EJTN

THEMIS COMPETITION 2016

Semi-Final D

Judicial Ethics and Professional Conduct

(27-30 June 2016, Omšenie, Slovakia)

DO THE INTERNATIONAL SOURCES OF LAW ON JUDICIAL INDEPENDENCE REALLY MATTER?

Team:
Viviana Di Iorio
Niccolò Ludovici
Giulia Poi

Trainer:
Antonella Guerra

In solidarity to all judges and public prosecutors whose independence is violated or threatened

ABSTRACT

This paper explores the principle of independence of the judiciary. After the analysis of the concept and of the different sources of law, it examines in detail the effective measures, which have been implemented by international institutions and European States for the safeguard of the independence and, at the end, it suggests some other measures. The paper is even focused on de facto measures, because, in our opinion, the international legislation is important but not sufficient without actual and effective measures. The theses sustained in the conclusions are the following: a) judicial independence is not a prerogative or a privilege, but a duty for the single judge; b) it has crucial importance, as testing ground of democracy, as the other side of the coin of the protection of human rights and as a determinant factor for economic and social growth; c) independence may be effectively guaranteed with many different models; d) de facto measures have to be combined with the protection granted by the sources of law.

TABLE OF CONTENTS

1. Introduction

This paper explores the principle of independence of the judiciary, a very complex and contested issue.

"*Who will guard the guards themselves*?" This question was first posed by Plato in his masterpiece "The Republic". If we consider the judicial power as the one who controls the compliance of legality in modern State systems, the next question is, who will control it?

Different models of control over judiciary power have occurred over time. In the past, judicial power has been controlled by the monarch, in some cultures, by the religious institutions, by the Government or by the Parliament, in others.

The principle of judicial independence is an achievement of the modern age, but still a lot of people think that judicial independence is a privilege which has no other value except that of preserving itself. This is a consequence of an increasing lack of accountability of the judiciary, not only in Italy, but also in other European countries.

For this reason we, as trainee judges, think that this topic is very up to date and chose to explore it in order to understand the real meaning of the principle, the width of its protection and the most significant and legislative measures and judicial practices that effectively implement it. Moreover, we wanted to understand if independence is even a duty for judges and, if so, how they should perform this duty.

The paper is organized as follows: it begins, in the first part, with an inquisitive stance analysing the concept, the sources of international, European and domestic (of EU countries) law which govern the protection of independence of judges and the case law of European Court of Human Rights (hereinafter ECHR) and of European Court of justice (hereinafter ECJ). It turns then, in the second part, to the empirical and critical analysis, examining in detail the effective measures, which have been implemented by international institutions and Member States for the safeguard of the independence; it will also suggest some other measures, which in our opinion would be significant in increasing the protection of judicial independence.

Through our work we shall try to remark:

- that judicial independence is not a prerogative or a privilege, but a duty for the single judge;
- the crucial importance of judicial independence, as testing ground of democracy, as the other side of the coin of the protection of human rights and as a factor for economic and social growth;
- independence may be effectively guaranteed with many different models;
- *de facto* measures have to be combined with *de jure* protection.

2. The concept of judicial independence according to the sources of law

Judicial independence is an aspiration rather than an absolute concept. Nevertheless, if we want to understand its true and appropriate limits, we have to start analysing the sources of law.

Among the EU member States, there is normative consensus on judicial independence. It is doubtlessly a shared principle and it has been implemented in different countries.

According to the current opinion, judicial independence has an external and an internal aspect. On the external side, it means that judicial power has to be independent from the executive power and the legislative one; on the internal side, it means ensuring to every single judge the conditions to decide the case (assigned to him by pre-established rules) without external or internal pressure, but led only by law, evidence, science and his conscience.

The principle is affirmed directly or indirectly at the international level, European level and in many national Constitutions and legislations. It is important to underline that all the international sources were written after the Second World War and after the experiences of totalitarianism in Europe, when humanity realized the tragedy of the violent violation of human rights, without any possibility of an effective judicial remedy, due to the subalternity of judges to the regimes.

So, the first step of our essay is the recognition of the main international sources.

2.1 International and supranational sources

a) UN Universal Declaration of Human Rights, proclaimed by the UN Assembly in Paris on 10 December 1948; pursuant to art. 10 "Everyone is entitled in full equality to a fair and public hearing by an *independent* and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." In the clear meaning of this article, judicial independence is functional to guarantee a fair trial and through it to guarantee the protection of the rights of persons.

b) European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR), drafted in 1950 and entered into force on 3 September 1953; in accordance with art. 6: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an *independent* and impartial tribunal established by law...."

This principle[1] is also indirectly governed by article 10 par. 2.

---

1 Article 10 par. 2: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

c) International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976; according with art. 14 par. 1: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, *independent* and impartial tribunal established by law...”

These first three sources are customary rules of international law, binding even countries which may not have ratified or acceded to them.

d) Council of Europe Recommendation n° R (2010) 12 of the Committee of Ministers to Member States of independence efficiency and role of judges.[2] This source is important because of its political value and it deserves a deeper analysis, even though it is a source of soft law. This means that it is not law, strictly speaking, as in the statute of European Council there are not any specific sanctions for governments that do not respect the provisions of the recommendations or do not respond to requests for information of the Committee. Nevertheless, the obligations are not simply politics, as they influence the discretion of the governments and the interpretation of the ECHR itself.

The Preamble to the text makes clear that the Recommendation is to address provisions and guidance, aimed at "promoting relations between the judiciary and among individual judges of different member states in order to encourage the development of a common culture of the jurisdiction". It contains, as general principles, an almost comprehensive discipline from recruitment to retirement of judges performing that function in a state of law.

Article 1 applies to all persons exercising judicial functions, including those dealing with constitutional issue and to lay judges, but it is clear from the context that they only apply to the professional courts.

The first remark that comes to mind when reading the text, on the one hand, is the close link between the independence of the individual judge and the independence of the whole judicial system (art. 4); and on the other hand, is the fact that such independence attributes are placed on a

2 Recommendation CM / Rec (2010) 12 of the Committee of Ministers to member states of the Council of Europe on judges: independence, efficiency and responsibilities, adopted November 17, 2010 on the occasion of the 1098 a meeting of Delegates, it is a document of great importance and represents the culmination of a substantive work that has engaged for over a decade the Council of Europe bodies, including the Consultative Council of European judges (CCJE), the European Commission for the efficiency of Justice (CEPEJ) and the European judicial associations.

It, rather than amend and supplement, intends to overcome the prospect of independence understood in a sense more formal and "defensive", which emerged from the previous recommendation on the subject, no. R (94) 12 on the independence, efficiency and role of judges adopted October 13, 1994, specifying, especially in light of the jurisprudence of the European Court of Human Rights, some of the fundamental principles of fair trial contained in Article . 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

functional level. In fact, they are not an end in and of themselves, as they are designed to ensure the efficiency of justice as an essential element of a state of law.

Pursuant to art. 30 et seq. the effectiveness of courts and judicial systems is a necessary condition for the protection of the rights of every person, for the respect of the requirements of Article 6 of the Convention, for legal certainty and public confidence in the rule of law. The individual judge is responsible for ensuring effective treatment of transactions including the enforcement of judgments; it is up to the authorities responsible for the organization and functioning of the judicial system to create the conditions that allow the judges to carry out their mission and achieve efficiency, with the protection and respect for the independence and impartiality of judges.

e) EU Charter of Fundamental Right, proclaimed in 2000, legally binding in the EU with the entry into force of the Treaty of Lisbon in December 2009; according with art. 47: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an *independent* and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented...." The second paragraph of art. 47 corresponds to Article 6(1) of the ECHR, but it must be reminded that the Charter applies only when the Member States are implementing Union Law (art. 51 EUCFR); so, it does not apply if the matter has no connection with EU law or falls outside material scope of EU law.

2.2. National Constitutions

The majority of the European countries have domestic Constitutions that guarantee the independence of the judiciary, but the literal text, the content and clarity of the relevant constitutional provisions differ greatly.

The most common constitutional provisions are that the judges are independent in the exercise of their duties and subjected only to the Constitution and the law or that the judiciary is a separate power, independent from the executive and legislative powers.

Some Constitutions also contain other provisions such as:

- justice is administered only by magistrates - impartial and independent;

- the organization and jurisdiction of judges are determined by law;

- the statutory law on the structure and control of the judiciary and on the legal status and rewarding of judges require a qualified majority vote in parliament;

- the magistrate's post is permanent and / or the magistrates may not be transferred, removed or arbitrarily dismissed,

- the judges are entitled to decent working conditions and / or a certain level of financial security;

- the assignment of judge is incompatible with belonging to the executive or legislative bodies;

- the judges may not be members of political parties or trade unions, and / or may not be engaged in political or public activities incompatible with the principle of independence.

Only few countries in Europe do not have any constitutional provisions guaranteeing the independence of the judiciary. For example:

In Luxembourg no constitutional text protects specifically the independence of the judiciary. A constitutional reform recently drafted will probably fill this void. However, the current Constitution states that judges have an unlimited mandate, that the rules for members of the judiciary are governed by law, and that judges may not become members of the government. Other judicial independence issues are ruled in various Luxembourg statutes.

The situation in the Netherlands is similar. Pursuant to article 117 par. 1 and par. 4 of the Dutch Constitution, judges are appointed for life and their status is set to judge led only by law.

In the UK the current legal basis for the protection of the judiciary is also purely regulatory. The Constitutional Reform Act of 2005 provides that the members of the government and all those who are responsible for areas affecting the judiciary or in any case the administration of justice must safeguard the independence of the judiciary.

Finally, even though in Norway the principle of independence of the judiciary is not expressly contained in the Norwegian Constitution of 1814, there have never been any doubts about its existence and protection; according to the Norwegian Law on the Courts of Justice issued in 1915 a "judge is *independent* in the exercise of his function." In addition, in order to protect the independence of the judicial offices, they are not administered by the Ministry of Justice, but by a separate body called the National Administration of Courts of Justice.

2.3 National legislations of EU Member States

We can also focus on how some European Countries enforce judicial independence at the highest level.

- Italy: judicial independence is guaranteed by Consiglio Superiore della Magistratura, High Council of Judiciary (hereinafter C.S.M.) which is an autonomous body different from legislative and executive powers.

- Germany: judicial independence is considered an important principle; nevertheless, this country does not guarantee it with an autonomous body. The administrative structure of Justice is based on hierarchical principles: the single judge is subjected to the head higher office which is ultimately subjected to the Minister of Justice. For this reason (the lack of an autonomous organism in charge of guaranteeing judicial independence), Germany is not a member of the European Network of Councils for the Judiciary (ENCJ).
- France: Judicial independence is guaranteed by the *Conseil Superieur de la magistrature.* Its structure and functions share most features with the Italian C.S.M.
- Spain: Judicial independence is ensured by *Consejo General del Poder Judicial.* Its structure and its function are very similar to Italian C.S.M.
- England: Judicial independence is not ensured by an autonomous body. The common law systems are very different from the civil law ones. Usually in England judges are designated by the executive power (the *Lord Chancellor*). Nevertheless, England takes part to the ENCJ with the *Judges' Council of England and Wales*. This body is independent from the executive and legislative powers, and its function is to preserve judicial independence. However its powers are limited: it has only advisory powers.

2.4 Italian Constitution

In the Italian constitutional system, the principles of independence and autonomy of judges have great importance. This importance stems from two needs: a conceptual need and an historical one.

As for the conceptual need, as everybody knows, Italy is a civil law country. In these systems the law is created mostly by Parliament, sometimes by government, (even today by smaller local authorities), while the judges have to apply it. This means that the judges only indirectly produce law applying it to specific cases with a technical discretion. This conceptual approach has made it possible to configure the judges as managers of a public role. Hence the belief that they can be selected through a public competition. Hence again the need for judges to be guaranteed independence and autonomy, because in the exercise of their function they must not only be, but also appear to be, impartial. Indeed, impartiality and fairness are taken as features which distinguish the judges from other public bodies which exercise other public functions.

As for the second reason, the historical one, it should be stressed that the current structure of the Italian system took shape after the Second World War, on the basis of the republican Constitution, whose democratic inspiration is in contrast to the previous fascist regime, defined authoritarian. In the past, in fact, there was an abuse, in the management of justice, connected with

three main factors: a) limitation of the right to take legal action; b) external pressures on the judiciary; c) creation of special courts. In re-establishing the State, Italian Constitution sought with particular attention to avoid the repetition of such abuses and deviations.

The most important sources concerning judicial independence are articles 101-111.

Judicial independence is governed on the *external side* by art. 104: "The Judiciary is a branch that is autonomous and independent of all other powers."

Art. 104 governs the Consiglio Superiore della Magistratura, High Council of Judiciary (hereinafter C.S.M.) which is the body engaged to guarantee at the highest level the judiciary independence.

Two thirds of the members are elected by all the ordinary judges belonging to the various categories, and one third are elected by Parliament in joint session from among full university professors of law and lawyers with fifteen years of practice. It is presided over by the President of the Republic.

Judicial independence is also guaranteed on the internal side. Pursuant to art. 101 par. 2 "judges are subjected only to the law" and pursuant to article 107 par. 3 "Judges are distinguished only by their different functions". These last provisions guarantee that inside judiciary order there is no hierarchic roles in the exercise of jurisdiction: this means that when the single judge decides a case nobody can influence him in his decision.

In accordance with art. 107 "Judges are irremovable. They cannot be dismissed or suspended from their service nor assigned to other courts or functions unless following a decision of the High Council of Judiciary, taken either for reasons and with guarantee of defense established by the rules of the judiciary or with their consent".

The concept of independence of magistrates is also implied by the new art. 111 Cost. which is inspired by art. 6 of ECHR and by the concept of "fair trial", that is by the principle that all court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in a third party position.

3. The concept of judicial independence according with the case law of ECHR

After having analysed the international, supranational and domestic sources of law, in order to understand better the concept, we shall now analyse the interpretation by the case law of ECHR.

The special and fundamental role of the judiciary as an independent branch of State power, in accordance with principles of the separation of powers and the rule of law, is strongly recognized within the case law of ECHR. In fact, an independent judiciary, operating within a system that

respects the separation of powers, is an essential element of the rule of law and a necessary condition for the effective protection of human rights.

3.1 General principles in the ECHR case law

ECHR has focused on art. 6 of the Convention and has developed four criteria to determine the independence of a judge: "In order to establish whether a body can be considered "independent" regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence."[3]

In other words, the Court has pointed out the following four pillars.

I) First pillar: the manner of appointment.

Appointment by the executive is not, in itself, impermissible under the Convention and does not, in itself, raise doubts about the independence of a judge concerned. However, it has to be guaranteed by law that judges do not receive any instructions in the subsequent exercise of their duties. In other words, appointees must be free from influence or pressure when carrying out their adjudicatory role.[4]

This was the issue arisen in Campbell and Fell v the United Kingdom in which the Court examined the nature of a tribunal (a 'Board of Visitors') that performed both adjudicatory and supervisory roles. It was involved in an independent oversight of the administration of the prison and it also regulated prison discipline and imposed sanctions for breaches thereof. It had frequent contact with prisoner officials and with inmates, "holding the ring" between the parties concerned. The prisoners' impression that the Board was closely associated with the executive was a factor of great weight, but the existence of such sentiments on the part of inmates was not sufficient to establish a lack of independence. If the Board was dependent upon the executive then the requirements of Article 6 would not be met. To establish a lack of independence in the manner of appointment, it is either necessary to show that the practice of appointment as a whole was unsatisfactory, or alternatively, that the establishment of the particular court or the appointment of the particular adjudicator gave rise to a risk of undue influence over the outcome of the case.[5]

II) Second pillar: the term of office

Pursuant to Article 6 (1) judicial independence does not require appointment for life. It is more relevant that the term of office is stable in its length and free of outside interference. A relatively short term of office (3 years) has been held acceptable for unpaid appointees to

3 Campbell and Fell v United Kingdom, 28 June 1984.

4 Campbell and Fell v. the United Kingdom, (28 June 1984) 7 EHRR 165 § 79; and Crociani v. Italy, application no. 8603/79, Decision of 18 December 1980.

administrative or disciplinary tribunals.[6] However, a renewable four year appointment for a judge who was a member of a national security court was considered "questionable" by the Court[7].

The reason of this standard is clear: judges are less independent if terms are renewable because they have an incentive to please those who can reappoint them.

III) Third pillar: guarantees against external pressure

Independence requires the existence of certain guarantees, the most notable of which is the guarantee against outside pressure being exerted upon a judge. Particularly, the Court has focused on the following three aspects.

(i) Prohibition of arbitral removal from office: in Campbell and Fell v. the United Kingdom, the Court held that members of a court must, at a very minimum, be protected against removal during their terms of office. In the following paragraph we shall focus in a very emblematic case of violation of this guarantee, which is the case Baka v. Hungary.

(ii) Not subject to instructions: another important guarantee against outside pressure is that judges are not subjected to instructions in the exercise of their adjudicatory function. This issue arose in the context of cases where the executive or the legislature directly influenced the outcome of a case. So, for example, courts which consider themselves bound by legal interpretations by the executive are not independent under Article 6 § 1. This was the issue arisen in Beaumartin v. France where the Court found that the power to interpret international treaties which was vested exclusively in the Minister for Foreign Affairs constituted a violation of Article 6 § 1[8]

(iii) The binding nature of judgments: to be Article 6 compliant, a tribunal's decisions must be more than merely advisory[9]. Van de Hurk v the Netherlands confirms that the power to give a binding determination which may not be altered by a non-judicial authority is an essential and fundamental component of the "independence" required by Article 6 § 1.[10] Even a theoretical possibility of interfering with a judgment can undermine its 'independence' and fall foul of Article 6. In Van de Hurk v. the Netherlands it was held that the government which was empowered by law not to implement a court decision was in violation of Article 6 notwithstanding the fact that the power had never been used. In that case, the relevant legislation allowed the Crown to decide whether a judgment of the Independence Appeals Tribunal should not be implemented. The power had never been exercised and was due to be repealed. Nevertheless, the Court found that the mere existence of this power gave rise to a violation of Article 6 § 1 despite the fact that it had not been referred to in

---

5 Zand v. Austria, application no. 7360/76, Decision of 16 May 1977, § 78.

6 Campbell and Fell v. the United Kingdom, (28 June 1984) 7 ECHR 165

7 Incal v. Turkey, (9 June 1998) 29 ECHR 449.

8 Beaumartin v. France, (1994) 19 ECHR 485 § 38.

9 See Belilos v. Switzerland, (29 April 1988) 10 ECHR 466 § 64: and see also: Van de Hurk v. the Netherlands, (19 April 1994) 18 ECHR 481 § 52.

10 Van de Hurk v. the Netherlands, (1994) 18 ECHR 481 § 45. Judgment of 19 April 1994

the proceedings and despite the fact that there was "nothing to indicate that it had any influence on the way the tribunal handled and decided the cases which came before it". Essentially, an independent tribunal's decisions must be incapable of being altered, in theory or in practice, by any non-judicial authority.

IV) The fourth pillar: the appearance of independence.

An appearance of independence (and impartiality) is important because "what is at stake is the confidence which the courts in a democratic society must inspire in the public".[11] The applicable test has been described in a number of ways: - whether the public is reasonably entitled to entertain doubts as to the independence or impartiality of the tribunal[12]; whether there are "legitimate grounds for fearing" that the tribunal is not independent or impartial[13]; whether "there are ascertainable facts that may raise doubts as to independence or impartiality"[14]or whether such doubts can be objectively justified. This is a crucial goal, as public confidence is an important factor in measuring judicial independence.

3.2 Prohibition of arbitral removal. Case Baka v. Hungary

An important decision has been assumed by the ECHR, Second Section, in the fundamental case BAKA v. HUNGARY (Application no. 20261/12), 27 May 2014[15].

The applicant, Mr. András Baka, was a former judge at the ECHR (1991-2008). In 2009, he was elected by the Parliament of Hungary as President of the Supreme Court of Hungary ("the Supreme Court") for a six-year term, until June 2015. In that capacity, he was also the Head of the National Council of Justice and was under a legal duty to express his opinion on parliamentary bills affecting the judiciary.

Between February and November 2011, Mr. Baka criticized some legislative reforms including a proposal to reduce the mandatory retirement age for judges from 70 to 62. He expressed his opinions through his spokesman, in public letters or communiqués, including to other members of the judiciary, as well as in a speech to Parliament.

From April 2010 a programme of constitutional reform was undertaken in Hungary. Thus, on December 2011, the Transitional Provisions of the new Hungarian Constitution (Fundamental Law of Hungary of 2011) were adopted, providing that the legal successor to the Supreme Court would be the Kúria (the historical Hungarian name for the Supreme Court) and that the mandate of

11 Incal v. Turkey, (9 June 1998) 29 ECHR 449; Fey v. Austria, (24 February 1993) 16 ECHR 387 § 30.
12 Campbell and Fell v. the United Kingdom, (28 June 1984) 7 ECHR 165 § 81.
13 Langborger v. Sweden, as above; Procola v. Luxembourg, (28 September 1995) 2 ECHR 193 § 45; and McGonnell v. the United Kingdom.
14 Castillo Algar v. Spain, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.
15 Referral to the Grand Chamber 15/12/2014

the President of the Supreme Court would terminate upon the entry into force of the Fundamental Law.

As a consequence, Mister Baka's mandate terminated on 1 January 2012 – *i.e.* three and a half years before its normal date of expiry. Therefore, Mister Baka lost the remuneration to which a President of the Supreme Court was entitled throughout his mandate as well as some post-function benefits (including severance allowance and pension supplement for life).

According to the criteria for the election of the President of the new Kúria, candidates were required to have at least five years' experience as a judge in Hungary. The time served as a judge in an international court was not counted and this led to Mr. Baka's ineligibility for the post of President of the new Kúria.

In December 2011, the Parliament elected two candidates, Péter Darák as President of the new Kúria and Tünde Handó as President of the National Judicial Office. Mister Baka stayed in office as president of a civil law bench of the Kúria.

Relying on Article 6 § 1 (right to a fair trial) of the ECHR, Mister Baka complained that he was denied access to a tribunal to contest his dismissal as the premature termination of his presidential mandate had been written into the Fundamental Law itself and was, therefore, not subject to any form of judicial review, even by the Constitutional Court.

Under Article 10 (freedom of expression) of the Convention, he further alleged that his dismissal was the result of the criticism he had publicly expressed of government policy on judicial reform when he was President of the Supreme Court.

In its Chamber judgment of 27 May 2014, the ECHR held, unanimously, that there had been a violation of Article 6 § 1 of the Convention.

The Court found that Mister Baka's access to court had been impeded, not by express legislative exclusion of such access, but rather by the fact that the premature termination of his mandate had been written into the new Hungarian Constitution itself and was, therefore, not subject to any form of judicial review.

The Court also concluded, unanimously, that there had been a violation of Article 10 of the Convention. In this respect, it found that Mister Baka's dismissal had been due to the criticism he had publicly expressed of government policy on judicial reform when he was President of the Supreme Court, underlining that the fear of sanction, such as losing judicial office, could have a "chilling effect" on the exercise of freedom of expression and risked discouraging judges from making critical remarks about public institutions or policies[16].

[16] ECHR, Press Release, 17 June 2015.

In the word of the ECHR, the facts and the sequence of events in their entirety "*corroborate the applicant's version of events, namely that the early termination of his mandate as President of the Supreme Court was not the result of a justified restructuring of the supreme judicial authority in Hungary, but in fact was set up on account of the views and criticisms that he had publicly expressed in his professional capacity on the legislative reforms concerned*" (para 96).

Also the ECJ decided on breach of European law by Hungary: it ruled the legislative reforms that the Hungarian judge Baka criticized were put under microscope by the European Commission, who sent a letter of formal notice to Hungary on 17 January 2012 in which it contests the infringement of the Directive 2000/78 due to national legislative provisions relating to the age-limit for compulsory retirement of judges, prosecutors and notaries.

The Commission claimed that the contested provisions were contrary to Articles 2 and 6 of Directive 2000/78 in that they gave rise to unjustified discrimination and, in any event, were neither appropriate nor necessary to achieve the allegedly legitimate objectives invoked by Hungary.

According to her, the legislation in question violates article 2 of Directive 2000/78 as it introduces age discrimination among judges, prosecutors and notaries who have reached the age limits set by the legislation for admission to retirement and those who can stay in business. In fact, lowering from 70 to 62 years of age limit that entails compulsory for judges, prosecutors and notaries the cessation of their activities would introduce a difference in treatment on grounds of age among people of a certain profession.

For its part, Hungary invoked, essentially, two objectives ostensibly pursued by the legislation at issue, that is to say, primarily, the standardisation of the rules relating to retirement for all persons and, secondarily, the facilitation of the entry of young lawyers into the judicial system with a view to establishing a 'balanced age structure'.

The Court assessed the merits of the case and decided that Hungary had infringed Directive 2000/78 EC. This is the substance of the action: the Court granted that the EC Directive 2000/78 states that the "principle of equal treatment" shall mean the absence of any direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive (religion or belief, disability, age or sexual orientation as regards employment and occupation). Article 2(2)(a) of that directive states that, for the purposes of the application of Article 2(1), direct discrimination is to be taken to occur where one person is treated less favorably than another in a comparable situation, on any of the grounds referred to in Article 1 of that directive. The new Hungarian legislation provides that judges, prosecutors and notaries must go compulsorily retired to the achievement of 62 years of age. People of 62 years engaged in one of these jobs are in the same situation as their younger colleagues but they must cease their work. The Court held that these

provisions introduce a difference in treatment directly based on age within the meaning of the combined provisions of Articles 1 and 2, paragraph 2, letter a) of Directive 2000/78.

3.3 The binding nature of judgments and the present situation in Poland

As mentioned above, according to the interpretation of the ECHR, an essential and fundamental component of the independence is that the power to give a binding determination may not be altered by a non-judicial authority This is a very topical issue in a live case that is occurring in Poland, where rulings of the Constitutional Court are made binding only when they are published by the Prime Minister in a governmental journal of laws, but the Prime Minister declined to do so since the Court rejected a draft of reforms on 9 March 2016. The rejected reform had increased the majority that the Court needs to pass the rulings and change the order in which cases are heard. On April 13 2016 the European Parliament adopted a resolution warning that the “effective paralysis” of Poland Constitutional Tribunal endangers the rule of law, democracy and human rights in the country (see in Europarl.europa.eu access 20 may 2016).

4. Measures to improve effective judicial independence

The analysis of the case law and the live case demonstrates that international and European sources are very important to raise visibility of judicial independence, but are not sufficient to implement it and to prevent abuses. Statement of judicial independence is only rhetorical if it is not factually implemented, not only with more specific legislations but also with *de facto* measures.

4.1 Legislative measures

According to the case law, judicial tenure and conditions of service of individual judges are necessary elements of the maintenance of judicial independence. In the following points we shall lay down some proposal of possible legislative measures which could improve effectively the safeguard of the independence. Some of them are already enforced in some European countries.

Of course, we do not think that they are the only and the best solutions, but we are sure that they would help. The most important proposal regards the councils of the judiciary.

I) In order to ensure them, the Council of Europe Recommendation n° R (2010) 12 of the Committee of Ministers to Member States of independence efficiency and role of judges (see subchapter 2.1) the greatest novelty of the provisions of the Recommendation recognizes the role and function of councils of judiciary, governed by art. 26 et seq. Defined as "independent bodies constituted under the law or the constitution, aimed at ensuring the independence of the judiciary and of individual judges and thus to promote the effective functioning of the judicial system", it is

expected that "at least half of the members of such councils should be judges chosen by their colleagues from all levels of the judiciary and respect for pluralism within the judicial system "and that they" have to show the highest level of transparency towards judges and towards society through the development of pre-established procedures and reasons for decisions". In exercising their functions, councils for the Judiciary should not interfere with the independence of the individual judge.

The so-called "Italian anomaly", represented by a "too independent Council" seems to have taken over in Europe, even because according to art. 8 "when the judges consider that their independence is threatened, [they] must be able to have recourse to the High Council of the Judiciary or another independent authority, or must have effective tools"; and even, according to Art. 20, the higher councils or "other independent authorities" may establish and maintain permanent systems for the collection of data on the functioning of justice.

So, the current European situation seems to stem the need to strengthen the "European model" Council of Justice, based on "independent administrative authorities with constitutional status" to safeguard the independence and autonomy of the judiciary.

In order to ensure an effective autonomy and independence of the judiciary, the self-governing bodies, however defined, should have a mixed composition of judges and non-judges, the former preferably chosen by election between magistrates while the latter chosen amongst experts in the subject of law (university professors, lawyers, etc.).

In the context of self-government of the judiciary, a mixed composition has the advantage of ensuring the participation of a highly qualified technical component, on one hand able of allowing cultural osmosis between the various areas of common legal culture, and on the other hand capable of avoiding judiciary self-referentiality. Under that profile it appears to be essential that the percentage of stipendiary component against secular component sees the prevalence of the former, on an elective basis, so to ensure the direct involvement of the judiciary in its self-government.

In our opinion it is very important that Councils of Justice may not only have consultative powers but also be directly deliberative: on the appointment of judges, on the administration of their careers (including the regular professional evaluations) and in general on the status of a magistrate, taking disciplinary responsibilities into account.

Lastly, it seems very significant that the Councils may have specific powers in relation to the financial and material resources, which are not only needed to the management of self-government but also to judicial offices at a local level.

On the other hand, the UN Special Rapporteur on the Independence of Judges and Lawyers, issued a more extreme opinion, that bodies for judicial accountability "*should preferably be*

composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. No political representation should be permitted."[17] while the UN Human Rights Committee has affirmed that "*judges should be removed only in accordance with an objective, independent procedure prescribed by law*"[18].

II) Legislation on the selection of judges: they should be appointed only on the basis of merit and capability; we think that the most independent procedure for judicial appointment is by professionals (other judges or jurists) and the least independent method is the appointment by one powerful politician (e.g., the minister of justice). Judges should never be appointed for political reasons.

III) Strongest protection of the highest ordinary courts, as it is typically the court of last instance and so its independence (or lack thereof) will probably affect the independence of the entire judiciary. What happened in Hungary and Poland are clear examples.

IV) Salary insulation and adequate salary. Judges need to be paid adequately in comparison with other lawyers (practicing lawyers, university law professors), not only to prevent corruption. If Government or Parliament enjoy discretion in determining the salaries of judges, they might punish judges by reducing salaries in response to adverse decision. Nevertheless, in periods of economic crisis, judges cannot stand apart from the economic austerity that the population face.

4.2 *De facto* favourable situations and measures

I) Some research through surveys and analysis of indicators hypothesize that effective judicial independence is much more influenced by *de facto* measures than by *de jure* measures (fonte), or at least, that only some *de jure* measures – those governing the selection and removal of judges - are really effective (James Melton & Tom Ginsburg "*Does De Jure Judicial Independence Really Matter? A Revaluation of Explanations for Judicial Independence"*- Coase-Sandor Institute for Law and Economics Working Paper n° 612-2014).

As judges, we are necessarily quite sceptical about the low influence of the legislation, especially regarding the international, European and constitutional legislation, but we agree that legislation has to be supported by *de facto* situations and measures.

Doubtlessly, an high level of democracy is the first condition which has the most positive effect on independency. Judicial independence is the testing ground of the democracy.

[17] Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/HRC/26/32 (28 April 2014), para 126.

[18] Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN Doc.CCPR/CO/75/MDA, 25 July 2002, para. 12.

Even political stability plays an important role; since in cases of political turmoil it is much more difficult to grant *de facto* judicial independence.

The economic performance of the country is also a significant factor, not only because it is often joint with political turmoil, but even because of the consequent inadequate investment in the courts and judicial structures.

Regarding the relationship between economic performance and judicial independence, some scholars have studied the positive influence of judicial independence even on economic growth (Lars P. Feld & Stefan Voigt "*Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators"* CESIFO Working Paper n° 906 – 20003). Actually, it is quite logical that private physical and human investments may be influenced by judicial independence, as government could run "*into a credibility problem concerning the safety of property rights if there is no neutral and independent arbiter who has the power to adjudicate whether government action has remained within the letter of the law*". (Feld-Voigt,4); this opinion is supported by results of the analysis of various indicators and variants and through an enquiry via questionnaire among experts of 57 countries.

One important factor is the respect of judicial decisions by the members of the legislative and executive powers, avoiding gratuitous public criticism or contempt. This is a very topical issue in our country where almost every day members of Parliament and of the Government hold the entire judiciary in contempt, especially during investigations of corruption cases.

We shall not forget the accountability and public confidence, that are both a precondition and a consequence of independence.

II) De facto measures

At the international level:

monitoring the independence of judiciary by supranational institutions is a very effective tool, as it happens with the work European Commission for the Efficiency of Justice (CEPEJ), an advisory body of the Council of Europe of exceptional importance that has been able over the years to build a common culture for efficient and responsible jurisdiction;

proportionate and effective sanctions to countries that violate the principle.

At the domestic level:

judges must be provided by government with the tools they need for their work, including physical premises, information technology systems and staff to operate efficiently; moreover, judgements need adequate means (such as the police or the executive) to be enforced;

improving judicial training, because professional skills are fundamental to build independent decisions;

promoting the public's understanding and consciousness of the importance of independence for judges and the justice system;

judges and the Council for the Judiciary should be closely involved in the formation and implementation of all plans for the reform of the judiciary and the judicial system and their opinion should be taken into account.

At the judicial level:

independence must be earned: "*a high quality justice for all in the form of timely, impartial and well-reasoned decisions is the first safeguard of judicial independence….The judiciary achieves legitimacy and the respect of its citizens by delivering high quality and transparent justice*" (Lord Justice Geoffrey Vos "*Protecting the independence of individual judges and ensuring their impartiality"* Sofia, 21-4-2016 at the High Level Conference of Ministers of Justice and representatives of the Judiciary – ENCJ);

judges can and should be functionally and practically free from influence from the executive and the legislature in their decision making;

judges must work with the executive and legislature to improve the efficiency and quality of what they deliver to the public.

5. CONCLUSION

In conclusion, protecting judicial independence is one of the most important tasks of modern democracies, because if public confidence in the judicial system collapses, so does every other democratic protection for the citizen. The rule of law is most effectively upheld by an independent, functioning and accessible justice system.

Summarizing, our thesis is that: a) judicial independence is not a prerogative or a privilege, but a duty for the single judge; b) it has crucial importance, as testing ground of democracy, as the other side of the coin of the protection of human rights and as a determinant factor for economic and social growth; c) independence may be effectively guaranteed with many different models; d) *de facto* measures have to be combined with *de jure* protection.

A famous Italian jurist, Piero Calamandrei, who was one of the authors of the Italian Constitution of 1948, said in 1955 during a public speech to students in Milan: "*Freedom is like air: you realize what it is only when you start losing it*". The same happens to judicial independence: you realize in-depth what it is, only when you start losing it. Unfortunately, history shows that it is true.

In the Italian modern history, in 1926, during fascism, the AGMI (the General Association of Italian Magistrates) decided its self-dissolution.

The latest issue of the magazine "La Magistratura", issued in January 1926, published an unsigned editorial entitled "The idea that does not die": *"Perhaps with a little more understanding - euphemistically as they say - there would have been possible to organize a small life without serious dilemmas and without risks, a small soft life tepid breezes, safe from the elements and protected by the nobility of some satrapy ... the "mezzafede"* (an engagement ring, less important than the wedding ring) *is not our strong point : the 'comfortable life' is too simple for simple minds like ours. That's why we preferred to die."*

The moral of the story is the following: without effective independence, the judiciary has no reason to exist anymore.

Shall we never forget.

BIBLIOGRAPHY

- AAVV., *Per una giustizia indipendente in Europa*, in *Questione Giustizia*, *www.questionegiustizia.it*, 2016;
- BARAK A., *The Role of a Judge in a Democracy*, (2006) in *Justice in the World Magazine* Vol 3;
- D'ORLANDO e MONTANARI L., *L'indipendenza della magistratura in Europa e il ruolo dei Consigli di Giustizia*, in Dir. Pubb. Comp. Ed Eur., 2010, 1603;
- EAD, *Judicial accountabilities in new Europe: from rule of law to quality of justice, Ashgate Publishing Group, Farnham*, Surrey, 2010;
- FELD L.P., VOIGT S., *Economic growth and judicial indipendence: cross country evidence using a new set of indicators*, CESifo Working Paper No. 906, 2003;
- FUSCO A., *Le garanzie di indipendenza dei giudici di Lussemburgo e Strasburgo*, *www.gruppodipisa.it*;
- KLAUS T., *L'indipendenza della magistratura in una visione europea, Corriere Giur.*, 2010, 5, 673;
- MELTON J. & GINSBURG T. "*Does De Jure Judicial Independence Really Matter? A Revaluation of Explanations for Judicial Independence"*- Coase-Sandor Institute for Law and Economics Working Paper n° 612-2014;
- PLATONE, *La Repubblica*, 1990, Milano;
- POPOVIĆ D., *European Human Rights Law – a manual. An introduction to the Strasbourg Court and its jurisprudence*, Eleven Interna Publishing, The Hague 2013;
- RUSSELL P.H., *Toward a General Theory of Judicial Indipendence*, in P. H. RUSSELL, D. M. O'BRIEN (edited by), *Judicial Independence in the age of Democracy. Critical*

Perspectives from around the World, University Press of Virginia, Charlottesville and London, 2001;

- SANTARELLI B., *Giovenale, Satire*, Oscar Greci e Latini Mondadori, Milano 2011;
- VOS G., *Presentation on "Protecting the indipendence of individual Judges and ensuring their impartiality*, 2016, www.encj.com