Do Judicial Councils further Judicial Independence? Some Lessons from Europe[*]

by

Carlo Guarnieri

(University of Bologna)

Ankara, May 27th 2011

Modern political systems entrust judges with the function of adjudicating disputes arising from the application of recognized norms. In constitutional democracies – where the Rule of Law enjoys specific support - judges enjoy strong guarantees, regulated by ordinary statutes, organic laws, constitutional norms and often supported by settled practices. However, although within a set of common principles, different legal traditions – with significant implications for the status of judges – can be singled out. In Europe, in recent decades, significant changes have affected the status of judges. Collegial bodies have been instituted with significant powers in the realm of judicial organization and the administration of the status of judges. In several countries these innovations have affected to a significant degree the relationships between courts and politics.

1. *Judicial impartiality and independence*

The status of the judge cannot be analyzed without taking into consideration its institutional function: adjudication. Adjudication is a type of dispute resolution that relies on an independent, third-party facilitator: an externally appointed judge.[1] Therefore, the freedom of action of the parties to the dispute is limited. They must comply with the judge's decision, even though they have no control over the choice of judge, who is imposed by the state. Generally speaking, judicial proceedings are much more effective than other proceedings – as mediation or arbitration - because they do not need the

[*] A larger version of this paper will be published in D. Clark (ed.), *Comparative Law and Society*, Elgar Series: Research Handbooks in Comparative Law, 2011

[1] Martin Shapiro, *Courts. A Comparative and Political Analysis* (Chicago: The University of Chicago Press 1981).

consent of both parties to achieve a resolution of the dispute. However, this effectiveness must be weighed against the risks for the disputing parties who must relinquish much more control over the proceeding. Judicial proceedings are usually initiated without mutual consent, as legal disputes are usually triggered by the action of one party against another. In some cases, for example in criminal proceedings, a public prosecutor acting on behalf of the state can initiate proceedings, not only against the will of the accused, but also without the consent of the victim.

For these reasons, judges are inherently placed in a difficult position. They must resolve cases without the main element that makes the triad an effective means of resolving disputes in other proceedings: the willingness of the participants to submit to both the proceedings and the involvement of the third party. This is the root of the crisis of consensus that is always latent in the judicial process.[2] To address this weakness, the judicial process tends to include a number of principles creating the appearance of and reinforcing judicial impartiality. The most important are: (1) the prohibition against *ad hoc* justice, which means that the dispute must be resolved by a judge having pre-existing jurisdiction over the general subject matter; (2) the adversary principle (*et audi alteram partem*), which establishes the right of both parties to be heard by the judge; and (3) the principle of judicial passivity (*ne procedat judex ex officio*), which forbids the judge from initiating proceedings independently.[3] Another element that reinforces the appearance of judicial impartiality is the fact that judicial decisions tend to be bound by a system of legal norms or, in some cases, precedents. This reliance on pre-existing norms aims to temper the disappointment of the losing party and prevent the judge from appearing personally responsible for the decision.

Above all, the need to guarantee judicial impartiality implies that judges must be <u>independent</u> from the parties in dispute and protected from interference by them. Such independence is a necessary condition for safeguarding at least the appearance of judicial

---

[2] Shapiro (note 1) 8-17.

[3] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press 1989).

impartiality, as any judge who is dependent in some way on one of the parties cannot be, and especially cannot appear to be, impartial. In the political development of Europe, the incorporation of judges into the machinery of the state and the superiority of government-appointed judges over other types of judges - for example, feudal or city judges - have largely guaranteed judicial independence from the parties in dispute, at least in the case of private citizens. However, the incorporation of the judge into the state organization creates the need to redefine judicial impartiality when one of the parties is the state itself or one of its representatives. In this case, only by defining judicial independence in relation to the state can the judge act as an impartial third party in disputes between the state and citizens (for instance in criminal trials). Judges can then become an effective check on the way public functions are performed, since guarantees of independence allow them to resolve such disputes and interpret the relevant laws without coming under pressure from the state.

This last element explains why the protection of judicial impartiality through strong guarantees of judicial independence became one the most important traits of constitutionalism. Since one of the main objectives of constitutionalism is to limit the arbitrary exercise of power and make it legally accountable,[4] submitting the performance of public functions to the scrutiny of an independent body becomes an effective and essential check on the exercise of political power, ensures the supremacy of the law and is a fundamental step in building a constitutional state.

Even though judicial independence exists in all constitutional regimes, there are important differences between countries, particularly between civil law and common law countries.[5] Historically, the judges in civil law countries have enjoyed less independence and their role has tended to be far less politically significant. In those states the

---

[4] Giovanni Sartori, *The Theory of Democracy Revisited* (Chatam: Chatam House 1987).

[5] John H. Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition* (Stanford: Stanford University Press, 3d ed., 2007) and Raoul C. Van Caenegem, *Judges, Legislators and Professors* (Cambridge: Cambridge University Press 1987).

centralization of political authority, including the judicial function, was brought about by the monarchy, to which judges were initially subordinated. The constitutionalization of political power and the consequent development of judicial guarantees of independence partially weakened this relationship, but the organizational integration of the judiciary into the structure of public administration was maintained if not strengthened. The decline of the monarchy in the nineteenth century did not radically alter the situation; it merely transferred the power to exert influence over the judiciary to a parliamentary executive.

The situation in Anglo-Saxon countries is different. In England the centralization of political authority resulted in the hegemony of one institution, Parliament. However, the political context of such a development is more polycentric: the political branches do not monopolize the creation of legal norms, and an important role is always reserved for judicial decisions. As a result, English judges have been able to maintain some autonomy in relation to parliamentary statutes. In addition, common law principles developed by judges still remain one of the basic elements of English law. In the United States, a written constitution combined with judicial review of legislation has ensured from the outset that the judiciary would not be subordinate to the political branches. On the contrary, following the rules laid down by the Constitution, the American judiciary has emerged as an equal power to the legislature and the executive, and its main task has been to balance law-making power in a constitutional system of checks and balances.

Summing up, in any constitutional state whose main objective is to safeguard the rights of citizens, judicial independence is primarily aimed at guaranteeing and supporting judicial impartiality in the adjudication process. As a consequence, its main point of reference must be the state and its institutions, particularly the executive, which directly or indirectly is most often a party to such adjudication. However, with the introduction of judicial review of legislation, the legislature also becomes a point of reference for judicial independence. The judiciary is considered a power on the same level

as the legislative and the executive: it becomes a veritable Third Branch, as it is often defined in the United States.[6]

2. *Judicial independence: its content*

Although guarantees of independence – or institutional independence – are designed to protect judges from improper pressures, they cannot assure their independent behaviour. In fact, complete judicial autonomy is difficult to conceive, because judges cannot be completely isolated from their environment. Therefore, we should distinguish between institutional independence and independence on the bench. Although the first is the necessary condition of the second, they do not coincide.[7]

In the last decades the influence of the international environment has been especially significant also in the field of judicial independence. The independence of courts and judges has been viewed as indispensable elements of the right to a fair trial, which is considered an essential component of the Rule of Law and is guaranteed by the most important universal and regional conventions regarding civil and political rights. The jurisprudence of the supervisory bodies set up under these conventions has had a significant impact on the setting of national judiciaries.[8] Moreover, a range of other instruments, although technically non-binding, have been widely endorsed and have influenced in a softer but not less effective way the strengthening of judicial guarantees of independence. In the last 25 years the United Nations and the Council of Europe have been the most active in this field. Principle five of the 1985 Basic Principles on the Independence of the Judiciary of the United Nations states in a sweeping way that 'the judiciary shall decide matters before them impartially, on the basis of facts and in

---

[6] Pasquale Pasquino, *Uno e trino. Indipendenza della magistratura e separazione dei poteri* (Milano: Anabasi 1994).

[7] Peter H. Russell, 'Toward a General Theory of Judicial Independence ', in Peter H. Russell and David M. O'Brien (eds.), *Judicial Independence in the Age of Democracy* 1-24 (Charlottesville: University Press of Virginia, 2001)

[8] Guy Canivet, Mads Andenas and Duncan Fairgrieve (eds.), *Independence, Accountability, and the Judiciary* (London: British Institute of International and Comparative Law 2006).

accordance with the law, without *any* restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from *any* quarter or for *any* reason' (Italics added). Similar provisions can be found also in the recent 2010 Recommendation by the Committee of Ministers of the Council of Europe on 'judges: independence, efficiency and responsibilities'.

Broadly speaking, all democratic constitutional systems approach judicial independence in similar terms: in principle, judges are subordinate only to the law. But differences emerge when considering the status judges enjoy and, above all, the way their guarantees of independence work in practice. The most significant elements concern appointments, salary, transfers, disciplinary proceedings, and career patterns, with the last factor being the most important variable characterising the organizational structure of the judiciary. All of them determine the position of individual judges in relation to their colleagues and those responsible for decisions affecting their professional life. Taken as a whole, these elements can be used to assess the extent of both internal and external judicial independence. While external independence refers to the relations between the judiciary and other branches of government, internal independence focuses on guarantees aimed at protecting individual judges from undue pressures from within the judiciary: fellow judges and, above all, superiors.[9] Although not always considered in full, the role played by organizational hierarchies is crucial for understanding the internal dynamics of the judiciary, which in turn affect the actual degree of judicial autonomy. Here is still relevant the distinction between the common and civil law traditions, as they create two alternative models of judicial organization.

[9] Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges', in Shimon Shetreet and Jules Dechênes (eds.), *Judicial Independence: The Contemporary Debate* 637-8 (Dordrecht: Nijhoff, 1985); Russell (note 7).

3. Judicial independence in common law countries

The English judicial system is founded on a strict association among the legal professions.[10] Recruited almost exclusively from practising barristers (that is, lawyers entitled to practise as an advocate, particularly in the higher courts) with numerous years of experience, the professional judiciary has been dominated by the Bar. The move from private practice to the bench is the most typical career path of an English judge. This approach has also been transplanted to some extent into the American and other common law systems, and results in a form of professional mobility that is largely unknown in continental Europe.

The formal power to appoint most judges is vested in the Crown. Traditionally, the Lord Chancellor played the central role in their appointment, but recently its role has been radically reformed. The Constitutional Reform Act 2005 has introduced a significant number of changes to the ways to which judges are appointed, managed and disciplined. The reform has created a Judicial Appointment Commission, whose job is to recommend names for the Lord Chancellor to appoint to any judicial post in England and Wales, with the exclusion of lay magistrates. The Commission, instituted in 2006, is an independent body, chaired by a lay member and composed of five judges – taken from the different levels of courts – a solicitor and a barrister, as well as a lay judge, a tribunal member and five lay members, who must never have been practicing lawyers. The Commissioners are selected by a panel composed of the president of the Commission, a member appointed by the Lord Chief Justice – who presides the Court of Appeal and is considered the head of the judiciary – with the agreement of the Lord Chancellor, a member appointed by the Lord Chief Justice and a forth member appointed by the third. The Lord Chancellor can accept, reject the proposals of the Commission or ask for a reconsideration but cannot appoint judges whose names have not been recommended by the Commission.

---

[10] John S. Bell, *Judiciaries within Europe. A Comparative Review* 298-349 (Cambridge: Cambridge University Press 2006)

Professional judges have traditionally been recruited exclusively from among the smallest group within the legal profession, barristers, and the salaries have always been considered adequate to attract high quality professionals. Therefore, the judiciary has been drawn from an elite group currently numbering approximately 12,000. In the 1970s the judiciary began to open itself up incrementally to solicitors, who are far more numerous than barristers (more than 100,000). However, solicitors have remained a smaller segment of the judiciary and are mostly confined to its lower ranks. The Courts and Legal Services Act 1990 made it possible for solicitors to qualify as advocates in the higher courts under certain conditions. Thus, in principle solicitors can now reach the higher ranks of the judiciary, but the number of solicitor-advocates in the higher courts has grown very slowly, and the same is true of their appointment to the judiciary. This is due at least in part to the fact that a prolonged advocacy qualification is necessary before judicial appointment, with judges generally recruited after at least 7 to 10 years of advocacy. As a result, the average age of appointment to the professional judiciary in England is far older than judges on the continent. As for the future, it is still too early to assess the impact of the 2005 reform.

Historically, the English judiciary did not have a hierarchical structure, and the notion of a judicial career was virtually unknown. When specific vacancies occurred, individuals were appointed according to the skills needed for the particular judicial office. Moves from one position to another were possible, but the system did not openly encourage individual aspirations for advancement. However, since the early 1970s, some type of a career pattern has slowly taken shape. The principle has emerged whereby judges already serving in lower courts are eligible for appointment to higher jurisdictions and professional full-time judges tend to be chosen from among the ranks of part-time judges. The English system now appears to be moving closer to the model found in civil law countries, although some significant differences remain. Judicial promotions occur in much the same way as initial appointments and do not follow pre-determined patterns. More importantly, judges do not undergo any systematic evaluation like their continental

counterparts. Thus, what internal judicial hierarchy exists is rudimentary. However, unlike France or Germany, the prestige surrounding judicial office in England is not necessarily related to rank or function. Whatever their position on the 'career ladder', English judges enjoy a comparatively high public status.

English judges are not easily removed from office; once appointed, they hold office 'during good behaviour', which invariably means until retirement age. English legal rules for removal and discipline of judges are not as abundant and detailed as rules in civil law countries or even the United States. Except for impeachment (fallen into disuse since the nineteenth century), the only formal sanction against High Court and Court of Appeals judges is removal by the Crown on an address by both houses of Parliament. Established by the Act of Settlement in 1701,[11] this rather complex procedure has been successfully invoked on only one occasion in 1830. In practice, compliance with ethical rules is controlled by the professional environment, the bench and the Bar, but on occasion the Lord Chancellor could summon a judge for a 'private meeting'. The powers granted to the Lord Chancellor over part-time judges and magistrates were more far-reaching, and he could directly remove them for incompetence or misbehaviour. The 2005 reform has transferred these powers to the Lord Chief Justice.

Unlike England, in the United States a unified legal profession exists with no separation between advocates and other practitioners, and while legal professionals (and therefore judges) may have different areas of specialization, they all share a common professional identity. The range of judicial recruitment methods is much broader in the United States than in England, as a result both of the federal structure of government and the legislative powers state governments possess over the administration of justice. While each state has its own specific form of selection, there are three general models: (1) *appointment* (with power vested in politically representative authorities); (2) *direct election*

[11] The article III of the Act provided that 'judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them'.

(both partisan and non partisan); and (3) what is generally called the *merit selection* or *Missouri plan* (whose main goal is to achieve a balance between political and professional criteria).

At the federal level, judges are recruited through a complex procedure that consists of three main stages: nomination by the President, screening of candidates by the Senate Judiciary Committee, and final approval by the whole Senate on a simple majority vote. Based on joint participation of the legislature and the executive, the process is a good example of political 'checks and balances'. The President's wide discretion in choosing candidates, especially those for the higher federal courts, does have constraints. Rejected nominations are historically not that infrequent, and over two centuries the Senate has refused to confirm 27 of the 147 Supreme Court nominees forwarded to it by the White House.[12] The process of appointment is strongly influenced by the relationships between the two other branches: when the Senate and the President belong to the same party the process is somewhat easier. On the contrary, when they are divided, the appointment of federal judges requires informal negotiations before and during each stage of the process. Senators from the state where the judicial vacancy is to be filled can play a crucial role; provided these senators belong to the same party as the President, their opposition to a nomination usually forces the President to withdraw the name (a practice known as 'senatorial courtesy').

In recent years, the political beliefs and party affiliation of candidates for judicial appointment in the United States appear to have increased in significance. This is often most obvious with US Supreme Court appointments: almost 90 per cent of Supreme Court justices have belonged to the same party as the president who nominated them.[13] This overtly political process of recruitment is related to the political role the judiciary plays in the American system of government. The judiciary is explicitly named in the Constitution

---

[12] Lee Epstein and Jeffrey A. Segal, *Advice and Consent. The Politics of Judicial Appointments* 20-21 (Oxford: Oxford University Press 2005).

[13] Epstein and Segal (note 12) 26.

as a third, co-equal branch of government, and federal judges enjoy life tenure (Article III, section 1). However, political influence tends to exert but also to exhaust itself at the moment of appointment.

Even though it may appear that ideological criteria are highly significant in the appointment of federal judges in the United States, the candidates' professional qualifications and competence do play a relevant part in the selection process: 'if a president is concerned with leaving a lasting legacy to the nation in the form of jurists who will continue to exert influence on the law after he leaves office, then professional merit too come into play'.[14] The potential area of recruitment is undoubtedly larger than in England, but is still confined to professionals who usually combine legal skills and political experience in different degrees. US federal courts are mostly staffed by former practising attorneys (usually with degrees from leading law schools), law professors, former public administrators, and increasingly by judges who have previously served in high state courts. Appointees have almost invariably been active in party politics prior to their appointment to the federal bench.

At the state level, direct election of judges is widespread, even though electoral methods vary from state-to-state and recruitment methods vary with the type of state court. In all cases provision is made for a term of office ranging from seven to fifteen years. The distinction between partisan and non-partisan election depends on whether it is possible for the candidate to run under the open support of a political party, although a candidate's party activity and support by local political forces can still influence non-partisan elections.[15] Critics of this method stress the inherent possibility of damaging the judge's image as a neutral umpire and devaluing the professional qualifications of the bench. The Missouri non-partisan court plan, named for the state which first adopted it in 1940, is a method developed by the American Bar Association (ABA) precisely to address such problems. Variations of the ABA's original model currently operate in about thirty

---

[14] Epstein and Segal (note 12) 69.

[15] Henry J. Abraham, *The Judicial Process* 34 (Oxford: Oxford University Press, 7th ed., 1998).

states and are usually referred to as 'merit plans'. The merit plan selection process usually consists of three phases. First, a special commission of judges, lawyers, and citizens nominates three to five candidates for each vacant position. Choosing from that list, the state governor then appoints a judge who will serve for at least one year. After this probationary period, the judge must undergo public scrutiny, through a ballot, to remain in office for a specific term that varies according to state legislation and the level of court jurisdiction.

The reasons behind the absence of a civil service style career for judges in England also apply in the United States. However, moves from one judicial position to another are frequent, so that more than half of federal judges have served in other judicial offices.[16] For example, members of the federal judiciary are increasingly selected from among the ranks of state judges. Even though these 'advancements' follow the recruitment procedure described earlier, mobility tends to be higher in the US than in England. This seems to leave more room for political influence since politics provides the opportunity to move to a higher rank.

The independence of federal judges is protected by the US Constitution, guaranteeing appointment 'during good behaviour', which in practice means for life. Under a constitutional provision (article II, section 4) that applies to the President, Vice-President, and all federal civil officers, federal judges can be 'removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanours'. The House of Representatives investigates such charges and can commit the individual to trial in the Senate by a simple majority vote, but conviction and removal requires a two-thirds majority of the Senate. Congress has initiated these proceedings against judges fifteen times; only seven resulted in actual removal, although several judges under investigation resigned before being formally impeached. For disciplinary measures against federal judges for less serious violations, the American system has much more structured legislation than the English system, and judicial councils established at the

[16] Epstein and Segal (note 12) 63.

appellate court level usually impose sanctions.[17] However, on the whole, members of the federal judiciary enjoy broad guarantees of independence, which shield them from political influence.[18]

At the state level, removal by impeachment has been widely adopted, along with other methods such as removal by address (directed to the governor and voted by both houses of the state legislature) and recall (a public petition to remove a judge followed by a popular vote). In addition, codes of judicial conduct now in force across the country provide detailed regulations for activities ranging from extra-judicial activities to campaign financing. It is up to specific institutions, usually known as judicial conduct organizations, to hear grievances against individual judges and to ensure compliance with ethical rules. While these bodies can usually only impose minor sanctions, for instance issuing a reprimand, they can always recommend to the competent authorities that more serious sanctions be imposed.

Summing up, common law judges are appointed only after having acquired professional experience, usually, but not always, as legal advocates. There are no formal provisions for advancement. Promotions are possible but not widespread and, on the whole, internal controls over judges by their higher-ranking colleagues are rather weak. In any case, after appointment – a process in which politics tend to play a role - strong guarantees of both internal and external independence exist. Since judges usually have lengthy legal experience outside the judiciary, there is no particular emphasis on internal controls. As for the reference group of judges – that is, those individuals judges take into account when reaching a decision – tends to lie outside the judiciary. However, while in

---

[17] The Judicial Councils Reform and Judicial Conduct and Disability Act, passed in 1980, does not apply to members of the Supreme Court. The only measure that can be adopted against them is impeachment.

[18] Although the Constitution maintains that judges' salaries "shall not be diminished during their continuance in office" (article III, section 1), recently there have been claims that they have not been adequately adjusted to inflation. Epstein and Segal (note 15) 34.

England it tends to be a small professional group – at least so far, especially the Bar - in the United States it seems to be more diversified.

4. Judicial Independence in civil law countries

In most civil law countries, the largest proportion of judges is recruited directly from university through some form of public examination, and with no requirement for previous professional experience. Successful candidates are then appointed at the bottom of the career ladder, and professional training and socialisation take place within the judiciary. Some form of either mandatory or optional training usually exists for both new recruits and senior members of the judiciary. Judicial training has become an increasingly important element in the administration of justice, and most entry-level judges are required to complete an initial period of probationary training.

Public competition is meant to be the most effective way of ensuring both the professional qualifications and independence of the judiciary. Competitions are open to young university graduates in law, usually with little or no previous professional experience. Legal education is typically multi-purpose, providing a general knowledge of all relevant branches of the law at the expense of any form of specialization. As a consequence, selection incorporates little or no emphasis on the practical side of the work of the judiciary, and is made on the basis of written and oral exams that test the candidates' theoretical knowledge of the law. Young recruits are supposed to be able to perform the entire range of tasks they could be assigned, from adjudicating a criminal, family, or fiscal case to acting as a public prosecutor. Legal training is carried out on the job and is generally supervised by senior judges. Thus, judicial socialization takes place within, and is therefore essentially controlled by, the judiciary. All of these elements, and in particular the reluctance to require professional legal experience outside the judiciary, encourage both the *esprit de corps* of the judiciary and the 'balkanization' of the bench and

Bar, and relations between the two different sides of the legal profession can often be strained.[19]

However, in most continental European countries, recruitment by public competition has undergone some major changes. Lateral entry into the judiciary, open to experienced lawyers or civil servants, has increased in an attempt to prevent corporatist tendencies. In the same way, judicial schools have been established in most European countries to provide legal education and training for new judges to fill the vacuum that exists between university education and professional practice.[20]

Traditionally, continental European judiciaries tend to operate within a pyramid-like organizational structure.[21] Salary[22], prestige, and personal influence depend on a judge's position on the hierarchical ladder and can be improved only through promotions. These are granted on a competitive basis and according to two criteria, seniority and merit, the latter being determined through assessments by senior judges. In principle, each career step requires a specific procedure. Although the number and position of those in charge of such decisions varies from one country to another, some features are relatively constant. Hierarchical superiors play a fundamentally important role in determining judicial status in most continental countries. Promotions rely often on information recorded in personal reports compiled by superiors, and this highlights the extremely delicate and critical role entrusted to the judicial elite. The process is based on the

---

[19] Giuseppe Di Federico (ed.), *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe* (Bologna: IRSIG-CNR 2005); Merryman and Perdomo (note 6).

[20] Bell (note 10) 360-365; Cheryl A. Thomas, *Review of Judicial Training and Education in Other Jurisdictions* (London: Judicial Studies Board 2006).

[21] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press 2002).

[22] Judicial salaries in continental Europe are related, as a rule, to the general scales of the ordinary bureaucracy and consequently adjusted. Although the system seems on the whole capable to protect judicial independence, sometimes problems arise concerning the way the adjustment is made.

assumption that individuals in top positions can manage, and are thus able to evaluate, the entire range of tasks performed at the lower levels of the pyramid.

The decision-making process for promotions in continental systems also involves others outside the judiciary: traditionally, the executive (i.e., the Ministry of Justice) and sometimes the legislature represented the most important institutional channels connecting the judiciary to the political system. However, in several continental countries the prominent role traditionally played by the executive branch has been weakened substantially by the creation of new institutions, the Higher Councils of the Judiciary, designed to strengthen the independence of judges.

4.1 Germany

The traditional setting of civil law, continental judges is still exemplified, to a large extent, by Germany. All German jurists share a common legal education and training leading to the 'qualification for judgeship' (*Befähigung zum Richteramt*). This qualification is a necessary requirement to serve in all legal professions and the higher ranks of the civil service. As a consequence, judges, public prosecutors, private attorneys, notaries, and government officials are all educated through a lengthy and highly selective route and tend to identify themselves with a larger professional group, the *Juristen*. Lateral mobility among these various professions also exists, and although it is restrictive, their common educational experience appears to create a strong connection among the different legal professions that is characteristic of the German system.

Under German federal legislation[23] training for future judges is organized in two parts: the first, devoted to theory, takes place in a university law faculty; the second, more practical, establishes contacts with different legal environments. After completing extended university studies, candidates for the legal profession sit the 'first state examination'. If successful, they are granted status as temporary civil servants, allowing them to carry out their practical training and receive a small salary. During this period

[23] The *Deutsches Richtergesetz* enacted in 1961. But *Länder* also have legislative competencies in this field.

trainees become familiarized with the full range of legal roles they may have to perform in the near future: the judiciary (both civil and criminal), bar, civil service, and public prosecution. The final stage of the legal selection process is the 'second state examination', covering similar subject matter as the first but with a more practical orientation. The entire process lasts about ten years and has a remarkably low success rate. It is only after completion of the second state examination that separate selections are made for judges.

Appointment to a German judgeship depends on two criteria, marks obtained in state examinations (the most important element) and information on candidates' attitudes and performance during the training period. Selection is made by the regional (*Land*) Ministry of Justice where candidates apply and appointments are usually made according to a candidate's position on the examination pass-list. Judicial appointees (*Richter auf Probe*) are under a probationary period ranging from three to five years, during which their guarantees of independence are restricted. They can be moved from one position to another and required to undergo further evaluations before finally becoming life-tenure judges (*Richters aufs Lebenszeit*).

Executive influence over the judiciary remains strong in Germany.[24] Within the general framework established by federal legislation, the power to appoint and promote is always vested in the *Land* Minister of Justice, but in eight *Länder* (out of sixteen) there is a committee for the selection of judges (*Richterwahlauschüsse)*. These committees are usually made up of representatives of the executive, the legislature, the bar and the bench; although the proportions may vary, non-judicial members are usually in the majority. As a rule, the Minister of Justice presides but cannot vote, although she has veto power over the decision. However, in all cases the procedure involves the participation of the judicial council (a body established in each court and made up exclusively of judges, half of them directly elected by their peers), which is asked for an advisory opinion. Decisions concerning judges' promotions are based on evaluations drafted every four or five years by judicial superiors, who have the power of 'hierarchical supervision'. However, the

[24] Di Federico (note 19); Bell (note 10).

jurisdiction over disciplinary matters is entrusted to specialized courts established at the *Land* level (*Dienstgerichte*): sanctions against judges can be imposed only on their ruling.

Federal judges sitting on Germany's supreme courts are appointed following the same general procedure, but with one crucial difference: the bench has no voice on the federal Committee for the selection of these judges. The Committee is made up exclusively of representatives of the executive and legislative branches, namely the *Länder* ministries (16) and an equal number of members elected by the *Bundestag*, while the presidency is held by the federal minister without voting rights. Appointments are made primarily on the basis of the candidates' professional qualifications, but their geographic origin also carries weight to ensure that federal courts are staffed with judges drawn from the different *Länder*. This does not mean that political patronage plays no part in the appointment process; party representation on the Committee plays a role and has come under strong criticism. Promotions of federal judges are decided by the federal minister without any involvement of the Committee, although an advisory opinion by the judicial council is always required.

4.2 Sweden

As in Germany, the Swedish recruitment system is based on a public competition among young graduates in law having experienced a period of training. In fact, at the end of the law degree a candidate can apply to become a judicial trainee. The training period lasts for three years and involves periods in lower and upper courts as well as a number of formal short courses. After this initial period a number of candidates are recruited in the courts as judge on probation for a period of three years: they are not allowed to judge alone, but may take part in collegial decisions. The next phase is to be appointed as an assessor. During this period, an individual is not a permanent judge with a secure position in a particular court but she has a series of fixed-term positions, as they fall vacant. The objective is to ensure broader experience. The period as assessor lasts between six and eight years: at the end, it is possible to become a permanent judge.

The initial selection of trainees is controlled by the National Court Administration, *Domstolsverket* (DV), responsible for the overall management of the court, its staffing levels and equipment. The DV is separated by the Ministry of Justice. However, its executive board is composed of ten members appointed by the government: the chief executive, four judges – among them, the representative of the judicial union – two members of parliament, one of local governments, a representative of administrative personnel and a representative of the attorneys' association.

Appointments and promotions of judges are governed by an independent body – *Domarnämnden,* composed of senior judges, appointed by the government, and employee representatives – which decides all appointments to lower courts. However, senior positions remain within the control of the Ministry of Justice. Traditionally, they have not gone only to career judges but also to leading practitioners, prosecutors or high civil servants. Once appointed on a permanent basis, Swedish judges enjoy the traditional guarantees of independence: they cannot be transferred without their consent neither removed, unless through a judicial procedure.

Therefore, Swedish judges are recruited according to professional, meritocratic criteria – and after a rather long period of apprenticeship. Their status is guaranteed but promotions are influenced by higher ranking judges. In turn, senior judges are appointed by the government, although candidates must satisfy criteria of professional qualification. Therefore, the internal gradient of judicial independence does not seem particularly protected and the executive is allowed to exert some influence on the judicial elite and, indirectly, on the whole corps.

5 The changing institutional setting of Latin Europe

Among the civil law countries remarkable changes have characterized the judiciaries of Latin Europe. These changes have involved the recruitment – with the development of forms of specialized training – and the management of the corps, with the creation of collegial bodies and the erosion of the traditional power of executive and higher ranks.

5.1 France

Although reduced, France still keeps the traditional influence of the executive on judicial career but has been in the forefront of the reform of legal education and training of judges and public prosecutors[25], entrusted to the *Ecole Nationale de la Magistrature* (*ENM*), an institution staffed by magistrates but under the direction of the Ministry of Justice. The *ENM* has provided a model for other countries, such as Spain, Portugal and recently also Italy. A competition open to young law graduates (*concours étudiant*) is by far the most important recruitment channel for the *ENM*, but there are other ways to enter the school, designed to open the judiciary to candidates from different professional environments.

The *concours étudiant* is open to candidates who are not more than twenty-six years old and hold a law degree. The written and oral admission exams are highly competitive, and successful candidates are immediately integrated into the judiciary as *uditeurs de justice* (judicial trainees), receive a salary, and enjoy certain guarantees of independence. The training period is currently fixed at 31 months and consists of two phases: an initial general training period in both the *ENM* and the courts; a second period, lasting six months, devoted to specialist training in the functions the *uditeur* will be assigned after the completion of training (adjudicating civil or criminal cases or acting as public prosecutor). Recruits are continually assessed throughout the training period, and their final ranking determines their ability to choose assignments.

Although the Ministry of Justice still plays a considerable role in the management of the judicial corps, significant powers have been entrusted to the Higher Council of the Judiciary (*Conseil Supérieur de la Magistrature*). Created in 1946 to preserve the independence of judges, the French Higher Council had been the object of several changes. After the 2008 constitutional amendment it is now a single body separated into two distinct panels, one with competence over judges and the other over public prosecutors. It is made up of fifteen members: a councillor of State elected by peers; a lawyer; six lay

[25] They form a single professional group referred to as *magistrature*.

members appointed – two each - by the President of the Republic, the President of the Senate, and the President of the Chamber of Deputies; and seven magistrates representing a variety of ranks and elected by their peers. The composition of this last segment of the Higher Council changes according to the type of panel: it consists of the president of the Court of Cassation, five judges and one public prosecutor when measures concerning judges are under consideration, with these proportions reversed – and the prosecutor general at the Court of Cassation taking the place of the president - for decisions affecting public prosecutors. Disciplinary decisions made by the standing panel for the judiciary prevail over the Minister of Justice, and the range of direct appointments by the Higher Council include most senior positions. In all other cases judges can be appointed only after a favourable opinion of the Higher Council. In contrast, the functions of the public prosecution panel are more narrowly defined, since this panel can only give non-compulsory advice.

The French judicial career still resembles the civil law traditional model. The judiciary's pyramid structure consists of two grades. Above these two grades are the most senior judges (*hors hierarchie*) who sit in the Court of Cassation and the main courts. The position of individual judges, the functions they perform, their prestige, and salary are largely determined by advancements, and steps on the career path depend not only on seniority but above all on merit. Judges undergo very detailed work evaluations every two years, and in many cases promotion results in a transfer, although prior consent is required. The procedure for promotion is rather complicated and centres on the judicial hierarchy. Evaluations of work performance are drafted by higher-ranking magistrates and recorded in personnel reports made available to everyone taking part in the decision-making process. Each year the Commission for Advancements drafts a list of magistrates qualified for promotion. Since any promotions must be drawn from this list, the Commission holds significant power. Today, its composition includes only a few officials of the executive branch: 16 out of its 20 members are magistrates directly elected by their

peers. Therefore, the proposals put forward by the executive are under the double constraints of the Commission and of the Higher Council.

5.2 Italy

Judicial recruitment in Italy still bears a close resemblance to the traditional continental model. A national public competition is in practice the only way to enter the judiciary, which is a unitary organization (just as in France, both judges and public prosecutors are referred to as magistrates). Law graduates usually sit the national examination shortly after completing their university studies. As a result, they have no experience in legal practice, and even if a candidate did it would not be taken into consideration in the recruitment process. University law faculties and various private institutions control legal education: only in 2006 a law has provided for a judicial school which still has to be instituted. The entry test is made up of written and oral exams testing general knowledge in the main subjects included in law faculty curricula.

Selection and subsequent training of judges and public prosecutors are the responsibility of the Higher Council of the Judiciary (*Consiglio Superiore della Magistratura*), an institution where magistrates make up the overall majority. The Ministry of Justice is not involved in either the recruitment process or decisions concerning the status of judges and public prosecutors. Unlike France, the time devoted to training recruits (*uditori giudiziari*) in Italy is limited. In 2006 it has been fixed at 18 months, but in practice this varies according to the pressure to fill vacant posts. So far, in the absence of the judicial school, apprenticeship takes place in courts and prosecutors offices under the supervision of senior magistrates. Training is divided into two phases. The first is devoted to familiarising young magistrates with different legal roles, including adjudication as well as prosecution. The second phase (lasting six months) attempts to train them in the specific functions they will have to perform once appointed (e.g., adjudication in civil or criminal courts as well as public prosecution). More importantly, no further weeding out of candidates occurs during this period. The reports on personal performance drafted by the

Higher Council are almost invariably positive, making the initial national examination the only effective means of selection.[26]

Among continental countries, Italy has undergone the most radical transformation of the judicial setting and is the only country to achieve true judicial 'self-government'. Traditionally, the judiciary closely resembled the French, since it was established in the second half of the nineteenth century under the influence of the Napoleonic model. Since the early 1960s a gradual process began substantially to alter the traditional set-up. The Higher Council of the Judiciary, formally established by the Constitution of 1948, finally began to operate. The Higher Council makes all decisions related to the status of both judges and public prosecutors. Recruitment, appointment, promotion, transfer, and disciplinary proceedings have been removed from the Minister of Justice and concentrated in the hands of that body.[27] The extent of judicial self-government in Italy is obvious if one considers the composition of the Higher Council. After the 2002 reform, it consists of sixteen magistrates directly elected by the whole judiciary, eight lay members elected by both chambers of Parliament from among experienced lawyers and university law professors, and three *ex officio* members (the President of the Republic, and the President and Prosecutor General of the Court of Cassation). In practice, the lay members are chosen to reflect the strength of the different political parties in Parliament. To understand the internal operation of the Higher Council, the influence various factions of the judicial association exert is crucially important. After that a series of reforms has broken the traditional dominance of the judicial elite, today a proportional system of election for all members operates, awarding a significant influence to different judicial groups.

---

[26] Di Federico (note 19).

[27] Disciplinary proceedings can be initiated by the Minister of Justice, but in most cases these are carried out by the Prosecutor General of the Court of Cassation. They take place before a standing committee of the Higher Council.

The composition of the Higher Council has had major consequences for the way promotions are managed and for the general organization of the judiciary.[28] As a result of reforms carried out since the 1960s, the traditional promotion system, based on competitive examinations or assessments of judicial work (previously controlled by senior judges) has been abolished. In theory, promotions should be based on a combination of the two usual criteria, seniority and merit, the latter being assessed by the Higher Council. In reality, advancements depend mostly on seniority, since professional evaluations are almost invariably positive. Therefore, those who meet the seniority requirements are promoted, draw their pay at the higher scale, but continue to perform the functions of their previous rank. In this way almost every magistrate can attain the highest salary within 28 years of service. However, since decisions still have to be made to fill judicial vacancies and professional evaluations tend to be uniform, the Higher Council lacks substantive information on the applicants' qualifications, and candidates are frequently chosen solely on the basis of seniority. However, membership in one of the judicial groups represented on the Higher Council plays a significant part in the process, and helps explain the need for magistrates to affiliate themselves with such groups.

As a result of all these changes, the reference group of Italian judges has changed. In the past, Italian judges looked to both the Court of Cassation and legal scholarship for their points of reference (primarily as a result of the role they played in promotions), but today reference points are increasingly found in the judicial groups controlling the High Council as well as in the political environment and the media. The Italian case exemplifies an apparently paradoxical situation. While severing formal institutional links with the political system and dismantling all hierarchical constraints can produce high levels of judicial independence (both internal and external), it can also help judges develop a network of less visible connections that could undermine the autonomy of the judiciary.[29]

---

[28] Di Federico (note 19).

[29] Guarnieri and Pederzoli (note 21).

5.3 Portugal and Spain

Portugal and Spain have followed the French practice of establishing a judicial school as a central element of judicial recruitment. In the Portuguese *Centro de estudos judiciarios*, trainees have to choose whether to become a judge or a public prosecutor soon after admission, since they constitute two separate professional bodies. Public competition to enter the school is similar to the French system: written and oral exams on legal subjects as well as more general social and economic issues. The separation between judges and public prosecutors is maybe more marked in Spain. After the initial competition, open to law graduates, trainees must make their choice. The future judges are trained at the *Escuela judicial*, managed by the Higher Council of the Judiciary (*Consejo general del poder judicial*), while prosecutors' initial training is made at the *Centro de estudios jurìdicos* of the Ministry of Justice. However, both countries allow for lateral entry into the judiciary for experienced jurists 'of recognized competence', and they can be appointed to a small number of positions in a variety of courts.

The Italian experience of judicial self-government has become a model for Spain and Portugal in their post-authoritarian periods. However, significant differences have emerged in these countries, especially Spain. Here, the transition to democracy and the Constitution of 1978 established principles such as the separation of powers and judicial independence, with the judiciary forming a separate body from public prosecutors. Within this framework, the Spanish Higher Council of the Judiciary was created to ensure the independence of the judiciary from the executive.

Following the Italian model, the Spanish Constitution requires that the majority of the members of the Higher Council be judges, with its functions limited to administering the status of judges. The *Ley organica* of 1980 stipulated that the Higher Council be presided over by the Chief of the Supreme Tribunal and be made up of 20 members appointed for five years; 12 were judges directly elected by their peers, and the rest were appointed by both chambers of Parliament. As in Italy, the Minister of Justice's powers were limited to funding the judicial system. However, in 1985 the setting of the Higher

Council has been reformed. Its composition has been altered, with all judicial members now elected by Parliament. The reform - while fostering some collaboration between judges and political parties - seems to have reduced the role of judicial associations that the previous proportional system of election had helped to create, although since 2000 Parliament must choose among a list of candidates drafted by the more important judicial groups.

The Higher Council is in charge of appointments and promotions according to procedures that vary with the type of judicial position to be filled. In principle, advancements depend on seniority and, to a lesser extent, on merit, but appointments to the highest judicial positions also take into account the need to ensure representation of linguistic minorities. In disciplinary proceedings, senior judges share these functions with a standing committee of the Higher Council, which intervenes only in instances of gross violation of professional duties.

Also in Portugal, after the fall of the Salazar and Caetano dictatorship, major reforms took place within the judicial system. The current principles regulating the Portuguese Higher Council (*Conselho Superior da Magistradura*) were established in the Constitution of 1976, that entrust the Council with extensive functions, from appointments and transfers to promotions and disciplinary proceedings. Following constitutional amendments in 1982 and 1997, the 17 members of the Higher Council now consist of seven judges directly elected by their peers through a proportional system, seven members elected by parliament, and two other members appointed by the President of the Republic (one of which is usually a judge). The President of the Supreme Court, a position elected by fellow judges, chairs the Higher Council. Thus, judges tend to hold the majority of the seats.

6 Some general remarks on European continental judges

A number of common features, therefore, define judicial status in continental countries. In all cases recruitment occurs at a younger age than in the English and American systems. The means of educating and training new judges, whether in special

schools as in France or extensive on-the-job training as in Germany, partially compensate for the recruits' lack of practical legal experience. More significantly, their professional socialization is achieved almost exclusively within the judiciary itself, which is therefore likely to become a crucial reference point for judicial attitudes. Recruitment is governed in large part by merit, and no partisan considerations openly operate in the selection process. Yet, with the exception of Italy where this process is under the full control of the judiciary itself, judicial recruitment is monitored by the Ministries of Justice, which can therefore exert some influence.

As for guarantees of independence, Germany and the civil law countries of Central and North Europe tend to rely on the traditional setting, entrusting promotions to higher ranking judges, whose appointment is often politically influenced. In these countries the role of bodies representative of the judiciary is limited to matters like court organization and budget allocation. A different arrangement exists in Latin European countries such as France, Spain, Portugal, and Italy which have created Judicial Councils designed to preserve the independence of the judiciary. This setting is presently being supported by the Council of Europe and it has influenced several countries of Central and East Europe. [30] All versions of these councils share one prominent feature: members of the judiciary are always granted representation, although in different proportions. Obviously, the level of judicial independence will tend to be higher where judges hold the majority of seats and are directly elected by their peers. In the same way, guarantees of judicial independence are likely to be broader where Judicial Councils are entrusted with extensive powers. However, judicial prevalence in these bodies is not without flaws: corporatism – that is a

[30] Councils of the Judiciary exist today in Belgium, France, Italy, Portugal, Spain and in some of the new EU countries like Poland, Romania and Bulgaria. See Daniela Piana, *Judicial Accountabilities in New Europe* (Farnham: Ashgate 2010). Other EU countries (for example, Netherlands and Denmark) have instituted Judicial Councils, whose main task is court administration. In 2004, the European Network of Councils of the Judiciary has been created, with the aim of cooperating especially in matters regarding judicial independence. Today, 18 countries of the EU belong to the network.

certain disregard for society's expectations, for instance in extremely lax evaluations of judges' performance – and internal politicization –with different judicial groups competing for power - have been often singled out.

However, in both the bureaucratic civil law and professional common law models of the judiciary no courts are ever totally insulated from the political environment. With a professional judiciary the influence of the political system is channelled primarily through the appointment process; in a bureaucratic judiciary political influence is filtered through the hierarchical structure and procedures for career advancements. The way promotions are organized represents the weak point of this arrangement; while recruitment by appointment or direct election tends to align justice with politics on the basis of shared values, hierarchical structures entail less visible but more diffused constraints. Desire for promotion is likely to produce a stronger incentive to comply with pressure or expectations from the Minister of Justice, judicial superiors, or even a 'self-governing' body.[31]

7 Current trends and perspectives

Although institutional independence can be considered a necessary condition of behavioural independence (or independence on the bench), there is no direct relationship between them. However, in the second part of the XX century a trend toward increasing guarantees of judicial independence and increased independence on the part of the judges can be single out in most democratic regimes. The growing independence of judges – and the growing political significance of their actions – has led to a general expansion of judicial power, a development often described as the judicialization of politics, that is 'the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators'.[32] The rise of judicial power has involved both the civil and the

[31] Guarnieri and Pederzoli (note 21).

[32] C. Neal Tate C.N. and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* 13 (New York: New York University Press, 1995).

common law worlds, although it has been stronger in some countries than in others, often involving not only constitutional but also ordinary judges, who increasingly participate to the process of judicial review of legislation. However, doubts have arisen on the extent to which judicial independence should be carried out. In fact, the enlarged visibility of judicial power has prompted the call for some form of judicial accountability: since judges are increasingly taking decisions with significant political implications, should they be made accountable? And how? How can we balance the competing needs of judicial independence and accountability? Are enough the existing institutional devices? Or is some form of political check necessary? And if the answer is positive, how should this check be organized? More specifically, toward whom should judges be accountable: other judges, the legal profession, the political class, or public opinion (whatever it could mean)?

There are different ways to deal with these questions.[33] Broadly speaking, we can distinguish three general approaches. First, judicial power can be - and is – made accountable through already existent devices like appeal, collegiality, discipline etc…: we need only to improve them. Second, in order to make judges really accountable we should introduce some form of political check, i.e. some institutional means through which the political system can be made know to judges its evaluation of their performance: e.g. by intervening in the appointment or promotion process or, in extreme cases, also by provoking the removal of a judge. Last, it is argued that judges can be made accountable, in a more effective way and without endangering their independence, by increasing the chances that they will behave in a 'responsible' way, that is in an efficient and competent way, and this state of things can be achieved by improving the selectivity of recruitment and the quality of training both before and after recruitment and by a stronger emphasis on judicial discipline and ethics. Therefore, it can be argued that the institutional design of Judicial Council should take into account these considerations, by avoiding both political and corporatist dominance and instead entrusting a significant role to the legal professions (especially lawyers and academics).

---

[33] Cappelletti (note 3) 57-113; Canivet (note 8).