

About solidarity and personal courage of truly independent and impartial judges

By Tamara Trotman. [Translation of the Dutch version in *Ars Aequi* (june 2014)
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The independence and impartiality of a judge: is it a hollow phrase or the guidance for every day's practice? In this section the chairwoman of Judges for Judges explains why the Foundation is committing itself to the plight of brave judges like Venezuelan Maria Lourdes Afiuni, Serbian Dragana Boljević and Ukrainian Oleksandr Volkov.

Introduction/Prologue

Every law student will have picked up something about Montesquieu, the division of powers and the importance of independent administration of justice. During one's studies these may seem beautiful, yet somewhat abstract words and notions. Let me quote from the most recent edition of my old textbook:

“The independence of a judge is a means to enlarge the authority of the ‘political’ function of the administration of justice, i.e. the maintenance of a coherent order of cohabitation which applies for everyone and is generally accepted. It is the toll that must be paid to the notion that this order should be governed by the rule of law, and that a judge should consequently be free to do justice with impartiality. Ascertaining what is ‘right’ in a particular situation regardless of whom it concerns, is a task and a commission which requires an amount of freedom for which a fight must be put up time and again.”¹

These words have become painfully real for Venezuelan Maria Lourdes Afiuni, Serbian Dragana Boljević and Ukrainian Oleksandr Volkov, for each of whom Judges for Judges is working and to whom I shall revert later.

The foundation Judges for Judges (Rechters voor Rechters)

The foundation Judges for Judges (Rechters voor Rechters) was founded in 1999 by Bert van Delden, former President of the District Court of The Hague, on the occasion of his stepping down from the office of chairman of the Council for the Judiciary. He considered it a good idea for Dutch judges to take up the cause of foreign colleagues in need. Van Delden had become inspired by the successful foundation Lawyers for Lawyers (Advocaten voor Advocaten), which since 1986 has actively promoted that lawyers should be allowed to practice in freedom and independence.

The objective of Judges for Judges as laid down in the foundation's Statutes is for Dutch judges to support judges abroad both in material and immaterial ways.

¹ D.J. Elzinga & E. de Lange, Van der Pot. Handbook of Dutch Constitutional Law, Deventer : Kluwer 2006, p. 805.

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I have since a number of years been actively involved with the Dutch foundation Judges for Judges. On 24th September 2009 the The Hague Appeals Court Judge Gerrit-Jan van Oven together with Bert van Delden organized a conference for judges who might be interested to revive the Foundation. It turned out that there was sufficient enthusiasm to carry on with the foundation's work. A new committee, of which I became a member, was formed in December 2009 and ever since the foundation has become increasingly active. We wanted Judges for Judges to gain more presence and its supporting network had to be widened. Nowadays Judges for Judges is as committed as ever to fellow-judges abroad who have run into problems or risk problems on account of their professional practice. These problems are mostly related to (presumed) violation of their professional independence. We also concern ourselves with judges, who have been discharged for disturbing reasons, have been arrested and imprisoned, put under pressure, are threatened or even assassinated. The support we give is mostly immaterial and usually works as follows.

We verify the incoming information about the judge concerned as well as we can. In close consultation with that judge we ascertain how the foundation can help improve his or her situation. In some cases the foundation will get in touch with the authorities in the country concerned, or with national or European parliamentary bodies. In other cases the foundation will cooperate with other authorities and organisations, such as the Human Rights-Ambassador, Dutch Embassies, bodies of the Council of Europe, Amnesty International, the Consultative Council of European Judges (CCJE), Medel (Magistrates européens pour la démocratie et la liberté), the International Commission of Jurists (ICJ) or the Special Reporter with the UN for the Independence of Judges and Lawyers. We seek publicity when necessary and useful.

By now the foundation has supported judges in various countries all over the world, a.o. in Russia, Georgia, The Philippines, Venezuela, Serbia, Slovakia, Swaziland, Bulgaria, Turkey Tunisia and Ukraine². In this article I shall shed some light on three countries with which I have been personally involved, and while doing so give a the reader an impression of the work of Judges for Judges.

Venezuela

The new board of Judges for Judges has used the first year to get to know the relevant persons and institutions for a foundation like ours. A good network is indispensable, if you want to be effective as a small organization. In order to achieve this we have spent quite some time with Lawyers for Lawyers (L4L), an obvious pendant. In June 2010 Judges for Judges was invited by L4L to co-organize a so-called side-event during the 14th session of the Human Rights Council of the United Nations in Geneva.

The theme was; *Attacks on Lawyers, Judges and Human Rights Defenders: The Urgent Need for Protective Measures*. It is fascinating to see from close by how such an important organ like the UN works; sometimes more effective than other times. It is important to always keep the famous words of the US diplomat Henry Cabot Lodge Jr. in mind: 'This organization was created to prevent you from going to hell. It isn't created to take you to heaven.' In general,

² Our website www.rechtersvoorrechters.nl provides more information on our activities.

countries are sensitive to statements by UN bodies, naming and shaming is often an effective means. But by conversations with concerned UN staff during the side-event it became clear that Venezuela itself showed absolutely immune to international pressure in the case of the Venezuelan criminal judge María Lourdes Afiuni.³ The Foundation shortly thereafter committed to fight for her cause.

Afiuni was arrested after she decided to suspend the temporarily custody from Eligio Cedeño on the 10th of December 2009. This businessman was suspected of money laundering and at that moment already remained in custody for almost three years. The maximum period allowed however under the Venezuelan law was two years. The decision from Judge Afiuni to suspend the temporarily custody from Eligio Cedeño was in line with a decision by the UN Working Group on Arbitrary Detention, which expressed that his continued detention was unlawful⁴. Eligio Cedeño fled the country that day. Immediately after this President Chavez publicly announced his dissatisfaction with Afiuni's decision and he accused her of corruption: according to Chavez Judge Afiuni would have helped Cedeño to fled the country and therefore she should be sentenced to 30 years imprisonment⁵.

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The decision from Judge Afiuni however was in accordance with the Venezuelan and international law. This didn't stop the fact that she was imprisoned in a women's prison from the 10th of December 2009 till January 2011 under appalling conditions. Afiuni's safety was at stake here since she was detained amongst inmates that she previously sent to prison. She was threatened and inmates tried to set fire to her cell. Even when she was diagnosed with cancer, she wasn't appointed the appropriate medical care. Eventually in January 2011 she was committed to a hospital, where she received surgery. On February 2nd, 2011, her detention converted into house arrest.

Judges for Judges called attention to Afiuni's case in several ways. This resulted into the fact that Afiuni's case was the subject of topic in the House of Representatives several times and there have been several meetings of Dutch Judges where judges were asked to participate in the 'Send Afiuni a Card' collaboration. Also on the 22nd of December 2011, in cooperation with the ICJ a Spanish press report was released which expressed concerns about the extension of the custody of the Venezuelan Judge Maria Afiuni, without a preliminary hearing, and the conditions of her house arrest since February 2011. In this article an appeal was made for fair trial and an unconditional release⁶.

The case of Maria Afiuni has attracted a lot of attention, both in Venezuela as in the rest of the world, from the UN, various human rights organisations and the media. This was certainly the case when a book came out written by the Venezuelan journalist Francisco Olivares

³ americanbar.org/content/dam/aba/administrative/human_rights/aba_chr_trial_report_afioni.authcheckdam.pdf as well as the report by the International Bar association via: www.ibanet.org/Article/Detail.aspx?ArticleUid=cae3da1b-b3a4-4b0d-8b17-21e317b38327.

⁴ Opinion No. 10/2009, A/HRC/13/30/Add.1, p. 172 ev.

⁵ Inter-American Commission on Human Rights, Report on Democracy and Human Rights in Venezuela, d.d. 30 December 2009, p. 74, par 297.

⁶ www.rechtersvoorrechters.nl/media/venezuela/Statement_RR_ICJ_Afiuni_22122011_ESP.pdf.

(*Afiuni la presa del comandante*) based on interviews with Afiuni, revealing that Afiuni was raped in detention in 2010 and had undergone an abortion while in prison.

On February 14, 2013 a number of Special Rapporteurs have again asked for attention for the case of Afiuni, asking the Venezuelan authorities among other things to investigate the rape and to provide adequate compensation. Margaret Sekaggya, the Special Rapporteur for human rights defenders, called the case ‘an emblematic case of reprisal for having cooperated with one of the UN’s human rights organs’⁷.

As of June 13, 2013 Afiuni has been provisionally released because of her ill state of health, under the following conditions: Afiuni is prohibited to leave the country; she has to report to court every 14 days; she is not allowed to contact the media or use social media. This last condition in particular has troubled Afiuni, as she has grown to be an active and polemic user of Twitter during her house arrest.

On December 10, 2013 Afiuni’s lawyers have (again) filed a court request to release their client unconditionally, stating that the ongoing restrictions of her freedom of movement is unlawful. On Human Rights Day, Judges for Judges flagged the issue on its website and in a *tweet*. That message has been noticed in Venezuela – through re-tweets or otherwise – leading the national newspaper El Universal to write an article about it the same day. Our action was of a highly symbolic nature. It is important to show in Venezuela that the other parts of the world have not forgotten about Afiuni and her process⁸.

Meanwhile, there is an atmosphere of fear among other Venezuelan judges. From Afiuni’s case they know what may happen to them if they take decisions that do not concur with the wishes of the political authorities.

The criminal proceedings has completely distorted the life of Maria Afiuni. The proceedings have halted effectively since October 23, 2013: the proceedings have then been declared null and void, but no new trial date has been set. Given the current violent political crisis in Venezuela the question is when the process will be continued.

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At the moment, the rule of law in Venezuela is out of sight. It is up to us to keep the international spotlight focussed.

SERBIA

Let me take you to another case³, closer to home. In December 2009 no less than 837 judges were dismissed in one governmental order. Judges for Judges has been monitoring the developments regarding this large-scale dismissal closely, with specific attention for the position of the dismissed colleagues. Dragana Boljević is chairperson of JAS, the Judges Association of Serbia⁹ and figurehead in the fight for a really independent judiciary, without the administration interfering. We have paid a number of working visits to Serbia during

⁷ www.un.org/apps/news/story.asp?NewsID=44141.

⁸ www.rechtersvoorrechters.nl/?p=1170.

⁹ <http://www.sudije.rs>.

which we attended the –ramshackle- disciplinary legal proceedings against Boljević. Also we have, together with Medel¹⁰, asked for national and international attention for the situation of the dismissed Serbian judges.

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Taking into account Serbia's¹¹ European aspirations of, it has been and still is clearly in the interest of this country that EU-organs have no reason to speak out too critically with respect to the reforms regarding the judiciary. It is therefore a classical *stick-and-carrot situation*. Consequently, our foundation has been in frequent contact with the European Commission, especially with the desk of the European Commissioner on Enlargement, Štefan Füle. The discussions are constantly influenced by the friction between the political will to enlarge the EU on the one hand, and the actual testing whether Serbia meets the EU-requirements with respect to the judiciary and the fundamental rights (Chapter of negotiations 23) on the other.¹²

On 29th of June 2012 JAS has presented Judges for Judges with a Charter of Special Merit in view of our foundation's work to promote the rule of law in Serbia and for its support of JAS.

This was a pleasant acknowledgement of our activities, but we became truly delighted when on 23rd of October 2012 the dismissal of judge Dragana Boljević and hundreds of other judges was reversed by the Serbian Constitutional Court. In a broadly motivated decision, identical in all cases, the Court considered that and how the decision of the High Judicial Council (HJC) which confirmed the dismissal of the judges, was taken with complete disregard of rules of proceedings and therefore was to be annulled.

It is important that the Serbian judiciary has given this sign itself and that it has not been necessary to take the case to the Strasbourg Court to get the arbitrary dismissals reversed.

To this day, the actual implementation of the decision of the Constitutional Court has turned out to be not simple. On a very basic level for example, places had to be found to put the re-instated judges to work again. Just reversing the dismissals does not create an independent judiciary. As the European Commission puts it:

‘Looking ahead, Serbia will have to pay particular attention to strengthening the independence of key institutions and notably the judiciary. The constitutional and legislative framework still leaves room for undue political influence, especially when it comes to the role of parliament in judicial appointments and dismissals. (...) The effective implementation of the strategies and action plans in the fields of judiciary and anti-corruption will test Serbia's preparedness and willingness to move forward.’¹³

On 21st of January 2014 the first intergovernmental conference relating to the negotiations for the accession between Serbia to the EU took place. One of the most important conditions for Serbian membership is the realization of a fully independent judiciary.

¹⁰ <http://www.medelnet.eu>

¹¹ Serbia has requested EU-membership in December 2009 and has been a candidate-member as of 1st December 2012.

¹² Judges for Judges was explicitly mentioned a number of times in the Report on the debate in Dutch Parliament on 15th of December 2011 with respect to the approval of the Stabilisation- and Association Treaty with Serbia.

¹³ Brussels, 16.10.2013, COM (2013) 700 final als toelichting bij het Serbia 2013 Progress Report Brussels, 16.10.2013, SWD (2013) 412 final.

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It is then painful to read the biting conclusion of the recent report of the Serbian Anti-corruption Council on the reforms within the judiciary:

‘The situation regarding the independence of the judiciary has not improved during the past two years. On the contrary, the situation has deteriorated, as greater interference by the executive power with the work of judicial institutions has been observed.’¹⁴

No doubt, this report provides support to the members of the Judges Association of Serbia JAS. It is not just that the administration puts pressure on and interferes with the judiciary. There is also a growing pressure on individual judges, possibly orchestrated by the press, coming from the politicians and from the politically appointed court-presidents, regarding the cases the judges work on. This follows from the address that the Judges Association of Serbia sent to the HJC, with the urgent request to really take action against these abuses.¹⁵

So, there is still a long way to go. Judges for Judges will provide help and support wherever we can.

Ukraine

Finally, I would like to draw attention to the situation of the judiciary in Ukraine, a country which at the time of writing this article has been the focus of media attention for many months, because of its volatile political situation.

In its *pilot judgement* of January 9, 2013, which has become final on May 27, 2013, the European Court of Human Rights (ECHR), acting in accordance with Rule 61 of the Rules of the Court, had determined, in no uncertain terms, that Ukraine is obliged to take measures in order to reinstate as soon as possible the previously dismissed Supreme Court judge Mr Oleksandr Volkov. Let me cite from the ECHR’s press statement:

‘The Court has noted that Mr. Volkov’s case disclosed serious systemic problems as regards the functioning of the Ukrainian judiciary, in particular as regards the separation of powers. Consequently it recommended that Ukraine urgently restructured the institutional basis of its legal system in order to reform the organisation of judicial discipline in the country.

Turning to individual measures, the Court did not consider the reopening of the domestic proceedings to be an appropriate form of redress for the violations of Mr. Volkov’s rights, as there were no grounds to assume that his case would be retried in accordance with Article 6 of the Convention in the near future. Given the very exceptional circumstances of the case, the Court held that Ukraine was to reinstate Mr Volkov in the post of Supreme Court judge at the earliest possible date.’

To date, Ukraine has not taken tangible steps to carry out the Court’s ruling. Professor Philip Leach, Mr Volkov’s lawyer and a member of the European Human Rights Advocacy Centre in England, has approached Judges for Judges and asked to support the case of his client. Our foundation has subsequently asked the Committee of Ministers at the Council of Europe

¹⁴ Anti-corruption Council, Report on Judicial reform d.d. 17 april 2014, www.antikorupcija-savet.gov.rs/en-GB/reports/cid1028-2486/report-on-judicial-reform.

¹⁵ Viz www.sudije.rs/en/actuals/news/judges-association-of-serbia-address-to-the-president-of-high-judicial-council.

(which is responsible for overseeing the implementation of ECHR Rulings) in a letter dated August 29, 2013, to take note of the case of Mr Volkov. Thus far, the Committee has urged Ukrainian authorities at every meeting to implement the Strassbourg Ruling and pointed out that Ukraine is unconditionally obliged to arrange for the reinstatement of Mr Volkov as judge at the Supreme Court. Hopefully Ukraine in its new political constellation will not disregard the calls the Committee has made.

Recently, Judges for Judges has also drawn attention to the situation of judges in Ukraine in another way. As of January 1, 2014, a new program for judges-in-training has begun, organized by the SSR (Stichting Studiecentrum Rechtspleging, the Dutch training institute for the judiciary). Judges for Judges was asked to make a presentation on the theme of ‘Judicial attitude, Professionalism, and Policy’. The request was based – according to the SSR working group responsible – on the idea not only that judges and judges-to-be should be aware that what is considered ‘normal’ in The Netherlands, is in fact a privilege that is not shared by judges elsewhere, but also that this privilege needs to be guarded, as all sorts of (extreme) political pressure may question this very privilege. Judges for Judges based its presentation on its book ‘Matters of Principle’, which contains the most important international, European and Dutch judiciary codes.

On March 26, 2014, at the invitation of Judges for Judges, two (dismissed) judges from Ukraine travelled to The Netherlands to share their story and experiences with the first group of judges-in-training who undertake the new training-program. These were the aforementioned Mr Volkov and his colleague Mr Oleg Bachun (whose case is still pending in Strassbourg awaiting the implementation of the Ruling in the case of Mr Volkov). In this way, the principles contained in the judiciary codes were brought to life.

Later that day our foundation organised a meeting in Amsterdam, with the title ‘Independence is not self-evident – Judges in distress’. Mr Volkov and Mr Bachun have also shared their impressive story at this meeting. Both former judges refused to give in to political pressure and are still steadfast in their ideals, even – as was the case then – when they understood that their stance would lead to their dismissal. They struggled without falter for the rule of law in Ukraine, including a truly independent judiciary without corruption, and hope to get back to work as judges one day. That attitude commands respect and inspires at the same time to reflect on what it means to be an independent and impartial judge.

Epilogue

In the chapter “Restraint and discretion” under the heading “Defence of the Rule of Law” the Flemish Magistrates Guide quite aptly says:

When democracy and fundamental liberties are in danger, the reticence of the magistrate gives way to the right of indignation.

And rightly so! In any country, an independent judiciary can only exist by the grace of individual judges who have the personal courage to keep their backs straight in hard times and –see the quote at the beginning of this article– to fight for the necessary space to do justice regardless of the persons involved. For these judges this is not a hollow phrase but their daily guidance. These are the persons who, when the chips are down, are actually prepared to accept the consequences of an honest fulfilment of their judge’s office. When the reader has become aware of this while reaching the end of this article, I will have succeeded. Judges for Judges wants to stand up for these judges wherever possible. The least Dutch judges can do

for these foreign fellow-judges is to profess their solidarity in words and actions, in order that they will feel supported.