



# 2016 AMBA PANEL DISCUSSION ON JUDICIAL INDEPENDENCE

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## **Sir Henry Carr**

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Photographs provided by Annika Wahrenberg, to whom we express our gratitude.

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# Introduction by Bill Chandler, Secretary-General of AMBA

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Good morning. The AMBA committee would like to welcome you all to this panel talk on the fundamentals of judicial independence: Implications for AMBA's proposals for reform.

You all are in fact the majority of the members of the Boards of Appeal. We also have lawyers from Legal Research and Administration, some representatives from the Registry, and we are particularly pleased to welcome the Vice President, Mr van der Eijk – we have a special, bound copy of the information pack as a small present for you.

What is the purpose of this event? I'd like to give a short background.

The Boards of Appeal are the final arbiters on important issues of patents in Europe. A granted patent can be invalidated in the national courts, but a patent revoked by the Boards must stay revoked. This leads to the concept that the Boards must be a judicial body. Otherwise, what have the legal systems in Europe been doing all these years? And this, in turn, implies that the Boards must be independent and impartial.

We have the EPC, which unfortunately embeds the Boards in the Office. So it is imperfect. But, like the United Kingdom's legal system, it has muddled along and worked well enough. It is only after almost forty years that R19/12, a decision of the Enlarged Board, exposed a particular problem that prompted the Organisation to investigate a possible reform of the Boards. But the question is, how should this be done?

One possibility would be simply to clarify the role of the Boards and the Vice President in the existing structure and just restore the status quo to what we had before. But the general view has been that "the genie is out of the bottle", and that we need to do more.

Another possibility would be to implement the 2004 autonomy project, which foresaw the Boards as a separate power within the Organisation. But that would require changing the EPC, and thus a diplomatic conference. This has been thought to be too much.

So, the question is, what can be done, if anything, within the EPC as it stands? And that is

what we are here to talk about today. AMBA, together with the Presidium, has proposed various structures, and some of the questions will be whether the structures work, whether they improve the situation at all, and what other possibilities are there?

We are privileged indeed today in the guests we have to discuss these questions and debate these issues. So let me go on straight away to introduce our distinguished guests, more or less in alphabetical order. We have Klaus Bacher from the German Federal Court of Justice; we have Dieter Brändle, President of the Swiss Federal Patent Court; we have Giacomo Oberto, from the Appeal Court of Turin. Interestingly for today's discussion, Justice Oberto is Deputy Secretary General of the International Association of Judges. The International Association of Judges has similar aims to AMBA. We have Alain Girardet, presiding judge at the French Supreme Court. We have Gerhard Reissner, President of the District Court of Floridsdorf in Austria. Justice Reissner is also a member and a former President of the Consultative Council of European Judges, CCJE, whose standards and recommendations we have drawn on heavily in our paper. So at least one person didn't have to read the whole information pack! And also, Justice Reissner was a former President of the International Association of Judges.

Our final panelist is Sir Henry Carr, Justice of the High Court of England and Wales. He has kindly agreed to moderate the discussions today. I hope he says the right things. We tried to brainwash him last night in the restaurant, so I'd like to hand over to him straight away, before he forgets it all.

Before I hand over, I should point out that according to the programme, there are several talks in each session, and the idea is that between the talks, and certainly during the panel discussion, you are welcome to ask questions. Don't hesitate to ask anything you want answered, or anything you think is not quite clear. We would like to promote an open discussion here today. Sir Henry is moderating it, but we are free to ask questions

when we like. So I'd like to hand over now. Thank you, Sir Henry.

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## Session 1

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### **Sir Henry Carr**

Unlike most of you in the audience, I am a new judge. I only began in October when, of course, being the United Kingdom, we had an extraordinary ceremony. One thing that struck me about that ceremony was that I had to take an oath and an important part of that oath, in fact the essence of that oath, was to be independent. I remember, of course, having been an advocate, that the decisions you make in the Boards of Appeal are of fundamental importance, and it is essential for you to be

independent of your equivalent of the legislature and the executive, and to be seen to be independent. That is why this conference is so important.

We are going to have really quite short talks, maybe ten minutes, and after each talk, please feel free to ask your questions. If nobody does, I will prompt a few questions myself, but I hope you will because this conference is really for you to express your views. The only other thing I am going to do is make sure things happen on time. So without more ado, we'll have the first talk.

## **Klaus Bacher**

Good morning everyone, and thank you very much for this opportunity.

We are facing a big task and many problems. My idea was, "Well, what would a man skilled in the art do?" In the first place, perhaps he would do some research into prior art. Perhaps there may be some solutions that are obvious, or even no longer new. Therefore, I have done some research on the situation in Germany. Then, I thought, it might also be useful to have a closer look at a situation which does not exist at present, but which may in the near future. I mean the UPC, and its regulations concerning judicial independence. Of course, I will also have a look at the current situation at the Boards of Appeal, although I am well aware that all of you have much more knowledge on this topic than I have. You may correct me if I make any mistakes.

I have made a table with some topics which seem important to me. The first topic (which illustrates my use of colours to indicate legal status) is a formal issue, but I think it is very important for the view to third parties. It is one of the problems that the Boards are facing. In Germany, of course, every court is a separate institution, and the UPC will be a separate institution with two presidents (for the Court and for the Court of Appeal). The UPC will even have legal personality, a technicality but something special. One of the problems of the Boards of Appeal is that they are formally part of the Office. The problem need not be fundamental, but it will remain a problem.

One thing which struck me was the nationality of judges. The UPC agreement has many, many clauses governing the nationality of judges. In the central division, there must be multi-national panels. In local divisions, there must be one (or in some countries like the UK, two) judges from the country concerned. Most of you would not have known, perhaps, that the German constitution says that judges in the Federal Supreme Court and in Federal Agencies have to be appointed proportionally to the Länder. I think Bavaria has about 15%, Nordrhein-Westphalia 20%, and Saarland least with about 5%. Why is it so? I think there is one reason (and it is the only reason I made this green). Everywhere in Germany, the courts have the same rules of procedure, but the lower courts are not federal courts and they sometimes do their business in different ways. That is why

it is good to have experience from all the Länder in the Federal Court of Justice, although it seems amazing when you look at this for the first time. Now, looking at the Boards of Appeal, we have a big European Organisation with many more member states than the European Union. So far as I can see, there are no express conditions on the nationality of judges. I thought that might deserve another shade of green; extreme green, because I think that is a great thing.

Another point is internal organisation, the allocation of judges to panels and the assignment of cases, where you also get a green colour. As I understand it, it is the task of the Presidium, so it is decided by the judges. It is the same in Germany, and I think that is the way it should be. For the UPC, I chose yellow, because the allocation of judges and even the assignment of cases are tasks of the President of the Court. I know this is a very common European rule, but, from the German point of view, it is much better to have a panel of judges. I think there is nothing that should be changed on this point at the EPO.

The fundamental thing, of course, is the independence of the judges. Of course each of the three institutions has its rules about that. They are worded differently, but the meaning is the same.

Another aim is efficiency. In Germany, there are no formal rules for efficiency or number of cases a judge has to handle in a year. I think it is the same in the EPO. Of course, in Germany, to become a Federal judge, you have normally to be a good judge in a lower instance. Who is a good judge in the lower instances? It is the one who performs well. We have presiding judges in the Federal Court of Justice, and to become a presiding judge, you have to be a good judge in the Federal Court of Justice. Who is a good judge of the Federal Court of justice? A judge who is efficient. So, of course, there are some mechanisms to enforce efficiency, but there are no strict rules. I think that is the major point on this. As far as I understand, it is the same at the EPO. Concerning the UPC, there is a white space on the chart, because we do not know.

So far, you may have been asking yourself why are we here, if everything is green? Well, in the final table, there are yellow cells on the right-hand side. What about appointment of judges? At the EPO, it is done by the President and the Administrative Council. I think Germany is comparable,

we have 17 ministers of justice and 17 members of parliament. It is a kind of election. The problem is that you don't know exactly which criteria are relevant for this election. I think, perhaps, the process in the EPO may be even more transparent than the process in Germany. But I think both regulations could be better and I think the system of the UPC is a little better, and so I made that one green.

A very important thing, in my view, is the term of office. There is a clear green in Germany which has lifetime appointment. Not, as in the United States, lifetime in the original sense of the word, but lifetime until retirement, which means 67. I think the 5 and 6 years at the EPO and UPC make a poor impression. If you have to face the loss of your job in five years and there is someone who may want you to do something in a particular way, that may be a problem. It is something which could be made better, although I am aware this would require a change of the EPC and cannot be done in the short term. It is the same with re-appointment and with promotion.

What is my conclusion from all this? There are many points, and I have chosen just a few that are relevant for judicial independence. In my view, we will not find any country in Europe that would be green in all respects, but that is not necessary at all. What is necessary is a very good regulation on some topics and an acceptable regulation on the others, to ensure the personal independence of judges. Therefore, I think we should not focus on one or two or even three of the issues. We should focus on a system which is balanced, in which all of the individual topics work together to secure independence. I think, so far, no solution may be obvious, but we still have time.

### **Question**

One thing not covered by your tables is the question of appraisals. What is the basis for re-appointments and promotions?

### **Klaus Bacher**

There is no problem of re-appointment in Germany. We have lifetime appointments. As I said, appointment is decided by a political body, and the rules for appointment are not very clear. However, we do have criteria for promotion. Normally, there is only one promotion, from Judge to Presiding Judge. There is an A4 sheet with five or

six very general topics: judicial competence, efficiency, social competence and so on. But it is clearly not possible to give points from 1 to 10 and say, "This is our man." It is not a transparent process. Promotion is not decided by the body that appoints the judges, but by the Federal Minister of Justice alone. To be precise, the Federal President has to make the appointment, but only on a recommendation of the minister. That is a problem. However, as an administrative decision, it is open to challenge. There is a case pending before the national administrative courts concerning promotion to Presiding Judge at the Federal Court of Justice. That means we have a Senate with no Presiding Judge, because there can be no appointment until the case is settled. There was a time when four Senates of the Federal Labour Court had no Presiding Judge because of pending challenges.

### **Gerhard Reissner**

I am very glad to be here, so I want to start by thanking you for having invited me.

We consulted different judges in different countries on appraisal and evaluation. You might consider appraising judges on a regular basis, and you might consider it in respect of possible promotion. For promotion, of course, it is absolutely necessary to have some criteria and some basis for checking whether they are fulfilled or not, in order to select the best among the candidates. You can gather information at the time of application and consider which of the candidates is worthy of promotion or not, and, of course, there is a big debate which criteria should be considered and which not. For a specialised court, you need an emphasis on the special qualities needed. Regarding appraisal on a regular basis, it depends whether it is necessary at all, but I think we will come to that topic later.

### **Giacomo Oberto**

First of all I would like to thank the organisers for the invitation. It is the second time I am here with AMBA, and it is always a pleasure to be here with you.

Focussing on the item of appraisals, it might be useful to have some information on the system in my country. In Italy, for many years, there has been a full separation between function and career. You could be in position for thirty years and still perform the same function in the same office.

Of course, if you applied for higher office, you would undergo a sort of assessment and evaluation of professional skills. The end of the process lay with the High Council of the Judiciary.

This full separation of function from career is still in force today, and has very positive aspects. It reduces competition between colleagues, because your salary does not depend on the function you perform, but only on your seniority. This system is still in place, but after 2006, we introduced a reform. For the first time, there is a regular pattern of assessments or appraisals for all judges and prosecutors (in Italy, the two share judicial power and all the rules concerning judges apply to prosecutors). All judges and prosecutors are appraised every four years up to a maximum of seven times. Thus, the seventh, and final, appraisal takes place 28 years after you become a judge. This assessment is independent of any you may have if you apply for a higher or different post.

These four-yearly appraisals are made on the basis of your work in the last four years. The process starts with an evaluation by the president of the court, or the section of it, you work in. If you have worked in more than one, any of the presidents can write an evaluation. The evaluation follows a pattern set by the High Council for the Judiciary and some things are obligatory: how you deal with lawyers, whether you work well, how much you work and so on; and you have to produce statistics. Then the judge may choose up to twenty judgements from the last four years. You choose the best, of course. The presidents may also choose judgments to base the evaluation on. This then goes to a local Council for its opinion, a small version of the High Council for the Judiciary, but within the judge's Court of Appeal district. Finally, everything goes to Rome, to the High Council for the Judiciary where it is first considered by a Commission of four judges or prosecutors and two lay members, and then by the High Council in plenary session.

That is a quick summary. Later, I will explain how the High Council is organised and what the advantages and disadvantages of this system are.

### **Alain Girardet**

I would first like to thank you for your invitation to what is a very important meeting for you. I am happy for the opportunity to share my reflections with you.

I think we are going to discuss appraisal later, but now I want to say that we have to distinguish different ways to become a judge. There are, in France, as in many other countries, very different paths to becoming a judge. The principal way is to pass a competitive examination. That is considered the most objective way. It is very Napoleonic, this competitive examination after university. But there are other ways, and we need them so as to get the best professionals in the judiciary. A special committee, made up of judges, elected by their peers, and of external people, chosen from among barristers, solicitors, and academics. The procedure involves a kind of professional evaluation of their career. This path accounts for perhaps one fourth of the judiciary.

We also have to bear in mind that there are specialised courts, in which one can become a part time judge. They are very important indeed. At the first level, they are not professional judges but their experience is very important; but at the second level, at the Court of Appeal, all the members of the Court of Appeal are professional judges.

So, when we talk of how to become a judge and what sort of appraisal is needed, we have to distinguish the several ways of becoming a judge, and the evaluation has to be adapted accordingly.

### **Dieter Brändle**

In Switzerland we have, of course a completely different system: no assessment: no promotions.

We have three levels of court. District courts, equivalent to the Landesgerichte; state courts, equivalent to the Oberlandesgerichte; and the Federal Courts. The judges of the district courts are elected by the people of the district. All judges in the district court are at the same level. They elect their president, but that is just an administrative job. He represents the court to the outside world. You can't be promoted from there. If you want to go to the state court, you have to apply for an open position and the electing body is the state parliament. Again, all judges are on the same level. In the Federal court, you are elected by the Federal Parliament. But no Swiss judge has a superior. There is no assessment.

I am not saying it is a great system, but it seems to work.

## **Sir Henry Carr**

Those answers might cause people to think, because I am sure we are going to discuss appraisal in more detail. But, just as we start this conference, we see the clash between, on the one hand, judicial independence and, on the other hand, the need for quality and therefore appraisal. As soon as you start to give judges short-term appointments with assessment, there is potential for the executive and the legislature to start to try and get rid of judges who are a bit too independent (in their view). I think one thing this conference needs to think about is: what type of appraisals, how often, how long appointment should be, and who should do the appraisals.

One of the interesting things about those answers is that you have Dieter Brändle effectively saying there is a type of election, and others saying it is a more judge-led process. Is it sufficiently democratic, from the point of view of public perception, to have judges (who one might think would be best at it)? Do we need some kind of a mixture? Now, I'm not answering these questions, but it is something you might like to think about.

## **Question**

In Mr Bacher's tables, the re-appointment procedure in the EPO should be coloured red. It is the greatest danger to the personal independence of members. The practice is a bit different from what the text of the Convention might suggest. The President is not "consulted" but actually prepares proposals for re-appointment. He takes the initiative. There is the potential for making those proposals on the basis of how much the member is liked by the administration (in terms of the content of decisions, or of their idea of efficiency). That is a mixture that does not exist anywhere else.

I would say it is not the job of a judge to please the Administrative Council. A judge might interpret the Implementing Regulations, for example, in a way the Administrative Council does not like, and the Council may then wonder whether it wants to re-appoint that judge.

The 2004 proposal was to give the judges themselves a decisive say in this process of re-appointment. Failing to re-appoint was seen as close to a disciplinary measure, and that gave a guarantee that there would be no undue influence on re-appointment.

## **Giacomo Oberto**

Thank God we do not have that problem in Italy. We have many others, but no problem of re-appointment.

The problem of re-appointment was dealt with extensively in Europe, after the fall of the Berlin Wall, when we came into contact with the countries of the former communist bloc. Still today, in many of those countries, judges are hired for a certain number of years, usually four, five, or six; and then there is a procedure of re-appointment. So the Council of Europe had to confront this problem many times.

The Council of Europe, when the recommendation of 1994 was revised in 2010, made a point of this issue. I would say that among the various bodies of the Council of Europe, there are slightly different viewpoints. If you take the recommendation of 2010, you do not have an absolute denial of such a system; but there is criticism. If you read between the lines, you understand that the position of the Council of Europe is negative. The official position of the Consultative Council of European Judges is even more clearly negative. But they take account of it being something which, unfortunately, happens in many countries, especially in Eastern Europe.

There is another problem too, which is similar in a way to the problem we are facing here. I often went to Eastern European countries, trying to bring them the gospel, the good news of the documents of the Council of Europe. They told me it was wonderful, but that their constitution would not allow it, and to change the constitution was a problem, exactly as changing the European Patent Convention is.

The eventual solution in the recommendation of 2010 was, for those countries in which such re-appointment was foreseen, there had to be some principles to be complied with. In particular, the principle that objective criteria had to be applied, in an independent way, by an independent body. If you have objective criteria laid down in the law, and you have an independent body which applies those criteria, and it is a body which represents the judiciary, then while you do not have the most perfect system in the world, you do at least have some guarantee that re-appointment is not biased or influenced by the fact that the judge has shown compliance with the will of the government or not.

In the document of the Consultative Council of

European Judges, there is a stronger stand against this. The feeling of the judges, of the International Association of Judges, is strongly against. It should be avoided. The strongest solution is tenure until retirement. If it cannot be avoided, then we must have at least the guarantees of an independent body applying objective criteria.

### **Sir Henry Carr**

What that question touched on is the essence of the separation of powers. You have the legislature, the executive, and the judiciary; and the executive may have a particular interpretation of legislation that the judiciary may not share. A lot of a judge's time is spent telling the executive they got it wrong. If promotion, or even tenure, is based on how often you have agreed with the executive, then the system does not work. I think we will talk about that more as the conference goes on. We have to have a system where the judges are free to disagree with those who pay them. They have to be free to disagree, without fear of the executive.

### **Question**

I want to ask about the word "efficiency" and what it actually means for a judge. If you are, say, a management consultant looking at a court, you might say that a judge who produces 24 decisions in a year is efficient. A judge who produces 28 is super-efficient, and one who produces 23 is not efficient at all, and should not be re-appointed. However, a lawyer might look at those 24 decisions and say they are good or they are bad, but that assessment is complicated. It is difficult to write down as a checklist. I was interested to hear about the Italian system. If you seek promotion, you put forward your greatest hits of the last four years and a body, basically other judges, looks at it and can determine whether they are good. Is it done as professionals assessing the work of other professionals, in a way that cannot be easily summarised or does Italy have some formal criteria?

### **Giacomo Oberto**

First of all, in the Council of Europe's Recommendations of 2010, we said in Article 31 that "Efficiency is the delivery of quality decisions within a reasonable time following fair consideration of the issues. Individual judges are obliged to ensure the efficient management of cases for which they

are responsible, including the enforcement of decisions the execution of which falls within their jurisdiction." That is a general definition of what efficiency is. As you can see, it tries to marry, so to say, efficiency in terms both of quantity and of quality: "quality decisions within a reasonable time". I would need a full day to talk about the question of "reasonable time" in Italy.

You ask how we assess quality and respect the reasonable time frame requirement. By the way, we have the requirement of reasonable time in Article 6 of the European Convention on Human Rights; but we also have there a reference to independence: "an independent and impartial tribunal". The Recommendations really re-state the rule to which we have to look in order to try to work better.

The solution which was found in Italy was this. You try to produce your 20 best hits of the last four years. At the same time, the local council and the president will examine all your activities during a six-month period. How were your hearings conducted? How did you organise your work? And so on. The period of six-months is selected randomly, so you do not know which six months it will be. That is balanced against your selected cases.

There was another point which I would like to make concerning the question of the quality of justice. In 2002, the Commission Européen pour l'Efficacité de la Justice (CEPEJ) was set up. Its main task is to draw up a general report on the status of justice in Europe every two years. It is a document that, with the years, has become more and more impressive, and now covers more than 500 pages. It gives a snapshot, a large and comparative snapshot, of justice in Europe. CEPEJ has a sub-commission, a Working Group (the so-called "SATURN" Group) which deals with the problem of respecting deadlines, and compliance with reasonable deadlines in the administration of justice. There is also another working group which is called "Quality", whose aims are that of focusing on issues of quality of justice. At the European level there is an effort to combine quality on the one side and efficiency on the other side.

### **Gerhard Reissner**

It was one of the great successes of this Recommendation in 2010/12 of the Committee of Ministers that it includes this definition of efficiency and focuses not only on quantity but also on quality.

Efficiency is still used in many countries as a sign of productivity, the highest number of cases in the shortest time. This is still an ongoing fight, so it is very good there is this definition. I am afraid it is not much in the minds of the stakeholders even now.

The Consultative Council dealt with evaluation of decisions in its Opinion No. 11(2008), and this is a crucial task. One point is that one should not look only at the final text of the decision, the one forwarded to the parties. You have to see that in the framework of the whole procedure, what was done before, how far the parties could address the court, how well the judge could deal with the different issues and motions, what the working conditions were, and so on. What is very clearly stated is that it is not the interpretation of the law which may be examined in such an Evaluation of quality of a decision. It is not up to others to give a judgment on that. This is the task of remedies within the procedure, which is foreseen for this. Yes, the judgment should be understandable and if the judge uses terms which nobody understands, there is a lack of quality. This will be a criterion for a qualitative assessment, but if one judgment is, from the legal point of view, better or not, this should not be a criterion. Naturally, that makes it very difficult to establish fixed criteria for assessment.

### **Sir Henry Carr**

That question focuses on the issue of quantity. Is quantity a way of assessing efficiency? I will be able to tell you some things about that when I talk about what has happened in the United Kingdom. One is tempted to say that quantity is not a way of assessing efficiency, obviously not, and, therefore, we cannot have a way of assessing efficiency. But all I can say at this stage is that we have to have a way of assessing efficiency. The example that occurs to me is the Iraq enquiry going on at the moment in the United Kingdom. It started in 2009 and the report has not yet been published. There is huge public dissatisfaction with the fact that Sir John Chilcot has been unable to produce a decision. That is a big problem. In a sense, what we need to think about is having a system which allows for very, very complex cases, but nevertheless imposes time limits which are commensurate with the complexity of the case.

### **Question**

Are there general considerations on how to conduct appraisals where decisions are collegiate? It is one particularity of our system here, that most cases are handled by three judges, most of the time two are technically and one legally qualified. Each of us makes a big contribution to the decision-making process. It can even happen that the initial text written by the rapporteur is completely rewritten by the other two. In such a context, how can an appraisal have any significance?

### **Alain Girardet**

I am not a specialist, but it happens very often in the Supreme Court in France, that the rapporteur prepares the case but the final decision is not what was proposed. We have to re-write the decision. However, the chairman of the chamber knows exactly how the decision was prepared, how the investigation was conducted, and how the proposed decision was written. Afterwards, it is up to the panel, but the appreciation of quality is not tied to the final decision. The quality of preparation is very important, because the quality of the final decision will depend on the quality of preparation, so you have to evaluate the preparation. More and more, it seems to me, the first stage of the preparation, what we call the *mise à l'état*, made by the rapporteur in order to prepare the decision, to identify the correct legal issues and to reply to the parties, has a very active role. It may be that an objective evaluation should be based on the *mise à l'état*.

### **Gerhard Reissner**

I totally agree that there are different roles and that they have to be assessed separately, but that needs a way of identifying the different roles. I understand this is not easy when there are panels as here. However, I really want to go a step further and ask: do you need it at all? If you need it, under which circumstances?

### **Giacomo Oberto**

In Italy, this problem is less felt than it was in the past. For about twenty years, the vast majority of decisions have been taken by single judges. Where decisions are taken by a panel of three or five (in the Court of Cassation it is normally five judges), one is the rapporteur. Usually, it is the rapporteur

who prepares the case and makes a report before the other judges. In over 90% of cases, it is the same judge who drafts the reasoning of the case. Sometimes, however, you read a judgement published in a legal review, and you see the rapporteur and the drafter are different. Then, it is clear that the decision was not what was in the mind of the rapporteur and there was some conflict. If the rapporteur is not sure he can produce reasoning which is fully in line with the decision that has been taken, he can ask the president to appoint another member to draft the decision.

This leads me to another point I missed before. What relevance should we give to the frequency of reversal or confirmation by a court of appeal? This is another question that was widely debated in the Council of Europe, in the Consultative Council, and so on. The general viewpoint in the international documents is that reversal on appeal should have no effect. There are many reasons. For example, who knows who is right? It often happens that the first instance judge says one thing, the decision is reversed by the court of appeal, and then the Supreme Court of Cassation says it was the second instance judge who was wrong. Now, when we have such complex legal systems, there can be two, three, four, five solutions that are all "right". That is the main reason why there is this attitude against this. The debate, however, was deep, because, in many countries, again countries in central and Eastern Europe, it is a factor in how judges are assessed. That is a danger for judicial independence. There is a sort of reward for judges who do not displease the Court of Appeal. There may be a tendency amongst first instance judges to conform to certain interpretations given by the Court of Appeal, even though their own opinion was different.

### **Gerhard Reissner**

I suppose this problem of reversal of decisions is not applicable here, because you do not have a supreme court.

As to the problem of assessing an individual in a panel, it is an essential element of an assessment that the judge is interviewed. He could be asked about certain decisions and be able to say what was his opinion and what was not.

### **Klaus Bacher**

There is a problem with that, in Germany. It would be unlawful, because deliberations are secret and

you may not tell any third party how a decision was reached.

The solution in Germany is similar to that in France. The person who makes the assessment is the presiding judge of the senate, so he knows who has written decisions without any breach of confidentiality. It does, of course, create a different dependency, a dependency on your presiding judge. If he likes you, it is good, if not, you should perhaps change senate. In my view, however, it is better to have a person who is in permanent contact with you than someone who comes from Berlin, or from Rome, and who has seen you for fifteen minutes and read ten decisions you may or may not have written. There is no perfect system. There must be a compromise. I have heard many arguments that it is very good that we have no appraisal of judges in the Federal Court of Justice.

### **Sir Henry Carr**

The question raised the very difficult problem of appraisal where there are three of you. On the one hand, you have the idea of a reference from the presiding judge who may have seen the applicant in various different panels. That is important. It arises in the UK essentially where judges apply to the highest offices. For example, you are already in the Court of Appeal where you sit with three judges, and you apply to the Supreme Court or perhaps to be Lord Chief Justice, the head of the judiciary. I am now told, that if you want to become Lord Chief Justice, as well as the assessment you have a very long form which talks about your capabilities and your personal contribution to judgments. The idea of this is to see how good you really are. I can imagine, in the old days, people would have refused, but now it is accepted.

### **Question**

I would like to raise the related issue of probationary time. Do any national systems have probationary periods? More generally, can it be compatible with judicial independence? It seems to me there is a problem of personal, rather than institutional independence.

### **Gerhard Reissner**

Justice Oberto has already told us about the problems of a probationary period of office that can be identified, and that such things ought to be

avoided. When we dealt with probationary periods in drafting the Recommendation 2010/12, it was at the request of Germany which said it had to be kept as a possibility, because it was an essential part of their own system. But the danger was seen, and it is a problem.

On the other hand, there was a commission in Germany, led by Professor Albrecht of the University of Frankfurt, with the participation of the Ministries of Justice of several Länder and of the Federal Ministry of Justice. It dealt with independence and the independent bodies guiding the management of the judiciary. There was the question whether there should be a Council of the Judiciary in Germany. That is very much opposed by politicians. Several countries were analysed, including Switzerland, where, as you just heard, there is election for a certain period, after which you have to be re-elected. The participants said this was not the best system, though it somehow worked. The analysis of the independence of the management of the courts was astonishing, however. The best, the most independent way of managing courts was that in Switzerland. There was nobody who had influence on the budget or on the contents of the offices. It works there, but it is strange that they have a limited period of tenure. My personal view is: avoid, avoid, avoid.

When we were discussing this issue in the Consultative Council, there were different opinions. At that time, the Austrian judge at the Strasbourg court was not prolonged, due to internal, political debates in that country. He was replaced by another candidate. I was blamed for that by my colleagues (though I had nothing to do with it, of course). The CCJE issued a statement that international courts were somehow different from national courts. This is something which has to be considered. There is an additional element in the international courts: the interests of the national states in sending a judge. But the CCJE stated (Opinion No. 5) that there should be a rule that normally, the judge's term should be prolonged, and this is only not to be done if there are exceptional reasons. Therefore, for the decision if the term of office should be renewed, what is needed is, not to assess whether a judge is good, but only whether the judge is a bad. This removes some of the personal tension which every judge faces at the end of his term, when the question of prolongation arises.

## **Sir Henry Carr**

I think the idea of probation is completely pointless. If you are the sort of individual who is going to be a bad judge, you can be very, very good for six months, and then you just let loose. I cannot see the use of that at all.

It is time to move on to Justice Brändle's talk.

## **Dieter Brändle**

Dear colleagues, we have heard a lot of details. I would like to get back to some basic ideas.

For today's discussion, we were kindly provided with an information pack about the topic of judicial independence. It is almost a book. Seventy pages! And if you follow the links, you end up with a library. That is really scary. Is the topic that complicated? Does it really take that much paper to explain what judicial independence means, and how and why it should be safeguarded? Yes, it probably does. There are many traps and obstacles to overcome, and there is always a kind of tug of war between the three powers, the legislature, the executive, and the judiciary; and not to be forgotten, the so-called fourth power, the media. That is to say, judicial independence must constantly be defended against one attack or another. And defence is a very difficult task when you do not really know what your main goal is, what issues are really important for you, when you do not know what you should concentrate your defence on.

I therefore believe it makes sense to focus on the core elements of judicial independence, and then we have to make sure that these are respected. It is the general lines that count. We should not get lost in details, in endless discussions about, for example, the minimum percentage of judges in an administrative body.

It is said that independence is a pre-requisite for the rule of law and a fundamental guarantee of a fair trial. It sounds good. It is true. But as the rationale for judicial independence, it does not help to achieve it. What is really important to guarantee judicial independence? Is there any specific system for nomination or appointment, election, promotion, that has to be applied? Probably not. As you look around Europe, you see judges elected by popular vote. I mentioned district judges in Switzerland. Some are elected by parliament, for example the Federal Constitutional Court in Germany. And most judges seem to be appointed by some authority or other and always based on dif-

ferent criteria, maybe public and maybe not. The same goes for promotion. There seem to be many stairways to heaven. It is not worthwhile fighting for a specific one. It just has to be fair and reasonable.

Is an appointment until retirement age important? Yes, such an appointment would indeed help independence. But appointment for a limited period, for example six, eight or twelve years, with a guarantee for re-appointment seems to be good enough. Again, different options are possible. What we probably would not like to see in Europe, would be American-style lifetime appointment, because then the independence of the judge might become a burden, if he misses the right moment in time to step down. I must say, I have seen a 93 year-old judge, who was really bright and awake and did a great job. One can never tell.

What I consider the core element of judicial independence is freedom from undue external or internal influence. It must be ensured that nothing and nobody can keep the judge from doing his job and from doing it properly. This requires, of course, a relative irremovability governed by strict rules, which define the deciding body and the offences for which a judge may be removed, and also the proper procedure. To have a judge kicked out just like that, as you have seen here recently, should be an absolute no-go.

And a judge has to be able to work with the necessary technical equipment and the necessary back-office and so on. He and his court have to be provided with the necessary funds. This may, of course, have to be worked out with parliament or the executive, but they have to be guaranteed. And, and I think this is important, the workload of each judge has to be such that he can handle it properly. This requires a number of judges adequate to the workload of the court. This number will have to be fixed by some law, and the important point is that this number of judges is indeed appointed. Unfilled vacancies result in undue pressure on other judges. It can amount to an obstruction to justice. This must be prevented. I believe this is a very important point, which must not be underestimated. You know what I am talking about.

The judge must also be free from any internal pressure. He is entitled to independence within the judiciary. The judge's decision must be free from

any influence from an internal hierarchy. It is not, for instance, for a senior judge to try to influence the younger ones on the basis of his standing, more than on the basis of a good argument. This, at the end of the day, is a question of personalities and characters. It cannot be handled with rules.

Undue external influence has to be excluded too, and I am not thinking of bribery or extortion. The executive branch, or parliament will, at least in Europe, not try to interfere in pending law suits. But they may, for instance with proposals concerning law projects or organisational reflections, try to push the judiciary in a certain direction. How can this be prevented? I believe rules and regulations, again, will not help much. What it takes, and I believe this is really the necessary foundation of judicial independence, is mutual respect and trust between the legislature, the executive, and the judiciary. Mutual respect and trust between the three powers is absolutely mandatory. If that is missing, judicial independence will always be jeopardised, and if this mutual respect and trust is there, judicial independence will almost always be respected. You may say, now, mutual respect and trust may be hard to achieve. Indeed. But this is what all people involved must work for. And if there are people who are not willing, or not able to play along, there are checks and balances between the powers that may be used to sort things out.

Finally, undue influence may also come from the media. I am not talking about criticism. That is perfectly ok. A judge has to live with criticism, and if it is well-founded, the judge can even learn from it. But actions by the media that interfere with proceedings must not be tolerated. Again, also between the judiciary and the media, mutual respect and trust would be helpful. Thank you.

### **Sir Henry Carr**

There are some very wise words from a very experienced judge.

### **Question**

You can imagine an executive that says, "I do not touch your decisions, you are totally independent in those." You can imagine the executive adding, "But it is only in judgments that you are independent. The rest, we determine." How far could we accept influence of the executive, and where do we have to say "no"? Can we use IT services provided by the executive, or do we need to provide

them ourselves? I think that would be a very good idea.

The Boards are within the Office, and we are so grown together in terms of services that it might be difficult to draw a line between what we must provide ourselves and what can be provided by the executive. The cost of becoming a bit more independent might rise to the point at which the Administrative Council says they did not intend to spend that much money, and we are back to square one. It is a complicated question, but we have to move from the old situation to new, and we have to decide where the real lines must be drawn.

### **Gerhard Reissner**

First of all, in the Recommendation 2010/12, it is clearly expressed that there is individual independence and there is structural. It even says that structural independence is a pre-condition for the individual one. I think this is a very good step in the right direction.

The general tendency is to keep all management away from the executive. In many countries the judiciary is one body, but sometimes there is a special managerial body which is independent from the executive power. Of course, there are limits, and in the end you need parliament to decide which branch of the state gets what amount of money. There are statements in all the documents we have mentioned that it is the task for those who are responsible for giving money to give sufficient money. It is a very general statement, but it has to be recognised.

The same problem, and this may be critical, can also occur within a court. There is also a body or a president, and of course a body is better than the president, who decides how the money is allocated. And it may be that it places limits on an individual judge. Perhaps one section thinks, because of the type of case it handles, that it needs more money than others. So it is not necessarily on the level of the executive and judicial branches of the state, but it is a central problem even within the judiciary.

If you have to decide this question of where borders lie, orient yourself on this general goal. All involved have to be aware that it is their task to make the judiciary work. Of course, there may be different ways of doing it.

### **Giacomo Oberto**

The judiciary has always to deal with political power. One way or another, there are always links between the executive, the legislature, and the judiciary. In Italy, for instance, the link is highlighted in the High Council for the Judiciary, in which there is a component of one third elected by the parliament, so there is clear political influence on appointment of such members. Of course, in other legal systems, this link is different. For instance, in common-law systems, the link is at the moment of appointment of the judges.

Then, however, you have to consider not only the legal system, but also the cultural environment in which it exists. In common-law systems, the idea of separation of powers is strongly rooted. Judges have the means, the claws to defend their autonomy and their independence. They have, for instance, the concept of contempt of court, which is unknown on this side of the Channel. They have a legal and cultural tradition which endorses the highest level of independence. They have life tenure. They have the means to protect their own independence.

To come back to Germany, I am sorry if I do, but I speak as an Italian envious of the German system. Unfortunately, we could not afford the German system in my country. It is quite expensive. But the German system of judicial appointment lies on top of a very complex and very well-performing education system, starting at university and continuing in the post-graduate system in which future judges, future lawyers, future university professionals, future notaries, exchange views. They have a common legal background.

One of the main problems we have in Italy, and also in France and other Latin countries, is the perennial fight between judges and lawyers. Judges think lawyers come from Mars, and they think we come from Venus. We really have very little in which we come together and can understand one another. We fight constantly, for one thing because in Italy we now have 250,000 lawyers, which creates the problems you can imagine.

A system of appointments, and also of judicial independence, lies in the framework of the cultural system of a country. In a system like the German one, where, at the end of the post-graduate period you have examinations, very serious, very competitive examinations, and you have a selection of

the best who can choose to become judges. It is clear that the influence of the minister of justice is small. They have a classification, a list in which you have people who have been selected and appraised according to their skills. So of course this reduces or annihilates the discretion of the Minister of Justice.

But, of course, if the German system were transported to Italy, it would be a disaster. It would never work. It would give political parties the opportunity to try to appoint friends and people loyal to the party and so on. Really, I think, in your particular situation in the Boards of Appeal, you have to choose what is best from amongst the different systems, but taking account of what lies behind each system.

### **Alain Girardet**

How far could we accept influence of executive?

We are talking about a long process. Independence is a fight. It has always been a fight, namely in France.

Just a few words to reply to the question. It seems to me very basic to draw a line. It is your job to draw it. It is easy to reply that it is your job. But it is your job.

In the eighteenth century, before the revolution, judges were very powerful. They could oppose a decision of the King, but their interests were protected. There really were very powerful. When the revolution came, the first thing the revolutionaries did was to pass a reform to ensure that judges could not interfere in the executive power. The phrase was that the judge was a “master of the law”. It is completely stupid, but during the 19th century, we were reliant on this idea that judges just apply the law. It was completely stupid, because the law cannot foresee every different fact, every situation. Judges have both to apply the law and to interpret it.

Interpreting the law is a way of making law. If you interpret, you make law. Making law, you are in conflict with the executive. That is part of the role of judges, and it exposes them to executive anger. You see, I understand the problem you are facing.

If we are talking about independence in 2016, we can refer to international standards. 50 years ago, I am sure, the discussion would not have been the same. Independence is a process. It is a process and we have to improve step by step. It is

something like a fight. Judges have to define their independence. It seems to me they are independent of the executive, but that does not mean they are not accountable. The judge is accountable for his duty, even before parliament. But he has to fight for his independence.

One means could be a professional organisation. In France, indeed, during the 20th century, professional organisations have become very helpful and have tried to organise a collective approach to independence, even if they are not all the same, if they are unequal and have different ways and approaches. I have seen the results. When I was a young judge, I was not as well-protected as now. Things are getting better, but it is a day to day process.

Another thing I would like to say, we have been talking about independence from the executive etc. But from my own experience, when I was in the court in Paris, specialised in trademarks and patents, I noticed that I was very often invited by some professional organisation, or company, by some lawyer, and very quickly, I stopped accepting. I was very happy to give a speech or comment on a new law or something like that. But you have to know that independence is a state of mind. Independence is always your job, and the state of mind is to know the right distance between parties, between solicitors, between the executive and you, between the legislature and you. It is your first duty, it seems to me, to behave like an independent judge. That does not mean you must have no relationship with a party, with a lawyer, but there is a kind of deontology which is very important. You are very well respected when you are very cautious about that.

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## Session 2

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### **Sir Henry Carr**

I wonder if anyone has any further questions, before we go to the next talk.

### **Question**

Justice Girardet rightly said it is our job to set the borders of our independence. I just want to add that it is a very difficult task in our situation. The EPC speaks about legislature and executive, but no separate judicial power is foreseen.

### **Alain Girardet**

I understand, and it was not meant as a provocation on my part. I do see that you start from more or less nothing. There is no formal statute that defines your role inside the Office, your duty, or your independence. There is no special committee to protect you. You may need to set up everything yourselves. I am sure you have the will to do so.

## Question

I would like to come back to working conditions and the working environment. This starts with rather trivial things. You want to have a book for your library, to go on mission, to take part in professional education. It goes further into sensitive things like who can start disciplinary proceedings, who can start investigations and things like that. Is it sufficient for a judge to be free in his decisions, only bound to the law? Or must there be a working environment which is not controlled by the administration which the court has to control?

In Germany, there is the nice phrase “Richterliche Selbstverwaltung”. In a court, for each field of administration (budget, staff, media and all these things) you have a judge who assists the president of the court in doing his job. In my view, that would be an appropriate model. It would make the Boards more independent, not only in the public perception but also in substance.

## Sir Henry Carr

It might be interesting to hear how that German model works a little more, from a budgetary perspective.

## Klaus Bacher

It is not as easy or as fine as it may seem from a distance. Of course, the courts have budgets and they have some freedom in how they spend their money, but that does not mean that the individual judge may spend money on any book he wants. I know from personal experience, that if I want a book, it is not the Ministry but the head of our library who has to decide. He has to choose whether to buy a book on patent law or two books on sales law, because there are three times as many sales law cases as patent law cases. For travelling to such occasions as this, it is close to impossible to get funds from the court. Either we are invited, or we pay ourselves.

## Sir Henry Carr

We probably all face this problem. I am currently in a dilemma. I have got quite a nice IT system provided by the Ministry of Justice. I don't like the screens much. Do I go out and spend my own money on screens, or do I just live with it? I think this is the kind of decision we face all the time. Actually, I'll probably just live with it.

## Alain Girardet

I would like to add another word about independence. What about criticism from outside? It is something that very often happens. You are completely independent, take a decision, and in the media, or even your colleagues, even barristers and lawyers criticise and criticise and criticise. The judge has to remain silent. He must not go and reply to the press or explain the decision. It is very uncomfortable. It happens, I am sure, to all of us. You come under pressure from the media sometimes. You have taken what you believe is a good decision, and then there is criticism. What can protect the judge, because this is a threat to your independence?

In France, we are not very well organised to protect judges from that kind of threat. It is mostly criminal judges who are in the spotlight, but even in industrial cases, or competition cases, you face comments in the economic press or in academic discussion. You read the article and you think it is crazy, that they did not understand what you wrote. And you cannot say anything. It is a kind of pressure on independence. The only thing we can do is ask the president of the court, or the Minister of Justice whether we can respond. But that never happens. It seems to me that we have to improve, because it is a question of independence.

## Gerhard Reissner

When we dealt with the possible tasks of a Council for the Judiciary, this was one of the possible tasks. Should the council protect judges and respond to criticism? But it might better be a task for a judges' association.

## Sir Henry Carr

I am going to ask Justice Girardet to give his talk.

## Alain Girardet

I was asked to speak about the merits, the advantages of the High Council for the Judiciary, but it is not an easy task. Things move very quickly, and there is still a debate in France (but not only in France) about the power of the High Council for the Judiciary. Before talking about that, we have to answer the question of what constitutes the legitimacy of the judiciary. That is our first question, before examining the need for a High Council for the Judiciary. Another question is, where does the

authority of the judiciary come from? It will depend on our history, indeed, but not only on history. We each have our particular history, so that we do not have the same legal cultures in France and the UK, for example; but we still share many principles.

One of the recommendations of the Council of Europe was, that the judiciary should not be appointed by the legislature or the executive, but preferably by a Council for the Judiciary. Note the word “preferably”. The door is open for other possibilities and we have to find the best way to assure our aim. It will depend on our legal history, but we have to keep in mind that we share the same principle, and I refer to Article 6 of the European Convention on Human Rights. Article 6 is the key article for the organisation of the judiciary. We have this in common.

For some countries that have already set up a Council for the Judiciary, independence was the key issue. To state it in simple terms, if the judge is appointed and promoted by an independent body, and he or she is independent from the parties, is impartial and competent, he or she will have the legitimacy to judge. His decision, or her decision, will be legitimate. Independence is the key point.

In other countries, legitimacy comes from selection of judges; or from the election of the authority which is in charge of appointing them, an authority which is accountable to parliament. In any case, legitimacy stems from the guarantees of human rights; that is a broader purpose than creating or applying law.

In France, it is also the constitution which gives judicial authority its legitimacy, and it is reinforced by the confidence the public has in it. In many countries, the relationship between the judiciary, the legislature, and the executive has always been difficult. For many members of parliament, many members of the government, judicial independence is necessary. But it is a necessary evil.

Coming back to our subject, a Council for the Judiciary is set up to safeguard the independence of both the judicial system as a whole, and the independence of individual judges in particular. Traditionally, the Council for the Judiciary is, as in France, in charge of appointment, promotion, and discipline.

The High Council for the Judiciary, in France, has the power to appoint and promote, but not all the judges, only the highest ones. For example

the president of the District Court, the president of the Court of Appeal, the members of the Supreme Cour de Cassation.

I would like to show, that sometimes a very small reform can have interesting results, especially in terms of promoting judges and in clarifying the criteria under which they have been promoted. In France, the Ministry of Justice has the power to appoint and to promote many judicial posts at the lowest levels. How could this be improved? In the early eighties, the Judicial Department used to announce the promotions or appointments only by decree. A simple reform, consisted of publishing the names of all the candidates for each post, classified according to length of service in all the courts in France. The name of the chosen candidate was just underlined. The result of this change was that the candidates that had not been chosen, started to complain to the High Council for the Judiciary, and the High Council for the Judiciary started to discuss with the Minister of Justice and to request an explanation of the motivation. That was the start of a clarification of criteria, even for the lowest posts. Step by step, but rather quickly, the Justice Department followed the High Council’s advice, even for the posts for which no advice was foreseen. Something very small like that, brought about important changes in the administration of judges.

The second point is the composition of the Council for the Judiciary. Who watches the watchers? Its composition reflects its independence. It seems to me, that to make sure that the judges are independent, the Council for the Judiciary has to be really independent. The High Council for the Judiciary derives its authority from its composition. There has been a big debate in France, which still goes on, about the proportion of members who are judges. We try to combine both, and to make sure that there are judges at all levels, from the District Court, from the Court of Appeal. They are elected by their peers. In addition, to avoid the risk of cooperatism, we appoint some external people, academics and so on. At the moment, it is not exactly 50 – 50. 48 members are judges, from the Cour de Cassation etc. and 52 are external and appointed by the President of the Republic, by the President of the Senate, the President of the National Assembly, the President of the Conseil d’état. Some judges would like complete parity. You were referring, in your plan, to complete par-

ity, 50 – 50, and why not? It is a hotly debated in France.

We have to be very careful about the composition of the High Council for the Judiciary, and very careful about the procedure for appointment as a member of it. There is a risk. There is a risk of political influence, because some members are appointed by the President of the Republic, by the President of the Senate and the National Assembly. Now, since 2008 when a reform was passed, the choice of members of this authority has to be discussed in parliament. Two months ago, the President of the Republic or the President of the National Assembly proposed a member of the High Council for the Judiciary to parliament. Parliament said “no”. He had to withdraw his proposal and propose somebody else. This is new for us, but you see it is not discretionary, but a formal process.

On the other hand, there is another risk. I am not sure it is a good thing to let judges arrange their affairs purely amongst themselves. They need to open their discussions, maybe even to a member of parliament. The risk is that the judges in the High Council for the Judiciary cooperate to get a majority with the representatives of professional organisations, and that they alone decide. There are two risks, indeed. There is the risk of control by politicians and external bodies, and there is the risk of control by judges and their professional organisations. We have to be protected from these two risks.

Another point. Influence of the president of the District Court, what we call “internal influence”. Could the High Council for the Judiciary control this internal influence? Let’s me take as an example. The president of the District Court or the Court of Appeal has the power to move a judge from one chamber to another; but before doing so, he has to inform the representatives of the general assembly of judges of the court. Is it enough? We try to improve this procedure.

It seems to me, to conclude, that a High Council for the Judiciary is a good way to guarantee the independence of judges, as long as two conditions are fulfilled. First, it must have real power of selection, appointment and promotion. Second, its composition must reflect its own independence and authority. It seems to me, that external members should represent more than 40%, to avoid the risk of cooperatism. Its members should be

replaced every five, six, nine, no more than ten years, because experience shows that networking could damage its working independence. Thank you very much.

### **Sir Henry Carr**

One thing I thought might be interesting. Justice Girardet touched particularly on the question of appointment. If we focus for a little on that topic, perhaps you would like to express your views, in the context of the Boards of Appeal, as to how one should select the panel which the decides who should be appointed, whether the President should be presented with a list of names, as I understand currently happens. We would be very much interested to hear your view on that kind of issue.

### **Paolo Ammendola**

The present tradition is that a selection board, created internally to the Boards, selects a list. It has worked very well, in the sense that the President took the first name on the list in 99.9% of cases. There have been very few exceptions.

The first problem we see is that this procedure is purely customary. It is not reflected in any written text, not even secondary law. There is a single document, which explained the procedure to the Administrative Council in 2008. We feel that it is a problem that the outside world is unaware of the contribution we play, and it is an important contribution, in ensuring that the appointment of members is not an arbitrary choice under the President’s power of proposal. A first level of improvement for the perception of the Boards’ independence could be achieved by introducing this procedure in secondary law.

The second problem arises when we consider what would happen if this selection board, or something similar, produced a single name rather than a list. There is a problem, of course, because the President, according to the EPC is the one who proposes. So there would need to be some sort of acknowledgement, on the part of the President, of the selection board. Therefore, in our proposal, we consider how to create a selection board that could be recognised by the President, that has enough authority to provide a single name. There are several options. One is to foresee, in addition to the selection of the list, an extended version of the Presidium, with representatives of the President and possibly the Administrative Council. They could

justify the ranking, and give a reason for preferring a particular one.

We have also considered possible reasons for choosing a specific person. In international courts, we have some elements that are not present in national systems. Nationality, for instance. There may be an issue if there are candidates with identical qualifications but one nationality is under-represented. There may be a political interest in a more representative court. There could be an issue of gender, if there are equal candidates of different gender and one would like a balance. We are thinking of involving a body with representatives of the Administrative Council and the President, to consider such secondary elements.

The President can never be forced, he always has a veto. The EPC allows that, but it would be very difficult for a President to do it, especially if he himself has appointed people to take part in the procedure. This was our idea. We would like to know whether you see some rationale beyond that, whether you see this as going in the right direction, or whether you see a reason for rejecting the idea.

### **Gerhard Reissner**

This leads to a very general question, which is, what is this reform all about? It was quite clear, when the Convention was adopted, that the Boards of Appeal should be a court. It is constructed without possibility of further remedy, and so it is quite clear. I also see that the whole institution, and especially the Boards of Appeal, has a very good reputation, at least according to my information. So, as a general matter, there is no question regarding the qualification as a court...

It has been questioned in certain concrete cases, in the Lenzing case and other cases, which all had a clear outcome. It is manifest that the Boards are seen as a court. You now say you would like to improve this, but my first question is this: is it an issue for the outside world, or is it an internal conflict? If you want to change outside awareness, I wonder if it will be enough only to change internal rules. It may be an additional element, if some party goes to a European Court, you have better standing with improvements in this direction. But you will also have to promote it to the outside. An assertion of independence is not made simply by changing the rules. That is my first, very general remark.

Can this conflict between the administrative part

of the institution and the judicial part be compared to the traditional separation and balance of powers question in a whole national judiciary? Is it more like a conflict between courts? It is similar, of course. In every culture we have administration and judges, and these problems are quite similar. You have the problem of convincing somebody to change some secondary law, because a change to the treaty as such will not be possible. As we have heard, there is no political will in that direction. You have to convince, so to say, your legislature, the Administrative Council, to change the internal rules, the secondary legal framework. This may be easier if you do not invent new bodies, but use the existing bodies and extend their competence. The Presidium is already in the rules, so it makes sense to consider investing more competence in it.

You spoke about the selection board, which is not in the rules but is only a tradition. I do not know exactly how it is composed, but you may need some external experts to enrich the competence of such a board; and you might consider using the Presidium and enrich it with some external people for the selection of members. The external members might just give advice, or they might take part in the decision. This is a very good way of proceeding, as you proposed.

May I come to the general problem of Councils for the Judiciary? The International Association of Judges, in a study which dealt with these issues, had two findings which are the most important. One is, if a council is not composed in the right way, then it is even more dangerous than no council. It is very important that it be properly composed. If it is composed in the wrong way, it might not be a buffer between the interests, but might bring in influence from the wrong side. The other issue, of course, is its legitimacy, which comes not only from its composition; the most important point is how it works, and that needs transparency and reasoning. These are the key elements of a Council which can be accepted by the outside world on the one hand, and by the judges themselves on the other.

### **Sir Henry Carr**

Looking at it from the UK perspective and drawing an analogy with your situation, on appointment committees, there is a very strong concern to ensure that the executive has no influence whatsoever. The way it is done at the moment, is that

you have at least one High Court judge and two independent lay members, who have experience of recruitment. To have someone who is currently involved with the government would not be acceptable. I don't know if that sheds any light. It is just how we do it at the moment. Does anyone else have any comments on the sort of composition of the selection panel and what role, other than saying "Yes, that's fine," the President then has?

### **Dieter Brändle**

I have a question. Do you think it works, as it is handled now? My advice would be: if it ain't broke, don't fix it. But, of course, I can see that you have an interest in having things in writing.

### **Paolo Ammendola**

If I may clarify, the entire exercise started because of another proposal, one the President made to the Administrative Council, which foreshadowed a possible change in this procedure. It was not very clear, but we were confronted with a document in which the entire tradition was ignored. There was no mention at all of the selection board, but it rather created a new body, advising a new President of the court on how to select members. It was like a completely new era. That is why we thought, that we might at least clarify what has been in place for forty years.

### **Giacomo Oberto**

I was convinced it was only a question of image, or at least more of image than of substance; but now I see it is also a question of substance. I was convinced that it was only a question of image because I was astonished, reading the reasoning of the Lenzing case. The European Court of Human Rights normally writes extensive reasoning in its judgments. On this point, there were just three or four lines, which makes clear that the process is self-evidently fully compliant with principles of judicial independence. They took it for granted: of course it is compliant.

Now, I think that if the problem is not only one of image, but also one of protection against a possible change that could cause problems. I think that the proposal of setting up an enlarged Presidium, or whatever you want to call it, would be a good idea provided you manage to have the right proportions between the actors. So far as selection boards are concerned, I think that it is a good

idea to set down principles, codifying the procedure and the criteria, and the composition of the selection board. I don't know enough about the concrete situation, but an enlarged Presidium can be envisaged as the body which makes the selection, but if you prefer to have a technical panel, so to say, in charge of concrete selection, that would be possible too.

To give you the example of my country, and it is the same in many other countries of course, selection of judges is one of the tasks of the High Council for the Judiciary. But the actual selection is not made by the High Council, because otherwise they would be busy with selection twenty-four hours a day, 365 days a year. The solution is that the High Council for the Judiciary has an important say in the selection in that it appoints the members of a selection commission, which is mainly composed of judges, but also of university professors and lawyers, according to criteria laid down in the law. The law says that the selection of judges and prosecutors is done on the basis of competitive examination. This competitive examination is carried out by a commission in accordance with criteria laid down by the law. The choice of members of that commission is made by the Council for the Judiciary.

You could do something similar with an enlarged Presidium, on the basis of your Implementing Regulations. Of course the best solution, once again, would be to change the Convention, but if that is not possible, you should at least have a sort of by-law regulating the criteria, an independent body, and the procedure to be followed while selecting. You may choose between a list of candidates, ranked into first, second, third, from which the President can pick whoever he wants; but the best solution would be that the selection board brings results before the enlarged Presidium which chooses one candidate, which would, of course, reduce to zero the discretionary power of the President in making the final proposal to the Administrative Council.

### **Alain Girardet**

I just wanted to add something. Maybe we can take into account the new reforms of the European Court of Justice. There was some criticism of the manner of appointing members. Some of the members were appointed by the member states, and there used to be criticism of some states who

designated former ministers, or maybe personal friends of the President, or something like that. Four or five years ago, the chairman of the court decided to set up an advisory committee, made up by the high judiciary of the national countries, at the highest level, so it is very authoritative. This committee just gives advice. Some countries continue to appoint former ministers, and some of them are very good, but some were really not competent at all and did not have the profile one expects of a judge. The committee rejected them, and what happened? In every case, the candidate was withdrawn and another was chosen.

You know with very, very few, and small reforms, you can achieve very big changes indeed. Why do all the countries respect opinion of this committee, even if it is not compulsory? It is because of the personal authority of its members. If, as you mention, an enlarged Presidium is in charge of selecting the members of the Boards of Appeal, you should be sure to have someone with a very high profile, coming from outside, a high judge who has personal authority and who will chair. I am sure that can bring about an important change.

### **Bill Chandler**

Coming to those two points exactly, we have a situation as Justice Oberto outlined. We have selection boards which need to change their composition because of the different technical areas they are recruiting in, and we have the Presidium. The problem is, in our system, none of those people is external. They are all from within. There could be criticism, that that does not really meet modern standards. The original 2004 project foresaw that it would remain like that. But that was 2004. We thought that might need to be changed with this external influence. As Justice Girardet says, it may be possible to achieve an effect without that, but by simply increasing accountability, simply by publishing a list with the names, and things like that. The question really is, what might be the best way of going? Can we remain with internal people but increase accountability by some simple mechanism, or do we really need also to increase the actual external participation in some way. These are a limited number of options, but which would be the best? Obviously, keeping internal people only is the simplest one, because, as you say, we need only simple accountability measures. Would that be adequate?

### **Gerhard Reissner**

Of course, the best would be to have both. I can only agree that the model of the Luxembourg court works very well, and the Strasbourg court goes in the same direction when it rejects propositions. They also have a committee now, to check candidates. But you can also do much from the inside, by making things transparent, by publishing the candidates, and the qualities of the candidates, their cvs, on a website. Then everyone can have a picture and when you make a selection, everyone can see that it is in line with the material you provided. This is current practise in some countries. In Ukraine, I think, for certain positions, to deal with accusations that it was not objective. This is one possibility, but there is a great variety if two bodies are involved in appointments.

It was asked whether to use a ranked list or only one candidate. It is also possible to propose two versions, where the second could insist with a qualified majority, or the first might be obliged to provide another candidate. In all this, you have to keep in a minimum the situations in which you have vacant posts because there is no agreement between the two bodies. There is a great variety of options, which also could contribute to the objectivity of this process, but there is no general advice one can give on this issue, in my opinion.

### **Sir Henry Carr**

One option would be to keep your Presidium, which I understand is internal, and perhaps have a small panel of judges from Convention countries, well-known judges. One of them, for each recruitment exercise, would join the panel. That person would be totally unaware of any sort of office politics, and might give some transparency and extra confidence in the system. That is a possibility.

On the question of publishing the candidates, the issue I would have is this. If you have ten candidates and you select one, you have nine public failures. I would worry about the effect that would have on candidates. People might be more reluctant to apply.

I would like to cover promotion and assessment in this session, if I can, in a little more detail, as we have just had on appointments. I will give my short talk, and then we will come onto those topics.

I was thinking, when I came over on the plane, if

I were attending this conference, what I would like to hear somebody speak about, and judging by the wonderful lectures I have sometimes attended at universities, normally you start with the academic theory, in this case of judicial independence, and then move on to some of the history, and then pick up the main themes that people have been speaking about. That normally takes about 55 minutes. I intend to do that, but as I have only ten minutes, I will just speak very, very fast.

To begin with the academic theory of judicial independence, perhaps the most interesting aspects that I have found is in the publication "Judges on Trial". The authors put forward] a cyclical theory of judicial independence, which is that it starts in the national system, and then it moves to international law, and then the cycle returns and international law affects the national system. One can see that certainly in the United Kingdom where, as I will tell you in a moment, our theories of judicial independence began hundreds of years ago. Then you can see that, in various ways it has spread to international law, moving to Montesquieu's theory of separation of powers in France, through to the American Declaration of Independence, and eventually to Article 6 of the European Convention on Human Rights. Now Article 6 has very much affected aspects of judicial independence in the UK, and so it has come full circle. I think that is what we are trying to do in this conference, to look at how, with international organisations such as the EPO, national theories should influence your approach. Maybe take the best from each system, and then it may in turn affect national systems. So that is the theory.

Then on to the history. This, perhaps, is an indulgence on my part, but I enjoy British history so I thought I would tell you just a little about how judicial independence developed in the UK, which really starts with Charles I in the 1630s and 1640s, who, as you all know, decided to dissolve parliament, and he needed lickspittle judges on his side to legitimise this process. In 1642, he raised the salaries of High Court judges from £200 to £1000, which worked very well. Now, no one has offered to do that to me, so I have not faced the temptation. However, he did lose his head, so ultimately it was not a success.

We then come to Charles II, who is a quite interesting case. His henchman was the Earl of Clarendon. The Earl of Clarendon decided that there was

a very inconvenient aspect of English law called habeas corpus, which essentially means that if you are accused of a criminal offence, you will be brought before a court and you will have the right to defend yourself. Very inconvenient. So the Earl of Clarendon decided that he would move all of Cromwell's more prominent men to be tried in remote parts of Great Britain at the time, where the writ of habeas corpus did not run. So they would not get a trial. In a very interesting book called "The Rule of Law", Lord Bingham has pointed out that what the Earl of Clarendon did to avoid the writ of habeas corpus was exactly emulated by the United States of America in Guantanamo Bay. The reason why they set up Guantanamo Bay was to avoid the writ of habeas corpus, so, you know what we learn from history.

And the final historic example I would mention is that when James II was finally expelled and William of Orange became king, England said, "We do not just want to let him in. We want something called the Act of Settlement, which will guarantee, as a matter of law, that certain things will happen, and certain things won't happen." One of the things that had to happen was that a High Court judge cannot be removed without an Act of the House of Parliament which is ratified by the House of Lords. That is provided for in Section 3 of the Act of Succession 1701. That still exists. When you ask about my tenure, it is pretty good. It is very difficult to get rid of me.

With that introduction, I just wanted to touch on some of the themes we have discussed in this conference so far. So, how do you know, in the selection process, who is going to be any good? Now, you don't. But, certainly, I can tell you about my interview to become a High Court judge, which was an extremely painful process that took place in, I think, February last year, so about a year ago. What is now done is that the candidates, who are selected for interview (itself an enormously elaborate process) come to the relevant place, and are given, effectively an exam paper. You are put in a room. Your mobile phone is taken away, to ensure you cannot cheat, which is rather worrying if you are applying to become a High Court judge. You open the paper, and, then, forty minutes later, you go before the panel of senior judges and retired civil servants. And you deliver a judgment, orally. You talk for about twenty minutes, and then they ask you questions about it. It is not a bad way

of seeing how somebody is going to be as a judge. The concern in my case was that, although they really wanted an intellectual property judge, the post was as a chancery judge, which has many areas of law. My great fear was that my question would not be about intellectual property but about something completely different. Of course, when I opened the paper, it was about charity, about which I know absolutely nothing. But we know, as judges, if we are put under a lot of pressure, we can do it. You can!

Just picking up a question that was asked earlier, what if you are a panel of three. How do you know how good anyone is going to be or anyone has been. Well, one thing that we did with the Copyright Tribunal where there are two lay members and a lawyer: when we were selecting the lay members, we gave them a case that had already been decided, as a scenario, and we would have them in two at a time and they would discuss the case with the chairman, and we could see how the discussion progressed; how much they had absorbed; and very often how cooperative they were. And some were quite aggressive, because they felt it was a competitive situation. That was a bad thing to do. But you do get the idea, when you see somebody in that kind of role-play, of how good they are going to be.

Just a couple of other points, I think, on tenure. We stay until we are 70, we High Court judges. We do not have six years. I think that short tenure is quite alarming if you are the kind of judge who makes decisions which the executive does not like. And there are a lot of judges who make decisions the executive does not like. The idea of having to be re-appointed, effectively, five years later, I think is a bad one. On the other hand, our wonderful judge, Lord Denning, whom I am sure many of you have heard of, went on a bit too long. He was there until his mid-eighties. He was in the Court of Appeal for thirty-two years. A record. It was too long, just in the last few years. It is sad, if you read the last volume of his memoirs. He said, "I should have gone earlier." I think we do need, and you need, tenure, but an age limit.

Finally, on the question of discipline and appraisal, it is extremely difficult. We don't have it, High Court judges are not appraised. We get informal feedback, nothing very much. Perhaps we should have groups of judges going around rather like inspectors and watching other judges.

At first, you don't like the idea of that, but then you think, "Well teachers have that, why shouldn't we?" There should be some form of letting judges know, not necessarily in an adversarial way, "You could do this a bit better; and you could do a bit less of that, I think it would be helpful."

And the final thing I would say, is that legal systems work because, generally, the custom and practice that has worked very, very well, is respected. The only time you need to re-think it, is if the custom and practice is not being respected. Maybe you are at that time, where you need some kind of regulation to ensure that that custom and practice becomes enshrined so it cannot be abused.

That is really what I wished to say. Thank you.

Let's talk a little bit about the aspect of promotion, and I know that once you are in the Boards of Appeal, there is not much higher you can go. However, I understand there may be some grading system that you might wish to talk about.

### **Bill Chandler**

The problem is, we have no real promotion prospects. We have two grades, effectively: member and chairman. Two functions which are fairly self-explanatory. Presiding judge and judge, and, of course a third level which would be the Vice President, the head of the court. There is only one of them.

The other factor of relevance here is the age-profile of members. They are generally over 45, and coming into consideration for chairman normally around 55, say. So, traditionally, we have just had these two roles, and there is no promotion within them. All there is, is an increase in seniority, which are called "steps". But the problem is that the Office has now a new career system, which, in the interests of making things easier to apply to the whole Office, may be applied to us. And the way the things map together, they don't really join up very well. It means there would be a promotion within a function. So there would be a promotion within the member function and a promotion within a chairman function. A question we would like to ask: does it make any sense to have promotions within a particular grade, and particularly for us, at the higher end of the age group. We are not talking about judges who come straight from university, stuff like that, who have a big career. We are talking about a relatively limited career. So, the question is, does promotion within

the grades make sense, and, just generally, how should promotions take place, whatever they are? At the moment we have a situation where the promotion to chairman is done by a group, a bit like appointment within the Boards. A selection board, if you like, consider the candidates and then decide and so we have a similar situation to appointment as a member for appointment as a chairman. Should there be any change there, or how is that in your country, and things like that? This is a relatively simple topic, but we would like hear particularly about this prospect of being promoted within a certain grade. I mean, one of the things we've seen could be a problem, if you turn up in a court and you know you've got the junior type member, as opposed to the senior one, it doesn't look too good, why haven't I got the good judge, you could argue. How does that work in your country, and how do you see that working with us?

### **Gerhard Reissner**

If you have no reason to get completely new tasks which have additional requirements, why should you be promoted? It is a point in your career where there is an extra influence from outside, whoever it is who decides on promotion. Why put judges in this situation?

Coming to my country, it is almost 20 years now since we successfully deleted all these possibilities. In the first instance we had the first ranking judge and the second and so on. It was very difficult. As you know, in Austria, we are very proud of such titles, the normal judge and the superior judge, like in the military. It was all abolished and now we have first instance and second instance and third instance, where, of course, you need a promotion. And at the Supreme Court, we also have the Presidents of the Chambers as a separate rank. All the other ranks were successfully deleted. All we have is seniority. Every four years we go to the next level of remuneration.

### **Giacomo Oberto**

We owe to France not only Montesquieu, but also Lefèvre d'Ormesson. He is less known, but he was president at the court judging Fouquet, the minister of Louis XIV. He was under pressure from the king to condemn Fouquet. One day, he said, "The courts give judgment, not services."

Unfortunately, we owe to France Napoleon too. This third Frenchman has, unfortunately, a

stronger influence than Montesquieu on the modern judiciary. In our part of the continent, the judiciary is organised in a Napoleonic way, which is to say, like an army. Unfortunately, many of my colleagues in Italy still think this. Supreme court judges are the generals, Appeal Court judges are the officers, and the other judges are the troops, the GIs. Many of us still have this mentality. Promotion, strictly linked to hierarchy.

I would like to read what the Venice commission of the Council of Europe says about hierarchy. It says, the issue of internal independence within the judiciary has received less attention within international contexts than the issue of external independence. It seems, however, no less important. In several constitutions, it is stated that judges are subject only to the law. In Italy, for instance, that is the case. This principle protects judges, first of all against external influence. It is, however, also applicable within the judiciary. A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court president or to higher instances in their official decision-making activity, would be a clear violation of this principle. So I think that the less hierarchy we have within the judiciary, the better for judicial independence.

Coming to the system in Italy, I have already said that, in the 1970s, it was changed so that we had a full separation between function and seniority. As far as promotion to a different jurisdiction or to a superior court is concerned, of course the final say is in the hands of the Council of the Judiciary. We have a complex procedure. We like cumbersome procedures. Starting from an evaluation by the president of the court, and then passing through the local Council constituted in each Court of Appeal district, and up to the Council for the Judiciary where there is a special commission, and where the final decision is taken in the plenary assembly.

What has happened in recent times, just for your information, is that the Italian Council for the Judiciary is practically paralysed. It suffers from a bulimic willingness to deal with every single aspect, concerning each and every judge and prosecutor, from cradle to grave. It is impossible, of course. What is the result? The result is, that it takes months and months to appoint the head in any jurisdiction in Italy. In Turin, we have been without a President of the Court of Appeal for

more than one year, and without a President of the first instance court for one year. You understand that this is no longer an acceptable system.

Maybe we can learn from the experience of some countries in Europe in which the president of the court is elected by the judges. I, as a judge of the Turin Court, am fit to sentence a person to life imprisonment. I am fit to sentence enterprises to pay millions of Euros. But I am not competent to contribute to the decision of who is the best person to be my president. You may imagine my response.

### **Klaus Bacher**

In Germany, there is a saying, which I think goes back to Bismarck, and which every Minister of Justice keeps in mind: "I don't have any problem with independent judges, as long as I have the power to promote them."

In Germany, salary follows function. A presiding judge has a higher salary than a normal judge, and a judge at the Court of Appeal has a higher salary than a first-instance judge, but judges with the same function always have the same salary. There are no further career steps or anything like that. There are some steps which depends on age, or on time served, but not more than that. I think it would be catastrophic to introduce such elements into your system. It might be a difficult to decide who should be promoted to chairman of a Board of Appeal, but you would double and triple your problems if you had steps within those functions. Don't do it.

### **Sir Henry Carr**

I just want to make a very quick start on the question of appraisal. It has been touched on already. My understanding is that you do not have appraisal in the Boards of Appeal. Can you explain, so we know the situation.

### **Paolo Ammendola**

It is true that we are excluded from regular appraisal. Of course, there is an appraisal when you are appointed as chairman of a Board. We also have the Enlarged Board, but appointment to the Enlarged Board is not associated with a change in salary. That is for historical reasons. Initially, the amount of work involved in being a member of the Enlarged Board was unknown. There were

some years with very few cases, when there was really no additional work to be done. Things have changed, however, with the reform of the EPC in the year 2000. We have an additional procedure which allows for review of decisions in cases of substantial procedural violations. This has generated a certain amount of work for the Enlarged Board which was not there in the past. Nevertheless, the status quo is that when you are appointed as chairman of a technical board, you are automatically also appointed to the Enlarged Board, and some senior legal members are also appointed as members of the Enlarged Board, but this is not linked to any salary increase. It is simply an additional function that is given. There is appraisal only when you apply to be appointed as chairman of a Technical Board, or, for legal members appointed to the Enlarged Board.

### **Sir Henry Carr**

I don't know whether any of the panel have an opinion on whether there ought to be appraisal in the Boards of Appeal. I think they are doing a pretty good job.

### **Gerhard Reissner**

I only wanted to remind you of the Opinion No. 17, which we gave in the Consultative Council, on the evaluation of judges. There was a big debate at first, because it did not seem to be of interest to all the members. Several said, "We don't have it and we don't need it." Then we discovered that some kind of evaluation exists everywhere. It is not called evaluation but it is the same thing, some feedback on performance. We then distinguished formal and informal evaluation, and so on.

When we questioned in which countries, which kind, formal or informal, exists one possibility which was mentioned was that it was other judges who gave feedback. When choosing how to evaluate judges, it emerged that to a great part it depends on how judges are selected at the very beginning. If you choose experienced judges in a certain field, it is not so necessary to have a formal assessment. The Swiss argued that there is no need for any interim evaluation. They had limited tenure and, if there was really something wrong, they would not be re-elected. This could be applied to all those jurisdictions in which you have such a limited period. Why should you have evaluation?

That you need some kind of evaluation, when it comes to promotion to a different position, for instance as you just mentioned for members of the Enlarged Board, is another point. Here also, the question arises: does it make sense to refer to a regular evaluation which was done years before? Does it not make more sense to look at recent performance?

### **Alain Girardet**

I can just give the example of France. There is an appraisal, and if there is appraisal, it seems to me better to organise it formally, because otherwise you have informal appraisal without any control.

In France, each member of the court, as far as I can remember, is appraised every two years. The presiding judge of the chamber gives his or her assessment of the judge to the President of the District Court, for example. The President of the District Court holds an interview with the judge. That is compulsory. After the interview, the President writes an evaluation of the judge and he gives some kind of mark. There are very precise guidelines, about social competence, legal competence, and so on. There are many, many aspects such as quality of writing. There are many, many criteria which were discussed with the professional organisation. After that, the judge receives the appraisal for signature, but he has the right to appeal before the Chairman of the Court of Appeal. It is very important, this appraisal. It could be improved, I am sure. But it seems to me the best way to introduce some kind of dialogue between the presiding judge and the judge, and between the President of the Court and the judge, and maybe also to ask the judge what he would change, what he wants to do next year and so on. It is a very important thing. Experience shows, that in perhaps 10% of cases, the judge asks the President of the Court of Appeal to amend the appraisal and very often, he does.

### **Gerhard Reissner**

Firstly, if you have a formal appraisal, then there is a great variety of ways to do it. There are very sophisticated ones and very general ones. Normally, the general ones are better than the sophisticated ones, because, while sophisticated ones look more objective because of the number of figures and so on, in fact they are not, because the single

figures are not very objective. And if you summarise them, they do not get better and more reliable. That is one point.

The other point is this. In my country at the moment, we have reliable to a large extent reduced regular evaluation. You are evaluated once, in the second year after you get a new position. We are again debating amending that, and substituting it by an interview or more of an exchange instead of this formal evaluation. The interview would not be reflected in a formal protocol or be visible to the outside world. It should be a real exchange of views with the President. It would also open, perhaps, the opportunity of criticising the President and the administration of the court. It is still not in place, but it is one of our considerations. There could be the danger of its being misused to apply undue pressure. We are very much of the view that nothing should be kept on file except that there was such an exchange, but not the content of it.

### **Dieter Brändle**

In 2013, there was a conference in Sankt Gallen, Switzerland. The topic was performance appraisal of the judiciary and judicial independence. Judges from 28 countries filled in a huge questionnaire, and told, in detail, how appraisals were carried out in their countries. The book that was made out of this, a very nice book, has about 350 pages. I did not read all of them, but I went through it, and what you can tell is that anything goes. You have no assessment in Switzerland and in Norway, and extremely detailed systems elsewhere. Nobody is happy with what they have, and nobody is convinced they have found the right solution. But the idea I got from it is that the general tendency is to say "Keep it simple".

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## Session 3

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### **Sir Henry Carr**

I think we should continue discussing the issue of appraisal for a little bit. I just wanted to tell you, in the Chancery Division of the High Court, the head of the Division calls the Chairman of the relevant bar association. For example, when I was chairman of the Intellectual Property Bar, he told me he wanted to do an informal appraisal on each of the IP judges, and asked for feedback from the barristers generally, constructive criticism, and suggestions for improvement, if any. I am told that does

not have any consequences, it is solely for self-improvement.

I mention that, because it is worth bearing in mind if one is considering introducing appraisals for the Boards of Appeal. The decisions of the Boards of Appeal are already very highly regarded around Europe. To echo “if it ain’t broke, don’t fix it”, if you do introduce appraisal, it is important to think what the consequences are, why you are doing it?

## Question

There is a lot of talk about management methods, and suggestions that we should do things as in private companies. In private companies, appraisal is often done in a 360° way, meaning that managers assess employees, but also employees assess managers. I experienced this, working in a law firm. It was a huge exercise, because you need the involvement of external people, to keep things confidential, in one direction, at least. I want to ask whether this has been considered at all in judicial systems.

## Gerhard Reissner

That goes a bit in the direction I mentioned, of dialogue between judges and Presidents. As to involving outside people in this exercise, more than perhaps as moderators so as to avoid conflict, I would not recommend this. You never know how things are done and used. It is very important, as was mentioned just now, that you know what you want to do with the appraisal. If you have an appraisal, but nothing comes out, that may be counterproductive. It may look as though you have something to hide. You really have to consider that.

What should be avoided, in any case, and all the documents agree on this, including the Committee of Ministers' Recommendations 2010/12, is to connect financial consequences to the outcome of the appraisal. That is done in Sweden and Spain. In Sweden, there is a yearly conversation between the President and the judge, and the President has a small part of the remuneration of the judges at his disposal. He can give all, or part, or none of it. The Swedish colleagues said it was not used too much, but it is there and it could be misused. All the documents recommend avoiding this situation.

## Dieter Brändle

When you want to check the quality of something, you usually ask the user, not the colleagues of the one providing whatever it is. If you go to a conference where the speakers are evaluated, the questionnaire goes to the audience, not to the panelists. It might make sense not to ask colleagues, if you want to know about the quality of judges.

What we are going to do in Switzerland (I think it will be next year or the year after) at the federal level, is send out a questionnaire to the members of the Bar Associations, and the patent attorneys.

What we expect is detailed feedback, but it will be about the quality of the courts, not of individual judges. What is important for the public is that the courts work.

That is something which could be used in your case too. You have a clearly defined set of clients, they are often in court, and they know what to expect. They lose a few and win a few, so that should not influence their comments.

## Question

I was interested in what we heard about the French system of assessment, but what we did not hear was how the assessment is used, what it is used for.

## Alain Girardet

In the French system, the appraisal is not open to external view. It is only the Chairman of the court, who makes the appraisal under control of the First Chairman of the Court of Appeal. We first have a kind of interview between the judge and the Chairman of the Court. To prepare for that, the Chairman of the Court asks the Presiding Judge to give his or her opinion about the judge in question. It is very formally organised, you know. There are very precise guidelines with very well identified criteria, and on each point there is a precise appraisal. If, and this does not happen very often but in more than 10% of cases, the judge does not agree with the appraisal, he can refer it to the Chairman of the Court of Appeal.

The second question is what is the use of appraisal? It is put into the judge's personal file. Then, if the judge asks for a promotion, it will be taken into account. When I was a candidate for the Supreme Court, I was invited by the High Council for the Judiciary, more than forty members. There was a discussion about what I thought, what my career had been, what I do, but they had my appraisals and by some of their questions, I understood very well what they knew. So, the appraisal will be used if you are a candidate to be promoted. It is the most important thing. Maybe it is too formal and there may be too much of one judge knowing another judge, but we are not ready to open that up to external people. We are not ready to accept it, but it is a problem of the historical relationship between members of the legal profession and judges.

### **Gerhard Reissner**

Starting with external information about the results of appraisals, I want to make a big warning. It was introduced in Albania. It is a problem, if you as a party are confronted by a judge who is not in the top rank but somewhere in the middle or even at the bottom of a ranking list. Parties of a case will ask, "Why do I get this poor judge, and not the best?" It would not contribute to confidence in the judiciary. I would not do that.

What I am very much in favour of, or could imagine at least, is the proposal of asking the people who are in contact with your court. Not regarding individual judges, but regarding systemic things and on the work of the courts as such. That is really a thing you could promote and show that you are interested in improving the system, that you are in charge of your own quality. Justice Oberto already mentioned CEPEJ, and they made a very good handbook on how to conduct such surveys. I do not know if you can apply it directly to a court like yours, but you will find ideas on what to consider, and what to avoid.

### **Question**

I wondered whether another distinction should be made. On the one hand, there are small instances like the Boards of Appeal, which has around 150 judges, all on the same site and where everyone knows everyone else, and where it would be quite easy for the selection committee to ask around and get a fair idea of the performance and quality of any candidate. Then you have national systems like, say, in France, where you have many more judges, spread all over the country, who might move from one city to another, and who will have to be assessed by people who do not know them. In that case, if you want as objective an assessment as possible, you might indeed need a formal, written assessment. Should a distinction like that not be made?

### **Gerhard Reissner**

I totally agree, and not only for this question, but for many of the topics we have covered. There is a difference between the situation involving the balance of powers with the judiciary of a country, and your situation. You can adapt it to your situation, however. You suggested, it would be easier to collect information about a candidate, and I agree with that, but you have to make it transparent. To

avoid gossip, you have to make it clear and transparent.

### **Alain Girardet**

There is a criticism about appraisals, whether their quality is really good or not. I remember I discussed this with an academic who had studied the evaluation of judges. He told me, that what is put forward is the average profile. You have to conform to an average profile. The most bright, the most original, are not well evaluated, and that is a problem. We need a kind of evaluation that opens the door, and to agree that one can be a good judge even if not exactly in the middle of the profile. We need that. Otherwise, the danger is to stand in the middle of the bridge and to stay in the middle of the bridge.

### **Sir Henry Carr**

I agree that there is a difference between a system that operates throughout a country and a small group, but, in a sense, we are all in small groups. In the UK, the Chancery Division of High Court has only 18 judges. There are only three patent judges. It is all very small. I personally like a system where I will get some feedback on how to improve, but which has no implications for my future career.

### **Question**

If I am not mistaken, each of you has drawn a distinction between formal appraisal, and informal interviews. None of you has supported the idea that appraisal should be used for anything other than promotion. Applying this to the Boards of Appeal, I have some difficulty in finding any use of appraisal other than for promotion, if one does not want to link it to either re-appointment or salary. Both of those were explicitly rejected by all of you. Are there any other legitimate aims?

### **Sir Henry Carr**

The most obvious answer is to improve your own, personal performance. As simple as that. Not promotion, but just getting better at the job.

### **Gerhard Reissner**

That is one of the main arguments, which are used for appraisal. The other one is that you yourself have a right to know where you stand.

### **Alain Girardet**

Even people I know in my court, who very close to retirement, are subject to an appraisal. It is an opportunity for them to find out what the others think about their work, and sometimes, after the interview, they want to discuss with the Chairman of the Court. Especially so in a big court like the Court of Appeal in Paris with more than 156 members, it is like a big factory. People like this chance to speak about their job, to speak about their future, to criticise the Chairman of the Court, as sometimes happens.

### **Giacomo Oberto**

We should make a distinction between appraisals within the framework of a promotion procedure, and appraisals which are made regularly, every six years. I spoke this morning about the situation in Italy. Until 2006, we had no appraisal independently of a promotion procedure. Theoretically speaking, a judge could remain without appraisal during the whole career, if he or she did not apply for a higher position. There was no stimulus for applying for a higher position, and that is still the case, for the reasons I explained: your salary does not depend on the function you perform. A higher salary is not a reason to go to the Court of Appeal or the Court of Cassation.

It was said this morning that a supreme court should be, and I think we all agree on this, representative of the whole country. In Italy, it is the other way around. The Supreme Court of Cassation is made up of Romans and Neapolitans. That is for the simple reason that I can get the same salary as a supreme court judge, while working in my city. I do not need to travel to Rome with all the expense you may imagine in the capital. There is no increase in salary if you go to Rome instead of staying in Turin or Milan. There is no incentive other than the idea of being part of the supreme court. I would not advise an Italian judge to go to the Court of Cassation, where there is an increase of 100000 cases each year. That is something frightening, even for a Supreme Court of Cassation which is currently composed of more than 300 judges.

In the times of the Berlusconi government, he said that judges were mentally disturbed people and asked how it could be possible that they stay in office for thirty or forty years without a single appraisal? So the system of regular appraisal was

introduced. We are not against this, but we have to keep in mind that the process of the appraisal you undergo when you seek promotion is done in order to compare you with other people, colleagues who are applying for the same post. On the other hand, regular appraisals are to see if you are fit and skilled enough to continue to be in the position you are in.

Actually, in the Italian system of regular appraisal, your assessment is not just positive or negative. As we Italians are more Byzantine than the Byzantines, the outcome can be “positive”, “negative”, or “not positive”. It is very difficult to understand the difference between “not positive” and “negative”, but there it is, in the law, and it has real consequences. If the result is negative, you are out of the judiciary. If it is not positive, you are allowed a second chance and, after two years, you undergo the same procedure again. If it is positive, you are reprieved. What is the result of this huge use of time and money, and, of course, energy? The result is, as far as I know that one or two judges have been removed from the judiciary, and very, very few cases were “not positive”. On the other hand, we even have had some cases of charges brought by judges against the members of the local Council who dared to assess them as “not positive”. I do not know how they ended, but they thought it was a criminal offence to assess them as “not positive”. Some colleagues call this “squeezing water”. It takes a lot of work trying to achieve something which is not possible.

This machine is working, working, working, and what are the results? Putting to one side these curious aspects, there is a positive result. If you know you will be evaluated every four years, maybe it helps you be a better judge. Your attitude is different if you know you will be appraised every four years than that of a person who knows he will never be assessed, never be appraised by anybody.

### **Gerhard Reissner**

It is not only in Italy that there are almost no negative grades. Even if there are more levels, five or six, 90% of all the judges everywhere are in the highest grade and the rest are in the second best, or something like that. Very few fall out. Having this in mind, of course, there is the argument that, as this becomes known, which of course it does, it is not good for the reputation of the judiciary. Then,

it does not make much sense to introduce such a system. It may be that it helps judges to be better than before, but it can also have this negative consequence.

### **Sir Henry Carr**

I thought the Berlusconi example was very interesting. That shows why you have to be very cautious about introducing appraisals. It sounds as if the purpose was to interfere with judicial independence.

### **Question**

If the purpose is to give feedback to the judge and an incentive to become better, my question is, whether that is not the natural task of the chairman? Are not regular personal discussions more useful?

If the president of a court goes regularly to its panels, he gets an impression of how they work and can give them the feedback. That is also something that is informal but which can be more illuminating than something written, which may later be contested, and which could even result in legal proceedings. In Germany, judges quite often go to court to contest their appraisals.

Another purpose is promotion. A good rapporteur is not necessarily a good chairman. A person who produces a high quantity of high quality reasonings is not necessarily a person who will effectively run oral proceedings. That requires quite a different personality than is required of a rapporteur. I would find it much more useful to have an ad hoc report on all candidates who apply for a certain post, paying particular attention to personal qualities.

The last purpose, which is peculiar to the Boards of Appeal, is the re-appointment procedure. I think a requirement of re-appointment combined with regular appraisal or reporting, may be misused for imposing targets on people and creating the wrong criteria for re-appointment.

### **Bill Chandler**

I am going to suggest, the re-appointment aspect is our next topic, and I think that is particularly important. Whether the appraisal can be misused in respect of re-appointment, and the other safeguards on re-appointment, so perhaps we could explore the re-appointment question, because I

think that is one that really troubles most of the members. As we know, Article 11(3) says “They may be re-appointed by the Administrative Council” after the five years. *May* be re-appointed, that is really all we’ve got in terms of regulations. The rest is customary. So we’ve got this customary re-appointment. Again, we’ve got a procedure set out in a CA document, but it’s not in any secondary legislation, and the question that worries us is that if you have an appraisal, and even if you don’t, how can we safeguard this customary re-appointment except for serious reasons which is what the custom is. And, again, if there’s going to be a reform, and the custom is effectively reset and not codified in any further way, any new way, there’s a risk there we see for the re-appointment, obviously mentioned earlier, it’s only five years, which is not very long, but there’s just this “may be re-appointed”, it’s rather weak. So the question is what would the standard be? We have a standard, presumably a low standard, for discipline. We have a certain level, below a certain level, you may have a disciplinary measure. The question is, what’s the territory between this disciplinary level and the non-re-appointment level, if there is any, and how should it be handled and safeguarded and how does the danger of appraisal play a role there? That’s sort of complex.

### **Gerhard Reissner**

I see this danger, of course, and I see this special situation of a short period of tenure. How to overcome that, I don’t know. I could envisage that you can define criteria which judges normally fulfil. They might be negative criteria, perhaps, whether the judge did something he should not, like putting false documents in the file, though I cannot imagine such things. The criteria would need to be very clear. This may solve the problem. The best, of course, would be to change “may” to “must”.

Regarding informal assessment, all these possibilities exist, and I would favour the line I mentioned before, the plan for Austria.

That the chair of a panel gives feedback is self-evident in the normal day to day work. There, it is not a question of dependence or independence within the panel. You have to find a common line and, therefore, you debate, and you regularly argue. Within the panel, this feedback is automatic.

### **Giacomo Oberto**

I was thinking about Article 11(3): "... members ... shall be appointed by the Administrative Council on a proposal from the President of the European Patent Office. They may be re-appointed by the Administrative Council after the President of the European Patent Office has been consulted." Could we envisage a sort of regulation providing that re-appointment is automatic, except in the case that some particular requirements are not met? Of course, the rules according to which re-appointment should not be the same as those for which a member of the Boards of Appeal could be removed for unfitness. That rule should be a disciplinary rule provided for in the law.

I think all the international documents tend, as far as disciplinary matters are concerned, to recommend the adoption of systems in which there are clear situations in which a judge can be subject to disciplinary action. Cases for disciplinary actions should be singled out by the law. The more accurately they are singled out by the law, the higher the level of independence, and the lower the level of risk to independence. We can have a system in which we have a clear list of possible disciplinary cases, and of sanctions connected to disciplinary violations. This is one thing.

Another, completely different subject is, whether a judge is skilled enough to pass from one term of appointment to another. Here, I think that by-laws should draw the line between these two completely different situations. I see nothing against the possibility of providing in the regulations that re-appointment is the rule, and that, in particular circumstances and with certain procedures, the re-appointment might not be granted.

### **Paolo Ammendola**

May I add, that even for disciplinary issues, we have no clear law in the EPC. We have a procedural guarantee. It says that no member can be removed unless there is a decision to that effect by the Enlarged Board. The question we were considering was whether any sanction always requires involvement of a judicial body such as the Enlarged Board, or could there be some other kind of body with the Boards in the majority or in the minority?

These were the options. Are there any considerations which should lead us to prefer one option rather than another? Of course, the more we are

in judicial hands, the more independence is guaranteed, but in view of accountability, and the fact that we should not appear to autarchic, another alternative might be suggested.

### **Sir Henry Carr**

I think the situation that you have raised is a very serious one, in that, potentially, you might face the situation where different bits of different systems are collected together. For example, as I understand it, in Germany and in France you have very formal systems of appraisal, and that could be used to try and justify very formal systems of appraisal for you. In other countries, you may have only five years' tenure. And the whole is put together on the basis of, well, it must be all right because this country does this, and this other country does that. You end up with a system that opens the possibility for real intimidation. If you have only got five years and have not got a job at the end of it, and you can be removed as the result of some form of not-entirely-clear appraisal, then it is a very, very dangerous threat to independence. I think what this conference needs to bring out is that there need to be clear criteria for not renewing an appointment, which are looked at by some form of judicial, external body if it happens.

### **Question**

I just want to step back to appraisals as such, and put it into the context of the EPO. We met management in the form of a "task force", and after all our papers, all of our discussions, they still say that the Administrative Council has decided to have a performance-based system. Now, our argument has been that we have three members in a Board, and it is very hard to appraise an individual, and that it is not suitable for judges, and a different approach should be used, so we entirely agree with all the comments you have made. Their response is "You can actually appraise someone to see whether they can become a chairman, there are criteria for that. What we want you to do is appraise them more often." That is because we have a system in which we don't have a single salary for a member and a single salary for a chairman. We have a system in which you go up step by step. Previously, it has been based on seniority. The Office has changed it. Now it is performance-based. They say it is possible in Germany. The presiding judge can evaluate his members. It is possible in

France. It is possible in many countries. So, what would your answer be?

Since we are in this situation, and they want us to have this performance-based system, would you say our answer should be “no, we will not have it”? Even very recently, the Administrative Council has confirmed that is what they want. That is the uphill struggle we have.

What would you say? How would you defend our position given that appraisal is in fact possible?

### **Klaus Bacher**

I think it was said before, it is not the question whether you have appraisal. The question is, what are the objects of appraisal? Take Germany. Yes, in the lower instances, we do have appraisal, but we don't have different salaries within one function, so we never have any appraisal for that goal. We only assess people for promotion, and to get feedback. If you have to wait ten or fifteen years to be ready for promotion, and if you learn after ten years that you are not qualified, it may be too late. It is better to hear it after two years, so that you have the opportunity to improve. That is what I meant, this morning. It is not the single issues that are dangerous, it is the combination. You have to have a balance.

I totally agree with Sir Henry. In Germany, if you have bad grades in your appraisal, well, your career might be stopped, but you don't have to fear losing your job. If you have a five-year tenure and you have appraisal and you add on top of that different salary steps depending on appraisal, it is a totally different situation. That it takes place in Germany is then not a valid argument. It is a totally different background and, therefore, a totally different situation.

### **Question**

I think this discussion has brought out the interesting position that the Boards are in. We are a specialist tribunal, which is difficult enough, and we are in an international organisation, which is even worse. It is as though we have fallen out of the ugly-tree and hit every branch on the way down. What this actually means is that we are in a sort of vacuum, which is why management try this pick-and-mix from different countries. You are all national judges, and your national judicial cultures surround you and protects you, whereas,

we are floating somewhere. Do you think there is anything that can be done, specifically, to deal with this very weird situation that an international specialist tribunal has? You can think of other international tribunals, the International Court, the European Court of Justice etc., but they are more like general courts, and in some way they are surrounded by a greater framework or they are at the very top and there is no one looking down on top of them. Our position is rather intermediate between that and the national tribunals.

### **Sir Henry Carr**

There is no solution that can be offered. However, my personal suggestion would be to do what you are doing, but more so. In other words, if you publicise what is happening at this conference and you get more and more judges around Europe interested, and you get more and more stakeholders interested, it becomes harder to impose a regime that you don't want. Everybody reacts against it. So I would do more of this kind of thing.

### **Question**

The point was made about introducing secondary legislation, to formalise certain aspects like re-appointments. What is the appropriate body to draft such secondary legislation. Courts tends to avoid is drafting legislation, in case you have to try and interpret it later. At the moment, the body that would normally be responsible for drafting legislation, the Office on behalf of the Council, is perhaps not the best body to draft the sort of legislation that we are considering.

### **Gerhard Reissner**

It has to be AMBA that does this job. Then you have to convince, and you have to promote the idea to as many stakeholders as you can, to your client community. It is quite clear that when the Convention was adopted, you should have a very, very strong position. A very independent and strong position. I already mentioned that today. Otherwise there would have been some possibility of remedy. So that's it what was wanted and what is wanted and what is absolutely necessary. This may be your argument, and you can't fulfil your role if you are facing attacks and proposals which undermine your independence.

You have the problem, on the one hand, that they will argue with examples from different

states. We have already mentioned that. But it has just been said, that there are differences. There is a special German situation, and special French situations; you are different. The argument against that is that it is policy that the whole institution is performance-based, and it should be the same for the Boards of Appeal. Your argument against that, is that there is no problem of independence in other sections, it is only your section which has the additional judicial element and, therefore, you have to have different regulation. It is much easier to say this than to convince them to listen, but I guess this must be the line.

### **Giacomo Oberto**

Do not take this suggestion as a joke. It is really the key to the solution. Experience shows that if you open the debate, the discussion, you do not know where it will end. But keep the discussion within AMBA, discuss all the possible aspects thoroughly, and come up with a text. The important thing is that when you go outside AMBA, you go out with a text which is already there, in detail, laying down in detail what you want, because you have previously decided and discussed it among yourselves. It should be a text in which you lay down the principles we have been debating today, which is the competent body to do this, how it is composed, what the objective criteria are, what the procedures are, what the possible challenges to decisions are and to whom, and so on. If you come with a text which is comprehensive, from A to Z, if you have a credible text to submit to public opinion and to the Administrative Council, to the President, you will see that your chances are very good. That is the only way to fill this vacuum which one of you mentioned a few minutes ago. Otherwise you risk that it will be filled according to the good will or the desires of the people in power at that moment.

As far as the question of performance is concerned, when some national system as in France or Spain introduced what in France they called “*primes de rendement*”, performance bonuses, we had a completely thorough discussion amongst the members of the International Association of Judges, and we issued some very strong declarations against it. If we go to the level of international soft law, legislation of the Council of Europe, Recommendations 2010/12 has a point in Article 55, which says that systems making

judges’ core remuneration dependent on performance should be avoided as there could be difficulties for independence. I fully agree, of course, with the text, but this “core”, which was added as a compromise, of course does not clarify the situation. I fully accept the rule without “core”. But you have to take into account what “core” means concretely. Of course, it is the most important part of the remuneration. But this article leaves open the door to a part of the remuneration being dependent on performance.

### **Sir Henry Carr**

Let us move on to the question of what I would call judicial conduct. Perhaps you would like to introduce the current situation in the EPO and any concerns you have.

### **Bill Chandler**

There were two aspects of the disciplinary complex we would like to have your opinion on. There is the actual carrying out of a disciplinary proceedings, once it is decided there is a possible case to answer. We have possibly less of a problem with that. We have a disciplinary committee, appointed by the Administrative Council. It has, in our view, a reasonably good form. It consists of a chair, a deputy, appointed each year by the Council, and a number of members appointed by the Council, and a number drawn from the Enlarged Board of Appeal, so it is a reasonable body. They would then decide on disciplinary measures to be taken.

More problematic is the other aspect of the disciplinary complex, which is the investigation, or various manoeuvres preceding a possible disciplinary procedure. At the moment, the Office has got so-called investigation guidelines, which are in the Service Regulations and they apply to all staff, but there is no real distinction in the application to Board members. And so, the result of that is that Board members may be subject to an investigation of some sort, under the control of the President of the Office, and an investigation can be triggered by an allegation of some sort. The idea was, originally, it grew out of harassment, ideas to do with harassment, and also the idea was to protect staff who were alleging some sort of harassment against their manager, but it grew from there and grew into a general investigation scenario. And the question there is, what safeguards are needed for the opening phases and the conduct

of such an investigation against a Board member. The secondary question, which is, as I say, possibly less of a problem, to do with safeguards in the disciplinary procedure itself once a case has been started by the Administrative Council. And the second case, for example we noticed that, quite often in judicial systems, the disciplinary committee, the members of it would be nominated by a council of the judiciary for example. In our case, they are nominated by the Administrative Council as I said. Nevertheless, the composition, we find, is quite good, of that Board. The problem we've got is more with the initialisation of the investigation, and the question is about safeguards, what sort of safeguards should be there.

### **Sir Henry Carr**

The basic problem, it seems, is that, if you look at this from the question of judicial independence, there should be no involvement of the executive in the investigation of judicial conduct. That is the absolute starting point. Looking at it from our perspective, given that judges in the United Kingdom are constantly striking down decisions of the government, the idea the government could then initiate an investigation against a judge is quite obviously unacceptable, and the situation here is not that different. This is fundamental.

### **Giacomo Oberto**

That reminds me of my first experience with the Council of Europe. It was in Belarus, when it appeared that Belarus might be opened up to the Council of Europe. We had a very long conference on judicial independence with people staying silent. When it was time for questions, nobody wanted to ask any. Finally, we begged, and there was one question. It was addressed to me and it was the following: "Judge Oberto, you said that in your court you are dealing with cases in which a party is the state. How can you feel independent as you judge and sentence a state, the state which pays your salary?" That was a very interesting question, that showed the degree of independence in that country. Beside this joke, it is true that according to all international documents, the legislative and executive powers have to stay out of the body responsible for disciplinary processes.

It may be interesting to know what happens in Italy, where it is the Minister of Justice or the General Prosecutor before the Supreme Court of Cas-

sation who has the initiative to start a disciplinary case against a judge. The procedure is carried out within a special section of the High Council for the Judiciary, two thirds of which are judges or prosecutors elected by the judges, and one third of which are members elected by parliament. It is presided over by a member elected by the parliament, but the president has no more power than other members of the disciplinary section.

Decisions rendered by this disciplinary section can be challenged before the Supreme Court of Cassation. This system, especially during the Berlusconi era, was widely criticised. They said, judges should judge themselves and they wanted to create a disciplinary "court". "Court" in quotation marks, formed not of judges but of people chosen by the government or by the legislature. Thank God it did not pass, but every now and then, the idea surfaces again.

In any case, the situation is as I told you. On this point, the international documents are very, very clear.

### **Gerhard Reissner**

The documents might be clear, but the practise is quite diverse. There are different phases to disciplinary procedures. Who can initiate? Who collects the material? Who decides on the issues? Of course, the most important thing is who decides in the end. There, it is quite clear that it should be a court. A real court. Or, at least, an independent body. In the context of Judicial Councils, it is promoted as one of the Council's tasks, but not carried out by the Council itself but an independent body elected by the Council with a possible appeal to the Council as such. There is also the recommendation that judges should have at least a majority in this body. It might make sense to have some outsiders in this body, so that things are not done behind closed doors; but the majority should be the judges. This is the deciding body. The initiatives are somehow spread among different institutions. In many countries it is still the ministry. This is a problem, and it is unfortunately quite widespread still.

In your case, I wonder what emerges from the Convention as such. I think there are no real fixed rules about who should initiate. You are completely free as to how to do it. It has to be regulated in the secondary legislation. There, you should be able to eliminate the influence of the president and

that part of the Organisation on the judicial part.

**Bill Chandler**

There is a provision in Article 10. It says that the President of the Office may propose disciplinary action.

**Gerhard Reissner**

Is it in the Convention or the Implementing Regulations?

**Bill Chandler**

It's in the Convention, yes. But it does not say about anyone else. In previous working groups that have talked about independence, they said that ought to be changed to say "in cooperation with the head of the court" or head of the Boards, at least, but the Convention does actually say he may propose.

**Gerhard Reissner**

You might go in that direction. You also could interpret it as not saying he is the only one.

**Bill Chandler**

No, but it is a problem that it does say he can. It is already an influence.

**Sir Henry Carr**

It says he can propose, it does not say he can take it forward.

**Bill Chandler**

No, it is clear that the Administrative Council has to actually take the measure, and if it is the case of removal, it has to go via the Enlarged Board, that's also clear. But it's all the stuff in between, and the details that's the problem.

**Question**

In the EPC system, the Enlarged Board, which is a judicial instance, is only involved in removal from office. Other disciplinary measures include downgrading, meaning downgrading even below the lowest grade for a judge, or a number of lesser penalties. My question is, when should there be judicial involvement? In my opinion, it should be long before removal from office. Downgrading a judge is a severe disciplinary measure. It says he

did something terribly wrong, though he is still in office. For those other disciplinary measures, the Office says those are not judicial, but are administrative proceedings. There is a grey zone, which is presently, I think, not well regulated.

**Question**

My question goes in the same direction. The disciplinary committee is not a judicial body. It does not decide the case, it does not decide upon a disciplinary measure. It only decides upon a recommendation that is to be made to the Administrative Council.

Article 10 says that the President may propose a disciplinary action, but it is completely silent as to who initiates disciplinary proceedings. The disciplinary proceedings are at the very beginning, and the disciplinary measure that may then be proposed by the President is at the end. We have, indeed, no judicial involvement at all, unless it is a question of removal from office.

**Gerhard Reissner**

The systems I know all see disciplinary matters in the hands of the court or an independent institution. It does not matter what the sanctions are, of course, because all of them possibly infringe independence. That is quite clear. There are some systems in which the administrative authorities (meaning, normally, the president) can issue a reprimand, either as an administrative sanction or a disciplinary one, that is, there are two different things in the same system. But there are strong voices against such systems, and for their being abolished. Such double sanctions, when they exist, are very much criticised.

I cannot imagine that all other sanctions are under administrative body or subject to a recommendation from an administrative body, and that only dismissal is considered by a judicial body. Maybe dismissal is the only possible sanction; but if there are other sanctions, they have to be in the same hand.

**Alain Girardet**

I would like just to add a word about our system, which is not very far from what has been described for Italy. We share the same preoccupation.

First, the executive has nothing to do with any investigation. That is a principle of democracy.

However, the executive, in the form of the Ministry of Justice, has a special body made up of judges. I think, in every country in Europe, the justice department can inspect a court, to know a little more about how things are done. That may be at the request of the Minister of Justice, or members of parliament. The inspector will write a report and present the report to the judges and to the Minister of Justice. If the Minister of Justice, wants some disciplinary measure taken, he will ask the High Council for the Judiciary. It is the same body, but with a majority of judges, 52 as against 48.

The procedure is very formal. It is adversarial. The judge is always assisted by other judges. There will be a written, reasoned decision. In order to obtain more transparency, there is a bi-annual report, one part of which is devoted to disciplinary measures. It describes the decisions and the offence, but without the names of the judges.

The High Council for the Judiciary also has the power to designate some of its members to inspect a court, and can decide, of its own motion, to prosecute a judge. That is, there are two ways. You can be sure I share your preoccupation about that. The investigation is the key. It is the first step. It is a very, very important step, to know who is investigating, under what controls, and what is the transparency for the people who may be charged. The transparency of a disciplinary procedure is a cornerstone, it seems to me. The procedure is public, unless the judge does not want it.

### **Dieter Brändle**

I have a practical question. How many disciplinary cases have you had, on the average, say, for a decade. Are you actually dealing with one single incidence, and are scared that there may be more of those?

### **Paolo Ammendola**

To frame the point, we saw the problem coming. When these investigation guidelines arose, we wrote a letter to the Administrative Council, signed by practically everybody who was present on that day. The response was . . . nothing. This is what worries us. We point out a problem, and nothing happens. But we do not want to raise this issue only because of this individual case, but because it is part, in general, of the entire reflection that is going on.

### **Dieter Brändle**

Then I think, if you want to see a chance to get through this solution, it has to be very simple, and it has to be obvious to everyone who reads it, that this is how things can be handled. You cannot set up a system like in France, where you have thousands of judges and you really need a system. You have to find rules that work for you, and they have to be really easy, simple, and short. And fair, of course.

### **Sir Henry Carr**

I think, just as I sit here looking at it, the answer to the question is very straightforward. You have raised an issue where serious disciplinary action can be taken against a judge by a body which is not judicial. Now, I cannot think of any profession where that is allowed. I cannot think of a single one. So why should you be in a situation as judges where it can happen to you? A fair trial is basic. Some of the measures you have mentioned, they are what we would regard as constructive dismissal, in other words sufficiently serious that your job becomes so unattractive, that it is akin to dismissal. I completely agree with Justice Brändle, there needs to be a very simple, clear set of rules. The fact it is a single case does not matter. It has exposed the problem you anticipated.

### **Gerhard Reissner**

I already mentioned this study in Germany where Swiss colleagues were invited by the commission of Professor Albrecht, and the outcome was that in the appointment system there is the problem of the election system, but for all the other things, independence is very high. One of the astonishing things was, when we asked about the issue of disciplinary measures, all the Swiss participants confirmed: "We don't have that." I hope I am right. You can clarify that. They said it was not necessary, because of their period of tenure.

I wonder if one can reduce your problem, if you work not only on the question of what the body is (though it is a very convincing argument, that, in no profession such things are not done from the outside), but also speaking of offences. If you set out clear offences, maybe this will diminish the danger that disciplinary procedures can be misused.

**Dieter Brändle**

We are not completely safe in Switzerland. Our Federal Patent Court Act says the federal parliament may remove the judge from office before he has completed his term, when he wilfully or through gross negligence commits serious breaches of his official duties, or has permanently lost the ability to perform his official duties. That is all there is to it. That is good enough.

**Question**

We have this investigation unit which runs directly under the President. In the one and only case we have had, it was the investigation unit that did the fact-finding. It disturbs us that it is someone who takes orders only from the President. I understand someone has to do it, but where would you put that authority.

**Gerhard Reissner**

I don't know what the powers of this investigation body are, but even at this stage, there could be a strong conflict with independence. If you have, as a judge, to answer why you have acted this or that outside way, the conflict is evident. That is one point.

The other point is, even if there is such an external investigation body, there must be a judicial body which decides in the end, to repeat the investigation and confront the judge with the results and extra evidence and so on, to give a fair trial at least in the final stage. Maybe it is not enough of an answer, but the powers of this investigation unit should be questioned, and there should be a guarantee of a fair trial in the deciding body and the deciding procedure.

**Alain Girardet**

Your tenure is very short at five years, it may be good advice to separate the authority which is in charge of appraisal from the authority which is in charge of re-appointment. We have to separate one from the other. That is a very good guarantee. The decision about re-appointment must be referred to a special body, specially constituted, made up of independent people.

**Sir Henry Carr**

I think the time has come to say thank you very much to everyone. I think certainly from the per-

spective of the panel, it was an extremely interesting conference. Thank you.