



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

**Address of The Hon. Mr. Justice Paul Gilligan, Executive
Board Member of the European Network of Councils for the
Judiciary to the Working Group of the High Judicial and
Prosecutorial Council of Bosnia and Herzegovina, Sarajevo,
2nd November, 2010.**

1. The Judicial Council is a vital institution which is intended to safeguard both the independence of the judicial system and the independence of individual judges. In a globalised and inter-dependent society, an independent judiciary should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights and impartial justice, free from external influence. It has to be clearly understood that the independence of the judiciary is not a privilege granted in their own interest, but is in the interest of the rule of law and of any citizen seeking and expecting justice.

Independence as a condition of judges' impartiality, therefore, offers a guarantee of citizens' equality before the courts. The importance

of a successfully operated Judicial Council cannot be over emphasised in the context of the modern democratic European country governed by the rule of law.

2. As set out in the Budapest Resolution of the General Assembly of the European Network of Councils for the Judiciary (ENCJ) of 23rd May, 2008, in most European States there now exists a council for the judiciary or a similar institution which is an independent or autonomous institution distinct from the legislative and executive powers of the State, and responsible for the independent delivery of justice.

3. Although the legitimacy of Judicial Councils is not necessarily at risk when they are created by statute, in countries that are in the process of consolidating democratic institutions, placing Judicial Councils on a constitutional footing may help strengthen their legitimacy within the legal and judicial framework. The constitutional provision will grant the newly created institution the legitimacy of constitutional recognition and may help insulate it from interferences from the executive or judiciary through

legislative decrees or rulings, and such establishment through a constitutional provision may help emphasise its importance as a guarantor of judicial independence.

4. The ENCJ maintains that States with a written Constitution should explicitly guarantee the independence of the judiciary therein, and such councils should have the power to manage their budgets independently of the executive power. They should be accountable for their activities by submitting periodic and public reports and should promote the efficiency and quality of justice in their respective jurisdictions.

5. Furthermore, fundamental to the European Network of Councils for the Judiciary, as enshrined in the Budapest Resolution, is the concept that the accountability of the judiciary can in no way call into question the independence of the judge when making judicial decisions.

6. Self governance of the judiciary guarantees and contributes to strengthening the independence of the judiciary and the efficient administration of justice.

7. A recent report of the ENCJ Working Group on Judicial Ethics emphasised that it was “the right of every citizen in a democratic society to have the benefit of a judiciary which is and, is seen to be, independent of the legislative and executive arms of government and which is there to safeguard the freedom and rights of the citizen under the rule of law”. This independence leads a judge to apply the law to the matters which are placed before him in a specific case “without fearing to please or to displease all forms of power, executive, legislative, political, hierarchical, economic, the media or public opinion”.

8. As further set out in the Budapest Resolution, each council for the judiciary has its origin in the development of its legal system which is deeply rooted in a historical, cultural and social context. All Judicial Councils nevertheless share common experiences and challenges and are governed by the same general principles.

9. The actual membership of the Judicial Council varies greatly from country to country and depends on the political reasons which motivated its creation. There is, however, an emerging international consensus that Judicial Councils should have a broad based membership which includes a majority of judges. The most successful models appear to be those with representation from a combination of state and civil society actors, and with broad powers sufficient to promote both judicial independence and accountability.

10. Effectively, the emerging view is that the protection of judicial independence requires judges to represent the majority of the council membership and the promotion of judicial accountability requires broad membership in order to ensure checks and balances.

11. As regards the appointment of council members, not unlike the judiciary itself, the members of the Judicial Council should be selected according to an objective and transparent process. The European Charter on the Status of the Judge (Council of Europe, 1998, Article 1.3) suggests the judicial representatives should be

“elected by their peers” and the Palermo Declaration (Draft Additional Protocol to the ECHR, Palermo, Italy, 1993) advocates a mixed membership with a majority of judges elected by their peers but also “prominent figures designated by parliament”. As noted in the Judicial Independence Guide:

“The power to appoint council members is often shared further increasing the checks built, into the system. In many cases at least the legislature and the executive participate. In some countries professional bodies... nominate their own members to serve on the council.”

12. The composition of the council for the judiciary is neatly summed up in Opinion No. 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society (23rd November, 2007) wherein it is recommended and concluded in respect of the composition of the council for the judiciary that:-

- A. In order to avoid the perception of self interest, self protection and cronyism and to reflect the different viewpoints within society, the council for the judiciary should have a mixed composition with a substantial majority of judges even if certain specific tasks should be held in reserve to an all judge panel. The council for the judiciary may also be exclusively composed of judges.
- B. Respective members, whether judges or not, shall be appointed on the basis of their competence, experience, understanding of judicial life and culture of independence. Also they should not be active politicians or members of the executive or the legislature.
- C. Judge Members should be elected by their peers without any interference from political authorities or judicial hierarchies through methods guaranteeing the widest representation of the judiciary. If direct elections are used for selection, the council for the judiciary should issue rules aimed at minimising any jeopardy to public confidence in the justice system.

- D. Appointment of non judge members with or without legal experience should be entrusted to non political. Ifs they are, however, elected by the parliament they should not be members of the parliament, should be elected by a qualified majority necessitating significant opposition support and should be persons affording in the overall composition of the council for the judiciary a diverse representation of society.

Where the functions of judges and prosecutors overlap, consideration could be given to a separation of powers, each to their respective areas, but such a course of action would have to be very carefully thought out.

13. As regards the competences of a council for the judiciary, the consensus as set out in the Budapest Resolution is to the effect that all or part of the following tasks should fall under the authority of a Council for the Judiciary or one or more independent and autonomous bodies:

- Appointment and promotion of judges;
- Training;
- Discipline and judicial ethics;
- Administration of the courts;
- Finances of the judiciary;
- Performance and management of the judiciary;
- Processing of complaints from litigants;
- Protection of the image of justice;
- Formulation of opinions on judicial policies of the State;
- Setting up system for evaluating the judicial system;
- Drafting or proposing legislation concerning the judiciary and/or courts.

14. The most widely recognised power of a Judicial Council is its role in the appointment of judges. The Universal Charter of the Judge (International Association of Judges, 1999, Article 9) calls for the involvement of “an independent body that includes substantial judicial representation” in the selection appointment and promotion process. The Council of Europe Recommendation recognises that *“the authority taking the decision on the selection and career of*

judges should be independent of the government and the administration”, or in the event of appointments by the government calls for guarantees for transparency and independence including, *inter alia*, “*a special independent and competent body to give the government advice which it follows in practice*”. The European Charter on the Status of the Judge recommends that all decisions affecting the judicial career including the selection, appointment and promotion of judges should involve a Judicial Council defined as an authority independent of the executive and legislative and composed of a majority of judges.

15. As set out in Opinion No. 10, the Consultative Council of European Judges “*the council of the judiciary should preferably be competent in the selection appointment and promotion of judges and this should be carried out in absolute independence from the legislature or the executive as well as in absolute transparency, as to the criteria of selection of judges.*”

Those who sit on appointment bodies must act transparently and have no conflicts.

16. Three further vital aspects of the Judicial Council are worthy of special reference. The first is the question of the Judicial Council having adequate resources and, simply put, if the council does not have adequate human and financial resources, it clearly will have a difficulty in effectively carrying out its function, This aspect was stressed in Opinion No. 10 of the CCJE to the effect that the council must be financed in such a way that it is enabled to function properly, and must have the power and capacity to negotiate and organise its own budget effectively. It follows on as set out in the opinion that, of necessity, the council should have its own premises and secretariat and its own staff according to its needs and, thus, it is crucial to the effective working of the council for the judiciary that an appropriate mechanism is in place so that it has the necessary resources to carry out its function.

17. The second aspect is that of the disciplinary process. As stated by Bingham L.J. (The Business of Judging: Selected Essays and Speeches at p. 53):-

“... because society grants the judges, for the greater good of the public, certain important privileges, it is entitled to, and

does. expect of the judges very high standards of propriety, integrity, assiduity and personal conduct.”

It is important that judges enjoy the protection of a disciplinary procedure which guarantees the respect of the principle of independence of the judiciary and is carried out before a body free from any political influence on the basis of clearly defined disciplinary faults. A member of the government or any other representative of political authorities cannot take part in the judicial disciplinary procedure. The general consensus is that there should be lay participation in the disciplinary procedure at all levels, but crucially in order to maintain public confidence in the Judicial Council which is charged with the administration of the disciplinary procedure relating to judges, it is vital that the procedure in place not only works but is perceived by the citizen as an effective method of disciplining members of the judiciary who fail to adhere to the principles as promulgated with respect to the judiciary.

18. The Universal Charter recommends that disciplinary action should be carried out by independent bodies that include substantial

judicial representation. The idea is to insulate disciplinary proceedings from both external interference - for example, from the executive or political parties - and internal interference - mainly from the judicial hierarchy. The Council of Europe recommendation calls upon Member States to consider setting up by law a special competent body which, has as its task, to apply any disciplinary sanctions and measures. It is of crucial importance that the citizen has confidence in the judicial disciplinary procedure and, thus, it is necessary to have various checks and balances with the object of balancing the independence of the judiciary with the issue of accountability.

It is appropriate to stress that not only must the disciplinary process be independent, but also fair and efficient and not open to any undue influence. It is a matter for the judicial council itself to ensure that its disciplinary process works in practice and is well regarded in the legal and public domain.

19. An interesting example of such a process can be found under the Belgian Council for the Judiciary, the *Conseil superieur de la*

Justice. The Belgian model incorporates a complaints mechanism in the form of an Advisory and Investigations Commission. The work of the Commission is overseen by the Council and is primarily responsible for the external supervision of the judiciary. The Commission formulates recommendations and proposals on the general functioning of the judiciary and publishes opinions on proposed legislation which may impact upon their judicial functions. It monitors and promotes the use of internal supervision mechanisms and incorporates a bilingual complaints service which caters for the needs of the French and Flemish communities. Upon receipt of these complaints, the Commission examines and follows up on such cases, notifies the relevant parties and conducts an extensive information-gathering exercise before launching formal investigations where necessary. The Commission's role is not limited to disciplinary transgressions, but also examines any failure by members of the judiciary to conduct their duties appropriately or to maintain the dignity of their office. Lay participation in the disciplinary process is ensured by a statutory requirement that 50% of the Council, and 50% of each college, is comprised of lay members.

20. The third aspect is training. The independence of the judiciary (both individual and institutional) is fundamental to the rule of law. One of the ways in which the independence of the judiciary is guaranteed is through the judiciary's control of its own training and, thereby, the provision of very high quality training. For this the judiciary is, of course, accountable. The principle is well expressed in Opinion No. 10 of the Consultative Council of European Judges (CCJE) dated November 2007 at paragraph 65.

“The responsibility for organising and supervising judicial training should in each country be entrusted not to the ministry of justice or any other authority answerable to the legislature or the executive, but to the judiciary itself or preferably to the Council for the judiciary; judges' associations can also play a valuable role in that respect. Furthermore, the conception of training programmes and their implementation should be entrusted, under the authority of the judiciary or preferably the Council for the Judiciary, to a special autonomous body (e.g. a training academy) with its own budget and which should work in consultation with judges. A clear division of functions

should be encouraged between the Council for the Judiciary and the training academy, when it exists.”

The fact that the training is under the control of the judiciary does not exclude the desirability of using outside lecturers (such as academics and overseas lawyers) as well as judges for training. Nor does it exclude inviting other independent persons to be members of the board of the body responsible for training, as this assists in transparency and accountability.

21. We live now in a globalised world. Geographical boundaries are of increasingly less importance, and this is largely reflected in our international legal landscape, where a multitude of international Treaties and Conventions now govern matters as diverse as commercial, family, employment, environmental and criminal law. At the core of this development must be the principles of comity and respect. Each jurisdiction must afford the respect and deference that is appropriate to other jurisdictions; as is acknowledged in the seminal decision of the House of Lords in *Spiliada v. Cansulex* [1987] A.C. 460, wherein Goff L.J. at p. 464 acknowledged that

there was no presumption in favour of the domestic courts and the receiving court must seek “... *to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice*”.

22. Such a system can only work, however, when the sanctity of judicial independence and thought is secured. Where this is denied then even where another jurisdiction may at first glance appear to be the appropriate forum for the case, justice may be still denied by the actions of a judge. If citizens are engaging in an increasing number of cross-border transactions, the fundamental principles of independence and impartiality must also transcend borders. Judges must know that they can trust, not only the judgments that they are enforcing, but also that their judgments will be effectively enforced abroad. For example, if the European Arrest Warrant system is to be effective then there can be no doubts as to the independence and transparency of the judgment handed down. This applies equally to the regimes established under the Brussels I and Brussels II *bis*, the Rome I and Rome II regulations and the Lugano Convention, and is a key consideration for meeting the *acquis communautaire* and

acceding to the European Union. Indeed, the four freedoms (goods, services, labour and capital) upon which the Union is premised could not function in this modern age in the absence of such independence and impartiality.

23. Invigorated by the new powers granted to it by the Lisbon Treaty, the European Union is committed to the development of an area of freedom, security and justice which, it believes, is a central concern of the peoples of the States brought together in the Union. However such initiatives will not only impact upon those citizens within its borders - close cooperation with its neighbours will undoubtedly mark a change of direction for the continent as a whole. The European Council's adoption of the Stockholm Programme this year marks a milestone in ensuring an open and secure Europe “serving and protecting citizens”. The emphasis on creating a “Europe of Law and Justice”, based on mutual trust and the mutual recognition of judgments, coupled with the explicit reference to the Western Balkans as a geographical priority for the external dimension of Freedom, Security and Justice, demonstrates the goodwill and unity of purpose that currently exists between our

jurisdictions. One must not, however, forget that the principles advocated by the Union in this field simply build upon an explicit recognition already advocated by the European Convention on Human Rights under Article 6, to ensure the right of everyone to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

It is quite simply of the greatest importance to all citizens of the European Union that the judicial power in each state operates fairly, impartially and independently so that mutual trust and confidence is maintained and the common area for justice can work in practice.

24. The Judicial Council must be an independent body which operates in a transparent and accountable manner. The structure, powers and processes of Judicial Councils must be designed to safeguard and promote judicial independence. If adequate checks and balances are not in place, the Judicial Council may become a pawn in the hands of the executive, legislative or powerful groups, thereby undermining judicial independence. Judicial Councils must be granted adequate human and financial resources. While the exact

composition of Judicial Councils varies greatly from country to country and depends on existing obstacles to judicial independence, there is an emerging consensus amongst judges, legal scholars and practitioners that Judicial Councils should be composed of a majority of judges and that councils with broad representation may function more fairly and independently. Judicial members of the Judicial Council should be elected by their peers rather than appointed by the legislature or executive. The selection process should be transparent and provide for civil society participation and oversight. Judicial Councils around the world have varying powers which range from judicial administration to decisions affecting the judicial career but there is an emerging consensus that where they exist they should be responsible for the judicial selection process and contribute to the promotion, discipline and/or training of judges. The decision making process of the Judicial Council should be transparent and allow for civil society participation and oversight. Mechanisms to monitor Judicial Council operations must be put in place and effectively implemented.

25. In essence, what is necessary in the modern day context of a European Judicial Council is the balancing of the protection of the classic principles of independence and impartiality and the contemporary- need for transparency, efficiency and effectiveness of the judicial system. The modern judicial council has to be responsible and accountable, has to be made to work without fear or favour and has to be seen by the public as working.

Sources:

- ❖ Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, adopted in Strasbourg, 21st - 23rd November, 2007;
- ❖ Budapest Resolution of the General Assembly of the European Network of Councils for the Judiciary (ENCJ), 21st – 23rd May, 2008;
- ❖ ENCJ Status of Judges Report 2009-2010;

- ❖ Bingham L.I., *The Business of Judging: Selected Essays and Speeches*.
- ❖ V. Autheman and S. Elena, *Global Best Practices: Judicial Councils*.
- ❖ ENCJ *Judicial Ethics Report 2009 - 2010*;
- ❖ S. Sheetreet and J. Dechenes, *Judicial independence: The Contemporary Debate*.