



**SSDD**

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**AUTONOMY AND RESPONSIBILITY OF THE COUNCIL:  
SHOULD IT BE ACCOUNTABLE FOR ITS ACTIONS?**

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A constitutional democracy is a political regime in which two main principles coexist: popular sovereignty and the protection of citizens' freedoms. In these regimes one of the most important values is "to limit the arbitrary exercise of power and make it legally accountable"<sup>1</sup>: a strong and independent judiciary, in charge of enforcing the rule of law and adjudicating disputes between citizens and the State, is one of the most effective instruments of protection. Judicial Councils have been instituted in order to sustain the independence and the effectiveness of the judiciary. On the other hand, in a constitutional democracy all institutions must be accountable and Judicial Councils are no exception, but the functions entrusted to them – more or less directly connected to guaranteeing judicial independence – imply that accountability must be arranged in such a way not to do harm to the important role they are called to play.

## I. THE COUNCILS: THEIR ORIGINS AND FUNCTIONS

Since the middle of the XX century Judicial Councils have been established in many countries of Europe, often enjoying the protection of the Constitution. Generally speaking, the main reason behind this innovation is an attempt at strengthening judicial independence and at improving judicial and court performance by creating a new institution between the government and the judiciary. In this way, the traditional powers enjoyed by the executive in continental European countries (usually by the Ministry of Justice) have been correspondingly reduced. In fact, it is in this region that Judicial Councils have flourished. However, England has recently joined the trend, although in a specific way we are going briefly to consider at the end of this paper<sup>2</sup>.

Broadly speaking, there are two types of Councils<sup>3</sup>: the Northern and the Southern European, although this latter should be better defined as Latin European.<sup>4</sup> The distinction is based on the main functions entrusted to them: while the tasks of the Northern Councils are in the area of the general financial and administrative management of courts, Latin (or Southern) Councils deal mainly with appointment, career and discipline of judges. Therefore, although court management affects to some extent also judicial independence, the role played by Latin Councils seems more significant, at least from a constitutional point of view, since decisions concerning the status of judges are directly related to judicial independence, as we have seen one of the most important features of a constitutional democracy.

Summing up, the main functions entrusted to European Judicial Councils are:

- protecting judicial independence, both external – that is, from the political branches – and internal, i.e. in relation to other judges;
- assuring the professional qualifications of the judges, that is their capacity of satisfactorily performing their institutional role (these two are the tasks usually assigned to Southern Councils);
- improving the overall performance of the judicial system through a better management of organizational resources (a task assigned mainly to Northern Councils).

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<sup>1</sup> G. Sartori, *Elementi di teoria politica*, Bologna, Il Mulino, 1990, p. 21.

<sup>2</sup> As for the Irish Council, it resembles more the so-called Northern type. See W. Voermans and P. Albers, *Councils for the Judiciary in EU Countries*, Council of Europe, 2003, pp. 20 ff.

<sup>3</sup> See Voermans and Albers, *op. cit.* .

<sup>4</sup> In fact, the Councils of Belgium, France, Italy, Portugal and Spain share all some basic traits. However, today similar arrangements have been adopted in some countries of East Europe.

## II. ACCOUNTABILITY AND JUDICIAL INDEPENDENCE

In general terms, because of the already mentioned significance of accountability in a constitutional political regime, the more significant the functions entrusted to a public body, the higher the need for accountability. However, in analyzing the way the accountability of the Councils is ordered and in evaluating these arrangements we should take into account also the need of safeguarding judicial independence, a value that – in some way or another – all Judicial Councils have to pursue.

However, the two values can be accommodated in a way easier than expected if we take into account the instrumental nature of judicial independence. Judges must be independent in order to be able to adjudicate in an impartial way, even when one of the parties at hand is the State or, better, one of its branches. Therefore, judicial guarantees of independence are justified only to the extent to which they are connected to the need of safeguarding judicial impartiality. In other words, judicial independence is not an end in itself but a mean to the end of protecting judicial impartiality.<sup>5</sup> At least in principle, it cannot be an obstacle, for example, to the need of ensuring the professional quality of the judiciary or of improving the organizational setting of courts.

## III. TYPES OF ACCOUNTABILITY

In fact, different types of accountability exist. Traditionally, constitutional democracies tend to rely to a large extent on legal forms of accountability, consisting in the control of the formal correctness of decisions. Legal forms of accountability of Judicial Councils – often carried out by administrative or accounting courts – are by no means without significance. However, they represent a narrow form of accountability, often limited to a check on the procedures followed in the decisional process without evaluating the substance of the decision. Therefore, they give only an imperfect and partial assessment of the Council's institutional performance. Instead, an assessment of the role played by the Councils imply to take into consideration the complexity of the tasks and of the values involved and makes difficult to envisage simple, clear-cut forms of accountability. Legal sanctions are less effective when complex – e.g. polycentric – issues have to be dealt with and non easy answer exists, because of the need of balancing different values in an always changing context. In these cases, in which the Council enjoys an inevitable amount of discretion, it is more convenient to design an institutional setting conducive to a Judicial Council protected in its decisional autonomy – and thus able to defend judicial independence and carry out its tasks in an effective and efficient way - but responsive toward the general values of society.

Forms of accountability capable of actually influencing the way Judicial Councils perform their institutional functions by determining the values they take into account are much more significant. It follows that a new definition of accountability must be adopted: in this context it comes to mean “those methods, procedures and forces that determine what values will be reflected” in actual decisions. Thus, to discover to whom someone is accountable leads to identify the sources of the values influencing his or her decisions.<sup>6</sup> Only by broadening in this way the definition of accountability we can be able to really assess the way the Councils perform their institutional functions and analyze the values they are likely to

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<sup>5</sup> M. Cappelletti, *The Judicial Process in a Comparative Perspective*, Oxford, Clarendon Press, 1989, p. 70.

<sup>6</sup> H. Simon et al., *Public Administration*, New Brunswick, Transaction, 1991, p. 513.

take into account. This is the reason why the points of reference of accountability – to whom they are accountable – are especially relevant: in this way we can understand which values are significant for Council’s decisions, toward which section of society it is responsive.<sup>7</sup>

Therefore, since the significance of most Councils decisions for judicial independence rules out strict accountability for single decisions – with the exception of the afore-mentioned cases of clear violation of the law – the way the Councils are composed becomes an extremely significant issue, especially in those cases in which the Councils are entrusted with tasks directly related to the protection of judicial independence.<sup>8</sup> In fact, if Council’s accountability is broadened to include responsiveness, its composition and the way its members are selected carry obvious and significant implications.

#### IV. HOW TO ORGANIZE COUNCIL’S ACCOUNTABILITY?

If the composition of the body matters – and it matters – we can state that Judicial Councils tend to be accountable, first of all, to the judiciary, at least when a significant part of the Council’s members is chosen by the judicial corps, which is the case today in many European countries. It is a sort of accountability of obvious significance but it is all internal to the judicial organization. However, if one of the tasks of the Council is the assessment of the professional qualifications of judges, also other legal professions should take a part. Judges are lawyers and the way they perform their institutional function – adjudicating disputes according to the law – should be scrutinized also by the whole legal profession. This is the reason why the participation of non-judicial lawyers to the decisional process of the Council is likely to play a positive role.

Although in many cases some of the members of the Councils are political appointees, the accountability toward the political branches can raise more objections. As we have pointed out at the beginning of this paper, Judicial Councils have often been instituted in order to strengthen judicial independence from the executive. On the other hand, the political – in the basic meaning of the word as the process of “authoritative allocation of values”<sup>9</sup> – significance of courts cannot be denied, especially in contemporary democracies.<sup>10</sup> However, the above-mentioned basic functional justification of judicial independence – protecting judicial impartiality – rules out strict accountability toward the political branches, be they the executive or the legislative, and runs against a majority of political appointees into the Council, although much depends on the methods of selection.

As we have seen, Judicial Councils of the Latin European type tend to exhibit a larger proportion of judges (or magistrates<sup>11</sup>): in some cases they are the majority.<sup>12</sup> Although a judicial majority can be considered a way to better safeguard judicial independence, the risk of excessively narrowing the range of values influencing Council’s decisions becomes high. A deficiency in communication between the judiciary and its environment can result, with

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<sup>7</sup> Cappelletti, *op. cit.*, pp. 112 ff.

<sup>8</sup> This is obviously the case of the Latin type.

<sup>9</sup> D. Easton, *A System Analysis of Political Life*, Chicago, The University of Chicago Press, 1965, p. 21.

<sup>10</sup> See C.N. Tate and T. Vallinder, *The Global Expansion of Judicial Power*, New York, New York University Press, 1995.

<sup>11</sup> In fact, in some cases – e.g. in France and Italy – prosecutors and judges belong to the same organization. Therefore, the Council tends to reflect this situation.

<sup>12</sup> See Voermans and Albers, *op. cit.* and *Les Conseils de la justice en Europe*, Rapport annuel du CSM, Paris, 2005. The European Charter of the Judge asks for at least half of the members of the Council being judges elected by their peers.

some form of judicial “autism” as a consequence. Similar considerations can be made for the ratio between lawyers and non lawyers. As a French judge has put it, “the law is not a business only for lawyers”.<sup>13</sup> In other words, the need of ventilation – of connecting the judicial body to the developments in society’s culture – has to be taken into account.

All these considerations can be strengthened if we consider the methods of choosing Council’s members. Direct elections – the way judicial members are usually selected in the Latin type – tend to increase Council’s responsiveness toward the electoral body. However, by making the Council directly accountable to the majority of judges, a risk for the (internal) independence of minority judges can be envisaged, especially when the Council has power over appointments, transfers and promotions. This risk is even higher when judicial elections are strongly influenced by judicial associations or groups, as it is often the case. Judicial associations can play an important and positive role inside the judiciary, for example in helping the development of a healthy esprit de corps and in improving the ethical standards of the judges. However, their influence on the Councils can generate a sort of internal “politicization”, with decisions taken not on the merits of the case but mainly in order to gain electoral support. In the latter circumstance, we can wonder if the Council would be able to carry out in an effective way its institutional function of checking the professional qualifications of judges, those very judges called to elect the body in charge of supervising them.

All these considerations tend to support the view that:

- no specific group or institution should enjoy a majority in the Council;
- direct election should not be the dominant method of selection;
- the Council should reflect in the broadest possible way the “stakeholders” of the judicial system: judges, lawyers and, last but not least, its “clients” or, better, the public.

## V. A FINAL NOTE: A LOOK TO THE ENGLISH REFORM

A more reliable assessment of the performance of Judicial Councils – and of the significance of their different institutional configurations - obviously needs more detailed research on their actual functioning. Only in this way it will be possible to explore at length costs and benefits of different settings. More research is also needed because of the current trend toward the institution of some type of Judicial Council in many countries of Europe, with a consequent diversifying of their institutional traits. In this context an important innovation has been recently introduced in England.

As it is well-known, in England the formal power to appoint 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.<sup>14</sup> 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

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<sup>13</sup> A. Garapon, *Une Justice ‘Comptable’ de ses Décisions?*, in G. Canivet et al. (eds.), *Independence, Accountability, and the Judiciary*, London, British Institute of International and Comparative Law, 2006, p. 244. Garapon’s comments are especially relevant for the discussion on accountability of justice.

<sup>14</sup> See J. Bell, *Judiciaries within Europe*, Cambridge, Cambridge UP, 2006, pp. 310 ff..

and Wales, with the exclusion of lay magistrates<sup>15</sup>. 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 other five lay members. 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 fourth member appointed by the third. Since lay members must never have been practicing lawyers, there is in the Commission a non-judge (and maybe also a non-lawyer) majority.

As we can see, the English Council enjoys significant power in the field of judicial appointments. From this point of view it could be classified as belonging to the Southern or Latin type (which would not be any longer Latin, although we know that Roman influence south of Adrian's wall was strong!). On the other hand, its composition and the way its members are selected are far away from the setting prevailing in Latin Councils. The English solution seems an interesting attempt at taking better into account the need of ensuring the social responsiveness of the Council, without endangering its capacity of adequately perform its basic function of selecting professionally capable and impartial judges. For these reasons, it will be extremely significant to watch the actual performance of the English experiment: it can be a useful lesson for all of us.

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<sup>15</sup> The Commission nominates also special panels to appoint heads of division (in the High Court) and the members of the Court of Appeal. As with the members of the new Supreme Court – which has succeeded the Appellate Committee of the House of Lords – the Commission makes a single recommendation to the Lord Chancellor, which he can accept, reject or invite reconsideration.