



Series 1: Safeguarding the Rule of Law Challenging Times

Episode 1: Safeguarding the Rule of Law

Carolyn Elliott-Magwood (CEM): Welcome to ‘CEELI Talks.’ My name is Carolyn Elliott-Magwood and I am Senior Rule of Law Fellow at the CEELI Institute, Prague. This initial series of four podcasts from CEELI features interviews, conversations, and reports with leading judges, civil society actors, and representatives of European institutions that advance the rule of law. This Series is part of our program with the Central and Eastern European Judicial Exchange Network.

As international in-person meetings are likely to be limited for some time to come, these podcasts allow us to support the network’s mandate to improve judicial integrity and court efficiency in our region, despite the global lockdown resulting from the coronavirus pandemic. This series complements our Webinars aimed at the judiciary but is also available to anyone who wants to know more about the role of the judiciary and how it functions.

So, coming up in this episode, Dr. Jan Grinc of Charles University here in Prague discusses some challenges to the Covid-19 emergency measures that have gone through the Czech courts.

As well, Judge Katica Artukovic from Bosnia Herzegovina tells us about measures her court has taken in light of the pandemic, and my colleague, Freda Grealy shines a spotlight on the work of regional judges with a look at the Brijuni Statement on Judicial independence.

But first I talked with Judge José Igreja Matos, President of the European Association of Judges, about the importance of the rule of law, and the role of the judiciary in protecting it during these unprecedented times. I started by asking Judge Matos about the work of his association.

Judge José Igreja Matos (JM): The European Association of Judges is composed by forty-four associations from European countries. The International Association of Judges that we are a regional branch is composed by ninety-two countries from the five continents. We have four study commissions, one devoted to civil matters, the other to criminal matters, also labor matters and finally the first study commission that is more engaged with problems related with the judicial organization and judicial independence.

CEM: *What has the association being doing in response to the Covid-19 crisis?*

JM: Related to the pandemic crisis — well it was a very difficult moment for us. There was this first moment, everyone was confined, there was this sense of solitude among citizens and obviously also among judges. And it was important for us and for me as President of the European Association to have some kind of communication with our members.

So, we decided, in coordination with the President of the International Association of Judges, to write some statements — with three main aspects to be considered. First, to deliver a strong message of solidarity and support to our fellow citizens, especially for those who were back then, and still now, working on the frontline of combating the pandemic.

The second issue was to deliver also this strong message about the willingness of judges to help. Because in our principles for instance — the Bangalore principles — it's very clear that in difficult moments judges must be, more even than any other citizen, available to help and to defend the values that could be at stake. In this matter, it was because of the emergency laws and the temptation of some political powers to undermine the rule of law and the basic principles that defines democratic societies.

And finally, it was also important to us to have some guidelines, best standards in order to slowly but in a steady way reopen courts and be available also for hearings in the courts —especially in criminal matters. Providing that the health of those who are witnesses or who go to the courts but also the judges, the lawyers, could be guaranteed.

CEM: *Could you tell me more about the second function you talked about, about the role of the judiciary in protecting the rule of law and particularly about how that is especially relevant today during the global pandemic crisis.*

JM: Yes, this was one of the main things that worry us since the very beginning. There were immediately some countries that were a great concern and I am not giving any news referring particularly to the case of Hungary. It's very important in our assessment in any emergency law has a sunset clause — if not there is an open space for any kind of discretionary power that is not controlled by the other institutions of the State. That was why we were very concerned about the situation in Hungary. Even in England, at the beginning they even considered a two-years period for the emergency and all that was appalling at least for me. Fortunately, it was immediately replaced for six months, what is still a very large period of time. I would be much happier in solutions like fifteen days, two weeks, even if they can be renewed, than to have this extended length of time, to have this absolute control. But you know we are living in dystopian times. This is a very harsh phrase to say but it is true, because if you consider first the decay of rule of law in recent years especially in Central and Eastern Europe.

CEM: *So, in addition to the judiciary, civil society has a role to play in protecting the rule of law and I am curious about your thoughts on the relationship between these two sectors when it comes to this role?*

JM: That is a very good question you know, because I am President of the European Association now for three years and in my mandate I have many difficult tasks to tackle. One of them was Poland, and one thing I am absolutely sure is that because civil society, because NGO's, because normal citizens have reacted against this intrusion of the political power in trying to reform the judicial system — it is only because of that that the situation is not so quickly gone wrong.

We can see that also in the way that a large majority of Polish judges are reacting against these changes on their statutes and careers, and the way they try to endanger their independence. The way they react for me is very important, that is why our work is mostly based on the idea that we cannot be alone on the defense of judicial independence — we desperately need public opinion.

I don't see if you can even think about being a judge if you are not independent. It is like our genetic code; it is impossible to even consider this possibility. If you are not independent, you are not a judge. But what I try to underline is that this idea of judicial independence is to serve the others — to serve the citizens. If I go to a court as a normal citizen, the most important for me is to know that the judge he is absolutely impartial, for him or for her, it's indifferent the name of the person, it is indifferent if the person has the influence of powerful people.

Another issue is the fight against corruption, because it is not feasible to consider the possibility of having a real fight against corruption if you don't have an independent judiciary. Because if they control the courts it is impossible to investigate and to punish those who have corrupt behaviors in society.

CEM: *José I was hoping you could tell us a bit about, in these times of crisis and extraordinary measures, how judiciaries can ensure that governments do not use the opportunity to seize greater control of their citizens?*

JM: That is a very tough question. We try to do our best. We should have the power granted by law to assess these kinds of measures, to correct them, or even to obstruct if they are not compatible with the rule of law.

This is not an issue for militaries, this is a health crisis. So, any measures should be directed to, in a way, protect the health of the citizens. In several countries, because of the pandemic, they are addressing issues like freedom of expression to try to obstruct the activities of the media. To decide on putting people in jail because they have comments somewhere that something could be done in a better way or not been well done by the government, etc. — this is clearly out of the scope of a health crisis.

The only idea behind the emergencies laws is to have people protected from any contagious problem and we are increasingly concerned. At the beginning, there was a very clear idea about this. Now, especially in totalitarian regimes, maybe they can use this opportunity to impose some kind of measures that are not necessary. The key issue is proportionality, that is also on the charter on the fundamental rights within the European Union and we should consider it in any case.

CEM: *I'm thinking specifically about emergency legislation that is affecting the operation of the courts such as whether they can be open, whether remote hearings are permitted or even required, how time limits will change. What are your thoughts on these measures that are directly affecting how courts operate?*

JM: We have been engaged in several initiatives regarding this crisis—one of them was in cooperation with the OSCE. [The goal] was to define the main issues that we should address in this situation. There was obviously the immediate problem of the health issues of those working in the courts. There are many judges who are afraid of going to the court because sometimes political authorities tend to neglect the protection of the courts, they only think about obviously the hospitals or public places and so on.

The second one is about urgent cases. The definition of urgent cases is absolutely decisive, because if your case is put as non-urgent by the law it could be a problem. For instance, domestic violence is an issue that everyone is talking about. But also, elder people are one of the main concerns of the fight against the disease, children, detainees. It was also a very big concern for us the situation of those who are in prisons and the problem of freedom of expression by journalists.

And finally, the third thing is the new cases that are now emerging because of the emergency laws and because of the new situation that we are confronted. Maybe this will last several months, even years and we must have some kind of training, and some kind of awareness, and knowledge on how to deal with situations that are absolutely new, even for us judges — the quarantine procedures, the restrictions on the liberty of movements from citizens, etc.

And finally, the role of an Association is to underline the importance of the collective interests. To be engaged in social integration through the values of cooperation and solidarity. It is not easy for judges to go each day to court, to have hearings in these difficult conditions, but we try to bring also this important message of solidarity and cooperation. Trying to spread good practice, good standards, trying to push political authorities to have protocols, trying to assess where the problem exists and to denounce it — always with the help of civil society. Civil society again is decisive and, if I may say so, organizations like CEELI are absolutely essential for the work that you are doing in the region of Central and Eastern Europe.

CEM: *Thank you for that Judge Matos. Now, I just have one more question I wanted to ask you: I was wondering if you could speak a bit about what you have learned over the past two months and what you think you your association, yourself, as well as judiciaries generally, will be taking with them into to their practice after the pandemic is over?*

JM: In a more technical approach, I would say there will be a new world after this because video conferences, digital justice, and remote courts are here to stay. There are big issues about this, especially if you are talking about collecting evidence from witnesses for instances. I am very careful about this kind of video hearings. I have this example of women that are having telephone or video hearings to decide if their children should be delivered to an institution. This is very shocking for me to be honest, because as a judge who has experience of 30 years, the personal interaction with the witness, with the defendant, with the person that is facing us, is absolutely decisive to see if he or she is reliable, etc. I am very optimistic about for instance digital platforms for communication to share documents, to interact with lawyers. In civil cases for instance, there is a huge opportunity to take this pandemic and go a step forward about digital platforms in many countries. And also, I think that we can be more effective if you can work from home when working with the papers or something that is more connected with intellectual work.

The other thing I would mention after these two months is that the pandemic can create conditions in the future for more totalitarian regimes, more autocratic regimes, because democracy depends mainly on interaction, on being close, on discussion, on dialogue.

So, if I may end with some kind of message to the judges — I would say two things. First, to keep strong in these difficult times. International institutions are here to help you,

to assist you, to be with you. And the second thing — especially directed to the younger generation of judges, because I truly believe that the younger generation of judges are decisive for the future of rule of law — correct training on rule of law, orientated around the basics of what is being a judge with Bangalore principles, judicial independence, separation of powers, etc. must be especially addressed to the younger generations.

***CEM:** A big thanks to Judge Igreja Matos for his full-hearted appeal and food for thought on the impact of this pandemic. As he highlighted, it's a concern across Europe, including here in the Czech Republic, where Covid-19 emergency measures have been the subject of a number of court challenges. Dr. Jan Grinc of Charles University walks us through a key case in the administrative court, and explained the background, the decision, and its wider impact.*

Dr. Jan Grinc (JG): There were multiple cases of judicial review of the current emergency situations, but the one that has been most present in the media was the case when the administrative court actually invalidated the orders of the Ministry of Health, which in general prohibited the sale of goods and put in certain restrictions on the free movement of persons. Now, the main argument of the court was that the Ministry overstepped its competence, but the courts did not review the necessity or the proportionality of the measures themselves. So, it was decided on formal grounds so to say.

The situation in the Czech Republic is a bit complicated. There are measures according to the Act on Public Health which can be adopted at any time, they are not dependent on the calling of the state of emergency — these are the measures that have been invalidated by the court. And on the other hand, when there is a state of emergency the government may adopt emergency measures according to a different Act on Crisis Management. And the main argument of the court was that once the state of emergency was declared in mid-March, all the measures limiting fundamental rights should have been adopted by the government under the Crisis Management Act and no longer by the Ministry of Health.

The court basically argued in a formal way that the state of emergency has some kind of parliamentary control built-in to it. So, it is more legitimate to adopt such harsh measures by the way of the governmental orders when the chamber of deputies may at any time terminate the state of emergency or take other action. So, the government basically tried to shift the legal responsibility to the Ministry of Health. I think they were not really thinking about the legal consequences of decisions they had made. They were more concentrated on the crisis management and considered the legal situation to be secondary.

***CEM:** And how did the government respond to this decision — what's the fall-out been?*

JG: The government respects the decision. It has tried to downplay it a bit by saying this is just legal discussion and it does not cast doubt on whether the measures adopted during the emergency are legal at all — which I think is detracting a bit from the decision. On

the other hand, the government also filed a cassation complaint against the decision of the Administrative Court, so it will be reviewed by the Supreme Administrative Court. I think that the application was decided very quickly by the Administrative Court, so maybe the government now has more elaborate arguments to support its own position.

Also, the immediate impact of the decision was not so harsh on the government, because by the time the Administrative Court invalidated the measures of the Ministry of Health, the government was already planning to relax some of those measures. So, mostly, I think the importance of the decision lies in the fact that the government was alerted that it has to be pay attention to the legal situation.

CEM: Yes and you mentioned that there have been other cases going through the courts, are those on-going or have they mainly been resolved?

JG: Many petitions have been filed in a way that they are not really procedurally able to be debated by the courts, so many applications have been dismissed. And the Constitutional Court has already decided that the sole act of the declaration of the state of emergency is not to be reviewed by the courts, unless there is some kind of a clear abuse of the situation. The political control by the chamber of deputies is the primary one, and the courts in general did not try to reassess the necessity or proportionality of the measures put into place, because they are aware of the fact that the government had to act immediately and the situation developed with each day.

There has been one interesting case where there was supposed to be a by-election to the senate, only in one district, and only one senator was to be elected and the government tried to postpone this election by an emergency order. And the court basically stated that this has to be done by adopting a law in Parliament. So, the government then put forward a bill and it was adopted. So, I think, the role of the courts of the Czech Republic so far has been positive in a way that they did not overly take control of the situation, but they have kept the government in check. And the main thing that has to be learned from this is to have a plan that would be clear in how to proceed in future emergency situations.

CEM: Thank you Dr. Jan Grinc for putting that ruling into a much broader context. Of course, the global pandemic is not only impacting the cases that judges are hearing, it's also meant changes to how the courts operate — as we can see from this on-the-ground report from Sarajevo, provided by Judge Katica Artukovic.

Judge Katica Artuković (KA): My name is Katica Artuković, I am a judge in Bosnia and Herzegovina, Vice-President of the Association of Judges in Federation of Bosnia and Herzegovina, and a member of the CEELI Institute Judicial Network.

The coronavirus has created a crisis which does not stop at borders and affects all areas of our lives. The Bosnia and Herzegovina Justice System is no exception in this regard, and

we are faced with new challenges. I want to tell you about the situation in Bosnia and Herzegovina and the resulting changes due to the crisis in the operation of the courts and our judicial system.

Firstly, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, which is the regulatory body for judiciary, adopted a new decision about how judicial institutions should proceed with work. This decision emphasizes that the work of judicial institutions must be consistent with the decisions of the competent crisis headquarters and other crisis management authorities in the territory of each individual institution.

All decisions on the liberalization or changes in working practices in judicial institutions must be in accordance with the current epidemiological situation in the field of work of each institution, which must be monitored on a daily basis and appropriately modified. For example, in the criminal law area, the presidents of those courts and the chief prosecutors have an obligation to take coordinated actions to increase safety procedures and operate in an accordance with social distance requirements, whilst also making decisions about reducing the number of court officials and staff who are on duty so as to protect health and safety.

Specific protective measures to be introduced might include the following at building entrances; disinfection of footwear, dispensers with disinfectant, measurements of the temperature, the mandatory wearing of a protective mask and protective gloves, the disinfection of all premises in the building and, in particular, the publicly available premises.

The presidents of the courts and the chief prosecutors are obliged to draft a plan outlining these specific measures in the institutions they manage and to submit the same to High Judicial Prosecutorial Council in Bosnia and Herzegovina, ministries of justice, and the bar associations. Obviously, increased funding is required to implement the measures and certain courts may not be opened until the funding is provided.

Hearings can be organized and scheduled only in a manner and in premises where it is possible to provide adequate social distance of all participants and constant natural ventilation. Taking into account the urgency of the case, the age of the case and the number of participants in the proceedings. This decision remains in force during the current state of emergency arising from COVID-19 virus.

It is important to bear in mind that once the current crisis subsides sufficiently for the justice system to resume its activities at an increased or full capacity, the courts will face a considerable, possibly overwhelming, backlog of postponed proceedings, hearings and trials, as well as possibly greater-than-normal numbers of bankruptcy, insurance, labor law, and other such matters.

There is no doubt that individual judges are entitled to measures to protect their right to life and right to health, and indeed the ability of the judiciary to continue to function depends on their well-being. At the same time, the question arises in the present circumstances whether judges might justifiably be asked to accept a higher degree of risk than that expected of other individuals that do not hold judicial office, given the essential role of the judiciary in securing human rights protection and the rule of law.

In the face of such risks, many judges are driven to continue to work and provide access to justice, while much of the rest of the population may be at home, individual judges continue to demonstrate courage in this regard.

Without doubt, the judiciary plays an essential role in securing the rule of law by ensuring that the actions of the other branches of government respect the law. Indeed, this role becomes even more important in times of emergency or other crisis.

To conclude, although we are faced with so many challenges, judges and other judicial staff are striving to keep the doors to justice open and remain committed to achieving our core objectives. In particular, by strengthening the rule of law and the right of access to courts for our citizens and other users. However, this must be done in accordance with the restrictions and safeguards directed by competent authorities to ensure the health and safety of all citizens.

Thank you and wishing you good health and success.

CEM: Thank you Judge Katica Artuković for that view from the frontline in the global fight against Covid-19.

Now, finally, my colleague Freda Grealy will tell us a bit about some of the work of the Conference of Chief Judges of Central and Eastern Europe.

Freda Grealy (FG): This podcast series is designed to support the judiciary, highlight the challenges faced particularly during this time of COVID 19, and to inform the public about the work that judges are engaged with.

In this episode, I want to tell you a little bit more about the work of the CEELI Institute with judges of Central and Eastern Europe and beyond.

Judge Matos in his interview mentioned the Bangalore Principles, but closer to home here in Central Europe, in Croatia in 2015, the Conference of Chief Justices of Central and Eastern Europe signed and adopted the Brijuni Statement of Principles of the Independence of the Judiciary. The Conference is a self-sustaining organization whose members are the Supreme Court Chief Justices who lead the judiciaries of twenty-three nations from the Baltic Sea to the Caucasus, including the Balkan Peninsula. The Brijuni

Statement outlines clear objectives and goals for every judiciary to achieve, and served to inspire judges about the importance of their work.

They add to the body of international and regional instruments that recognize that true judicial independence — both institutional and individual — is indispensable to the successful functioning of the judiciary under the rule of law.

We at CEELI are delighted to be able to continue to support the work of the Conference of Chief Justices of Central and Eastern Europe in the publication and distribution of the Brijuni Statement.

You can find copies to download along with many of our other publications from our website at ceeliinstitute.org

***CEM:** Thank you Freda and thanks to all our guests on this podcast from the CEELI Institute. For more information, resources, and the transcript of the show you can visit us at ceeliinstitute.org.*

In our next programme the Right Honourable Judge McCloskey, President of the High Court of Northern Ireland discusses the challenges and opportunities for video conferencing in support of remote access to justice and Ilze Tralmaka of Fair Trials shares some concerns about the effects this global pandemic may have on the rule of law.

This is 'CEELI Talks' from the CEELI Institute, Prague. I'm Carolyn Elliott-Magwood, till next time — thanks for listening.



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