Judicial Independence and the Rule of Law

- Nils Engstad, President of the Consultative Council of European Judges (CCJE), introduction at the OSCE Human Dimension Implementation Meeting (HDIM), Warsaw, 19 September 2017

1. I want to thank the organisers of this conference for inviting me to take part in this event, the largest annual human rights conference in Europe. It is, as always, a great pleasure returning to the wonderful city of Warsaw.

2. I am here today in my capacity as President of the Council of Europe's Consultative Council of European Judges (CCJE). The CCJE was set up by the Council of Europe's Committee of Ministers in 2000 as an advisory body in order to promote the independence, impartiality and competences of judges, elements that are vital to the rule of law. Today I will share with you some observations on the rule of law.

3. There are probably as many definitions of the rule of law in political and legal theory as there are definitions of democracy. They are numerous. Anyway, there are two requirements that can not be ignored when defining the rule of law; the requirement for legality and the requirement for access to independent courts deciding on the legality of the government's actions against its citizens.

4. The principle of legality involves the ideal that the law must be accessible and so far as possible intelligible, clear and predictable. However, even accessible, clear and predictable laws adopted by democratic procedure can be bad and harmful. Laws can be evil, as Professor Brian Z. Tamanaha has put it[1]. Consequently, democracy in itself is not a guarantee for the enactment of good laws, but a good law-making process should always pay due regard to democracy, as it should also pay due regard to the rule of law and to the protection of human rights. Laws must conform to human rights and to international commitments. As stated by the European Court of Human Rights, laws must be compatible with the rule of law[2].

[1] Tamanaha, B. Z. *On the Rule of Law – History, Politics, Theory*, Cambridge University Press, 2004, p. 100
[2] *Malone v. United Kingdom*, 8691/79. ECtHR judgment of 2 August 2084, para. 67

5. A good law-making process should also involve public participation and public consultations, especially with potentially affected parties. Consequently, also out of respect for the principle of division of state powers and for the benefit of judicial independence and judicial accountability, the judiciary should be ensured effective participation in any preparation of reforms of the judiciary and the judicial system.

6. A good example in this respect is the process for reforming the court structure and judicial independence in Norway. For the preparation of the reform, the Norwegian government recently established an expert commission composed of fifteen members, four of whom are active serving judges appointed after consultations with the Norwegian judiciary.

7. A bad example is the recent vetoed bill on the Polish Supreme Court, submitted to the Parliament without any prior public consultation or participation from the Polish judiciary, and put to the vote the week after its submission. Let me add, this bill was not bad only because of the law-making process, but also because of the content of the bill, representing a major setback for the independence of the judiciary and for the rule of law in Poland[3].

8. There is no rule of law if there is no access to justice before independent courts deciding on the legality of the government's actions against its citizens. Consequently, there is and must be some kind of tension between the judiciary and the government. This tension calls for institutional and other safeguards with respect to the independence of the judiciary and to the accountability mechanisms available with regard to the judiciary. These safeguards are under attack in a number of national legal systems.

9. The reports on judicial independence and impartiality in member states of the Council of Europe, presented by the CCJE and the Consultative Council of European Prosecutors (CCPE), reveal numerous incidents showing that undue interference in judicial independence come in various forms. Some of them are flagrant attacks on the independence of the judiciary, while others come in subtle ways.

10. Time does not allow me to go into details, but let me share with you my concerns regarding attempts to politicize judiciaries and prosecution authorities. Independent judges are essential for the rule of law, but so are independent prosecutors. As stated by the European

[3] Statement of the CCJE Bureau of 17 July 2017 on the Polish Parliament's recent adoption of two Acts on the Polish judiciary and on the draft Act on the Polish Supreme Court

Court of Human Rights, both the courts and the investigating authorities must remain free from political pressure[4]. This is also essential for the public trust in justice.

11. For sure, there are challenges to the public trust in the judiciary in many countries. In some corruption is widespread, also affecting the judiciary. Corruption, in any form, must be combated. In some jurisdictions excessive length of court proceedings remain a chronic problem. We know there are shortcomings in national judicial systems that should be remedied, not least in the interest of the public trust in the judiciary. However, you do not have to be fond of your judge. Judges are not there to be loved. Judges are there to uphold the rule of law, democracy and human rights and to do so independently and in an accountable way. Therefore, shortcomings in a domestic judicial system can never be a valid argument for politicization or a full governmental take-over of the judiciary.

12. Why so? Because politicization of and political pressure on judiciaries and prosecutors may cause self-censorship and have a chilling-effect on judicial independence and impartiality. Politicization of courts and prosecutors is likely to be followed by adoption of acts and implementation of actions causing widespread negative effects on media-freedom, on the freedom of expression, on the independence of lawyers, on the work of human rights activists and human rights NGOs. We have seen this happen in our time, in democracies where governments rely on a majority in the Parliament, and where the government has a strong ambition to remain in power for a long time. In the worst case, such undue political interference will lead to a termination of judicial independence and put an end to the rule of law. That is well known. That is why people march in the streets when judicial independence is under attack; because an attack on judicial independence is also an attack on the rule of law, on democracy and on fundamental freedoms.

13. At the end of the day, it is for the people, the civil society and the citizens of any nation to decide which path to be followed. Therefore, when needed, people should keep on marching.

Thank you for your attention.

[4] *Guja v. Moldova*, 14277/04, ECtHR judgement, Grand Camber, 12 February 2008, para. 86