May 7<sup>th</sup>, 2019, seven new judges elected by their peers began their functions in the Superior Council of the Magistracy (CSM). Two lists competed. The main theme of the election campaign was the role of the CSM in defending the independence of judges. The winning list (by a large majority) accused the other candidate (the now former head of CSM, then running for re-election) of interfering in the independence of the judges and of making the CSM an authoritarian body in the administration of courts. The result of the election was seen as a protest and rejection of the previous management system.

### ***Serbia***

MEDEL sees with much concern these points of the project of reform of the Serbian Constitution, in what regards this topic:

- The provision on the election of the non-judicial members of the HJC by parliament, i.e. their election by the five-member commission, does not safeguard the independence of those members of the HJC and enables the possibility that they are elected according to the preference and undue influence of any dominant political party or parties;
- The aim of the HJC should be not only to guarantee but also to ensure the independence of courts and judges;
- The HJC should not be composed of an even number of members.

### **III. Impartiality of judges, codes of ethics and professional conduct and disciplinary measures.**

#### ***Bulgaria***

Art. 307 of the Judicial System Act defines any act or omission of a judge, including a breach of the Code of Ethical Behaviour of Bulgarian Magistrates, which damages the prestige of the Judiciary, as a breach of discipline. This provision contradicts the principle, accepted by CCJE, that rules of ethical conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not in itself constitute a disciplinary infringement.

Art. 195a of the Judicial System Act demands that all judges submit to the Inspectorate at the Supreme Judicial Council a declaration on all activities and memberships of organizations, including non-profit legal entities and associations. This requirement to register membership even in associations of judges has a chilling effect deterring the exercise of the right to a professional association. CCJE Bureau, in its Opinion adopted and published on 2 November 2017, encouraged the Bulgarian authorities to initiate a process for repealing that provision. This did not happen. The Opinion of the CCJE Bureau (CCJE-BU(2017)10, on Bulgaria) in this part has been thoroughly ignored by Bulgarian authorities. As for the second part of that opinion, the Bulgarian Constitutional Court (decision of 21.02.2019) suspended the provision calling for automatic removal of judges from their office following a public criminal charge against them (Art. 230 /1).

From 01.01.2018 to 08.04.2019 the Bulgarian Judicial Act had six amendments, which were adopted in haste, without any public and professional discussion. The last amendment (dated 08.04.2019) is a clear example of lobbying legislation. The new rules of Art. 49 and 50 on court inspectors` mandate aim to support the careers of specific persons within the judiciary.

The Supreme Judicial Council decided to abandon the revolutionary load measurement system based on the necessary time and began developing a new system that would be a contradictory return to the old system based on the number of cases. We expect a disturbance in the reporting of the workload of judges in the coming months and years.

### **France**

Since 2010, the CSM has been developing a compendium of the ethical obligations of judges. During the revision of this document in January 2019, the *Syndicat de la Magistrature* was able to point out that this document adopted an overly disciplinary approach to ethics and was not sufficiently a guide to good practice. Moreover, there is a general tendency to abusively extend the duty of reserve of judges in order to prohibit them or, at the very least, deter them from any public expression that is at all critical of the institutional functioning of justice or public policies.

Finally, it should be pointed out that the disciplinary procedure does not sufficiently guarantee the rights of defence of judges, who, during the disciplinary investigation phase, have neither access to the file nor the possibility of being assisted by a lawyer or counsel of their choice.

### **Portugal**

In the year 2018 two, disciplinary proceedings against two judges were initiated, which motivated a lot of controversy and strong criticism of the judges association.

In one case, the judge was punished with a penalty of suspension. The basis of the accusation is the fact that the judge decided to print all documents of all his electronic case files, not complying with the instructions of the Superior Council of the Magistracy, although the law expressly attributes this competence to the judge. The appeal of the decision is still pending and therefore the decision is not yet final.

In another case, following a very strong press and public campaign against one appeal court judge, because of the content of his decision on a domestic violence case (in particular for having quoted the bible and alluding to the revoked legislation which considered many years ago adultery as unlawful), the Superior Council of the Magistracy punished the judge with the penalty of written and registered warning, for having considered that the reasoning violated the duty of correction. The case is also in appeal.

In both cases, the Superior Council of the Magistracy announced in the press that it would begin disciplinary proceedings, identifying the judges, even before giving notice to the judges concerned, notwithstanding the law determining the confidential nature of those proceedings.

### **Romania**

MEDEL sees with much concern the changes to the Law on the Statute of Judges and Prosecutors that have introduced in the law that the action for recovery against a judge having committed a judicial error in bad faith or as a result of gross negligence is no longer optional but mandatory.

Another point of great concern is the power given to the Ministry of Public Finance to start the procedure, thus granting to the Executive competences in disciplinary and/or assessment of professional conduct of judges.

It is also important to notice that Romanian judges still don't have a professional insurance and gross negligence should never be the ground for liability for judicial errors.

#### **IV. The economic basis for smooth functioning of the judicial system.**

##### ***Bulgaria***

The Bulgarian Parliament (Narodno Sobranie) once again adopted the independent budget of Bulgarian judicial system for 2019 accepting the draft proposed by the Ministry of Finance. The draft proposed by the Supreme Judicial Council again was subject to a reduction of financial means (about 13 % reduction) and change of composition.

##### ***France***

As underlined by the Council of Europe's Commission for the Efficiency of Justice in its latest report, the French justice budget remains one of the lowest on the continent.

The government's main response to this institutional precariousness consists, beyond a very slight increase in the budget (essentially allocated to the construction of prisons), in organising the shortage of means by multiplying procedures with reduced guarantees (single judge, decisions taken by ordinance without prior hearing, limitation of ways to appeal) and by generalising the computerisation of the access to the judge and the procedural acts, thus risking of affecting access to justice for a whole part of the population, as the "Défenseur des Droits" has stressed in a recent report (*Dématérialisation et inégalités d'accès aux services publics, rapport du défenseur des droits*, Paris, January 2019).

##### ***Romania***

In Romania for many years there has been a provision in law stating that the budget of the courts should be managed by the High Court of Cassation. This provision never came into force, because it was postponed every year, so the first instance court, the tribunals and the courts of appeal's budget is managed by the Ministry of Justice. This is a factor which can affect the independence of the judges working in these courts.

#### **V. Judges and media: public discussion and criticism of judges.**

##### ***Bulgaria***

High representatives of the executive and legislative powers continue to comment publicly on judges' decisions in a way that undermines the independence of, or public confidence in, the judiciary. This is done through media with increasing aggression, even regarding pending cases. There are cases of persecution of judges in their private lives by journalists and calls for physical assault. Judges and Bulgarian Judges Association who openly speak in favour of judicial independence and criticize deficiencies in the system are the usual targets for such malicious campaigns. In this situation, being an active member of the Bulgarian Judges Association may threaten the perspective of a successful career.

### ***Portugal***

In the year 2018, over a period of months, because of the reasoning of a decision on a domestic violence case, in which expressions were considered inappropriate and misogynist, a judge was brutally attacked by the press, by social networks, by commentators, by politicians and even by colleagues. Criticism overcame all acceptable and legitimate limits, because it addressed the judge personally and not the decision he wrote.

### ***Romania***

In Romania, judges are targeted by politicians and media for their decisions and the SCM doesn't have an effective procedure in order to defend the judges and the judicial system from these attacks. For a judge it's difficult to appear in the media in order to defend his decision and the reaction of the SCM is usually "delayed" by the legal procedures, so it is not effective.

### ***Serbia***

In 2017/18, for the first time in Serbian history, relevant NGO's stood together with professional associations of judges and prosecutors and all legal professions - the judicial institutions (Supreme Court of Cassation, High Judicial Council, State Prosecutorial Council, appellate courts in Belgrade and Kragujevac, and numerous other courts), a good part of Bar, professional association of judges and prosecutors, including the professors of Constitutional Law were of the same opinion – stating that the Constitutional amendments were so bad that they should be rewritten from the beginning.

Standing before that unanimous position, the Ministry of Justice started to try to stop that unity by:

- encouraging the establishment of GONGO's (Government Oriented NGO's), and
- tailor-made attacks to each of the counterparts.

Since then, attacks on public media against the most relevant members of the professional associations of magistrates have been constant, trying to diminish them before the public opinion, sometimes targeting them personally.

***May 10<sup>th</sup>, 2019***