

Do Judicial Councils Further Judicial Independence? Lessons from Europe

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Why judicial independence?

- How to restrain political power? Different forms of contain, check power
- The Rule of Law as a way to restrain power: rule of laws and not rule of men
- In order to adjudicate disputes between citizens and the State according to the Law the judge must be impartial
- An impartial judge needs to be independent from the parties (and therefore from the State)

Judicial independence and impartiality

- Judicial independence as a necessary **but not sufficient** condition of judicial impartiality
- Absolute independence => absolute irresponsibility => partiality?
- How to achieve impartial judges? Two main ways: indirect and direct...

The Socialization to the Judicial Role

- Socialization as a way to support judicial impartiality => inducing judges to adopt the requirements of the judicial role (expectations about judges' behaviour) => impartially adjudicating
- Tools: recruitment, training, career, judicial ethics, the reference group (the **relevant others** of the judge)

Judicial Responsibility

- Making judges responsible:
 - Discipline
 - Civil responsibility
 - Criminal responsibility
 - The ambiguous role of the career
- The tension between responsibility and judicial independence
- **No right answer:** finding a good compromise?

Judicial Independence: two institutional settings

- Common law: selective recruitment, low internal control, a professional (external) reference group
- Civil law: early recruitment, high internal control, a bureaucratic (internal) reference group
- The weakness of the civil law model:
 - Low internal independence
 - Weak or limited professionalism

Judicial Councils

- The trend toward increasing judicial independence in civil law countries:
 - The experience of authoritarian and totalitarian regimes (Italy, Southern Europe, Latin America) => increasing checks on political power (e.g. judicial review)
 - The crisis of elective institutions => trust in courts (EU Barometer)

Judicial Councils

- Judicial Councils as a way to support Judicial Independence in a bureaucratic setting => restricting executive influence on judges
- Three main functions:
 - Judicial appointments
 - Organization and budget
 - Evaluation of judges' performance (career, transfers, discipline)

Types of Judicial Councils

- The “weak”, Northern version (Court service):
 - running the judicial organization
 - preparing and implementing the budget
 - advisory opinions on judicial appointments
 - functions entrusted to separate bodies
 - e.g. NL, S, England

Types of Judicial Councils

- The “strong” Southern version:
 - governing the judiciary (recruitment, training, career and discipline) (e.g. F, I, ES, P)
- Traditional settings:
 - the judiciary is run by the higher ranks and the ministry of Justice (e.g. D, A)

“Northern” Judicial Councils

	England & Wales	Netherlands	Sweden
Organization and budget	Judges' Council (Lord Chief Justice and 17 judges)	Council for the Judiciary (2 judges and 2 lay members)	National Courts Administration (>3 judges and >2 MPs >1 lawyer = 10)
Appointment (advice)	Judicial Appointment Commission (7 judges and 8 lay members)	Council for the Judiciary and Court Boards	Judicial Committee (5 judges, 2 lawyers, 2 lay members)

Judicial Councils in Latin Europe

	France Conseil superieur de la magistrature	Spain Consejo general del poder judicial	Portugal Conselho superior da magistradura	Italy Consiglio superiore della magistratura
Judges	8 : president of the cassation, 5 judges and 1 prosecutor elected and a councillor of State	13 : president of the Supreme Court, 12 judges elected by Parliament	8 : president of the Supreme Court, 7 judges elected	18 : president and chief prosecutor of the cassation, 12 judges and 4 prosecutors elected
Lay members	7 : 2 each by pres. of the Rep, of Senate, National Assembly and a lawyer	8 : lawyers appointed by Parliament	9 : 7 lawyers appointed by Parliament, 2 (usually one judge) by pres. of the Rep.	9 : president of the Republic, 8 lawyers appointed by Parliament

The “Strong” Councils: Problems

- Political influence? The ratio between lay members and judges
- Corporatist influence: judicial elections and their impact on professional checks (a vicious circle?)
- Internal independence: is it really safeguarded? “Majority” and “minority” judges
- How much power for the Council? Which functions? How much autonomy?

Courts and politics: crucial points

- Recruitment and socialization: they impact on the reference group
- The reference group: is it professional? Its impact on judicial behaviour and performance
- Judicial power in the political system: the need of checks and balances
- Consider independence **and** significance (e.g. the role of the public prosecutor)