



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
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Lord Justice Geoffrey Vos

President of the European Network of Councils for the Judiciary

Introduction

1. Thank you very much, Mr Chairman.
2. I am honoured to have been asked to speak today at such an important gathering.
3. This is an important time for the judicial systems of the Czech Republic and of Europe. To put it bluntly all European judicial systems are under pressure. Years of austerity and economic recession have made it difficult for all of us to uphold and improve the standards of justice that we aspire to. But here the debate is even more crucial as you consider the future organisation of your justice system in a world where views vary widely. I very much hope that we will have an edifying and constructive debate over the next 2 days.

Why should an English judge support a Council?

4. I realise that I am carrying a standard for an institution that may not be universally acclaimed by all the speakers at this meeting. I have studied carefully some of the academic writings of Professor David Kosar and Professor Michal Bobak and find that the very concept of a Council for the Judiciary can meet with scepticism and even open opposition. Despite all that, I would like to take this opportunity to explain why I believe that a Council for the Judiciary provides, at least, one of the most secure and resilient foundations for an independent and accountable judiciary.
5. I shall not have the arrogance or the presumption to suggest that a Council for the Judiciary is the only possible way of ensuring an independent and accountable justice system, because I would be the first to admit that there is more than one way, as we say in English, to skin a cat.
6. I should first explain why it is that an English judge is making these large statements, when he comes from a country in which the Judges' Council is entirely consultative and has none of the powers that the proponents of the European model of Councils for the Judiciary would advocate.

7. The first thing to say is that UK judges face all the challenges that judges face in other parts of Europe. It is just that we have a cultural history that makes it easier for us to combat some of the pressures we face. UK judges are a very independent bunch. But they too are in need of safeguards, and they too must earn public confidence. The pressures are, as I have already indicated, the same the world over.
8. The second thing is that the constitution in the UK was amended radically in 2005 and 2008 so as to alter the office of Lord Chancellor, which had provided an important cornerstone for independence of the judiciary for 600 years. The mechanism by which UK judges can resist pressures from the other two pillars of the state, the legislature and the executive, was changed dramatically by these reforms. Time will tell if they are really working, but some would certainly argue that further reforms are needed and that consideration of the introduction of a European model of a Council for the Judiciary should be given active consideration.
9. The third thing is that I fully understand that Professors Bobek and Kosar would argue that I come from a country that might be well able to cope with a model for Councils for the Judiciary that was “Made in Latin-Europe”. But they would also argue that Eastern European countries who have recently joined the EU cannot cope so easily.
10. I am not so sure. I accept there are huge differences between the UK and any of Poland, Slovakia, Bulgaria or Romania to name but a few. But there are also similarities, and, in my view, the post-Communist states cannot be properly regarded as a coherent mass without the very significant differences between them being recognised. One size does not fit all, and, as I shall explain in a moment, the ENCJ has never suggested that it should. The fact that the ENCJ makes recommendations as to what a Council for the Judiciary might properly do and achieve, it is neither prescriptive nor directive.

The need for a fire-break

11. Before trying to understand what mechanism can be used to provide a fire-break or a barrier between the judiciary and the other two arms of state, one needs to understand why such a barrier is needed in the first place.
12. We all understand the basic concept of judges deciding cases impartially and independently free from all outside influences and without fear or favour. But we need to acknowledge that this is actually much easier said than done. We need just to examine why that is so.
13. First, judges are generally appointed by the state, and are generally paid by the state, yet they decide cases involving the state all the time as part of their work. Such cases are criminal ones, administrative ones, employment cases and many others. If the judges are going to be impartial and fair to both sides, they need to be free of any influence by the state, because the state is such a frequent party to litigation.
14. Secondly, judges need to free from inappropriate influence by politicians, the executive and from Parliament, because by the nature of things politicians always have some kind of political agenda. They want to spend

less, or to clamp down on organised crime, or to house more people, or to reduce poverty or whatever it may be. None of that is a bad thing. But judicial decisions cannot be influenced by a political imperative to clamp down on certain types of crime, or to achieve any other social imperative. Judges have to decide every case between the parties according to the law and the merits.

15. I can divert a moment to say something about prosecutors. They are in a slightly different position from judges, even though in some countries their governance is amalgamated with that of judges. The difference is that the Government is entitled to set the priorities for prosecutors. For example, a Government may be elected to stamp out drug crime. If so, it may legislate to make drug crime the highest priority for police and prosecutors. If so, the prosecutor, though obliged to act independently and impartially in deciding upon a prosecution in any particular case, is bound by law to follow the legally enforceable government priorities. Judges are not in that position. They must decide every case without fear or favour according to the law and the evidence without regard to any political imperative of any kind.
16. Going back, though, to the judges' need for independence. In addition to needing to be independent from the state, judges need also to be free from influence by the media. This is also often easier said than done, particularly in countries where there is a vibrant popular press that makes it an article of faith to criticise judicial decisions, for example for being too lenient in sentencing criminals or deciding in favour of unpopular sections of society. Once again, it is the judge's duty to follow the law, and not to be influenced by public opinion.
17. But that brings me to the next necessity for a functioning justice system, and that is judicial accountability. It is one thing not to be influenced improperly by the state or by the press, but quite another to make sure that what judges do is always public, open and accessible.
18. All judicial decisions must be publicly available, delivered in an open court and published on an accessible website or platform. Justice in secret is no justice at all. The public must have confidence that judges are serving their interests, and that the cases decided between citizens and the state are decided fairly and without bias towards the interests of the government.
19. Public confidence in the judiciary is absolutely central to a successful judicial system.
20. So, how then can these seemingly impossible things be achieved?

How should a Council for the Judiciary look?

21. I want to say a little about the purpose, make-up, and functions of a Council for the Judiciary.
22. The Council forms the barrier between politicians on the one side and judges on the other – and prosecutors in many cases as well. The idea is to ensure that judges can go about their lawful business of deciding cases impartially whoever the parties may be without being affected by any of the improper influences that I have already mentioned.

23. The Council cannot, therefore, be made up of Government representatives. It cannot be made up of people appointed by the Government, and it cannot be made up of representatives elected by politicians. Nonetheless, because the Council should have so many crucial functions, the Government will be very interested in the way that it despatches its business. So there is a fine balance to be weighed.
24. The ENCJ recommends that the majority of a Council for the Judiciary should be made up of elected judges. The Minister of Justice should not sit on the Council, and, as I have said, none of its members should be appointed politically. There can certainly be some representatives of civil society, lawyers, and academics, but not politicians. The Minister of Justice can attend as an observer, but he/she should not participate as a member.
25. The ENCJ's recommendations as to the functions of the Council for the Judiciary explain why this is the case: the Council should be responsible for the appointment of judges, the promotion of judges, judicial training and ethics, the system by which citizens can complain about judges, and the system for disciplining judges, the evaluation of the judiciary, the management of the performance of the judiciary, the administration of the courts, the financing of the judiciary, and the making of proposals for legislation concerning the courts and the judiciary. The Council should control its own finances, and must act independently of both the legislature and the executive.
26. In short, if the work done by judges and the careers of judges are controlled by the executive, it is inevitable that the cases will not be decided impartially and free from Government influence.

Can the Council structure work in post-communist countries?

27. The short answer, in my opinion, is "yes". There are some excellent examples in Poland and Lithuania to name but two. There are also some countries in Eastern Europe that provide more problematic examples. But we should not jump from these problematic examples to the conclusion that the model is wrong or unsustainable.
28. First, it is true, or at least it was true, that the older judges inherited from the communist era are obviously going to find it less easy to understand the modern Western European concepts of the independence and accountability of the judiciary. In some countries, there is no doubt that these backward looking judges still hold sway. Their influence can indeed be quite negative. But in most countries their influence is fading. They are reducing in number by the passage of time. It is remarkable that in most of the Balkans and Eastern Europe, almost all judges under 50 speak perfect English and/or French and have aspirations that equal the aspirations of judges in other parts of Europe.
29. Secondly, I do not believe that it is the structure allowing for a Council for the Judiciary that is wrong. Even if it is true that sometimes the attitude of the post-communist Government operating that structure may be unhelpful or inappropriate. The structure is fine if it is operated with a will to make it work. But if it is operated with the objective of subverting it, then it will obviously be far more challenging. If a government wants to engage in

lustration of judges because they are corrupt, that is one thing. But it is quite another thing if that government wants to introduce lustration of judges because it wants a more compliant judiciary that will decide particular cases or a particular type of cases in their favour. Unfortunately, both examples can be found in Europe inside and outside the EU, even though the reality of who is right is not always very clear to outsiders.

30. Coming back to the UK for a moment, even if the UK model worked perfectly, it would not be possible, or I would say desirable, to export it, since it depends so much on tradition, trust and following established practice.
31. What is required is a model that can provide a proper workable barrier between the judiciary on the one hand and the executive and the legislature on the other. It is hard to see how one can criticise a Council that is itself elected and independent and stands between the government and the judiciary allowing the judiciary to do its work of deciding cases fairly and independently between the parties – as I say – according to the law and the evidence.

Problematic examples

32. When we look closely at the oft-cited problematic examples of modern European models of Councils for the Judiciary, we see why the problems have arisen.
33. When I worked with the Councils for the Judiciary in Bosnia Herzegovina, Albania, and closer to home here, in Slovakia, in each case there was, I think, a clear reason for the problems that the Councils faced that could not be laid at the door of the model.
34. I would not want to go into too much detail, but in Bosnia Herzegovina, there has been a serious problem caused by organised crime that the politicians have been unable to tackle. It has resulted in pressures on the judiciary caused by the politicians' desire to use the judicial system either to avoid prosecution themselves or to ensure the just or unjust prosecution of their opponents. As I have said, a government determined to subvert the proper operation of any system will always be able to do so, however resilient it may be on paper.
35. Likewise in Albania, where the problem is the perceived and alleged corruption within the judiciary itself. The politicians make outlandish claims as to the extent of this corruption, but whatever the truth of the matter, the Council is caught right in the middle of the cross-fire. I know there are some excellent upright and entirely honest judges in Albania. But the public perception of the judiciary is not good despite excellent young judges being appointed and coming through the new judicial school all the time. I believe they will ultimately prevail, and the model of the Council for the Judiciary will help them, provided the politicians will allow it to do so.
36. In Slovakia, the problems are also deep-seated and are maybe caused more by the dominance of the old school judiciary than in other countries. But again, I am not convinced that the model is wrong, just the manipulation of it by politicians and perhaps by some of these older judges themselves. It is

sad when one sees older judges encouraging younger ones to maintain an inappropriate disregard for a transparent modern European judiciary.

37. These are just examples. I could give you many more. But what is vitally important is that judges, even in these countries, feel themselves to be and very often actually are independent and accountable.
38. The ENCJ undertook a survey recently across European judges answered by some 6,000 of them in some 20 countries, which showed a high level of subjectively perceived judicial independence. Of these judges, the average rating of their own independence on a scale of 1-10 was 8.77, even though, somewhat amusingly, their average rating of their colleagues' independence was rather less on 7.94. Asked if they believed that colleagues in their countries had taken bribes in the last 2 years, 12% across Europe thought they had, 65% thought they had not, but, perhaps most worryingly, 23% were not sure. The results in individual countries are of great interest and importance.
39. The difficulty of judges maintaining real independence, particularly in Eastern Europe where political pressures can be high, should not be underestimated. It is comforting to see that judges think they are independent, even where they face multiple challenges of poor salaries, tough working conditions, bad IT, high case-loads, and reducing resources generally. But these problems affect us all to a greater or lesser extent.
40. And one thing is certain. You will never have an independent judiciary in which the population have confidence if there is no mechanism to provide a separation between the functioning judiciary on the one hand and the government on the other. A proper independent Council for the Judiciary can and should provide such separation. But all three arms of state need to work hard to ensure that judges can and do maintain their independence, and are fully accountable to citizens generally in every aspect of their work.

Is there more than one model?

41. If you have had a chance to look through the ENCJ Guide on the [website](#) that, you will see that there are many different models that can achieve the ends that I have repeatedly stated.
42. Some judiciaries have no Council at all, and yet manage to maintain a very independent judiciary. There are several examples of the kind in Scandinavia and in Germany as well. Some judiciaries have what I might describe as "non-compliant" councils with the President of the State as President of the Council, but even some of these are strong and independent, because the state President plays a largely ceremonial role. There are cultural and historical forces at play when a Council is created or reformed. Regard ought to be had to the European model, but I am not suggesting it needs to be followed faithfully without variation. What does need to be followed faithfully, however, is the pursuit of the outcomes.

The desirable outcomes

43. Whichever way you choose to skin the cat, the outcomes are what is crucial. An independent and accountable judiciary can only survive and prosper if

the 3 arms of state want it to do so. It is a big prize because an independent and accountable judiciary will, by definition, have the confidence of its citizens, it will deliver dependable and timeous outcomes for those citizens. The justice system will be accessible to citizens from all sections of society, and there will be no need for any citizen to take the law into their own hands.

44. Let me leave this aspect of the matter with this thought. The structures that underlie a successful justice system need these days to be more resilient than ever. The independence of judges faces new challenges with every passing month. The internet society in which we all live with its instant reactions to everything that occurs, gives us all less time for contemplation, and less time to react after full consideration. With modern judges joining Twitter, Instagram, Facebook and other proliferating forms of instant media communication, justice systems and Councils for the Judiciary in Eastern and Western Europe and elsewhere will undoubtedly have a great deal to think about in the coming years.

Conclusions

45. Can I end then by reiterating my thanks to the organisers for inviting me to speak. I am very much looking forward to the debate.
46. If, as I suspect, we all have the same objective – namely a reliable independent and accountable justice system in every country for the benefit of all the citizens of Europe - we should be able to find much common ground.

GV
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