Councils for the Judiciary in Europe: Trends and Models

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CONTENTS

1. Councils for the Judiciary in focus

In various European countries Councils for the Judiciary –called 'Councils for the Judiciary' or 'Council for the Magistrature'– exist. These institutions generally function as intermediaries between government and the judiciary in order to guarantee the independence of the judiciary in some way or in some respect. Councils for the Judiciary have different competences in different EU countries. Some of them act as boards for the appointment of judges and disciplinary action against judges (e.g. France and Italy), other administration authorities play an active role in the budgeting and general (financial and administrative) management of Courts, as well as housing, education, computerisation etc. (e.g. Sweden and Denmark).

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At present there seems to be an European trend to establish Councils for the Judiciary in countries that hitherto relied on ministerial management and budgeting of the Courts and the judiciary. This shift has lead to the establishment of Councils for the Judiciary in Ireland (1998) and Denmark (1999). The Netherlands only recently established –effectively since 1 january 2002– a Council for the Judiciary (Council for the Administration of Justice) of their own[1]. This contribution reports on some of the characteristics of various European Councils for the Judiciary. I will especially highlight the issue of public or constitutional responsibility for the management of the judiciary in EU countries that work with a Council for the Judiciary and the countries that are considering to establish one. In most EU countries that do not have a Council for the Judiciary the public responsibility for the management of the judiciary itself was, until recently, mainly expressed via and governed by Ministerial responsibility of a Minister of Justice (or of the Government) to Parliament. A Council for the Judiciary brings about changes in the former pattern of responsibility-arrangements. It causes shifts in the constitutional balance of power.

The research reported on here was originally commissioned by the Dutch Government. In 1998 the Dutch Minister of Justice wanted a comparative study into the position and functioning of different European Councils for the Judiciary as an inspiration for and reflection on their own plans to establish a Dutch Council for the Judiciary. This contribution summarizes some of the most interesting elements of the Dutch report[2]. The Dutch plans and the subsequent establishment of the Dutch Council for the Judiciary in 2002 are the stage behind the analyses and some of the conclusions in this contribution.

2. Northern and Southern European model of Councils for the Judiciary

Although every Council for the Judiciary is the unique product of a specific development within a legal culture, some general distinctions can be made among the different Councils in Europe. Some Councils are established according to, what we can call, the Southern European model of Councils for the Judiciary. Southern European Councils for the Judiciary are mostly constitutionally rooted and fulfil some primary functions in the safeguarding of judicial independence. These functions typically include advice as regards the appointment or promotion of members of the judiciary, or the exercise of the power of appointment of promotion by the Council itself, the training and the exercise of disciplinary powers with regard to members of the judiciary. The responsibilities and competences of Councils for the Judiciary set up according to the Southern European model are all have to do with career decisions of (individual) judges.

Councils for the Judiciary fit out according to the *North European model* do have distinctly different characteristics. In most cases these latter Councils rather

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[1] Wet van 6 december 2001 tot wijziging van de Wet op de rechterlijke organisatie, de Wet rechtspositie rechterlijke ambtenaren en enkele andere wetten in verband met de instelling van de Raad voor de rechtspraak (Wet Raad voor de rechtspraak), (Act establishing the Council for the Judiciary) *Stb.* (Official Journal) 2001, 583.

[2] See W. VOERMANS and P. ALBERS, *Verantwoordelijkheid voor de rechtspleging; een Rechtsvergelijkend onderzoek naar de positie van de raden voor de rechtspraak in landen van de Europese Unie*, Ministry of Justice, The Hague 1999.

possess competences in the area of court administration (supervision of judicial administrations, management of case loads and case stocks, strategic planning, flow rates, promotion of legal uniformity, quality care etc.), court management (think of housing, automation, recruitment, training, etc.) and the budgeting of courts (involvement in setting the budget, distribution and allocation, supervision and control of the expenditure, etc.). The responsibilities and competences of Councils for the Judiciary set up according to the Northern European model are not primarily focussed at the careers of judges but rather on the –effective and efficient– management of judicial organisations.

A) Councils according the Southern European model

Examples of Councils for the Judiciary fitted out according to the Southern European model are to be found in France, Italy, Spain, Portugal and Belgium.

In France a High Council for the Magistrature (*Conseil supérieur de la magistrature*) hast existed since 1946. The President of the Republic chairs this Council. In addition, the *Conseil* consists of the Minister of Justice (Vice-Chairman), twelve members who are appointed for a four-year term by and from the ranks of the judicial organisations themselves and the Public Prosecutor's Office. In addition, one member of the CSM is elected by the *Conseil d'Etat* (Council of State), one is appointed by the President of the Republic and one is appointed by the President of the *Assemblée nationale* (the French Parliament) three members appointed by the Head of Satate. The *Conseil* has competences in the domain of the appointment of members of the judiciary –members of the judiciary are appointed by or on recommendation of the *Conseil* by the French President– disciplinary judicial procedure and promotion of members of the judiciary.

Italy also has a High Council for the magistrature (*Consiglio Superiore della Magistratura*). This Council is closely related to the French *Conseil Supérieur de la Magistrature* and is also chaired by the Head of State. It consists of the First Chairman of the Supreme Court of Appeal, the Attorney General with this Court, twenty members appointed by and from the judicial organisation and ten qualified jurists chosen by Parliament. The competences of the Council embrace appointment, transfer and promotion of the members of the judiciary, the appointment of other persons who are serving on Courts of justice of the ordinary judiciary, and disciplinary judicial procedure with regard to the members of the judiciary.

In Spain a General Council functions for the judiciary (*el Consejo General del Poder Judicial*). This consists of the president of the *Tribunal Supremo* (chairman) and of twenty members appointed, on the recommendation of Parliament, for a period of five years by the Head of State. Twelve of them come from the circles of the judiciary and eight from that of barristers, solicitors and other jurists. The competences of the *Consejo* concern appointments, training, promotion and supervision via inspection and disciplinary judicial procedure.

Another example of a High Council for the magistrature according to the Southern European model is to be found in Portugal. There the president of the Supreme

Court chairs the so-called *Conselho Superior da Magistratura*. Furthermore, it consists of sixteen ordinary members, two of whom are appointed by the Head of State, seven by Parliament and seven by and from the judicial organisation. Like in Spain, the public prosecution is not part of the Portuguese Council. The competences of the Council include appointments, posting/transferring and promotion of judges.

Belgium only recently established a Council for the Judiciary[3]. Since July 1999 the *Hoge Raad voor de Justitie* (High Court of Justice) is responsible for the determination of job descriptions for magistrate functions, the development of judicial quality standards and criteria, judicial training and the development of training programme's, the issuing of recommendations on judicial appointments, including the posting/transferring and promotion of judges, the supervision of courts and the addressing of complaints. Disciplinary proceedings are not conducted by the High Court itself, but the Court is responsible for the instruction of disciplinary cases and the preliminary hearings. The Belgian High Court consists of forty four magistrates. They are recruited from and elected by the different Belgian Courts and Magistrates echelons. The Court has a Flemish division (with twenty-two members) and a French division (also with twenty two members)

B) Councils according the Northern European model

At present, examples of countries where a Council for the Judiciary functions, set up in accordance with the Northern European model, are Sweden, Ireland, Denmark and the Netherlands.

The 'fatherhood' for a Council for the Judiciary in accordance with the Northern European model remains with the Kingdom of Sweden. In Sweden the so-called '*Domstolsverket*' exists since 1975. This Council for the Judiciary is set up as an independent administrative body led by a director-general. The executive of the Council is under his chairmanship and further consists of four judges (two Court presidents and two presidents of Courts of appeal), two members of Parliament, a lawyer and two union representatives. The competences of the Swedish Council for the Judiciary consist of, among other, administrative tasks with regard to the drafting of the budget and the apportionment of the national budget for the judiciary among the law-courts, and further the execution of managerial competences such as supporting the law-courts in, among other things, the area of personnel and training management, housing, automation and computerisation (business administration systems, jurisprudence databases, and suchlike), administrative organisation and bearing the responsibility for accounting information concerning the spending of means. In addition to this, the Council principally fulfils regarding the recruitment and appointments[4] of judges.

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[3] Established by Wet van 22 December 1998 tot wijziging van sommige bepalingen van deel II van het Gerechtelijk Wetboek met betrekking tot de Hoge Raad voor de Justitie, de benoeming en aanwijzing van magistraten en tot invoering van een evaluatiesysteem (BS 2/2/1999).

[4] The bureau of office support for the Appointments Review Committee for the Judiciary that functions independently from the Domstolsverket. See *Appointment of permanent judges and the position of the Appointments Review Committee for the Judiciary and its working method*, published by Domstolsverket, Jönköping 1997.

Ever since 16th April 1998[5] Ireland also has a Council for the Judiciary (Courts Service)[6]. The Council is under the chairmanship of a Chief Executive Officer (appointed on 1st January 1999) and is further made up of nine judicial members from the different ranks of the judicial instances in Ireland, the Attorney General, two lawyers, members from the echelons of the administrative and legal staff of the judiciary (clerks office, registrar, etc.), a public prosecutor/district attorney, a member representing the interests of the clientele of the law-courts, a member designated by united unions and a juridical expert. The Council has a number of tasks and competences in the area of the administration and management of law-courts, including apportioning of the budget, inspection on and justification of spending of the budget funds by the law-courts, the general administrative assistance to law-courts, supporting departments for judges (including the auxiliary personnel), external relations (among other things public information), responsibility for housing, taking care of facilities for clients of the judicial procedure, training programmes, provision of information and responsibility concerning data relating to the working process of the law-courts, providing annual reports and strategic policy plans and –more in general– advising the Minister of Justice in the domain of the judicial procedure.

Denmark also only quite recently (26th June 1998) voted a Law on the Council for the Judiciary (*Lov om Domstolsstyrelsen*), by which, inspired by the Swedish example, an independent Council for the Judiciary is being set up. The Council for the Judiciary functions from its coming into operation on 1st July 1999 in Denmark. The Council is under the chairmanship of a director and board of five –independent– committee members from the different judicial instances (Supreme Court, High Court and Town Courts) two committee members from the circles of the juridical staff of the law-courts, and two from the supporting departments. Furthermore, a lawyer and two committee members with management-expertise will have a seat in the board of the Council. The director and the daily administration do not have any independent competences, which they could exercise independently from the general executive of the Council. The Council, in addition to supporting tasks for the Juridical Appointments Council (a separate body), has competences in the domain of the budget (among other things making budget proposals to the Minister of Justice) and the competence, should the occasion arise, to address Parliament directly if the Council considers the allocated means to be insufficient). In addition to this the Council has the authority to set up strategic policy plans for the judicial procedure, the authority to apportionate the budget funds among the law-courts, to inspect the spending, the responsibility of drawing up annual reports and annual statements of accounts, and a general competences in the area of the management of the courts (varying from housing, and accounting to the training of the staff). In addition to this, the Council will play a supporting role in providing information and in automation.

In the Netherlands a Council for the judiciary was established on 1 January 2002[7]. The Council –a Northern European-modelled one– has modest sized board

[5] Date of implementation of the Courts Service Act, 1998.

[6] In Gaelic the Council is called '*An tSeirbhís Chúirteanna*'.

[7] See footnote 2.

consisting of five members[8], three of them judges[9]. The Council performs a number of policy making duties (external affairs and public services, judicial collaboration, personnel management and appointment policy, recruting, professional training, appointments, advice to the Minister of Justice and policy on quality) and management-related duties (housing and safety, automation, administrative organization and providing administrative information)[10]. Furthermore the Council plays an important role in the area of the budget procedure and the distribution of the means for the administration of justice as well as the supervision of the expenditure thereof. With these competences, the Council for the judiciary becomes a double-edged sword: on the one hand it encourages the independence –in the organizational sense– of the judiciary and on the other hand it expands the self-responsibility and accountability of the judiciary in the area of administration, management and budgeting. The management-related, policymaking and budgetary competences that are assigned to the Council for the judiciary, formely largely belonged to the responsibility of the Minister of Justice. In this sense the establishment of the Council in 2002 constituted quite a radical break with the past. The Council does not have a lot legal powers *vis-à-vis* the courts or individual judges. The core of the legal competences of the Council is related to the budgetary cycle (distribution of funds and supervision) and the recruitment and appointment of personnel. It's main management instrument, however, to implement it's policies is the instrument known as: 'management by speech'. The Council is still very young, and it is too early to draw any conclusions. What is interesting is that the Council in it's first year of existence especially focussed on developing a policy to safeguard the quality of the administration of justice[11].

3. Learning from the experiences with other European Councils for the Judiciary?

Councils for the Judiciary are the product of various political and cultural developments within a legal system, that in turn is deeply rooted in the historical, cultural and social development of the country involved. Because of that, every Council for the Judiciary is unique and we can not see or compare these institutions out of their context. The question thus as to whether for example the Dutch government –when considering to establish a council in 1999– could learn something from the examples of and experiences with Councils for the Judiciary in other legal systems, was a tedious question in more than one respect. In any case, it is a fact that the examples of other countries do not lend themselves to direct transfer. The experiences that other countries have had with Councils for the Judiciary, are very much determined by the specific social and constitutional context of a country and the cultural development that such a country has gone through. Every system has found its own balance, via specific 'checks and balances'. To be able to estimate the value and sig-

[8] Currently presided by mr A H van Delden

[9] Article 84 of the Act establishing the Council for the Judiciary

[10] Article 91 of the Act establishing the Council for the Judiciary

[11] One of the result is the implementation of a system and procedure for citizen-complaints

nificance of a system from outside its own borders a broad knowledge of the situation and history is required. In many respects the balance between the constitutional guarantees for independent jurisdiction and independent Courts and the forms of public control of the same jurisdiction are closely interwoven.

Discussions and developments abroad can contain important experience-related information and arguments that can be of value for systems that are contemplating a Council for the judiciary. Below, I made a brief inventory of matters and experiences that struck me when I was describing the Council for the Judiciary. These remarks can be significant as confrontation experiences for actual or future discussions in European countries –especially the new EU-member states– on the concept, significance and organization of a Council for the Judiciary within a constitutional framework.

4. The emergence of Councils for the Judiciary in Europe

The most remarkable aspect in the country studies made in the research is that at present in three countries (Ireland, Denmark, and the Netherlands), new Councils for the Judiciary were recently established. In Ireland, that already happened in 1998, in Denmark the establishment of the provisional Council for the Judiciary came about in 1999, and in the Netherlands a Council for the judiciary was established on 1 January 2002. This simultaneous advent rests not entirely on coincidence. First of all –certainly in Denmark– the model of the Swedish *Domstolsverket* and the good experiences they had, have been a source of inspiration. In addition to this, there are also the recommendations that Council of Ministers of the Council of Europe made in 1994 within the framework of Article 6 EVRM –concerning the judicial independence, the role of judges and the appropriateness of the administration of justice– that play a role[12]. These recommendations do not require that a country calls an independent board into being, for the guarantee of the independence of the jurisdiction, but they do demand, for example, that the appointment of judges takes place independently and that judicial organization in any sort of way can exert influence on their own working process. These recommendations have thus partially been the catalyst. In all three countries (the Netherlands, Denmark and Ireland) a situation first existed in which the management and the support of the judiciary was entrusted to the Ministers of Justice. From the viewpoint of guaranteeing the judicial independence –as it appears from the Swedish experience– it is considered as important that the management and the support of the management take place at a distance. In the Danish, the Irish and the Dutch plans this is described as an important advantage for an independent Council for the Judiciary. The resistance against the Swedish Government's plans at the start of the 1990s, to return certain managerial competences of the *Domstolsverket* to the responsibility of the Government, illustrates that, also

[12] *Recommendation on the independence, efficiency and role of judges*, Recommendation No. R (94) adopted by the Committee of Ministers on 13th October at the 578th meeting of the Ministers' Deputies.

after some time, putting these duties at a distance is still viewed upon as an important guarantee.

5. New Councils for the Judiciary based on the North European model

Not only is the advent of independent Council for the Judiciary new, the package of responsibilities that they have is remarkable. In the Netherlands, as well as in Denmark and Ireland, it was decided to entrust the new Council for the Judiciary with managerial and support tasks (varying from training, accommodation, automation, providing information, help with recruitment and assistance to Appointment advisory committees) and competences in the area of budget, apportionment of the budgets and justification of spending. Thus not only are increasingly more Councils for the Judiciary created in Europe, the newcomers are all variants of the North European model. Certainly to some extent this is due to the success of the Swedish Council and the example it presents. Through leaving managerial competences and –certain– budget responsibilities to a judicial organization the self responsibility for the management of judicial bodies can be extended and with it the efficiency. In Sweden it is stated that indeed this self responsibility of the judicial organization in its entirety has increased by the way the Domstolsverket functions within the Swedish system. The cause of this greater self responsibility –as we can see in Sweden– is to be found in the presence of a professional and specific organization responsible for the judicial management and budget affairs that acts as a buffer between the judicial organization and the Government. This buffer is equally an ally and a guard dog.

A second cause of the larger self responsibility in Sweden lies hidden in the combination of independent administration, management and budgeting of the judicial organization by the Domstolsverket together with integral management at the level of the Courts. For their operational management the Courts are very much left to their own devices. The Domstolsverket promotes, coaches and to a certain extent supervises this administrative self responsibility of the Courts. Also in the Netherlands one has opted for this proved –at least in Sweden– combination of remote management and integral management. In any case, in Sweden they are strongly attached to this combination.

6. Contributions to the quality of the administration of justice

Councils for the Judiciary contribute to the quality and the effectiveness of the (system of the) administration of justice, according to those who were interviewed within the framework of this study. The Northern and the Southern European model actually express two principal methods to further the quality of a system of administration of justice.

In the Southern European model this quality contribution takes place primarily via a system of judicial responsibility for quality that addresses the person of the judge and his career. With the accent exerted in countries such as France and Italy on

recruitment, training, evaluation, appointment, promotion and posting, via the person of the judge during his or her entire judicial career, the quality of justice administration is monitored by promoting and controlling the quality of the independent judge. This control is carried out by judges themselves. Via a role in disciplinary penalties the Southern European systems also have the possibility not only to reward but also to reprimand.

The promotion and monitoring of the quality of administration of justice in systems that work with the Northern European Council, the approach usually lies not as much in the control on judges but moreover in the material and managerial area. Via the Council for the Judiciary the attention is constantly kept on the needs of the judicial organizations, without the distorting influence of the Government. By being able to take care of direct material needs, to support and to have a central information centre, the Northern European Councils try to reach the highest possible quality of judicial services by effective management and efficient administration. Through the increased efficiency of judicial services one tries to increase the quality of the administration of justice.

7. Promotion of the independence

An important incentive for establishing a Council for the Judiciary in just about all the investigated countries is the promotion of the independence of the judiciary. This independence and independent status of the judiciary is not the same in all countries. In France the judiciary does not have a very high status, while in Italy the independence of the judiciary receives a special status: there the judiciary, precisely due to problems concerning the independence of judges in the (recent) past, has a special prestige. According to the respondents in this study, in Italy the Council for the Judiciary contributes more to the preservation than to the promotion of the independence. The favourable effect of Councils for the Judiciary, whether they are based on the Northern or the Southern European model, on the independent status of judges and judicial organizations manifests itself in all the investigated countries.

8. Constitutional basis

Another detail in most of the investigated countries is (the wish for) the constitutional basis of a Council for the judiciary. In France and Italy the competence and the position of the Council for the Judiciary are regulated by the Constitution. In the Netherlands, Ireland and Denmark there is the intention to do that. The wish for constitutional establishment is normal: a Council for the Judiciary is an important institution that assumes an own role in the constitutional distribution of the State powers. The main aspects of the distribution of the competences and positions of the most important State powers in a country having a written constitution should be regulated in the Constitution.

9. Broadly composed boards of the Councils for the Judiciary

Nearly all the investigated Councils for the Judiciary –with the exception of the Dutch– are broadly composed with boards of 15 or more members. The majority of the council boards are composed mainly of judges coming from the different sections of the judiciary. Some – mainly the highest – judges are, by virtue of their office, member of a Council for the Judiciary, other judges are elected by judges from the different judicial ranks. In France and in Italy the President and Minister of Justice are 'qualitate qua' members of the board. Differences exist in the non-judicial part of the board, i.e. the part of the board with members that are not judges by profession. Usually these 'lay'-members[13] are elected in all sorts of ways by groups of interested parties at the level of the Court Staffs[14], Labour Unions and/or by Parliament. The broad and representative composition of Councils for the Judiciary in most countries makes it, in principle, susceptible to politicisation and syndicalism. In different times the correct balance and the correct relationship between the denominations of the board members can be seen differently or lie otherwise. In order to retain the balance in the vote ratio within the Council for the Judiciary two systems exist: first, that of the appointment requirements (only members who satisfy certain requirements of professionalism and representatively qualities can be appointed); secondly, the system of spreading appointment authorities (appointment by Parliament, by Government or again by others). The latter system is vulnerable in that that it can cause, for example, a Council for the Judiciary unintentionally to consist only of judges because, for example, Parliament only wished to appoint judges. In order to avoid this risk, most investigated systems contained a combination of both appointment systems.

10. 'External' members in the boards of the Councils

The foreign Councils for the Judiciary, such as those discussed here, share practically without exception the element of the 'layman' or non-judge-members, who have a seat in the board of the Council (further: external members). The examples of France and Sweden show that in both countries the vote of, for example, lawyers, clients and unions in the boards the Council for the Judiciary is valued. Also in Denmark and Ireland one has opted for external members on the board of the newly established Councils. Via the contribution of external members an element of social control is introduced with regard to the work of the Council for the Judiciary. In most of the countries however the juridical/magistrates-contingent within the Council for the Judiciary always make up the majority. The presence of external members in the Council for the Judiciary can indeed give rise to much discussion, such as the example of France shows. External members can 'politicise' the boards of the Council

[13] They are not exactly lay-members in the sense that they are not lawyers most of the time; most of the time these 'lay-members' in fact are lawyers, but not judges or magistrates

[14] E.g. Court Clerks

which constitutes a threat to the judicial independence. In France and Italy, problems around the politicisation or the syndicalisation through judicial appointments tend to be attenuated via the proportions in the board for the magistrature, as appears from the proposed amendments with regard to the composition of the Council for the Judiciary in both countries. In fact, with this the problem of politicisation and syndicalisation is only confirmed, not actually solved.

11. The combined action of public control and the role of the ministerial responsibility

The legal systems described in this study, within which Councils for the Judiciary function, consist of different mixtures of constitutional instruments of checks and balances, among which the control via the ministerial responsibility is usually only one of the instruments. Compared with France and Sweden the way in which, via the ministerial responsibility, control until recently (2002) was exerted on the management and the budgeting of the judiciary in the Netherlands –at least in theory– is very intrusive. In the Dutch discussions up until 1999 on more independence of the judiciary by way of establishing a Council for the Judiciary ministerial responsibility was perceived by some as the pre-eminent instrument of control on the functioning of the judiciary. The question is, however, if the ministerial responsibility as a mechanism of control with regard to the budgeting and the management of Courts is indeed always such an effective instrument. That management and the budgeting of Courts is hardly a current political theme in most of the studied countries. The focus of the political discussion between Government and Parliament is in most cases more concerned with the area of maintaining the law and prosecution of crimes. That also means that the ministerial responsibility as an instrument of control must not be overrated. The examples from other countries make it clear that, even if there is talk of an entirely different, less intrusive, control on the budgeting and the management of the judicial organizations via the ministerial control, effective public control on the judiciary is till possible. Examples in other European countries show that in fact there are different alternative and effective mechanisms of control, such as publicity, official control, legal protection or the supervision and control by a Council for the Judiciary that can effectively control the way in which Courts function.

12. Epilogue

Comparative legal research is as much fun as it is complicated. One the one hand it is interesting to visit and study different legal systems and analyse them on the other hand it is very difficult to 'extrapolate' the analysis of a system and to draw conclusions that bear significance for another system. Legal phenomena most of the time are rooted to deeply in the distinct legal and cultural developments to be able to be exported without further questioning. Fortunately for this research project the Dutch plans to establish a Council for the Judiciary was not dependent on this research project into other European Councils. The research results only were an inspi-

ration and instruments to fine-tune the Dutch proposals. Ever since 1 January 2002 the Duth have their own Council for the judiciary. It will be interesting to see how it develops and what experiences result from it. Maybe in it's turn the Ducht experiences may provide an inspiration for other European Countries considering to establish a Council for the Judiciary.