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Rechtspraaklezing 2017

The future of the judge, the judge of the future – A keynote address

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Colofon

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The Rt Hon. The Lord Thomas of Cwmgiedd

The Right Honourable the Lord Thomas of Cwmgiedd has been Lord Chief Justice of England and Wales since October 2013. He studied law at the Universities of Cambridge and Chicago and practiced as a barrister from 1972 to 1996, becoming a Queen's Counsel in 1984. He was appointed a Judge of the High Court of England and Wales in 1996, becoming Judge in Charge of the Commercial Court from April 2002 to July 2003, when he was appointed as a Lord Justice of Appeal. He was the Senior Presiding Judge for England and Wales from 2003 to 2006. From 2008 to October 2011 he was Vice-President of the Queen's Bench Division and then President of the Queen's Bench Division from October 2011 to October 2013. He was President of the European Network of Councils for the Judiciary from May 2008 to December 2010.

The future of the judge, the judge of the future – A keynote address

The Rt Hon. The Lord Thomas of Cwmgiedd

Thursday, 28 September 2017

It is both a pleasure and a privilege to come and speak at your conference today. These are not easy times for judges. Society is changing at a pace that has never before been experienced and the consequences are generally not appreciated. Your planning for the uncertain and unknown future at this conference is vital. Judges must be at the forefront of adapting to this change; it may be very uncomfortable for some, in seeing their traditional way of working change, but the task of the judiciary is to adapt while maintaining the principles on which our democracies and our way of life are based. This will be difficult. It will impose huge strains on each of our democracies. But the judiciary has a central role.

The assumptions questioned

We have tended in Europe to take for granted that our democracies function well and that the judiciary has its proper role to play; in short there is nothing to be worried about.

The past year has seen that assumption tested in several states. It is therefore important to be able to examine again the crucial role that the judiciary plays as one of the three powers of the state – both in its independence from and its interdependence with the other powers of the state – the second a term not so familiar to judges and one which some view as misplaced.

The instances where the position of the judiciary has been tested are well known.
There was the Article 50 decision of the High Court in England and Wales to which I was a party and in respect of which the judges were castigated as “enemies of the people” – a phrase much beloved by Robespierre, Lenin and other dictators. Similarly, in the United States, a judge who questioned the legal authority of the President in the exercise of his

executive power has been described as a "so-called judge" and subject to abuse. In Poland, the executive government and the legislature have taken significant steps to rein in the independence of the judiciary for their own political ends. In Kenya, the chief justice and three of his colleagues took a brave course, but the outcome is still uncertain.

These events give rise to three questions:
(1) Why has this happened?
(2) Is there a real risk that this will happen elsewhere?
(3) What should a judiciary do to mitigate the risk of it happening in its own jurisdiction?

QUESTION 1: WHY HAS THIS HAPPENED?

As far as I am aware there has been no real research into the reasons for what has happened, but I would venture to suggest four particular causes.

First, because of the universal acknowledgement of the fundamental importance of the rule of law, judges have come to be seen as the institution of the state which will uphold the rule of law – insisting on a proper and truthful analysis of the issue and telling the executive that it is wrong when it does not act in accordance with the rule of law. The growth of judicial review, particularly at its early stages with the emphasis on procedural compliance with the law, established the judiciary as the institution that would often oppose a government's actions when the executive had failed to deal with issues in accordance with the proper procedure. In England and Wales, the concern was such that the executive's lawyers produced a booklet entitled "The judge over your shoulder".

Second, even though the position of judges in enforcing procedural compliance with the law became well established, the politicians were nonetheless prepared in legislation to give judges powers to decide issues that traditionally had not been for judges to decide. The ECHR and the Charter of Fundamental Rights and Freedoms gave judges significant new powers. The judges began to exercise those powers when requested to do so at the suit of litigants who saw the judiciary as the institution of the state that would bring about change in a way that had not hitherto happened.

Third, the judges exercised these powers by making decisions the politicians did not like. Though they had given them the powers, they castigated the judiciary as "activist" when they made decisions they did not like, particularly if they protected a minority against the views of the majority.

Fourth, the perception of judicial activism blended with the perception of the judiciary who insisted on proper compliance with the rule of law to provide the opportunity to castigate judges as those who defied the will of the people – either by obstructing populist changes, or by imposing values that were not populist or, at the least, were not understood as arising as a result of legislative action. Politicians saw this as an oppor tunity, which could be of short-term advantage to them, as they generally do not like being stopped or told what to do by judges. Therefore, some took advantage of the opportunity to undermine the judiciary, even though only for short-term political gain. Some other politicians did not see the longerterm consequences for democracy and the rule of law by letting this go unchallenged.

At a time where other institutions are less able to withstand populism, the growth in the scope of powers that judges exercise and their insistence on proper procedures has therefore put the judiciary at risk of abuse designed to undermine their constitutional position in upholding the rule of law and thus bringing about the erosion of democracy.

QUESTION 2: IS THERE A REAL RISK THAT THIS WILL HAPPEN ELSEWHERE?

This question can be answered shortly and in one word. “Yes”. Would you ever have thought of England and Wales that judges there would be described as enemies of the people, and that the Executive would fail to defend them? Your four scenarios reinforce the reality of the risk.

QUESTION 3: WHAT SHOULD A JUDICIARY DO TO MITIGATE THE RISK OF IT HAPPENING IN ITS OWN JURISDICTION?

In the past we have not had to worry too much about these risks, but I think the time has come when it is necessary for the judiciary and for the other institutions of the state to think of the longer term and to put in place steps to ensure that the judiciary has the strength necessary to withstand attacks upon it designed to weaken its ability to uphold the rule of law. I have six suggestions to make.

(i) The institutional independence and cohesion of the judiciary

The judiciary must have strong safeguards that will protect its institutional independence.

First amongst these is a proper structure of governance providing for strong leadership, but also a representative voice and adequate protection against inappropriate action by a rigid

hierarchy. The governance must be cohesive – a Judicial Council achieves this. The judiciary must also be firmly led by those prepared to make difficult decisions which may in the short term not be popular amongst judges. However, without strong leadership prepared to undertake radical change, a judiciary is at the present time very vulnerable to being undermined or marginalised.

Second, the appointment system needs to be strong and independent of both political and other influence.

The judiciary must run an efficient judicial system and use the digital revolution to bring about radical change. Such change will enable cases to be decided fairly, inexpensively and quickly. It has been recognised for over 800 years that justice delayed is justice denied, to use William Gladstone's telling phrase articulating Magna Carta's famous imprecation that "To no one will we sell, to no one deny or delay right or justice".

A failure to run a quick and efficient system through use of digitalisation will be blamed on judges. Those wishing to undermine the judiciary have always found a ready ear among people who have grounds for believing that a judicial system is slow, costly and inefficient. The leadership of the judiciary will make a fatal error if it panders to protecting any aspects of judicial ways of working or the misuse of independence that impede the implementation of radical digitalisation in transforming the efficient administration of justice.

Third, judiciaries must be able to assist other judiciaries under attack and judiciaries under attack are entitled to look to other judiciaries to help them. I have strongly backed the ENCJ in its powerful support of the Polish judiciary. No state likes to be attacked for undermining the rule of law.

(ii) The conduct of individual judges

Judges must give good reasons for their decisions in language that can readily be understood. If the judgment is very complicated, and sometimes it has to be, then judges must provide a summary in ordinary language.
Individual judges must act professionally, deciding cases efficiently and quickly and adhering to the highest ethical standards

Judges who do not live up to the high ethical standards must be dealt with; experience has shown why weakness in this respect is so damaging.

(iii) The interdependence with the other powers of the state must be strengthened

The interdependence of the judiciary with other branches of the state is a term that is not often used. It was a term, however, coined by the US Supreme Court judge, Justice Jackson, to describe the necessity of each of the three powers of the state working together. We must not forget this.

My view of interdependence can be summarised by ascribing three aspects:
a. A proper understanding by each power of this state of the functions of the other powers of the state;
b. Mutual support between the powers of the state;
c. Non-interference by a power of the state in matters within the scope of what is reserved to the other powers of the state.

For the judiciary, this means working with the Executive and the Legislature to modernise the legal system, making sure it is fair, quick and efficient, engaging in law reform and tackling issues such as diversity, but having an understanding of the limits of judicial functions and not interfering in the functions of the other powers.

As to non-interference, judges must be careful when deciding cases not to go beyond the proper functions of a judge. This is sometimes very difficult, particularly in the field of human rights. For example, the upholding of human rights extensively in extradition cases or in gay-rights cases is plainly within the functions of the judge, but making decisions on whether euthanasia should be permitted as a matter of principle I would suggest is not. Such matters of substantive policy are for the democratically accountable powers of the state.

The clearest example of non-interference is what I have already mentioned – judges keeping out of political issues and not expressing any views on them.

(iv) Explaining its position directly to the public

Judges ought to explain to the public why justice matters – in other words the centrality of justice.

Judges must also look very carefully at broadcasting and televising proceedings so that the public can see the quality of the judicial system in action. I see no reason why legal argument in appellate courts cannot be broadcast or televised nor why summaries of decisions

or reasons for sentences in criminal cases cannot also be broadcast or televised. That is not to say that there should be unrestricted broadcasting; for example, it cannot be right for a witness to give evidence in the knowledge that will be broadcast to the public at large.

Judges must play an active part in educating the young about the importance of justice. For example, court open days and school and university visits can play a vital role.

Judges should maintain contact with minority groups, so that they can see the importance of our court system and its fairness. This has the advantage not only of integrating minority groups more into society, but also discourages resort to informal tribunals within minority communities.

Judges must have a proactive media strategy and engage with the media – the Dutch judiciary have led the way.

(v) Establishing a clear convention that the other powers of the state defend the judiciary when attacked. If they do not, the judiciary must speak out.

It is necessary to debate with the other powers of the state why it is right that each of the powers of the state understands how important it is to defend the other powers of the state when they are wrongly attacked. If the other powers do not defend the power under attack, this is the first step in the erosion of the institutions of state; it is a first step away from democracy and the rule of law. Sometimes, some may wish for this, but I still have faith that the majority do not.

Our Executive failed to defend our judiciary when it was attacked in the media as an enemy of the people. As the case was getting on appeal, I could not speak out; nor could the President of the Supreme Court as that court was about to hear the appeal.

However, the failure of the Executive could not be left uncriticised. I told the judiciary when the case was over and the time was right I would speak out about the future. I did so in unambiguous terms when giving evidence to our Parliament, explaining why it was so damaging when the Executive power through the Minister did not defend the judiciary.

(vi) The judiciary must always be prepared to stand firm on principle and fight to defend its independence and the freedoms on which our democracies are based

There is always a risk, however small, that the other institutions of the state will fail to defend judicial independence when the judiciary stands firm in upholding rights or when the judiciary on proper grounds impedes the policies that have not been constitutionally approved.

In such circumstances, and I hope they will never happen in this state, then it is the duty of the judiciary to stand firm, to stand on the principle and to do all within its power to uphold the rule of law.

This will never be easy to do, but perhaps we did not become judges if we wanted the easy life. There may be a heavy price to pay, but courage, independence and cohesion will in the end ensure that the judges succeed in their duty of upholding the rule of law, difficult and unpleasant though that may be.

De Rechtspraaklezing biedt jaarlijks een genodigde van binnen of buiten de juridische wereld de gelegenheid zijn of haar licht te laten schijnen over onderwerpen die betrekking hebben op de plaats of de rol van de rechtspraak in de samenleving.
De lezing moet bijdragen aan de gedachtevorming over de ontwikkeling van de rechtspraak.

Sdu oprecht de beste keuze