European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Conference on "the Limits of Judicial Independence?"

organised by the National Council of the Judiciary of Poland

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 conference organised by the National Council of the Judiciary of Poland at this crucial time in the life of the Polish judiciary. I am most grateful to your Chairman, Judge Dariusz Zawistowski, for having asked me to come to Warsaw. This is not my first trip to Warsaw, but the last time I was here was a long time ago in 1970, and I want to assure you that I was too young then to be speaking on subjects as important as the one I am addressing today!

2. As many of you will know, the study of the "independence and accountability of the judiciary" is at the centre of the ENCJ project. We are in the course of undertaking the third year of our project on the subject, 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. For example, we have undertaken a survey of the opinions of nearly 6,000 judges in 20 countries as to their own independence. The results are astonishing and repay further study on the ENCJ website.

3. Against this background, I feel peculiarly well-qualified to speak about the "limits of judicial independence" from the judicial standpoint. Judges must be independent 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.

4. But I am not sure this means, as some judges certainly think, that there is and can be no limits on judicial independence. That is because the judiciary is itself one of the three pillars of the state. 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.

5. Politicians often add to what I have just said, the words "in their decision-making": i.e. 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 the benefit of all those who need to have their disputes resolved by it.

6. In my view, however, the qualification is a potentially dangerous one, at least if it is taken as meaning that governments can do whatever they want in relation to judges and the justice system so long as they do not interfere with any individual decision. Of course, many government decisions can affect individual decisions indirectly. To take a well-known example, judges in the Supreme Court of the USA are appointed by a political process. If just one of the right-leaning Justices is replaced by a left-leaning one, it is a matter of historical fact that decisions on highly charged legal issues arising under the constitution, like, for example, abortion or segregation, will be fundamentally affected.

7. Likewise, in 2012, when the US Supreme Court upheld the controversial medical care reforms promulgated by President Obama under the Federal Government's authority to implement and enforce taxes, US Supreme Court Justice Roberts famously said that:-

> "Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices".

8. This has been paraphrased as "elections have consequences". But where then does the balance of principle lie? As a matter of principle, when is it appropriate for judges to complain that their independence is being interfered with as a result of reforms introduced by an elected government? These are amongst the most difficult questions of our age, but I believe they can be answered simply by reference to the well-known and well-established principles promulgated by the ENCJ.

9. Three of the most important of those principles can be shortly encapsulated as follows:-

   (1) Every citizen in a democratic society is entitled to benefit from an independent self-governing judiciary which must be and be seen to be independent of both the legislative and executive branches of government, and should be recognised by politicians, citizens and judges.

   (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.

   (3) Judges should be appointed on the basis of merit and capability alone.

10. These principles set the limits on judicial independence. First, judges and Councils must be closely involved in reforms to the judicial system. Reforms should not be done to them, but equally they cannot stand out against the will of a freely elected democratic government as Justice Roberts reminded us. The involvement of civil society representatives in the appointment of judges is one thing that can help reduce the deficit in their democratic legitimacy. This is something that the ENCJ is studying in one of our projects this year.

11. The principles I have mentioned also demonstrate that judges should never be appointed for political reasons. They should be appointed because and only because of their ability to take impartial decisions on the basis of the law and the evidence and without fear or favour.

12. In some situations, judges can be perceived as hostile to modernisation and reform of the justice system. This too should not be the case – 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.

13. Throughout Europe, these are challenging times for justice systems. In most countries, they have had to face reducing budgets and increasing workloads. Judges cannot stand apart from the economic realities that everyone else in their countries face. But they can and should insist on a meaningful voice in how the limited resources are deployed so as best to safeguard a high quality of justice for the citizen.

14. It is perhaps appropriate to drill down a little further into the precise terms of acceptable limitations on judicial independence. I can see no justification for any limits on the need for a wholly independent judicial appointment process, nor for any limitation on the absolute necessity for the decisions taken by individual judges and individual courts to be inviolable – they must be free from all inappropriate external influences: from politicians, the media, and any other pressure groups. The "telephone justice" prevalent in some parts of the old Soviet bloc is universally regarded with derision.

15. It is here, however, that the grey area looms into view. Some judges regard it as an infringement of their independence to be told by their court president, for example, to deal with their cases more quickly or increase their caseload. I cannot agree with that approach. The reason is because 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. Part of that co-operation is, as I have said, with the other branches of government, who will have been elected to ensure that the justice system functions properly.

16. Judges are, however, entitled to functional independence. They should not, for example, be deprived of the tools they need to do their work. Any functioning system

needs 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 third arm of state must be provided with adequate facilities and resources.

17. 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.

18. I can then attempt to pull these threads together. The executive in all countries needs to have a clear understanding of what judicial independence and accountability entail. That is why the work of the ENCJ in this area is so important. I urge all those with a real interest in the subject to look at our last two reports on the subject in 2014 and 2015.

19. Judges also need that understanding, and need to realise that the concept of judicial independence is not an absolute one. Judges are responsible for the effective delivery of justice, and that is a grave responsibility. To achieve it, they must work with their governments to understand the necessary barriers between the pillars of state, but first and foremost to provide what is imperative in every state – a fair and impartial decision making process, in which citizens from all parts of society and the state itself has absolute confidence. This will only happen when there is a healthy measure of mutual respect between the judiciary on the one hand and the executive and the legislature on the other hand.

20. I have no doubt that the debate today will descend to the particularity of the issues that are currently under consideration here in Warsaw. For my part, however, I would suggest that almost every issue can be resolved by a consideration of the applicable underlying principles. It is those principles that I have tried to emphasise in what I have said this morning.

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

GV
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