

Challenges to Judicial Independence

- Nils Engstad, introduction, seminar 12 April 2018 on Judicial Independence in Turkey, University of Oslo, hosted by the Norwegian Bar Association, the Norwegian Association of Judges, the International Commission of Jurists Norway and the ICJ Student Network
1. The title of this part of the seminar is "*the importance of an independent judiciary*". In his speech, the former President of the Norwegian Supreme Court, *Mr Tore Schei*, has already provided us with a general introduction to the topic. Therefore, I will devote most of my time in this introduction to the threats and challenges facing states in our part of the world with regard to judicial independence, democracy and the rule of law.
 2. However, as regards the title of this part of the seminar, I would put it simple: An independent judiciary is not merely a crucial element of the rule of law. An independent judiciary is a *prerequisite* for the rule of law. Without an independent judiciary controlling the exercise of governmental power, there is no rule of law. It is as simple as that.
 3. The rule of law concerns essentially control of and limitations on public power through law with the aim of protecting the individual. The rule of law entails that governments must act on the basis of laws enacted by the legislature. The rule of law requires separation of state powers. By judicial review the judge shall judge whether the government has acted within the boundaries of the law. Thus, an independent judiciary controlling the exercise of governmental power is the bedrock of a healthy democracy based on the rule of law.
 4. Currently in Europe, we face serious attacks on judicial independence from political forces attempting to politicize the judiciary and to weaken checks and balances. We have seen this happen in Hungary, Poland and Turkey, but there are developments also in other countries calling for concern.
 5. Yesterday the U.S. based NGO, *Freedom House*, published a report on "*Nations in Transit 2018 – Confronting Illiberalism*". In **Romania**, according to the report, a positive trend has come to an end with the new government's

relentless attempts to weaken the justice system, sideline the anticorruption agency, and essentially legalize corruption. **Serbia's** score declined for the fourth straight year. **Ukraine's** Democracy score declined for the first time since the 2014 revolution. In **Slovakia**, the murder of journalist **Ján Kuciak** in February 2018 exposed allegations of ties between high-ranking government officials and organized crime. **Poland** recorded the second-largest Democracy score decline in the history of the report. **Hungary** registered the largest cumulative decline in the history of the report. Hungary's Democracy score has been falling for 10 consecutive years.

6. The report states that:

"In 2017, illiberalism established itself as the new normal in the region that stretches from Central Europe through Eurasia. In Central Europe, governments that disdain independent institutions and seek to fuse the ruling party with the state are no longer exceptional. The bulldozing of the judiciary in Poland exposed how few safeguards there are, even in the heart of the European Union, against a determined government that disregards political and constitutional norms."

7. This is a striking description, to my mind, pointing towards some of the rules in what we may call the *authoritarian populist playbook*: (1) Disable checks and balances by taking over the most powerful democracy and rule of law-institutions as the Constitutional Court, the Supreme Court and the Office of the Prosecutor General. (2) Implement a governmental take-over of the judiciary and the public prosecution authorities. (3) Bring public media under your control. (4) Limit press freedom. (5) Bully civil society groups and reduce them to silence. (6) You intend to remain in power for a long time, therefore, change the election system for the benefit of your party.
8. With this in mind, I will turn to Hungary, Poland and, lastly, Turkey. **Hungary** held a general election four days ago. Victor Orbán won a super-majority in the Parliament. "*By securing two-thirds of the seats in Parliament, Mr. Orbán's*

party, Fidesz — along with its ally, the Christian Democrats — now has the power to change the Constitution and further bend the nation to his will”, the New York Times wrote after the election.

9. Fidesz, once a moderate liberal centrist party awarded the Norwegian Human Rights Rafto Price in 1989, became a national conservative right-wing populist party, which won a super-majority in the Parliament in a landslide victory in the 2010 election. Prime Minister Viktor Orbán’s Alliance soon adopted constitutional and legal amendments in order to consolidate their control over Hungary’s independent institutions.
10. The first target was the Constitutional Court, which became a subject of “court packing”. The new Constitution adopted in 2011, increased the number of members of the Constitutional Court from eleven to 15 and prolonged their term of office from nine to 12 years. All of the eleven judges put on the Constitutional Court between 2010 and 2014 were appointed by the Fidesz government. The Constitutional Court’s rulings in recent years have favoured government interests.¹
11. What about the Supreme Court and the ordinary courts? By a premature termination of his mandate following adopted amendments to the Constitution, the critical voice of the President of the Supreme Court, András Baka, was “reduced to silence”, as he wrote to the Supreme Court presidents in the EU in December 2011. András Baka had publicly criticized several aspects of the constitutional and legislative reforms that directly affected the judiciary, most notably the lowering of the mandatory retirement age for judges from 70 to 62. The lowering of the retirement age, by the way, forced more than 200 judges to retire as of 1 January 2012, paving the way for appointments of new government-loyal judges.
12. The Orbán-government created a new powerful National Judiciary Office, vested with far-reaching powers to manage the judiciary. This was a rather

¹ Freedom House, Freedom in the World 2018, Hungary Profile

unique construction as these powers were vested to one person, the President of the National Judiciary Office, who, by the way, was the wife of a Fidesz politician. However, despite the pressure put on Hungarian judges, it is my impression that many of them have continued to issue independent decisions. By the new mandate following the 2018-election, it is expected that Orbán will tighten his grip on power still further with a specific attention to the judiciary, the NGOs and the remaining independent media. Judicial independence remains a concern in Hungary.

13. So does media freedom and media diversity. Several media has reported that Hungary's main opposition daily newspaper **Magyar Nemzet** (Hungarian Nation) shut down yesterday following Orbán's landslide victory on Sunday. The 80-year old Magyar Nemzet has been the largest print daily that retained an opposition voice in a media landscape dominated by state or government-aligned outlets, and an advertising market controlled by the government.
14. So, let us turn to **Poland**. Publishing his concerns in an article in **Politico** three days ago, the Polish Ombudsman for Human Rights, **Adam Bodnar**, wrote: "*Europe can save Poland from darkness*". "*Brussels must remain firm with Poland, regarding Warsaw's assault on judicial independence and the rule of law*". He correctly pointed out that the independence of Poland's Supreme Court and its entire judicial system is at stake. Polish civil society, opposition politicians and independent judges are doing what they can to resist, but the European Union must intervene in their defence, before it is too late.
15. There is no doubt that the Polish government is concentrating powers in its hands. The public prosecution system is now subordinated the government. Public media are subordinated the government. Since taking power in 2015, the Law and Justice Party (PiS) has also moved aggressively to assert control over the judiciary.

16. One of its first steps was to pass legislation designed to curb the powers of the Constitutional Court, and by the end of 2016, the ruling party gained control over the Constitutional Court now dominated by pro-government judges.
17. Ten days ago, the law on the Supreme Court entered into force. The Supreme Court law lowered the mandatory retirement age for the court's judges from 70 to 65, forcing close to 40 percent of sitting Supreme Court judges to an early retirement, including the court's president, Małgorzata Gersdorf, even though her constitutional term ends in 2020. In addition, the law increases the number of judges on the Supreme Court from 83 to at least 120, providing the government the ability to enact a complete takeover of the court. Once again, we see a "court packing".
18. In July last year, the Polish parliament adopted another judicial reform law, granting the Minister of Justice the power to appoint and dismiss the presidents and deputy presidents of ordinary courts. The minister has so far removed 150 court presidents and vice presidents.
19. A law that entered into force in January this year, allows the Polish Parliament to elect a majority of the members of the Polish Council for the Judiciary, which plays a key role in judicial appointments and dismissals. Previously the judicial members of the Council were selected by their peers. We have seen a governmental take-over of the judiciary and the institutions that were set up to safeguard the independence of Polish courts. They have really played by the rules in the authoritarian populist playbook.
20. What we have seen is the rule of law backsliding in our neighbourhood. What we have seen is the rise of autocrats dismantling democracies, dismantling the rule of law, terminating judicial independence, silencing opposition media and intimidating critics in civil society. That is what happened in **Turkey** too.
21. **Ahmet Insel**, Professor at the Pantheon-Sorbonne University of Paris, wrote in July 2017 that Turkey's President Erdogan faced down an attempted military coup in July 2016, but far from reinforcing democracy, Erdogan had

used the state of emergency following the attempted coup to institutionalize an *elective autocracy*. He continued: “*It is an autocracy because all powers, without exception, are concentrated in the hands of one person. Justice is under the personal control of Erdogan.*” To my mind, this definition captures the core elements of an *autocracy*: All powers of state are concentrated in the hands of one person or in the hands of a group of persons.

22. Following the 2016 coup attempt Erdogan introduced a long-lasting state of emergency. He took this opportunity to restrain opposition and started a massive campaign in the public sector. A purge of the civil service led to mass dismissals. By the end of 2017 more than 110 000 public-sector workers were sacked, and more than 60 000 people were arrested. By extensive use of pre-trial detention, many suspects have been held behind bars for long periods without due process.
23. More than 4 000 judges and prosecutors have been dismissed and over 2 000 arrested. The charges are dubious, and arrests based on messages shared via social media are common. Thousands of loyalist judges have been appointed in recent years. Judicial independence seems now to be non-existing in Turkey. The process aimed at terminating judicial independence was, however, well under way before the July 2016 coup attempt.
24. According to the *Report on challenges to judicial independence and impartiality*, published jointly by the Council of Europe’s Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors in 2016, in December 2013, corruption investigations were initiated against members of the Turkish government and their families. After those investigations had been started, thousands of police officers were reassigned or dismissed from office.
25. In 2014, new members of the High Council of Judges and Prosecutors (HSYK) had to be elected. According to information received by the CCJE, the executive’s candidates were elected after the government had put considerable pressure on the electorate. After the elections the High Council’s work changed in favour of the interests of the government. Critics argued that the

government put pressure on the judges and prosecutors to stop the corruption investigations. Eventually, all corruption investigations against members of government and their families were closed. According to information received by the CCJE, all prosecutors and one judge who had been involved in the corruption inquiries, had been dismissed from office by May 2015.

26. During the last two years before the attempted coup, hundreds of judges and prosecutors were reassigned without their consent to small cities in the provinces, suspended from office or even dismissed. Judges argued that this change of practice was used to put pressure on judges and prosecutors. Some judges reported that they had already been transferred the second or even third time within one year. The purpose of such transfers allegedly was to punish judges or prosecutors for work the government did not approve of.
27. Consequently, the attempted coup in 2016 was not the beginning of the end of an independent judiciary in Turkey. It was an intensified continuation of a process that already was well under way. The constitutional amendments approved through a referendum in Turkey in April 2017, will further increase the power of the presidency and reduce democratic checks and balances. It is difficult to see possibilities for major improvements with regard to democracy and the rule of law in Turkey. The same goes for Hungary and Poland, I am sorry to say.
28. Let me end this introduction by quoting **Michael J. Abramowitz**, president of Freedom House, who yesterday stated: "*What is happening in Central and Eastern Europe can't be separated from what is happening in Europe as a whole. No one is shielded from the normalization of illiberal ideas.*" Consolidated authoritarian regimes should not be the new normal. Hence, we should continue to support the defenders of rule of law and democracy in states infected with authoritarianism. The defenders are judges, they are lawyers, they are public prosecutors, they are human rights activists, they are members of NGOs and of independent media, and they deserve our support. Therefore, I thank the organizations hosting this seminar for their initiative, and I thank you all for your attention.