European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Address Kees Sterk, President of the ENCJ

Budapest, 10 July 2018

Meeting with OBT

Ladies and gentlemen, esteemed colleagues,

1. As we are gathered here we are not just individual Hungarian, Croatian, British or Dutch judges meeting in mutual friendship, wanting to learn from the system and practice of law in our respective countries. No, we are also European judges, with the duty to apply the Law of the Union. We are all members of the same legal order of the Union, and furthermore we are members of governing bodies of our judiciaries. To me that means that it is not only friendship – important as it is - that binds us but also a common responsibility to uphold the fundament of our common European legal order, especially the rule of law and the independence of the judiciary within that order. The ENCJ tries to live up to this duty by cooperating and assisting a member of our network whenever it asks for it.

2. But let me first say, that it is a great honour and it gives me great pleasure to speak here today to the esteemed members of the Hungarian Council.

3. I would like to kick off this meeting between the ENCJ delegation and the Member of the OBT and other respected representatives by discussing the topic of the balance of powers in a democratic state governed by the Rule of Law and the importance of self-governance of the judiciary.

4. When Montesquieu wrote down his ideas about the trias politica and the balance of powers, his main concern, being a thinker of the enlightment

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period, was to put the rights of the individual central. For societies to prosper citizens needed to be, political liberated and there should be no fear between citizens. According to Montesquieu, what was needed was both separation and balance. To prevent abuse of power against the rights and liberties of citizens:

"it is necessary from the very nature of things that power should be a check to power. 'There is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression".

5. The central and continuous theme of the work of Montesquieu is that the independence of the courts of law more than any other institution separates moderate from despotic regimes. The balance of power is the ultimate remedy against the risk of despotism by governments. Again: the rights and liberties of citizens are key.

4. Lord Bingham, in a much more recent work (the Rule of Law, 2010) discusses the eight principles of the Rule of Law. The sixth and seventh are the most relevant for us here today:

   6. The law should provide access to justice, especially where people cannot resolve inter-personal disputes themselves.

   7. Courts and tribunal processes should be fair.

   As to the sixth principle, that the law should provide access to justice, he added that:

   "This principle is regarded as the core of the rule of law principle. It is that ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers. This sub-rule reflects the well-established and familiar grounds of judicial review. It is indeed fundamental. …..

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The historic role of the courts has of course been to check excesses of executive power, a role greatly expanded in recent years due to the increased complexity of government and the greater willingness of the public to challenge governmental (in the broadest sense) decisions…."

5. He also observed that there is an inevitable, and in his view entirely proper, tension between the executive and judicial power and that such tension exists even in politically quiet times. The balance of powers implies that there is effort involved. Finding and maintaining an equilibrium between the three arms of the state demands continues work by all state powers involved.

6. Unfortunately there is a recent tendency in our legal order that the other state powers not only not maintain and strengthen the judicial power, but do not protect the judiciary against attacks by the media, members of Parliament or even the government. The reasons for these attacks are not always clear and differ from member state to member state. Sometimes it is ideological: a governing party does not believe in the separation of powers and an independent judiciary, and wants the judiciary under their control. Somethings it is shear convenience for those in power to do what they want without having to live up to the law. But it is also true that sometimes the judiciary is not living up to the reasonable expectations of the citizens, as to speediness for example.

7. In the ENCJ, we adhere to the separation of powers and the independence of the judiciary, because it is the fundament of our legal order. Personally I strongly believe that these principles serve best the interests of the citizens and society. Furthermore, we established common ground that, in democratic states there should be a proper understanding of the respective roles and responsibilities of each of the branches of the state and the need for them to work together – a form of interdependence. In order to make this work the other state powers should accept that the judiciary is also a state power, an institution, and not merely a group of individual judges, only independent in the specific case being judged. Therefore, it is important that each judiciary should have a structure of governance that can protect its institutional independence and, in doing so also the independence of

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individual judges. Councils for the Judiciary, particularly if structured to be in harmony with the hierarchy of the judiciary are the obvious answer. Again, and I repeat it over and over again, to the safeguard of the rights and liberties of citizens.

8. I will now explore a bit more the issue of self-governance. I think it is appropriate to refer to the ENCJ Budapest Declaration adopted by the General Assembly in 2008. The former Hungarian Council, the OIT, hosted that event. The title of the Resolution is: "Self Governance for the Judiciary: Balancing Independence and Accountability". The Resolution considers that in most European States there is a Council for the Judiciary or a similar institution, which is independent or autonomous institution distinct from the legislative and executive powers of the State and responsible for the independent delivery of justice. Some Councils are constitutionally established to guarantee and defend the independence of the judiciary, other Councils or autonomous Courts Administrations have particular responsibility for the administrative management of the Courts, including financial management, human resources, organisation and information technology. Each Council for the Judiciary has its origin in the development of its legal system, which is deeply rooted in a historical, cultural and social context, all Councils nevertheless share common experiences and challenges and are governed by the same general principles.

   Self-governance of the judiciary guarantees and contributes to strengthening the independence of the judiciary and the efficient administration of justice and therefore all or part of the following tasks should fall under the authority of a Council for the Judiciary or of one or more independent and autonomous bodies:

   -the appointment and the promotion of judges
   -the training of judges
   -the discipline and judicial ethics
   -the administration of the courts
   -the finances of the judiciary

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- the performance management of the judiciary
- the processing on of complaints from litigants
- the protection of the image of justice
- the formulation of opinions on judicial policies of the State
- setting up a system for evaluation of the judicial system
- drafting or proposing legislation concerning the judiciary and/or courts

9. However, self-governance as mentioned before, does not safeguard the independence of the judiciary. The best protection for the judiciary against attacks is to gain the respect and the support of the citizens by delivering high quality justice in the form of timely, impartial and well-reasoned decisions.

Let me tell you as an intermezzo of my meeting in her office in Warsaw, last Friday, with the first president of the Polish Supreme Court, mrs Gersdorf. She told me that the judges of her generation had made a mistake. They had thought that after the successful fight for freedom in the eighties, the citizens would automatically appreciate the concept of separation of powers and of an independent judiciary. She said that her generation was wrong. In her view judiciaries must not only explain – over and over again - the importance of their work to the public, but must also listen to the needs of the public. Judiciaries need the protection of the people, she told me.

So independence goes hand in hand with accountability. A judiciary that claims independence, but refuses to be accountable to society, will not gain its support and trust. At the core of the relationship with citizens is trust. Trust is not earned by leaning back and staying in an ivory tower far away from the daily lives of citizens. In order to establish trust, it is first important that the judiciary is trustworthy. A judiciary that resists change and is perceived to be backward looking will ultimately lose the trust of the people and become vulnerable to external attacks in particular from the other state powers and the media. The judiciary must be willing to modernize, in order to remain relevant to modern society.

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In short, a Council for the Judiciary must be an independent body, which operates in a transparent and an accountable manner. The structure, powers and processes of Judicial Councils must be designed to safeguard and promote judicial independence and an efficient judicial system. If adequate checks and balances are not in place, the Council for the Judiciary may become a pawn in the hands of the executive, legislative or powerful groups, thereby undermining judicial independence. Councils for the Judiciary must be granted adequate human and financial resources.

10. An important question is how Judiciaries can accommodate the changing needs of society. First of all there should be an independent Council with the proper powers and resources to lead the modernization of the judiciary. ENCJ believes, as recently stated in the Lisbon Declaration on leading positive change, that Councils for the Judiciary should initiate and lead a process of positive change with a view to promoting an independent, accountable and high quality judiciary, so enabling judiciaries to optimize the timely, impartial and effective delivery of justice for the benefit of all.

There are two aspects to this: first, the internal in the sense of the engagement of stakeholders; and secondly, the external in the sense of the judiciary's relationship with other state powers and strengthening the role of the judiciary within the State.

11. As for the latter;

(1) Councils should assume a new role, both as regards their own countries and more generally, to achieve a better balance of powers and strengthen the position of the judiciary by expressing and explaining the role of an independent and accountable judiciary within a State governed by the Rule of Law. The Rule of Law is key in the Union; it does not end at the border of any particular member state but is transnational.

(2) Councils should be instrumental in helping educate society about what judges do by actively explaining the work of the judiciary in the media, by building on existing efforts in several countries where judges go into schools and talk to children, as part of an overall effort to explain how the judiciary

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is a vital, and independent, part of any democracy. Because, unfortunately not only in Poland, there a general lack of understanding of the importance of justice and the rule of law in almost every member state, which makes it easy for others to attack the judiciary. It is not possible to promote this understanding just by pronouncing excellent judgments.

(3) This should be part of more general efforts to make the judiciary more visible, relevant and understood by the public.

12. These principles also apply to the ENCJ. Recently the ENCJ has found itself in a position where it had to take a stand on developments in certain Member States. The ENCJ has and will in the future always speak out to defend the rule of law, which is at the core of the European Union. It is one of its fundamental values, together with democracy and fundamental rights. To uphold and protect the rule of law is a responsibility for both the judiciary and the other state powers. Fair and impartial courts, as the key institutions of an independent judiciary, need to be respected and defended.

13. In this regards ENCJ has reiterated several times recently, that a key requirement for maintaining and enhancing mutual trust between judicial authorities in the EU, as a basis for mutual recognition, is the independence, quality and efficiency of each of the judicial systems and respect in every state for the Rule of Law.

14. The ENCJ aims to initiate a dialogue with the other State Powers on the national and the European level. I personally, strongly, believe that we need to re-establish what an independent judiciary entails and how Councils for the Judiciary can strengthen the independence. The 2016 ENCJ survey among judges shows that judges do not feel respected by the other State Powers. While on the subject of the ENCJ Survey, the Hungarian Council decided not to participate in the previous two editions of the survey among judges, I hope that in the next edition the Hungarian judges will also be given the opportunity to express how independent they feel.
In the most recent Flash Eurobarometers on the perception of the public about the independence of the judiciary, interference from politicians and the government is mentioned most frequently as reason for a negative

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perception of the independence of the judiciary. This is an issue that needs to be addressed and discussed by all stakeholders.

15. Turning back to the competences Councils should have according to ENCJ Standards, I would like to focus briefly on two issues; the selection and appointment of judges and judicial reform.

16. ENCJ has developed a set of minimum standards for the selection and appointment of judges. Judges should be appointed based on merit and capability alone. There needs to be a clearly defined and published set of selection competencies against which candidates for judicial appointment should be assessed at all stages of the appointment process. They should be appointed based on their ability to take impartial decisions based on 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.

    Whether the appointment process involves formal examination or examinations or the assessment and interview of candidates; the selection process should be conducted by an independent judicial appointment body.

    This independent appointment body is essential for the trust of the people in a fair trial for a court of law.

    An unsuccessful candidate is entitled to know why he or she failed to secure an appointment; and there is a need for an independent complaints or challenge process to which any unsuccessful applicant may turn if he or she believes that he/she was unfairly treated in the appointment process.

17. If the Government or the Head of State plays a role in the ultimate appointment of members of the judiciary, the involvement of a Minister or the Head of State does not in itself contend against the principles of independence, fairness, openness and transparency. Required is that their role in the appointment is clearly defined, and if so, that they act within the

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limitation of their powers. Their decision-making processes must be clearly documented. The involvement of the Government or the Head of State does not impact upon those principles if they give recognition to decisions taken in the context of an independent selection process. In case, whoever is responsible for making the ultimate appointment (the Government or Head of State), has the right to refuse to implement the appointment or recommendation made in the context of an independent selection process and is not prepared to implement the appointment or recommendation, it should make known such a decision and state clearly the reason for the decision.

18. Applying these principles to the Hungarian system, the question arises in which category the President of the National Judicial Office should be placed. The President is not elected by his or her peers, but appointed by a 2/3 majority of the Parliament. The President appears to be neither judiciary nor government. Leaving this particular issue aside, the important issue remains if the role of the President of the National Judicial Office in the selection of judges is clearly defined, and if so, whether she acts within the limitations of her powers, and the decision-making processes is clearly documented. Furthermore, it should be clear that judges are appointed based on their professional qualifications and not with their political alignment in mind. The appointments should be made only from a selection drawn up or approved by the independent selection body that includes the judiciary. And finally, there should be a formal constitutional or statutory requirement to make known a decision not to follow the proposal of the independent appointment body and state clearly the reason for the decision, open to scrutiny.

19. As to the reform of the Judiciary, the ENCJ has considered the role of the Judiciary in these procedures. The Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation. The reason behind this is that reforms should strengthen

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judiciaries, and not be an excuse to weaken their independence. Reforms should not be done to judges or justice systems. On the other hand, judges should not be hostile to modernisation and reform of the justice system, again provided that the 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 independence. Judges can and should insist on a meaningful voice in how limited resources are deployed so as best to safeguard a high quality of justice.

20. In closing, I want to return to the protection of the independence of individual judges and ensuring their impartiality. They are key to the confidence of the public in the justice system. When it collapses, so does the protection of citizens. There are maybe a few things that will help to ensure the independence and impartiality of individual judges. First, the courage and spirit of individual judges. And I think Hungary is blessed in this respect. Secondly the appointment, promotion and discipline based on merit and capability alone; thirdly, the close and collaborative involvement in the formation and implementation of reforms to the judiciary and the justice system; and fourthly, a strong Judicial Council who protects the independence of individual judges.

21. We know that these are challenging times for the Hungarian judiciary. Please know that we share your concerns and we offer you our assistance and cooperation when and where needed. In the end, we all share a common objective– namely a reliable independent and accountable justice system in every Member State for the benefit of all the citizens of Europe.

I thank you for your time.

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