International Successful Experiences in Judicial Communication

Association of Tunisian Judges with Euromed Rights, Conference and Training Course, March 27 and 28, 2021

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It is an honour for me to be addressing you at this important conference and training session organised by the Association of Tunisian Judges with Euromed Rights. An important part of this conference and training session will look at the relationship between judges and the media, and the extent and the manner, in which judges may speak publicly. These raise difficult and important issues about the extent to which judges may become involved in public debate beyond the reasons they give for their decisions, and about the obligation of the media to report accurately, fairly and respecting the integrity of an impartial judiciary. I have been asked to speak on the large but important topic of successful international experiences in judicial communication. Its focus is not the relationship between judges and the media, but it deals with the involvement of judges in communication with other judges in different parts of the world or with bodies external to their own cases. It is a big topic on which much could be said but I will speak from the point of view of the International Association of Judges ("the IAJ") of which the Tunisian Association is a valued and active member.

There may be some who are not familiar with the IAJ and its work so I might begin with a brief description of the association itself. In doing so I intend to convey something of the success and the importance of successful experiences in communication between judges in the international context.

The IAJ was formed in 1953 by five European Association of Judges and the Judges Association of Brazil. The IAJ now has representative associations from over 90 countries of the total of 195 countries in the world. The total number of judges which was represented by the IAJ in 2015 was estimated to be 119,623 of the total number of judges estimated at that time of 171,090. The objectives of the IAJ are to promote the rule of law and the independence of the judiciary. These objectives are sought because of their importance to society for all of

its internal and external dealings and not to protect the judge personally. People in a community cannot conduct themselves with safety, comfort and profit unless they can be certain in the application of rules which exist independently of those who have power over them. The vulnerable cannot be safe at home if the law will not protect them from an abusive relative, and business dealings cannot be transacted if people cannot enforce promises and protect their property rights. An independent judiciary is crucial to an ordered society to ensure that the rule of law is applied to everyone. The need for independence of judges is to ensure that the laws are applied fairly, consistently, equally to all and without direction from others or interference by others. The same certainty about the law that is needed for members of society to go about their activities requires also that there be confidence that any dispute about the law and its application will be resolved by impartial decision makers who will apply the law without personal fear or personal favour.

The IAJ is divided into four regional groups with formal structures within each representation of the countries within each regional group. The IAJ has, until the current pandemic, met formally once a year as a body and each regional group has met annually on that occasion and also on at least one other occasion during the first half of each calendar year. The regional groups, as the name "regional group" implies, are mainly made up of the associations of the countries within the region to which each national member group belongs, but there are some exceptions with some national associations belonging to two regional groups such as the Portuguese, Spanish, and Mexican associations. The member of each group, however, can vary differently from one another in their laws, legal systems, language and customs. The Tunisian Association belongs to the African regional group which includes other national associations with strikingly different cultural and historic backgrounds such as the South African Group with its legal system imbedded with English and Dutch traditions. The regional group to which Australia belongs includes such diverse countries as in United States of America, Canada, Taiwan, Mongolia, Kazakhstan, Puerto Rico, Mexico and, until recently, Iraq.

Each of the four regional groups has a president and one or more vice presidents. The IAJ itself has a president and six vice presidents including, as vice presidents, the four presidents of the regional groups, and two others who are elected at biennial meetings. This serves as the presidential committee of the IAJ and is assisted by a secretariat comprising a secretary general, four assistant secretaries general and a small part time secretariat. The members of the

presidency committee are all elected for two-year terms and in 2018 I was elected as president at the meeting in Marrakesh.

The work of the IAJ is done through several organs. There is a central council made up by each of the national associations which have been admitted to membership. The central council is the organ of the IAJ responsible for formulating policy and for the admission of new members. There can only be one member association from any one country and each member association has only one vote at central council. The work of central council has many important examples of successful international experiences in judicial communications. One of those was the adoption in 2017 of the updated universal charter of the judge. The IAJ had adopted a universal charter of the judge at a meeting in Taiwan in 1997 and many years later central council decided to review the document and established a working group to examine the charter and to recommend any changes.

The details of that work are now forgotten but they were the important elements of successful international communications to achieve agreement on fundamental core issues concerning the importance for society of judicial independence and the rule of law. The members of the working group came from each of the regional groups and was aimed to include a broad representation of the different judicial traditions and systems within the IAJ. The importance of the diversity of those within the working group cannot be overstated. It was fundamental to the value, authority and importance of the charter that it speaks from all of the perspectives of the judiciaries within the IAJ. Judges all decide disputes but they do so in significantly different legal systems. The differences are often fundamental and irreconcilable. Some features of the judiciaries in civil law countries are inconceivable in common law countries and vice versa. The need, for example, for continued affiliation with a political party for judicial appointment would be unthinkable in most common law countries, just as many civil law countries would think it fundamentally wrong for appointment to the judiciary to be by executive appointment by the government of the day.

A full list of the differences in principle and practice between the different judiciaries within the IAJ would be very long. It would include differences in many, if not all, aspects of judicial activities, association and practices. The differences are always interesting and usually defended tenaciously and without exception. Some would consider it entirely unacceptable for judges to be elected as they are in some states of the United States of America and, at least in

form, for appointment to the Supreme Court in Switzerland. Others would consider it entirely unacceptable for judicial associations to include prosecutors amongst their members as occurs in Italy even though both organs aim to achieve independent legal outcomes. What is important about these differences, the extent of these differences, and how fundamentally each are maintained, is that the differences informed the working on the universal charter.

The charter begins with the central idea which is important for all countries governed by the rule of law, namely, that those who apply the rule of law must be independent. The place of the rule of law in the government of the people has a long tradition in western political theory but is not thought to be the best form of the government by all political theorists. Plato in *The Republic*, for example, considered that the ideal government was a state governed by wise and superior "philosopher kings" who knew what was good for the people and, because they knew what was good, could not themselves be subject to any control over their commands or decisions. Aristotle, on the other hand, believed that government by law was superior to government by men because it was rule by reason or some higher principle than the passion or personal inclination of whoever may happen to have had power to compel others to behave in a particular way. Government by law, in other words, is the removal of arbitrary passion from individual people who have the power to govern others.

The importance of decisions to the parties in dispute, and for the public generally, requires that the rule of law be applied by an independent judiciary if the rule of law is to be effective and is to have the confidence of the people. Public confidence in controversial judicial outcomes requires a judiciary which is free from political interference and which is not vulnerable in its decision making. 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 IAJ in 2017 (updating the universal charter which had been adopted in Taiwan in 1999). Article one states:

> The judiciary, as guarantor of the Rule of law, is one of the three powers of any democratic State.
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> Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote 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.
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> 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.
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> All institutions and authorities, whether national or international, must respect, protect and defend that independence.

The independence needed to guarantee the rule of law is indispensable and indivisible. It is essential to that independence that judges be both separate from the other branches of government and also that they be secure in the exercise of their independent function.

The universal charter goes on to deal with the various issues which follow from that basic principle. It deals with what must be required to secure both external and internal independence and it elaborates upon issues dependent upon those issues such as appointment, conditions, discipline and remuneration. The conditions under which judges operate must be such that the public can feel confident in the outcome. Judges must be secure in their person, position, future and economic conditions. Judges will often be asked to make decisions in which governments, legislatures and powerful corporations and individuals will have an interest in a particular outcome and those who come to judges for justice must be confident of a fair and impartial decision whether it is favourable or unfavourable. Confidence in impartial decision making requires the judges to be secure. It must not be possible for judges to be removed from office except on the grounds of proven misbehaviour, incompetence or incapacity. They must have security of tenure so that their livelihood and position is not vulnerable to unpopular decisions. They must also have the conditions necessary for them to undertake their work competently and appropriately. In today's world that means that they must have access to those means of modern technology which will enable them to work efficiently and openly. We have seen just how important and vital that has been since the start of this pandemic.

Confidence in an independent judiciary is undermined if judges are vulnerable when they make difficult decisions. Vulnerability can have many causes but amongst them are inadequate remuneration, lack of security of tenure and lack of physical and economic security upon

retirement. Personal vulnerability may be thought to encourage judges to decide cases to protect themselves rather than to apply the law without fear or favour. The existence of such vulnerability may erode the confidence which the public can have in the independence of judicial decisions if they consider that decisions may have been made in part to protect the judge rather than simply to apply the law without fear or favour. To remove the vulnerabilities which undermine the confidence in the administration of judges, it is therefore 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 an adequate pension upon retirement. It is the removal of these vulnerabilities which will enhance public confidence in the impartiality and fairness of difficult decisions. A litigant who has lost a case is entitled to feel that the loss was fairly, and impartially, reached notwithstanding the disappointment. That requires the judicial process to be undertaken by reference to known rules in a predictable environment in which the litigants can participate by reference to known principles, objective criteria and by evidence which is probative and contestable. It requires also that the work of the judges be open, transparent and visible to all. That requirement is sometimes expressed by the maxim that justice must not only be done, but that it must manifestly and undoubtedly seen to be done. The maxim expresses many important aspects of accountable justice including that the public is entitled to see the inner workings of the judicial system in its application to individual cases. In that application judges must supply reasons for their decision by reference to known rules, objective criteria and probative and contestable evidence. An aspect of that impartiality requires judges to avoid personal controversy and not to engage in public disputes after giving reasons for a decision. The judge does not have an interest in the outcome and should not go on to defend a decision after giving reasons. Similarly, the judge should not become the target of public or private attack: if the judgment is wrong it can be corrected on appeal or the law can be changed. There should be no campaign against a judge for applying the law as he or she believes it to be.

A fundamentally important part of the ongoing successful international experience in judicial communication is the work of the study commissions. The IAJ has four permanent study commissions with dedicated office holders including a president and vice presidents. The first study commission is concerned with issues of the organisation of the judiciary, including the status of the judiciary and the rights of the individual. The second study commission is concerned with civil law and procedure including comparative and international aspects of civil law and procedure. The third study commission is concerned with criminal law and procedure

including the comparative and international aspects of criminal law and procedure. The fourth study commission is concerned with public and social law and comparative and international aspects of public and social law. Each study commission is formally comprised of one representative from each of the member associations nominated each year at the request of the general secretariat.

The study commissions are a valuable place through which judges from around the world may deepen their knowledge and understanding of matters of common interest and concern affecting their role as judges. Some years ago, for example, I presented a detailed paper to the second study commission about concurrent expert evidence in commercial disputes. The receipt of expert evidence concurrently is regularly undertaken in Australia but is relatively unknown in other jurisdictions. Details of the Australian experience was received with interest by other members some of whom sought to modify their own procedures.

We frequently take for granted that the way in which we do things is the only, or the best, way in which a particular problem is to be solved. The problems, however, are frequently the same throughout the world but the way in which they are dealt with may differ. That is sometimes due to different legal traditions and theoretical underpinnings of the legal system in the different countries. Another example of successful judicial communication can be seen in the work of the regional groups. One of the practical issues which was considered some years ago by the ANAO group was the complex question of cross border disputes where the same issues may need to be decided in courts in different countries with potentially conflicting decisions upon potentially inconsistent and different evidence. An attempt to resolve this problem was developed in the United States and Canada for cross border disputes being heard concurrently by video link in the two countries simultaneously. Each national court preserved its domestic jurisdiction, including rights of appeal, but the concurrent procedure enabled the evidence to be given only once with the consequent reduction in the possibility of inadvertent inconsistencies and unfairness. The procedure did not, and was not intended to, produce the same result on the application of the same substantive or procedural law but helped to reduce the possibility of inadvertent inconsistencies which might, in terms, have created inconsistent decisions to be enforced in different countries despite different outcomes in those countries.

So far, I have considered the positive successful experiences from international communications but there are also some negative experiences which although not successful

are still important. I have in mind the important work done in providing institutional support to our Turkish colleagues following the 2016 events and more recently the moral support The IAJ has given to our colleagues in Poland.

In 2016 there were thousands of judges arrested in Turkey following what was said to be an attempted coup upon the government. Among those arrested were members of the Turkish Association of Judges which at the time was a member of the IAJ. One of the judges arrested sent an email after having been released from detention saying that he had been shown no evidence against him except the presence of his name on a list. His email ended by saying only that he was no longer a judge. The last email received from the president of the Turkish Association of Judges before his arrest was short and said only "now my wife and I have been detained. Goodbye". He has since been convicted for what to the outside world appears to have been him doing no more than his duty by applying the law without fear or favour. A small fund has been made available to assist the families of those Turkish judges who have found themselves caught up in the troubles and turmoil in their country.

Earlier this year there was a webinar in Poland to mark the anniversary of the March of a Thousand Gowns. On Saturday 11 January 2020 a silent march of European judges had taken 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 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 publicly.

The emergence of the pandemic has created a new challenge for international communications, but a challenge which we need to overcome and for us all to share our knowledge of the damage the pandemic has done to the fabric of justice and to the links and the bonds between us. The entire world is facing understandable fear and a consequence of that fear has been that governments throughout the world have taken unusual measures. Judges have also responded to the pandemic by modifying their practices, but cases still need to be decided and rights still need to be upheld. The risks posed by the pandemic, and the measures taken to deal with the pandemic, are grave and potentially erode the strength of the legal institutions which enforce them. It is in my view important that the impact upon justice be recorded by judges throughout the world so that it can be evaluated with care and precision. Some of the challenges to the

administration of justice which should only be temporary may be in force for much longer than it is necessary. The negative impact upon the administration of justice is something which judges are uniquely placed to see, to report upon and to wind back when necessary.

We find ourselves to be the guardians of values which we have inherited from others in the past and which to some extent we have taken for granted. We now need to ensure that we preserve them for the future. We did not anticipate the events which have occurred, but it is important that we make sure that what we leave for the future is at least as good as what we received from the past. International open communication between judges can be a successful means of ensuring that to occur.

G T Pagone