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Dark Side of the Moon

International Conference on Law

The Normalization of the State of Emergency and the Situation of Judiciary in Turkey

7-9 September 2018 in Istanbul

Contribution to the panel „The independency of judiciary“

Ladies and Gentlemen,

On behalf of MEDEL, I would like to thank the organizers very much for the invitation to this conference and the opportunity to participate in the panel on judicial independence. I am speaker of the international section of the German New Association of Judges. We are member of MEDEL.

MEDEL means Magistrats Européens pour la Démocratie et les Libertés, in english: European Judges for Democracy and Liberty. MEDEL organizes european associations of judges and prosecutors and currently consists of 21 member organizations.

According to the statutes, one of the main objectives is to defend the independence of the judiciary both against other state authorities and against individual interests. This applies in particular to the countries in which we have member organizations. If we see judicial independence threatened there, we interfere.

We are therefore very concerned about the judicial situation in Turkey, the many dismissals and arrests following the failed coup d'état of 15 July 2016, including judges and prosecutors, and the ban on our member organisation YARSAV. As a representative of MEDEL and the german New Association of Judges I observe the criminal trial of the president of YARSAV, Murat Arslan, who has been in custody for 23 months now, although to my opinion the charges haven't been proved until now.

I will not say anything more about the judiciary in Turkey. I was asked to take up some aspects of judicial independence in other European countries. I will start with a brief overview of Germany and then go into the guarantees of judicial independence at the level of the European Union and the Council of Europe.

Judicial independence in Germany

The Basic Law for the Federal Republic of Germany of 1949 stipulates to the judiciary that the judges are independent and only bound by the law, and that the judges finally appointed can only be dismissed or transferred on the basis of legal regulations and a judicial decision is required for this.

The German constitution thus distinguishes between objective and personal independence.

Judges in Germany are employed for life after a probationary period, with a few exceptions. Dismissals and transfers against the will of the judge are possible in disciplinary proceedings and otherwise only under very limited conditions, for example, if the court organization is changed.

It is also important that dismissals in disciplinary proceedings cannot take place until the court decision has become final.

It can therefore be said that personal judicial independence in Germany is well protected and thus also, indirectly, objective judicial independence. Transfers without the judge's consent are very rare in practice. Dismissals are also very rare.

As in the Basic Law of 1949, the Weimar Constitution of 1919 already stipulated that the judges are independent and only bound by the law, and that they can only be dismissed or transferred on the basis of a legal regulation and judicial decision.

From 1944 – 1945 the judiciary was completely under the influence of National Socialist rule. With a few exceptions, the judges were either loyal followers of the National Socialist regime or they adapted. Judicial independence was not removed through dismissals and transfers but through more or less voluntary submission to leadership orders and party programmes.

In the German Democratic Republic the judges were elected every 5 years. From the end of the Second World War until reunification in 1989 there was therefore insufficient protection against dismissal and transfer in eastern Germany, that means little personal judicial independence.

Judicial independence in Europe

For states that are members of the EU and the Council of Europe, the law of the EU and the European Convention on Human Rights determine, in addition to their national legislation, what is to be understood by judicial independence and to what extent.

Thus Article 47, paragraph 2 of the Charter of Fundamental Rights of the European Union stipulates:

Everyone has the right to have his case heard by an independent, impartial court previously established by law in a fair trial, in public and within a reasonable time.

Similarly, Article 6 of the European Convention on Human Rights.

Judicial independence is therefore closely linked to the rights of the parties in civil or administrative proceedings or the rights of the accused in criminal proceedings.

European standards influence the understanding of national law. Conversely, European standards are shaped by the traditions of the European states.

On judicial independence, the Committee of Ministers of the Council of Europe made recommendations to the member states in 2010 summarising what is desirable from the

Council of Europe's point of view as a common European standard. They do not correspond in all respects to the practice in the Member States.

Thus, they go beyond what is prescribed by German legislation. For example, the Council of Europe recommends:

The authority taking decisions of the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

In Germany, however, judges are selected and promoted by the ministries of justice in the so-called Länder, and in some cases also by parliament.

There are also no Councils for the Judiciary in Germany.

As regards redundancies, the Council of Europe recommends:

A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.

For transfers the recommendations are as follows:

A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organization of the judicial system.

According to my information, such standards have not been guaranteed in Turkey until now.

In member states of the European Union such as Poland and Hungary these standards are in danger now. I will come back to this later. However, in many other European countries there is still good protection against dismissal and transfer. There are other risks and problems here that affect judicial independence.

Workload, pay, appointment and promotion

In 2016, the European Network of Councils for the Judiciary asked judges from 27 European countries what they felt would contribute most to improving the independence of the judiciary in their country.

The most frequently mentioned:

A reduction in workload.

In second place stood:

Better pay.

And in the third place:

Appointments and promotions should be based on the ability and experience of the candidates.

In recent years, in many countries, especially in southern Europe, the judiciary has been cut back and the workload has increased dramatically. That is why, on 23 May 2018, more than 50 % of judges and prosecutors in Spain went on strike for a whole day demanding new appointments and improvements in the technical equipment of courts and public prosecutor's offices.

They have also protested against politicians repeatedly interfering in their decisions.

One example is statements made by the Spanish Minister of Justice following a verdict that led to major demonstrations in Spain. It was about a charge against 5 young men for rape and sexual abuse of a young woman. The men were sentenced by the court, but in the opinion of the demonstrators the penalties should have been higher. One of the judges did not agree with the majority of his colleagues, and declared in a dissenting vote that he was in favour of men's acquittal. In a radio interview, the Minister of Justice said that everyone knew that this judge had a special problem. He also said that he was surprised that the Council for the Judiciary had not taken any disciplinary measures against the judge.

All associations of judges in Spain have protested against these statements because it is an obvious interference in judicial independence.

In the Federal Republic of Germany there have never been such extreme statements by politicians, but the public criticism of judicial decisions by politicians is also increasing here.

„Upheavels“ of the judicial system

In some EU countries there are not only isolated attacks on the independence of the judiciary. Poland in particular is undergoing a systematic reorganization of its judicial system, which is a matter of great concern to MEDEL and many other judiciary organizations. I cannot give details here.

The reconstruction is so far-reaching that it is attracting a great deal of attention throughout the European Union. The European Commission, the European Parliament and many national governments have long been trying to dissuade Poland from following this path.

Since this was not achieved, the European Commission initiated proceedings against Poland before the European Court of Justice at the end of 2017 with a view to finding that Poland had violated the European Union treaties. One of the issues at stake in this procedure is that a Polish law gave the Minister of Justice the right to extend the term of office of judges who have reached retirement age. In addition, the European Commission has now decided to initiate further proceedings before the European Court of Justice because Poland has reduced the retirement age of judges at the Supreme Court from 70 to 65 years. As a result, 27 of 72 judges at the Supreme Court are forced into retirement.

A few years ago, Hungary also tried to force judges into retirement. The retirement age was reduced from 70 to 62 years. About one tenth of Hungarian judges were affected. The European Commission had also initiated proceedings before the European Court of Justice. The court ruled that the Hungarian law violates a European anti-discrimination directive about discrimination on grounds of age. Hungary accepted the decision and the judges

concerned were allowed to continue their work. But there are other attacks on the rule of law in Hungary. We therefore continue to view this country with great concern.

Ladies and Gentlemen,

with this short overview I could only address some problems. I hope, however, that I could give you an impression of how judicial independence in Europe and Germany is legally protected and what current dangers and threats it is exposed to.