DEMOCRATISATION AND SELF-GOVERNMENT OF JUSTICE IN EUROPE

(THE IMPORTANCE OF ASSOCIATIONS OF JUDGES AND PROSECUTORS / SUPERIOR COUNCILS / THE PORTUGUESE CASE)

Filipe Marques

(Judge in Portugal

President of *MEDEL – Magistrats Européens pour la Démocratie et les Libertés)*[1]

I. THE IMPORTANCE OF ASSOCIATIONS OF INDEPENDENT JUDGES AND PUBLIC PROSECUTORS IN A DEMOCRATIC SOCIETY AND FOR THE RULE OF LAW

a) the current deadlock of democracies

It is well known that the genesis of the (now called) European Union was the necessity of rebuilding a Europe torn apart by the deadliest war hitherto fought, seeking to ensure peace between States that a few years before fought a bloody conflict. It is therefore understandable that the primary concern was that the areas of coal and steel were to be taken into consideration – one of the main sources of energy and the main raw material of warfare – subjecting them to a supranational authority, which could not be easily manipulated by any of the States. At the same time, looking for the economic development that the continent desperately needed, a free trade area between the States began to be established, with the elimination of customs barriers and the consecration of four freedoms of movement throughout all the territory (goods, services, people and capital), which came to be realized a few years later. The portion of sovereignty that the States were willing to concede was only the indispensable,

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All the opinions in the text are exclusively from the author and do not reflect the position of MEDEL or its *Bureau* on the particular matters addressed.

and the areas that were not instrumental to that goal remained untouched. In this perspective, of course, the Judiciary was not a concern for the founders of the community – a Court was established to settle the conflicts related to the correct application of community laws by the States, but without any interference in national judicial systems, which remained solely in the sphere of national sovereignty.

The success of the European project and the economic and social development that it brought had an inevitable power of attraction over States that originally had not formed it: in a first enlargement (Ireland, the United Kingdom and Denmark) and in 1995 (Austria, Sweden and Finland), mainly pursuing economic interests; for others (Greece, Portugal and Spain, in the 1980's), also the stabilisation of their young democratic systems; between 2004 and 2014, to secure peace on the continent through the stabilisation of democratic regimes in the former communist States.

The serious global economic crisis that was felt at the beginning of this century, however, has led many to question the European Union as a whole. However, they do so by reducing their speech to the economy – this is the only source of all the problems of the Union and the lack of economic growth is its only capital failure. However, we should question ourselves: is the problem of the Union merely (or essentially) economic or are there more profound reasons, which are rooted in the very evolution of the capitalist system at world level (and not just European), which may be at the base of populist movements that today endanger the future of the European project?

ALAIN TOURAINE, in his book *Le Nouveau Siècle Politique* (Paris: Éditions du Seuil, October 2016, p. 180) says that no society was ever founded only over international trade, the market, communication or the mere productivity of labour force. The crisis we are experiencing is neither European nor merely economic – it is a crisis of the democratic system and its relationship with the capitalist system. Capitalism and democracy were on parallel tracks until the

end of the last century – the conquest of individual liberties coincided with the interest of the capitalist system, for whose success was essential the full freedom of individual choice and movement of the factors of production in a market that was intended to be free of any barriers. This parallelism of interests, however, was lost as globalization advanced and democratic mechanisms and their inherent lack of pragmatism began to put barriers to capitalism that saw in the elimination of frontiers a unique opportunity to spread to the entire planet. Liberal democracy is in danger of being replaced by a globalised plutocracy or non-liberal democracies, true dictatorships by plebiscite – in the words of MARTIN WOLF ("*Capitalisme démocratique en péril - Par quoi pourrait-il être remplacé?*", *Finantial Times*, 06/09/2016 - http://www.lenouveleconomiste.fr/financial-times/capitalisme-democratique-en-peril-31872/), as to some extent we already witness in Russia or Turkey. Some like CHANTAL MOUFFE (interview granted in 27/10/2015 to *Reporterre – Le quotidien de l'écologie* – https://reporterre.net/Nos-societes-sont-post-democratiques) now talk of a *post-democratic society*, in which the truly relevant decisions are taken outside the parliaments, without the *post-capitalism* of the collaborative economy announced by MICHEL BAUWENS and JEAN LIEVENS (*Sauver le monde: vers une économie post-capitaliste avec le peer-to-peer*, Paris: Les Liens qui Libèrent, 2015) being able to stand up to it.

All that has just been said has immediate consequences on the role of the Judicial Power and highlights the relevance or total irrelevance that it may come to have in the future.

The *post-democratic* society that is currently settling in disregards national States and borders, which are now seen as anachronistic barriers to the installation of a globalised and unlimited economy (often justified precisely as the only solid foundation for an almost infinite expansion of democracy).

In this context, also the Judiciary - which applies general and abstract laws according to purely legal criteria and without worrying about the economic

efficiency of its decisions - is increasingly seen by the economic power as an obstacle to the expansion of the capitalist system (or, in the euphemistic expression and more often used, to "economic development"). For this reason there has been a growing tendency to "escape from the courts": it began by the creation of "alternative dispute resolution means", went through the movement of “dejudicialization” (widespread throughout Europe) of the last decades and culminated with the attempt to set up alternative bodies to the courts, private to conflicts involving large multinational corporations, such as the one which has been envisaged in the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States of America (criticized by MEDEL in its statement on the TTIP).

Quoting DANI RODRIK (*The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist*, New York: Oxford University Press, 2011), the world economy has a “fundamental political trilemma” - *“we cannot simultaneously pursue democracy, national determination and economic globalization”* – and this should be the solution for that trilemma: *“democracies have the right to protect their social arrangements, and when this right clashes with the requirements of the global economy, it is the latter that should give way”*.

b) the need for protection of the independence of the Judiciary: a way to save democracy

In their book *“How Democracies Die”* (New York: Crown Publishing Group, January 2018), STEVEN LEVITSKY and DANIEL ZIBLATT describe how the democratic system is being captured and subverted from the inside by autocrats: *“This is how elected autocrats subvert democracy – packing and “weaponizing” the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence) and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the*

electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it.".

All of the above steps are present in the recent political evolution in Poland, as well as in Hungary or Turkey and in all the other countries where we have been witnessing the weakening of democracy.

And it is not by chance or a mere coincidence that the first thing mentioned by the quoted authors is the neutralisation of the Judiciary: courts are an essential element in any *checks and balances* system. Only independent courts may successfully face majority-controlled parliaments and governments in their attempt to undermine the rights of minorities or to impose unilateral readings of the social reality.

c) MEDEL – its history, goals and members

On June 15, 1985, judges and prosecutors from eight European States (Germany, Belgium, Spain, France, Greece, Holland, Italy and Portugal) have decided to create an association called *MEDEL – Magistrats Européens pour la Démocratie et les Libertés*.

In its statutes, approved in 1987, it is said that its main objectives are:

1. The establishment of a common debate between the magistrates of different countries to support the integration of the European Community, in view of the creation of a European political union;

2. Defending the independence of the judiciary against all other powers, as well as against any other individual interests;

3. The democratization of the judiciary, in its recruitment and in the conditions for the exercise of the profession, in particular in the face of the hierarchical organization;

4. Respect, in all circumstances, of the specific legal values of the Rule of Law;

5. The affirmation of the right of magistrates, as of all citizens, to freedom of assembly, association and expression, including the right to organize, to meet and undertake collective action;

6. A judicial organization capable of securing a public service of justice in response to the principle of transparency, allowing citizens to control their functioning;

7. The promotion of a democratic legal culture through exchanges of information and the study of common themes;

8. The proclamation and defence of the rights of minorities and diversity, and in particular the rights of immigrants and the most deprived, in a perspective of the social emancipation of the weakest.

Similarly to what happened in the EU, from the associations of eight countries, MEDEL has now 21 member associations, coming from 15 countries: Germany, Belgium, Bulgaria, Cyprus, Spain, France, Greece, Italy, Moldova, Poland, Portugal, Czech Republic, Romania, Serbia and Turkey:

- Neue Richtervereinigung (NRV) ;
- Bundesfachausschuss Richter und Staatsanwälte in Vereinigten Dienstleistunggewerkschaft (VER.DI) ;
- Association Syndicale des Magistrats (ASM) ;
- Jueces para la democracia (JpD) ;
- Unión Progresista de Fiscales (UpF) ;
- Syndicat de la Magistrature (SM) ;
- Eteria Elinon Dikastikon Litourgon Gia ti Demokratia ke tis Elefteries ;
- Magistratura democratica (Md) ;
- Movimento per la Giustizia ;
- Iustitia ;
- Stowarzyszenia Prokuratorów RP ;
- Associação Sindical dos Juízes Portugueses (ASJP) ;

- Sindicato dos Magistrados do Ministério Publico (SMMP);
- Soudcovská unie České republiky ;
- Uniunea Naţională a Judecătorilor din România ;
- Društvo sudija Srbije ;
- Udruženje tužilaca Srbije ;
- Yarsav ;
- Ένωση Δικαστών Κύπρου ;
- Asociația Judecătorilor din Republica Moldova (AJRM) ;
- Съюзът на съдиите в България .

To these we must add two associations that have recently expressed the intention to adhere (one of prosecutors from Poland and one of judges from Montenegro) and a Moroccan association that has requested the observer status and in recent years has always been present in the meetings (*Amicale Hassania des Magistrats*).

Throughout the thirty years of its history, MEDEL's activity can be summarized essentially in two main lines:

- the defence of social rights and individual liberties;

- the fight for an effective independence of the magistrates and the active and energetic denunciation of any attack on that independence.

The latter, in recent years, has been the main activity of MEDEL, which is a disturbing and alarming sign of the evolution of European politic and democratic systems, as stated above.

II. SYSTEMS OF HIGH JUDICIAL COUNCILS AND THEIR IMPORTANCE / IS IT A GUARANTY OF AN INDEPENDENT JUDICIARY?

In its contribution to the *Assises de la Justice*, organised by the European Commission in November 2013, MEDEL identified six key points for the definition of minimum standard rules of the Judiciary in Europe:

- the existence and composition of higher councils;

- the statutes of judges and prosecutors;

- the autonomy of the public prosecution;

- access to justice;

- the definition of the concept of a court and its distinction of informal and non-judicial dispute resolution bodies;

- the right to participate in judicial associations.

The first – the existence and composition of higher councils – is in the view of MEDEL one of the key elements to ensure the independence of the judiciary. We must never forget that already in 1788 Alexander Hamilton ("The Judiciary Department", in *The Federalist*, n.º 78 – available at: http://www.constitution.org/fed/federa78.htm) justified the need for a statute for the magistrates that could defend them from any interference from the other powers of the state, because it was the *"weakest of three powers"*, without the ability to influence the remaining two and depending on these for the exercise of its duties and to execute its decisions - *"The Executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and*

must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"

The question of the self-government of the judiciary is central to an effective guarantee of the independence of the judiciary in relation to the other powers of the State, with the existence of a Superior Council who is independent of the executive branch and with exclusive competence in disciplinary and management matters being a decisive element for its implementation. There is a total disparity between the Member States of the European Union as to the degree of self-government of the judiciary, with countries where that independent body does not even exist.

The policy of the European Union on this matter in an authentic paradox: recognizing expressly the essentiality of the existence of superior councils as a guarantee for the independence of the judiciary, the Union has imposed to candidate States its implementation as a condition for the accession, as occurred in Romania; however, founding states of the Union, such as Germany, do not have a higher Council, despite the insistent claims that have been made over the years by the associations of magistrates. We can even say that Germany would not today fulfil the requirements imposed on third States as a *sine qua non* condition for membership of the European Union.

But the mere existence of a Superior Council is not enough for the affirmation of an independent Judicial power. It may even prove to be pernicious, in case the composition of this organ allows the Executive power, under the appearance of an independent self-government, to control in practice the Judicial power. A concrete example of this can be seen in the amendments carried out by the Turkish Government to the composition of the Council of Judges and Prosecutors of Turkey (HSYK), which led to the total loss of independence of that organ, leading even the European Network of the Councils of Judiciary to suspend it, because it found that *"it is no longer an independent institution of the executive and legislative powers, which can guarantee the*

ultimate responsibility to support the judicial power in the independent realization of justice". It is therefore necessary that, alongside the rules that provide for the existence of Superior Councils, others are established relating to their composition, ensuring an effective independence of the judiciary in the face of the other powers of the state.

This was recognised by the Council of Europe in the Recommendation of the Committee of Ministers to the Member States CM/REC (2010) 12 (Judges: independence, efficiency and responsibilities), where it is stated in paragraph 27 that *"not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary"*. The importance of this majority to ensure the independence of the Judicial power has also been underlined by the European Court of Human Rights – in its decisions of June 21st, 2016, given in cases 55391/13, 57728/13 and 74041/13 (Ramos Nunes de Carvalho e Sá c. Portugal), it found that the Portuguese Superior Council didn't meet the independence criteria, because more than half of its members are not judges.

In addition to its composition, it is also important to lay down minimum rules on the financial autonomy of the councils, preventing indirect interference from the other powers of the State through discretionary budgetary constraints.

In the plan of internal independence, it is essential to define minimum common rules for transparency in the functioning of the Council and to define its competences, especially preventing any interference by the Council – whether through decisions of apparent mere management, either through the exercise of disciplinary power or performance evaluation – in the work of judges and in the decisions they have to take in individual cases.

III. THE DEVELOPMENT OF THE JUDICIARY IN PORTUGAL: THE INDEPENDENT PUBLIC PROSECUTORS / THE SUPERIOR COUNCILS

The history of the Superior Councils in Portugal reflects all that has just been said.

a) before the democratic regime

The existence of a separate organ with the competence to decide on the appointment, management and career of magistrates in Portugal can be traced back to the XV century, when king John II was reigning (1481-1495) – the *"Conselho do Paço"* was an organ directly dependent of the king that had the competence to administrate courts and appoint all judges. In 1892 a *Disciplinary Council of the Magistrature* was created, and in 1901 two different councils were created, but only with advisory competences near the Ministry of Justice: the *Conselho Superior Judiciário* (for judges) and the *Supremo Conselho da Magistratura do Ministério Público* (for prosecutors). In 1912 (after the Republican revolution of October 5, 1910), the competence in matters of management and discipline of judges was concentrated in the new *Conselho Superior da Magistratura Judicial*, and in 1921 those same competences for public prosecutors were also given to that organ.

In 1926, Decree-Law n.º 11.751, of June 23rd (after the fascist revolution of May 26th, 1926), created the *Conselho Superior Judiciário*, with the following composition:

- the President of the Supreme Court of Justice;
- two members appointed by the Minister of Justice;
- two judges elected by all judges;
- the General Prosecutor of the Republic;

- in cases involving prosecutors, two prosecutors elected by their peers;
- in cases involving court clerks, two court clerks elected by their peers.

This mixed system of appointment and election wanted to end the instability of the first republic period (1910-1926), with constant fluctuations between appointment and election.

However, in 1932 (Decree-Law n.º 21.485, of July 20th) the government changed the system once again and all the members of the Judicial Council had to be judges, but all of them were appointed by the government. This structure remained unchanged (with small detail modifications in 1944 and 1962) throughout the entire fascist period, until the April 25th, 1974 democratic revolution. At the time of the fall of the fascist regime, this was the composition of the superior council, with all the members appointed by the government:

- the president of the Supreme Court of Justice;
- one vice-president;
- the presidents of the four second instance courts (Lisbon, Porto, Coimbra and Évora);
- one judge acting as secretary.

Its competences were merely informative and consultative of the Minister of Justice, and all its activity was directly or indirectly subordinated to the executive power.

Also in 1962 the *Conselho Superior do Ministério Público* was once more established, having competence to evaluate the merit of public prosecutors and exercise disciplinary action over them, cooperate with the Minister of Justice in the superior orientation and perfection of the Public Ministry institutions and coordinate superiorly the competences of that magistrature. It was composed

by the General Prosecutor of the Republic and its agents in the Supreme and second instance courts.

Despite the existence of these superior councils, they were no more than the way of legitimizing the intervention of political power in the Judiciary. The Minister of Justice had all the powers that today are attributed to the superior council of prosecutors and it was extremely easy for the executive to influence the careers and appointment of magistrates.

b) after 1974

Less than two months after the revolution of April 25th, 1974, Decree-Law n.º 261/74, of June 18, established in article 1 that *"The Conselho Superior Judiciário is the supreme organ of the Judicial Power, and the majority of its members are elected by the judges"*. The President of the Supreme Court and the presidents of the four second instance courts were now elected by secret vote from the judges of those courts and were members of the council. The only non-elected member of the council was the vice-president – a judge of the Supreme or second instance courts, appointed by the President of the Republic (after suggestion of the Prime Minister and the Minister of Justice).

The new democratic Constitution was approved in April 2nd, 1976 and in its article 223 established that the law would determine the composition of the *Conselho Superior da Magistratura*, which should include judges elected by their peers, and that would have the competence on the areas of appointment, placement, transfer and promotion of judges and the exercise of disciplinary action.

At the same time, the new Constitution established that the Public Ministry is a separate career, with its own statute and magistrates, and that the appointment, placement, transfer, promotion and the exercise of disciplinary

action towards them is of the competence of the *Procuradoria-Geral da República*, presided by the General Prosecutor of the Republic.

With the first modification to the Constitution, in 1982, article 223 had now a clear composition of the *Conselho Superior da Magistratura*:

- the President of the Supreme Court of Justice (elected by secret vote by all the judges of the Supreme Court);
- 16 members:
    - Two appointed by the President of the Republic, one of them having to be a judge;
    - Seven elected by the Parliament;
    - Seven judges elected by all judges, from all instances.

Judges were therefore in majority, seen that at least 9 out of 17 members were judges.

In 1997, however, a new change to the Constitution has modified that majority: in the composition of the *Conselho Superior da Magistratura*, now in article 218, the President of the Republic is no longer forced to appoint at least one judge, which means that nine out of the 17 members may be non-judges.

As for the public prosecutors, in the above mentioned 1982 modification of the Constitution, article 226, nr. 2 now stated that the organic of the *Procuradoria-Geral da República* would comprise a collegiate body including members elected by prosecutors. In 1989, the Constitution expressly called that organ the *Conselho Superior do Ministério Público*, saying that it would include members elected by the Parliament and members elected by the prosecutors (article 222, nr. 2).

In 1992 a Superior Council for Administrative and Fiscal Courts was also established in the Constitution (with similar competences to the *Conselho*

Superior da Magistratura, but for judges of the Administrative and Fiscal jurisdiction).

c) the current situation

As shown by the evolution above, we have currently in Portugal three different superior councils:

1. *Conselho Superior da Magistratura*

Composed by:

- the President of the Supreme Court of Justice (elected by secret vote from all the judges of the Supreme Court) – who presides to the Council;

- seven judges (a judge from the Supreme Court – acting as vice-president – two from second instance courts and four from first instance courts, one from each judicial district – Lisboa, Porto, Coimbra and Évora – all elected by secret vote from all judges);

- seven members elected by the Parliament;

- two members appointed by the President of the Republic.

2. *Conselho Superior dos Tribunais Administrativos e Fiscais*

Composed by:

- the President of the Administrative Supreme Court (elected by secret vote from all the judges of that court) – who presides to the Council;

- four judges (elected by secret vote from all judges);

- four members elected by the Parliament;

- two members appointed by the President of the Republic.

3. *Conselho Superior do Ministério Público*

Composed by:

- the General Prosecutor of the Republic (appointed by the President of the Republic, after proposal of the government) – who presides to the Council;

- the four General Prosecutors that preside to each judicial district (appointed by the Superior Council of the Public Ministry);

- seven prosecutors elected by secret vote by their peers, representing all degrees of the hierarchy (1 general-prosecutor, 2 prosecutors and 3 deputy-prosecutors);

- five members elected by the Parliament;

- two members appointed by the Minister of Justice.

Focusing specifically on the superior council of judges, its current composition tries to condense these principles, according to Professors Gomes Canotilho and Vital Moreira (*Constituição da República Portuguesa Anotada*, Vol. II, Coimbra: Coimbra Editora, 2010):

- a majority of members appointed by the directly elected organs of sovereignty, i.e. the Parliament and the President of the Republic, thus accentuating its democratic legitimacy and avoiding the creation of forms of corporate self-management of the judiciary;
- at the same time, a strong presence of members from the judiciary, most of them elected by the judges themselves (the whole of the judges and not separately by the various categories of judges), which reflects to a certain extent the self-government of the judiciary;

- absence of members appointed by the Government, underlining the separation between the judiciary and the executive by pushing away all interference of the latter in the governance of the first;
- the presidency of the Council being inherent to the President of the Supreme Court, in order to avoid, through this personal union of positions, any conflict of legitimacy or authority, and in order to strengthen the position of the judges of the Supreme Court within the Council.

According to article 149, a) of the Statute of Judicial Magistrates (Law 21/85, of July 30th), the Superior Council has exclusive competence to *"appoint, place, transfer, promote, exonerate, assess professional merit, exercise disciplinary action and, in general, practise all acts of equal nature concerning judicial magistrates"*.

d) the functioning of the Conselho Superior da Magistratura

Let me end this communication by giving you a quick overview of the functioning of the *Conselho Superior da Magistratura*.

The council functions in *Plenary* and in *Permanent Council*. The first is composed of all its members, while the latter has this composition:

- the President of the Superior Council of the Judiciary, who presides;
- the Vice-President;
- a judge of the second instance courts;
- two judges of first instance courts;
- one of the members appointed by the President of the Republic;
- four members appointed by the Parliament;

- the member designated to write the decision to be voted.

The Plenary has competence on these matters:

- all acts regarding judges of the Supreme Court or of second instance courts or related to those courts;

- assess and decide appeals against acts carried out by the Permanent Council, by the President, by the Vice-President or by the members;

- issue opinions on legal diplomas relating to the judicial organisation and the statute of judicial magistrates and, in general, on matters relating to the administration of justice;

- study and propose to the Minister of Justice legislative provisions aiming to the efficiency and improvement of the judicial institutions;

- adopt the internal regulation and the proposal of budget of the Council;

- adopt the necessary arrangements for the organisation and proper implementation of the electoral process;

- appoint the Presidents of courts;

- deliberate on the proposal of classification of merit of a judge as *mediocre*;

- assess and deliberate on matters not provided for in the preceding subparagraphs, if it decides to do so, either under proposal of the Permanent Council or under reasoned request of any of its members.

- exercise any other functions conferred to by law.

The Permanent Council has competence on any other matters not attributed to the Plenary.

The Superior Council has an inspection department, composed of judges appointed among those who are in second instance courts (or exceptionally from first instance courts, but with no less than 15 years in the career and with the highest merit evaluation). These inspectors have competence to evaluate the merit of the work of judges (according to article 36, § 1 of the Statute of Judicial Magistrates, all judges are subject to evaluation after one year in service and, after that, every four years) and are also the ones who carry out any disciplinary investigations against judges.

The inspector carries out the inspection, makes a final report and proposes a classification which is presented to the *Permanent Council*, that may follow the recommendation or not. The judge may appeal to the Plenary and from the Plenary's decision may appeal to the Supreme Court of Justice (although this last appeal is only on the legality and not on substance).