



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

Presentation on “Protecting the independence of individual judges and ensuring their impartiality”

High-Level Conference of Ministers of Justice and representatives of the Judiciary

Strengthening Judicial Independence and Impartiality as a Pre-condition for the Rule of Law in Council of Europe Member States

Sofia, 21st April 2016

Lord Justice Geoffrey Vos

1. First of all, I would like to say what a great honour it is to have been invited to speak at this important conference organised by the Council of Europe for the launch of its action plan on strengthening judicial independence and impartiality.
2. As many of you will know, the study of the “independence and accountability of the judiciary” is at the centre of the project of the organisation of which I am the current President, the European Network of Councils for the Judiciary. The ENCJ is really the only truly systemic judicial organisation in Europe. It deals with justice systems and not only judges individually. It has no individual members. It is a network of the Councils for the Judiciary and similar organisations in Europe that provide the all-important buffer between the judiciaries on the one hand and the executive and legislative branches of government on the other. Our members emanate from EU member states, but we also have some 15 observers from states that either have no formal Council for the Judiciary or are Councils in non-EU states.
3. We are in the course of undertaking the third year of our project on the subject of judicial independence, and I do not think I will be criticised if I say that some of the work we have done has been acknowledged as ground-breaking. Our objective, having spent 10 years concentrating on laying down a series of standards and guidelines for independent, accountable and effective justice systems, is now to take effective measures to help our member Councils for the Judiciary and Observers to put these standards fully into practice. In this way, I feel that our work chimes with the objectives of the Council of Europe’s new action plan

4. The independence project itself began by identifying the indicators of an independent and accountable judicial system, and applying those indicators to each of the justice systems operating in our members' and observers' countries. We drew a clear distinction between the objective indicators of independence and the subjective ones. For example, in many countries in Eastern Europe there is an entirely appropriate constitution enshrining the independence of the judiciary in a way that many of the older democracies cannot match, but whether subjectively the judges are as independent and accountable as would be desirable is, in some cases, a rather different matter. Our objective was to identify and score the indicators of true objective and subjective independence and accountability of both the individual judge and the justice system, and also to identify the generic challenges to the independence of the judiciary that all systems and judges face.
5. Our first conclusions were perhaps obvious. They were that the best safeguard of judicial independence is the provision of a high quality of justice for all in the form of timely, impartial and well-reasoned decisions, and that a judiciary that claims independence, but refuses to be accountable to society, will not gain its trust. Independence must be earned. The judiciary achieves legitimacy and the respect of its citizens by delivering high quality and transparent justice.
6. High standards will not, however, be achieved without objectively determined court budgets, proper administrative facilities and adequate human resources.
7. Moreover, the converse of what I have already said applies, a high quality of justice is not enough to guarantee an independent judiciary. There is still a need for formal safeguards, such as the existence of a Council for the Judiciary responsible for the governance of the judiciary, the protection of its independence, and improving the quality of judicial performance and for informing the public about the justice system.
8. It is clear that there are challenged judicial systems across the EU. An entirely compliant constitutional structure, including an apparently independent Council for the Judiciary, does not guarantee that the judicial system will be perceived as truly independent. Judicial accountability is a function of public understanding. The more interest that citizens show in the operation of their justice system, the more likely it is to be truly accountable.
9. Finally, in this connection, another truism, but an important one: if politicians, citizens and judges alike recognise the need for real judicial independence, a lack of transparency and a lack of funding will not be tolerated. For that reason, education at all levels, including judicial training and promoting the public's understanding of the importance

of independence for judges and the justice system, is key to ensuring that these aspirations are achieved.

10. These conclusions are crucial to an understanding of how we can work with challenged systems towards improving the confidence that citizens and the state have in them.
11. The primary challenges to independence were identified as being inadequate investment in the courts and judicial structures, increases in case complexity and workload, gratuitous criticism of judicial decisions by politicians, parliamentarians and the executive, and inadequate staffing and administrative assistance for judges.
12. Risks to the objective independence of the individual judge included changes to the retirement ages for judges, challenges to the security of tenure of judges, reduction in judicial pay and pensions and adverse changes to judicial conditions. Threats were posed across Europe from inappropriate pressure on judges arising from media comment. In some places, threats existed from internal pressure on judges exerted by court presidents or management, Councils for the Judiciary, or more senior judges. Increases were also observed in groundless complaints about judges personally or specific judicial decisions.
13. The main risks identified to the accountability of both the judiciary as a whole and of the individual judge were the failure of judges to reflect changes in civil society, and their being out of touch with ordinary citizens. Moreover, problems were created by judges having an online presence, for example by joining social networks, and by still prevalent judicial corruption in some member states. Accountability risks were also posed by the absence of a functioning press office to advise judges involved in cases attracting media attention.
14. Challenges to the independence of the judiciary are now very apparent in a number of countries both within the EU and in candidate member states. I will cite just a few of the examples already mentioned in the CCJE/CCPE's report commissioned by the Secretary General:- In Poland, the government is seeking unilaterally to change the composition and *modus operandi* of the Constitutional Tribunal in moves that are hotly resisted by the serving judiciary and the Council. In Turkey, the High Council has recently removed or demoted large numbers of judges on the supposed grounds that they support factions that oppose the serving government. In Albania, alleged judicial corruption has led to a dramatic loss of confidence in the justice system; massive international efforts have led to important proposals for reform, but it remains to be seen how workable and effective these proposals will be.
15. These are not the only countries where judicial independence is seriously threatened; there are many others. This can be seen from the

results of the ENCJ's 2015 survey of the opinions of nearly 6,000 judges in 22 countries as to their own independence. The results were astonishing and repay further study on the ENCJ website.

16. The survey showed that, on average, judges rated their own independence on a scale of 1 to 10, at 8.8, and the independence of judges in their own country generally at 7.9. So far, so good. But there were serious causes for concern. A large percentage of judges did not feel that their independence had been respected by government and the media. Many judges also thought that appointments and promotions in their countries had not been made only on the basis of ability and experience. Finally, in 11 of the 22 countries surveyed, more than 30% of judges either thought that judicial bribery had occurred in the last 2 years or were not sure if it had occurred.
17. Looking then at these problems from a judicial standpoint, what can be done to promote the "protection of the independence of individual judges and [ensure] their impartiality"?
18. It is first important to understand why individual judges and justice systems must be independent from the other pillars of the state. This is for one very simple reason. It is because they must decide issues that arise in every possible legal area between the citizen and the state. They must, therefore, be independent of the state, acting through either the executive or the legislature, if the public is to have confidence in the impartiality of their decisions.
19. Secondly, it is important to understand where the limits of judicial independence lie, if we are to be able effectively to protect that independence and ensure impartial judicial decision-making in every case. Rather like the rule of law itself, judicial independence is an aspiration rather than an absolute concept. Judges can and should be functionally and practically free from influence from the executive and the legislature, but they cannot operate in a constitutional vacuum.
20. Politicians often suggest that the limit is that the qualification is that "Judges can and should be functionally and practically free from influence from the executive and the legislature *in their decision-making*". This qualification is explained by saying that it is not practicable for judges to be free from the peripheral influence of government decision-making when, in reality, the courts have to be financed by the government, and judicial leadership must in practice co-operate with government if the justice system is to operate within other state structures to deliver efficient high quality justice for all.
21. But I doubt whether the qualification is justified. Governments cannot do whatever they want in relation to judges and the justice system so long as they do not interfere with any individual decision. Government decisions can affect individual decisions both directly and indirectly, as

the examples of Poland and Turkey that I have given so clearly demonstrate.

22. To understand the true and appropriate limits of judicial independence it is useful to consider just two well-known and well-established principles promulgated by the ENCJ:-
 - (1) Judges should be appointed on the basis of merit and capability alone.
 - (2) Judges and the Council for the Judiciary should be closely involved in the formation and implementation of all plans for the reform of the judiciary and the judicial system.
23. First and foremost, judges must never be appointed for political reasons. They should be appointed on the basis of their ability to take impartial decisions on the basis of the law and the evidence and without fear or favour. This is an immutable rule. Because tinkering with judicial appointments for political reasons indirectly, but demonstrably, affects the decisions that courts make.
24. Secondly, judges and Councils must be closely involved in reforms to the judicial system. Reforms should not be done to judges or justice systems, even if judges cannot stand out against the will of a freely elected democratic government. Judges should not be hostile to modernisation and reform of the justice system, provided always that the contemplated reforms are aimed at improving the quality of the justice system for the benefit of those that it serves. Judicial involvement in the reform process should provide the balance between the wishes of the elected government and need to maintain judicial impartiality and the rule of law. Judges cannot stand apart from the economic austerity that everyone else in their countries face. But they can and should insist on a meaningful voice in how limited resources are deployed so as best to safeguard a high quality of justice.
25. Where then is the boundary between the judge's absolute right to decide the individual case on the basis of the law and the evidence, and the need to provide an efficient speedy quality justice system? Many judges complain of an infringement of their independence if they are told by their court president, for example, to deal with their cases more quickly, or they are required to operate in a more efficient way. But judges cannot be independent unless they are also accountable. Accountability is the *quid pro quo* for independence, and judges cannot simply say that they are the final arbiters of what they do and how they do it. They need to be seen to be co-operating in the operation of an efficient justice system.
26. That co-operation is a two-way street. Judges must be provided with the tools they need to do their work, including physical premises,

Information Technology systems and staff to operate efficiently. That does not mean that judges are entitled to better facilities than anyone else in the public service. But it does mean that the justice system must be provided with adequate facilities and resources. In return, they must work with the executive and legislature to improve the efficiency and quality of what they deliver to the public. If that means co-operation in efficiency reforms, so be it.

27. I can perhaps interpose a cautionary tale from my own country. We are, in England and Wales, in the process of undergoing a major reform of the Court Service which operates and manages the courts and the deployment of judges. This will result in less physical courts, more online courts, more modern Information Technology, less staff overall and even perhaps less judges. But it is being undertaken with the co-operation of the judges. Such a reform offers the potential to interfere with the independence of the judiciary. But change does not automatically do so. The key to all such processes is, I think meaningful involvement of the judges and the Council for the Judiciary in the entire process.
28. The executive in all countries needs to have a clear understanding of what judicial independence and accountability entail. That is why the ENCJ has done so much to identify the indicators and the challenges to each of independence and accountability. Judges, however, need to realise that the concept of judicial independence is not an absolute one. They are responsible for the effective delivery of justice, and that is a great responsibility. To achieve it, they must work with their governments to provide what is imperative in every democratic state – a fair and impartial decision making process, in which citizens from all parts of society and the state itself has absolute confidence. This cannot be done by judges or the executive and parliament alone. There must be mutual respect and co-operation between the judiciary on the one hand and the executive and the legislature on the other hand if it is to be achieved.
29. In closing, I want to return to the theme of this presentation, namely the protection of the independence of individual judges and ensuring their impartiality. There is almost no more important task, because if public confidence in the justice system collapses, so does every other democratic protection for the citizen. The rule of law is most effectively upheld by a functioning and accessible justice system.
30. There are maybe 3 things that will most centrally ensure the independence and impartiality of judges. First, their appointment, promotion and discipline on the basis of merit and capability alone; secondly, their close and collaborative involvement in the formation and implementation of reforms to the judiciary and the justice system; and thirdly, the existence of durable constitutional safeguards that

ensure proper finance and facilities for the operation of the justice system. Each of these three factors will have their effect on reducing and eradicating judicial corruption; ultimately that is a crucial goal, because otherwise public confidence in a quality justice system can never exist.

31. I am sure that this conference will be a great success. I am honoured to have been invited to take part.

GV

21st April 2016