



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

**ANNIVERSARY OF THE DANISH COURT ADMINISTRATION AND THE
JUDICIAL APPOINTMENTS COUNCIL**

The Courts of Denmark now and in the future

The Judiciary as an Independent Power of State

The Independence of the Courts in an International Perspective

Speech by Lord Justice John Thomas

President of the ENCJ

Introduction

It is a great privilege and honour for me to have this opportunity of speaking to you on the 10th Anniversary of the Danish Court Administration and the Judicial Appointments Council.

No person these days disputes the fact that a democratic country must be governed by the rule of law upheld by an independent judiciary. There is also broad agreement that not only must judges be individually independent but that independence must be underpinned by the institutional independence of the judiciary – the independent organisation and governance of the judiciary. Although that is the agreed theory, what is really important is to ensure that this is reflected in practice.

It is also agreed within the Member States of the European Union that each state must be able to rely also upon the quality of the judicial system of every other member state, as increasingly many EU instruments rely upon mutual

confidence not only on the independence of the judiciaries of other Member States, but the quality of the judicial system

There is gradual consensus that certain functions which underpin judicial independence should be in the hands of persons independent of both the executive and the legislature, particularly the appointment and promotion of judges, their training, discipline, performance standards and court administration, though it is not universally accepted that each of these should be independent. There is also an emerging consensus that one of the best means of ensuring that these functions are independently carried out is through the establishment of Councils for the Judiciary. It is interesting to note that not only is this the recommendation of the Consultative Council of European Judges but the World Bank itself has recommended this as a way forward.

The challenge that faces us, and one that is of particular importance in Europe is to ensure that this consensus as to independence is reflected in practice and delivers justice that is of equal quality in each member state. It is the maintenance of the quality of justice to which judiciaries must pay the closest attention, for the acceptability to the citizen of the institutional independence of the judiciary is dependent on the ability of the judicial institutions across Europe to deliver a judicial system of quality.

The establishment of bodies such as Councils or other institutions to deal with these functions is, on its own, nowhere near enough to ensure independence and quality. It is essential, in my view, to address in the constitution of these governing institutions a number of separate issues. First it is essential that those appointed are of the highest calibre and will act independently of the political process. Secondly, the body must have a transparent and open means of financing its work and operation so that pressure cannot be exerted improperly. Thirdly, the relationship of the body to the judiciary is important. It should not be subservient to the judicial hierarchy nor should it fail to

command the complete confidence of the judicial hierarchy. Achieving that balance is by no means easy.

Finally the institutions that govern the judiciary must be accountable, for a governing institution that does not have a means of public accountability will in the end lose the confidence of the citizen. This last aspect is one that is, in my view, often insufficiently addressed, as some have not understood its importance or adhere to the belief that the independence of the judiciary obviates the need for accountability.

The accountability of the institutions that govern the judiciary is important because it is their duty to ensure that judges of high quality are appointed, that a system exists to ensure that resources are deployed so that cases are heard promptly and at the least possible cost, consistent with justice and sound decision making. Judges are no different to others in the performance the public expects from them as the proper performance of a judicial system and of any individual judge is not only compatible with judicial independence but essential to maintaining it. A judiciary, as recent experience has shown, is most vulnerable to losing its independence when it does not pay close attention to performance and quality.

As within Europe we are required to place increasing trust in the proper functioning of the judiciaries of other Member States, I do not believe we can any longer ignore the need to address the quality of each other's systems and find a means of evaluating them. This is a very difficult subject but judges in one jurisdiction cannot be expected to attach full faith and credit to the judgment of a jurisdiction unless they have full confidence in its quality and independence. Nor will judges readily send back persons to be tried in another system when they have doubts about its functionality; technical issues always can provide the required let out.

This subject is touched upon in the draft proposals for the Stockholm Programme but it raises a number of difficult issues. First, it is plainly unacceptable that an assessment of a judicial system should be made by a

political body. It is plainly a task in which the judiciaries of Europe must have a role. Secondly, given the diversity of our systems, how is it that we can reach common standards to apply across Europe? But despite these difficulties, we cannot ignore this issue.

The maintenance of the quality of our systems and its independence depends on two further factors – the proper provision of resources by the state and proper training. Again, there is universal agreement on the theory of the proper provision of finances; however we all know from our own experience that, particularly in times of fiscal stringency, the judicial system has to compete with other needs of the state or the resources the state derives from taxation. It is important, it seems to me, that each state adopt a transparent means of fixing the budget and, within Europe, any evaluation of quality of our systems takes the proper provision of financing into account. Again, there is no universal agreement that the training of judges should be independent for we all know the influence that training can have on persons and the way in which they do their work. Within Europe there is presently much discussion as to the best way in which to ensure that there is an understanding amongst the judges within Europe of much European legislation and case law. However, in any proposal for the establishment of guidelines on training or some European training institute or college, it will be important to ensure that control is vested in the judiciary with suitable forms of accountability.

Thus, although I feel that we can be confident of the acceptance of the principles of an independent judiciary and the need for independent institutions to govern the functions related to the judiciary, we cannot be complacent about what is happening on an international perspective to secure these in practice. In Europe we must, as I have suggested, find a means of ensuring that each of the systems measures a proper standard of independence and quality, difficult though this task will be to achieve.

Closely allied to the position of the independent judiciary in much of Europe is the position of the prosecutor. There is again a broad consensus that a prosecutor must be independent and able to take decisions which are

uninfluenced by party political considerations. One of the very difficult questions, however, that we will have to address over the coming years is the relationship of the prosecutor to the judiciary, as in much of Europe the independence of the prosecutor is in effect protected through Councils for the Judiciary being also councils that include prosecutors. There are many who find this relationship difficult to accept as it does not readily fit into the threefold division of power between the legislature, executive and judiciary and the independent role of a judge in deciding between prosecutor and accused, but it will be important to find an alternative and attractive institutional means of protecting the independence of the prosecutor before any such links are dissolved. In my view this is again a topic to which insufficient attention has been directed but one which it will be important to resolve, not only for the maintenance of the mutual confidence between the respective states of the European Union but also if an institution such as a European prosecutor is developed.