

THE INDEPENDENCE OF THE JUDICIARY AS THE KEYSTONE OF THE RULE OF LAW IN EUROPE

This presentation seeks to discuss questions related to the independence of the judiciary. This specific feature of the principle of rule of law is unfortunately under imminent pressure in some member states of the Union. It seems that the deep roots of that elementary characteristic of the judicial power are not so solid any more, in so far as political majorities claim that they are vested with the power to take any decision allegedly approved by the people and even to impose it to the judiciary pretending that judges should be obliged to respect the democratic principle and thus the will of the majority.

The first part of this contribution will focus on recent developments in Greece and the second part on serious setbacks in the field of rule of law in certain Member States (Hungary and Poland).

In Greece we notice that attacks on justice become very common and judges feel that they are targeted. The independence of the judiciary is almost daily discussed in the media and constitutes a sign of deep political conflicts. The independence of the judiciary is undergoing a major crisis of credibility, with the result that justice as a state function is treated with distrust by citizens and feels itself threatened by the actions of political power. But what are the reasons for the credibility crisis that surrounds the independence of the judiciary and through this the judicial system as a whole? Is there a shortage of adequate and appropriate legal framework? Do the crisis of reliability and the alterations in the independence of justice constitute problems that have to be solved by legislative interventions?

In order to respond to these questions, we need to recall the theoretical foundations of the independence of judiciary and its basic conceptual characteristics. The independence of justice is closely linked with the interconnected principles of the rule of law and the separation of powers.

The summary of the constitutional guarantees of judicial independence will show that the institutional framework is dense and adequate. The provisions of the Constitution are thorough and clear and lead to the conclusion that the Hellenic Republic has one of the most comprehensive systems of self-administration of justice. Why then is the perception that judicial independence is in a permanent crisis?

Recently, a new wording has entered the public debate, since official governmental lips are claiming the desire or demand that court judgments reflect the so-called common feeling of what is just. What exactly does this mean? Who expresses this feeling and what happens

if there are suspicions or even valid indications of inconsistency between the common feeling and the actual judgment? Will the feeling win out at the end or will the decision prevail? Of the same misleading nature is the simplistic question whether the judgments may be criticized and, since the answer is - and can only be - positive, they are massively criticized by government officials who claim an inalienable - obviously individual - right to oppose specific decisions with important political implications.

Turning to the second part, it is unfortunately an undisputed fact that the governments in Hungary and Poland, based on their so called "democratic legitimacy" do not refrain from attacking the judiciary and threatening its independence. The judiciary is regarded as a rather insurmountable obstacle to the application of obscure political programs allegedly approved by the electorate.

To be aware of the Polish situation it is sufficient to read two very touching documents, the first being an open address of the First President of the Polish Supreme Court Professor Malgorzata Gersdorf and the second a letter of Professor Krystian Markiewicz, President of the Polish Judges Association "IUSTITIA", sent to the Vice-President of the European Commission Frans Timmermans.

The main question is how to deal with these repeated threats of the fundamental principle of rule of law. In this respect two different mechanisms may be envisaged. The first is of a more political nature, whereas the second is linked with a well known procedure before the Court of Justice of the EU.

In concluding that the true alternative in order to ensure compliance with EU law is the infringement procedure against the member state who does not respect the duties deriving from EU law, it is worth noting that the Commission has already applied the infringement procedure in specific cases and it is really not a coincidence that the respective actions are mainly directed against Hungary and Poland. The infringement actions constitute the only valuable weapon in the hands of the Commission allowing the Court to take even provisional measures against the disobedient member state.