

THE JUDICIARY: POSSIBLE WAYS OF DEVELOPMENT. MARCH OF A THOUSAND GOWNS A YEAR LATER

PANEL II: CURRENT DIRECTIONS OF DEVELOPMENT OF THE JUDICIARY

On Saturday 11 January 2020 a silent march of European judges took place in Warsaw in support of judicial independence in Poland. It was an impressive sight to see the many judges in their robes of office making a point about judicial independence. The action taken by European judges in January 2020 was unusual but reflected a deep concern that the integrity of the legal system in Poland had fundamentally been threatened and that something needed to be said.

An independent judiciary is essential to a free society as a guarantee that everyone will be treated equally in accordance with the law and will not be subjected to arbitrary powers. Society needs to feel confident that its judiciary cannot be manipulated by government or other powerful interests but also that they are not vulnerable when deciding cases according to law. In 2017 the Polish legislature had made a series of changes to its legal system including to the disciplinary system which appeared to target judges who expressed disagreement with the changes.

The importance of the judiciary as the guarantor of the Rule of Law is stated in article 1 of the Universal Charter of the Judge, which was adopted by the International Association of Judges at its meeting in 2017 (updating the Universal Charter which had been adopted at its meeting in Taiwan on 17 November 1999). Article 1 states:

The judiciary, as guarantor of the Rule of Law, is one of the three powers of any democratic state.

Judges shall in all their work ensure the rights of everyone to a fair trial. They shall provide the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. It is not a prerogative or a privilege bestowed for the personal interest of judges, but it is provided for the Rule of Law and the interest of any person asking and waiting for an impartial justice.

All institutions and authorities, whether national or international, must respect, protect and defend that independence.

This guarantee to the public requires that the judges be independent from other branches of government and that they be secure when exercising their independent function. That independence, and the security of the public, is undermined when judges are vulnerable when needing to make difficult decisions.

Sometimes it takes courage to be a judge. To be a judge means having to decide disputes in which at least one of the parties will be unhappy with the decision. Sometimes the unsuccessful party will be dangerous or powerful. Sometimes the unsuccessful party will be a criminal with a proven record of violence and retribution. Sometimes it may be someone with immense power either in government or outside and with an ability to cause harm to the judge. Judges

do not have armies to enforce their will but depend upon public acceptance of their decisions by reasoning in the context of a system governed by the rule of law.

All judges know that their duty is to ensure that they decide cases fairly and impartially but that deciding disputes between opposing parties will leave someone unhappy. The unsuccessful party is expected to accept unfavourable decision and, therefore, needs to be confident that the decision was based on laws that were known and which were applied without favour. Judges know that they cannot decide cases based upon their own prejudice, or whim, and that there are appeal processes to correct legal error. They know also that what they do is done within a legal structure that permits laws to be changed to ensure that policy decisions can inform amendments to the law if the law needs to be changed as the views of the people change over time.

The public needs judges who are courageous but also that they are not made to fear when they decide disputes and when they give reasons for their decision. The Judicial oath of office includes a commitment to decide cases without fear, and public confidence in its judiciary depends upon having confidence that judges are not fearful when they decide and give their reasons. Laws which discourage judges from speaking plainly will undermine that confidence and have no place in a free society.

The current state of the judiciary has, as it always has had, threats to its independence. Those threats come from many and different sources and at times from sources that seem well intentioned. There is a constant and present need, however, always to be on guard to defend that independence for the benefit of the public. It is essential because the public needs an independent judiciary to be confident in going about its ordinary business and ordinary activities. Ordinary people need to know that they can rely upon a fearless judiciary to apply the law and to resolve any disputes about its application when disputes arise. Knowing that disputes will be resolved by an independent judiciary committed to the Rule of Law is an important structural feature in a free society: people can safely obey rules when they know that rules will be fairly enforced.

The new architecture for the future judiciary will have much of its ancient structure and foundations. It will need to meet the ever-present challenges and the ever-changing ways in which those challenges appear. The continuity in architecture is the need for independence of decision making and conditions of fearlessness when deciding and giving reasons. The new architecture upon that structure and foundation must look to what makes judges vulnerable and to remove that vulnerability.

There are many things which may cause vulnerability including inadequate remuneration, lack of security of tenure and lack of security upon retirement. A person vulnerable in his or her position may be seen by the public as likely to be tempted by personal fear rather than the public good. That kind of vulnerability will undermine the confidence of the public in its judiciary and, ultimately, in its legal system. It is important that judges are adequately paid, that they cannot be removed from office except in the case of proven misbehaviour or established incapacity, and that they have adequate pension upon retirement. Removal of that kind of vulnerability will enhance public confidence in the impartiality and fairness of judicial decisions.

The absence of direct attack is also important. Judges need an environment in which they can express themselves without fear. They need that for the benefit of the public not for their own personal reasons. Error in decision making is something to be corrected by appeal courts rather than by making judges personally vulnerable in their personal or professional position. Disciplinary procedures should never be used as a means of stifling judges applying the law and expressing their view of the law and its application.

Freedom of speech is a precious feature of a free and liberal society because it enables each of us to express our view and by doing so enables each of us to learn from each other. Restrictions upon that freedom lessens the richness of society and should not be imposed lightly. The ability for judges to speak freely is different from the general freedom of expression enjoyed by the public, but it is no less important. It is the judges who are entrusted with the task of applying the law to its people and its people need to know what the judges think when they are acting in the name of the people; they need to know that their judges are not afraid to speak when applying the law.

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