

Lord Justice Thomas, presidente dell'European Network of Councils for the Judiciary, intervenendo al FRANKFURT SYMPOSIUM nel novembre del 2008, commentava la situazione dell'indipendenza dei giudici in Europa. Enfatizzando la necessità dell'indipendenza della magistrature rispetto allo Stato, sosteneva nella sua relazione *("Some perspectives on Councils for the Judiciary"*) che la magistratura necessita di un istituto centrale, per poter assolvere i propri compiti e gestire il rapporto con il legislatore e con il potere esecutivo.

LEGGI DI SEGUITO LA RELAZIONE DI LORD JUSTICE THOMAS PER IL FRANKFURT SYMPOSIUM DEL 7/8 NOVEMBER 2008 ***(e aderisci al rinnovato social network www.con correnzaeavvocatura.ning.com***

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FRANKFURT SYMPOSIUM: 7/8 NOVEMBER 2008
Some perspectives on Councils for the Judiciary

Lord Justice Thomas
President of the European Network of Councils for the Judiciary

It is a great privilege and honour to have been invited to address this important Symposium at such a significant point in the development of the judicial branches of the state in each of the states in Europe.

The separation of powers
I speak of judicial branch, for in the tradition of Montesquieu it is necessary always to have in mind that in each Member State and in the European Union, we recognise the separation of powers between the legislative, executive and judicial branch of the state and, at a European level, of the European Union. In consequence it is recognised that certain of the powers and functions of the state are the powers and functions of the judicial branch, principally the maintenance of the rule of law and the adjudication of disputes between citizens and citizens and citizens and the State or the European Union. To discharge those powers and functions, it is universally accepted that the judicial branch of the state, and each judge, must be independent. That is a privilege granted to the judiciary solely for that purpose.

The tasks necessary to maintain an independent judiciary
But what is necessary for the maintenance of that independence? In its important Opinion on Councils for the Judiciary1, the Consultative Council of European Judges (CCJE) set out at paragraph 42 a series of tasks which must be carried out in an independent manner – that is to say in a manner independent of the legislative and executive branches. Those tasks can be grouped as follows: (i) Appointment, promotion, career development; (ii) Discipline and codes of conduct; (iii) Training (including the provision of guidance to judges; (iv) court administration; (v) protection of the image of justice.

In a some states all these tasks are performed by a Council for the Judiciary; in the majority of states some tasks are carried out by a Council for the Judiciary and some are carried out by independent bodies, though in a few states some are still carried out by the executive branch. In some states none are carried out by a Council, simply because there is no such body. This diversity is the consequence of differences in the historic and political development of each of our states2. The European Network of Councils for the Judiciary agrees with the CCJE that it is essential that the tasks necessary for the proper and independent functioning judicial branch of the state are carried out by a body that is independent of the legislative and executive branches of the state. Our Network considers that a Council for the Judiciary, as the embodiment of the judicial branch of the state, should play the central role in carrying out all or some of these tasks itself and in ensuring that the tasks it does not carry out itself are carried out independently. Whether the Council carries out all of the tasks itself or whether some tasks are carried out by other bodies must be a choice for that state based on its traditions, historical development and other such matters. It is, however, essential that each body carrying out the tasks is independent and that there is an effective institution embodying the judicial branch of the state that ensures this is so. That institution must, in my view, be a Council as it is the only type of body that can take general responsibility for the governance of the judicial branch of the state.

The applicable considerations
In considering the type of body to discharge each of tasks, it is necessary to ask a number of questions: (i) What degree of judicial control or judicial participation is essential? (ii) How are members of the judiciary to be appointed to the body (such as the Council) that discharges these tasks? (iii) What degree of external public participation is essential? (iv) What is the relationship of the body to the judicial hierarchy? (v) How is the judiciary or the body that discharges the task to be accountable for the proper discharge of its duties in carrying out the tasks? This last is important, but unfortunately it is a question that is not asked sufficiently often. This may be because as judges we do not generally think of ourselves as being accountable for the decisions we make in court. But we are through the open and public process of our decision making, the provision of reasons and the review of our decisions on appeal; indeed there are few other functions of the state that are subject to more public scrutiny and public accountability. Just as we are accountable for our decisions in court, so we must be accountable for the

discharge of all tasks entrusted to us. But that must be in a way that respects our independence.

Common problems and objectives, but different solutions
In making an evaluation of how the tasks are to be carried out, it is important to bear in mind that the judiciaries of Europe face problems that are common, for example, the need for codes of conduct, the need for proper resources for training and the protection of the image of justice before a public and media that may not have a sufficient understanding of the process. When the ENCJ Steering Committee or Executive Board meets, it is our practice that each representative reports on developments in his or her member state3. The problems that each of us raises is very often a problem all of us have. It is therefore very useful to learn from each other how we should approach and solve these problems. Although this task is facilitated by a programme organised through the EJTN for exchanges between Councils, the organisation of the network has proved valuable in strengthening the position of the judiciaries.

Although we have the same objectives in solving our common problems – namely ensuring the independence of the judicial branch of the state so that it can deliver justice impartially as quickly and as cheaply as possible consistent with the interests of justice and so maintain the rule of law - the solution in each state and in the EU does not have to be the same. Each state can only determine which type of body or bodies must perform each of the task I have enumerated in accordance with its own historic traditions.

May I therefore, against that background, look at each of the tasks that must be independently performed, if the judiciary is properly to be able to perform its functions in the 21st century before turning to the central role of a Council? I do so, because, although I consider a Council an essential body, it is not necessary that it perform each of the tasks.

In my own state we have three different jurisdictions, England and Wales, Scotland and Northern Ireland. Until very recently all of the tasks which I have enumerated were under the control of the Lord Chancellor who was head of the judiciary, speaker of the upper house of our legislature and a member of the cabinet. He appeared to be the living embodiment of the denial of the separation of powers; nonetheless for complex reasons, our system had worked well. But it became clear sometime ago that our historic solution was no longer functioning properly and reform was needed. Between 2003 and 2008, we have carried out a series of reforms the effect of which has been to change control over each of these tasks. We have more recently tried also to address the issue of accountability4. I hope it may be helpful if I explain the solution we in the United Kingdom have adopted in respect of each of the tasks and the role of the Council, but I would be happy to answer questions on a much broader basis. We have benefitted greatly

in achieving our reforms from the help we have received from other judiciaries in Europe through our participation in the ENCJ.

(i)Appointment, promotion and career development.
In some states control over appointment, promotion and career development is vested in a Council; in some states where the Council carries out this task, the judges are in a majority and in some in a minority. In other states the task is vested in an independent body and in some the executive still retains an important role. The reason why there is such diversity is the debate over public participation in the task. It is, I think, difficult to deny public participation in the task, principally to guard against the perception that a judiciary appoints only those in its own mould.

In England and Wales, until our reforms, the entire control rested with the Lord Chancellor acting on the advice of the most senior judges. In our reforms we addressed the issue of public participation by assigning the task of appointment etc to an independent Judicial Appointments Commission comprised of 5 judges, 2 lay judges, 2 legal professionals and 6 highly qualified members of the public. The three most senior judges are appointed by our Council. All the other members are appointed by a method entirely independent of the executive. The Commission makes all appointments save for the most senior judges – the 42 members of our Court of Appeal and the 12 members of our House of Lords. There is a special body of 2 judges and 2 lay persons with the senior judge having the casting vote.

How has this structure taken into account the five questions I posed? Its purpose was to ensure judicial and public input into the appointment of judges; it removed any possibility of political influence. However, instead of allowing the judges to appoint those that they thought most suitable, the structure gave the public a proper input. The issue of accountability is addressed by the Appointments Commission publishing an annual report and its Chairman and Deputy Chairman being questioned by our legislature. The position of the judiciary hierarchy is protected by a system of consultation before appointments are made This Commission has been operating for 2 years; some minor changes are needed, but the general view is that it seems to be working well.

The Appointments Commission has no role to play at all in the assessment of judges. In common with most countries, assessment rests entirely under judicial control. That seems to me to be right in principle because the assessment of judicial performance is essentially a professional task for other judges to which the public can make little contribution. The accountability for this should primarily by an annual report on what is done.

(ii)Codes of conduct and discipline
It is unfortunate that many countries in Europe do not have codes of conduct. In the UK, the Judges Council of England and Wales only developed a code of conduct in 20025. A code is, however, important because it sets a clear standard of judicial conduct and underpins a disciplinary system. It is for the judiciary to promulgate such a code, but with proper consultation and a mechanism for review. A Council is plainly the most appropriate body for this task.

The exercise of disciplinary powers is a more difficult issue. Many consider that the appropriate body should be a court or a body that is entirely controlled by judges (such as a section of a Council). It is argued that provided the proceedings are public and the result made public, there is sufficient accountability and independence from the judicial hierarchy. The public has no role to play.

In England and Wales, we have adopted a different solution. The disciplinary function is ultimately jointly exercised by the Lord Chief Justice and the Minister for Justice. Complaints are referred to an office. If there is a matter to be investigated, the investigation is carried out by a judge. If the investigating judge considers there is a case to answer, the matter is referred to an independent tribunal, comprised of judges with lay representation, which makes the decision. The decision cannot take effect unless the Lord Chief Justice and the Minister agree. Decisions are made public, an annual report published and reports made to the Council. This solution was adopted primarily because it was considered that it would strengthen public confidence; the judges were not seen to be making decisions alone in respect of their own members. I do not believe that the detail of the solution in England and Wales is one that would work elsewhere, but in my view, there is a strong case for some public participation in disciplinary matters whether through a section of a Council or through a separate body.

(iii)Training
It is generally accepted, though this is not the position in every state, that the control of training is a task for the judiciary (either through a Council or other body), though it is best carried out through judicial schools or academies. The reason is self evident: the decision on what courses are taught and the manner of their teaching must be independent as otherwise there can be an imperceptible, but wholly improper, influence on the independence of decision making. The same is true in respect of guidance given to the judiciary about the interpretation of law. If the rule of law is to prevail, then it is for the judiciary to apply the law laid down by the legislature uninfluenced by guidance from the executive or others; the executive cannot be in a different position to any other litigant. This is also an issue which will need properly to be addressed in relation to the provision of training provided through the EU and guidance given by non judicial EU institutions.

However close attention has to be paid to accountability, because training consumes considerable financial resources and poor training can result in judges making poor decisions. For this reason, it is important that consideration is given to the body responsible for training having representatives of the public or the legal profession or experts, providing a proper report of the way it discharges its task and putting in place an appropriate mechanism for answering questions posed by the legislature as to how the funds it has provided have been spent.

(iv)Court administration.
There is a growing view across Europe that court administration should be in the hands of a body in which there is at least substantial judicial participation if not control. The Netherlands, Denmark and Ireland were in the vanguard of this movement and have been followed by some of the new accession states. This view has gained ground because good court administration properly financed is essential to the discharge of the powers and functions of judges and there is no better way of ensuring this than vesting control and responsibility in the judiciary.

However it is, I think, also accepted that this is a task the judges cannot perform on their own without external expertise and external accountability. The sums of public money at stake and the public interest in ensuring that there is an efficient administrative infrastructure to support the judiciary means that it is difficult to deny room for public participation, independent expertise and a robust mechanism for public accountability.

In the United Kingdom, we have this year changed the status of court administration so that it is no longer controlled by the Ministry of Justice; Scotland has adopted a model similar to Ireland which vests the control substantially in the hands of the judiciary. In England and Wales, control is vested jointly in the judiciary and the Ministry with day to day governance in a board with an independent Chairman.

(v)Protection of the image of justice.
The modern age requires the judicial branch of the state to protect the reputation of the courts and judges by being prepared to explain in a manner understandable to the public why decisions have been made and to defend a judge or judges from unfair media criticism.

Although a judge should in his judgment, explain his decision so that the public understand it, it is not always possible in a judgment to give the kind of explanation that the public as a whole need to have. Nor is it possible to anticipate unfair public criticism.

Until 2004, this task in the United Kingdom was entrusted to the Lord Chancellor. One of the indications of the need for reform was that in an age where the media is so powerful, a conflict developed between the duty to protect the judges from unfair political criticism and political expediency. The judiciary of England and Wales now has its own communications office; it has also joined those countries, led by the Netherlands, which have judges trained to act as media spokesmen whose responsibility it is to ensure that the public is properly informed. Judiciaries have found that if they do not provide information and answers, others, less informed, are quite happy to do it for us.

Conclusion

Each of the topics I have addressed would form a talk in itself and benefit from a much more detailed analysis. Time does not permit. However, in my view, when an analysis of the tasks which must be performed to maintain the independence of the judicial branch of the state is carried out, I think the inevitable conclusion is that a Council for the Judiciary is needed. It must fulfil a central role, even though some of the tasks may be carried out by others. There is no real alternative. The judicial branch of the state needs a central institution not only to discharge the tasks I have enumerated itself (or to ensure that others discharge them independently), but also to manage the relationship with the legislature and the executive and to take overall responsibility for the proper functioning of the judicial branch of the state and in particular the timely and impartial delivery of justice at the lowest cost consistent with the interests of justice. A judiciary that does not have the means of ensuring this will find that others are quite happy to do it for them. Without proper and responsible arrangements for governance this may well happen.

Not only will a Council fulfil the central role I have described, but it should also provide leadership and central representation for the judiciary and balance the relationships with the Judges Associations and the judicial hierarchy.

Finally may I add a word about the composition of a Council for the Judiciary. If a Council is to fulfil the role in the governance of the judiciary which I have outlined, its composition is of central importance. There is great diversity across Europe. In England and Wales we do not have direct elections to the Council. Each level of the judiciary has its own Association where elections are held and the officers of those Associations (or their delegates) serve on our Council; our Lord Chief Justice is our chairman. We have found that selecting the representation by means of using the Associations means that the Associations work closely with the Council and understand and generally support what it does. There is generally no tension between the Associations and the Council; nor between the Council and the judicial hierarchy (the senior or presiding judges at courts or groups of courts or in regions). That is

because the Lord Chief Justice is both President of all the Courts of England and Wales and Chairman of the Council.
7 October 2008