

## SELECTION AND APPOINTMENT OF JUDGES: CONSTITUTIONAL AND LEGISLATIVE PROTECTION AND *DE FACTO* PRACTICE (\*)

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### *1. Selection and Appointment of Judges in the Different Legal Systems.*

From a general point of view it should be observed that selection, recruitment and appointment of judges are carried out in many different ways in the various systems throughout the world<sup>1</sup>. This variety is also present in Europe, where every imaginable system for the selection of candidates for the judiciary is to be found, including election by popular ballot, as in certain Swiss cantons.

Of course, each method has its advantages and its drawbacks.

- a) The first method consists in conferring the choice of judges on the executive or legislative authorities: while, on the one hand, this serves to reinforce the legitimacy of the judicial appointment, the heavy dependence of the judiciary on the other powers, together with the political implications, carries obvious risks.

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(\*) Paper submitted to the international conference on the subject “Safeguarding the Independence and Conditions of Service of Judicial Officers,” organised by the African Group of the International Association of Judges in co-operation with JOASA (Judicial Officers Association of South Africa) in Cape Town (South Africa) on 2-6 June, 2019.

<sup>1</sup> For a comparative study of the systems of recruitment, appointment and training of judges in the countries belonging to the International Association of Judges see INTERNATIONAL ASSOCIATION OF JUDGES - “JUSTICE IN THE WORLD” FOUNDATION, *Traité d’organisation judiciaire comparée*, I, Zurich-Brussels, 1999. On this topic see also BORGNA and CASSANO, *Il giudice e il principe. Magistratura e potere politico in Italia e in Europa*, Rome, 1997, p. 107 et seq.; OBERTO, VERARDI and VIAZZI, *Il reclutamento e la formazione professionale dei magistrati in Italia e in Europa*, in DOGLIOTTI, FIGONE, OBERTO, *et al.*, *L’esame di uditore giudiziario*, Milan, 1997, p. 41 et seq.; OBERTO, *Recrutement et formation des magistrats en Europe : une étude comparative*, Strasbourg, 2003; ID., *La formazione dei magistrati alla luce dei principi internazionali e dei profili di diritto comparato*, Padova, 2008.

On the system of recruitment of Italian judges, see OBERTO, *Recrutement, formation et carrière des magistrats en Italie*. The article has been available since 29 June 1999 on the following web page:

<https://www.giacomooberto.com/tbilissi.htm>; OBERTO, *Recrutement et formation des magistrats : le système italien dans le cadre des principes internationaux sur le statut des magistrats et l’indépendance du pouvoir judiciaire*, in *Rivista di diritto privato*, 2001, p. 717 et seq. (the text has been available since 29 March 2001 on the following web page: <https://www.giacomooberto.com/csm/rapport.htm>); BARTOLE, *Per una valutazione comparatistica dell’ordinamento del potere giudiziario nei paesi dell’Europa continentale*, in *Studium juris*, 1996, p. 531 et seq.; DOGLIOTTI, FIGONE, OBERTO *et al.*, *L’esame di uditore giudiziario*, op. cit; CAIANIELLO, *Formazione e selezione dei giudici in una ipotesi comparativa*, in *Giurisprudenza italiana*, 1998, p. 387 et seq. For an examination of the judiciary systems of Europe see the Council of Europe publication under the title *L’Europe judiciaire*, Strasbourg, 2000 (the book also contains—in relation to some countries—information on the recruitment and training of judges). Of course, mention has to be done here also to EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *Evaluation of European Judicial Systems*, available at the following web site: <https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems>.

- b) Election by the electorate is the method that confers on judges the highest level of legitimacy, as it comes straight from the people. However, this system obliges the judge to conduct a humiliating, and sometimes demagogic, electoral campaign, inevitably with the financial backing of a political party, which sooner or later might ask for a favour in return. Furthermore, the judge might be tempted to tailor his judgments to his electorate.
- c) Co-option by the judiciary itself offers the advantage of being able to choose the judges who are best prepared technically, but there is a strong risk of conservatism and cronyism.
- d) Nomination by a committee of judges and legal academics (preferably appointed by an independent body representing the judiciary) following a public competition, constitutes the final system, as currently applied in a number of countries.

It would be impossible to summarise here the diversity of methods adopted throughout Europe and the world for the recruitment of judges. In an attempt to cover this topic in the best possible way, I propose to identify (while bearing in mind the principle of independence) the categories into which the various systems fall.

The first thing to note is that a university qualification in legal studies is required nearly everywhere. A minimum age together with “good character” is also a requirement laid down by law nearly everywhere. Having said this, the system of competition is certainly preponderant in Western and Southern Continental Europe (with some notable exceptions such as, for example, the Swiss cantons, where judges are elected by the people or by parliament). Such a competition may be open, in some cases, to any person with a law degree (subject to the conditions established by the various laws), or else to persons whom one could term “specialists,” in that they not only have a legal qualification, but also some form of specialisation or practical experience.

Moreover, depending on the country concerned, the competition can give either direct access to the judiciary, subject to the completion of a period of initial training under the supervision of the High Council for the Judiciary (such was for a very long time the case, for example, in Italy, where now a School for the Judiciary exists), or access to a training institution (such is the case, for example, in France, the Netherlands and Portugal; the result is practically the same in Germany, although there the selection is formally made by the minister of justice of each *Land* (Region), but on the basis of rigorously objective criteria and as a result of a long and serious training which precedes the choice of career and is common to judges, lawyers, notaries and academicians; the system of competition is also to be found in the Baltic states and in Turkey.

By way of contrast, the Common Law systems and those of the European Nordic states are characterised either by the complete absence of any competition for access to the judiciary, or by the absence of a competition in the strict sense: here, appointment to the judiciary is primarily the culmination of a training process, a *cursus honorum*, which candidates complete in the field, even though the Commission for Judicial Appointments—which provides, in the U.K., an independent mechanism for applicants for judicial office who feel that their candidacy has not been considered fairly—and the setting up of a Judicial College, opened new perspectives in this field<sup>2</sup>.

Of course this kind of system—an appointment by the Executive or Legislature, which is sometimes “prepared” by a selection operated by a special appointment commission, which is composed of members of the judiciary, but also of the government and of representative of the “civil society”—is widely followed in Common Law systems throughout the world. A peculiar case is constituted by the United States of America, where federal judges are appointed by the President of the United States, and approved by a vote of the Senate whereas State judges are either appointed by the governor, or elected by the people.

Obviously, under the first type of systems (those which are based on a public competition), it is the boards appointed to carry out the task of selecting candidates and the initial training

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<sup>2</sup> Information on the Judicial Appointments Commission is available on the following web site: <http://jac.judiciary.gov.uk>; for the Judicial College see: <https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/>.

institutions which play the determining role in selecting new judges, even if the formal instrument of nomination carries the signature of the Minister of Justice or the President of the Republic. In the other systems, however, the influence of the executive is (or can be) very considerable. However, in the Anglo-Saxon countries and the Scandinavian countries, other factors (such as the legal tradition, the widespread respect for the judiciary, the social and economical position of judges, the existence of the “contempt of court”) guarantee, on the one hand, the quality of the selection and, on the other hand, the maintaining of a situation of separation between the authorities and an independent judiciary.

In the countries of the former communist bloc the situation seems somewhat complex and difficult to grasp.

The overall conclusion from this is that the situation is still weighted too heavily in favour of the political authorities *lato sensu* (the executive, but also, in several cases, the legislature). While it is true that very often “qualifications boards” are involved (as for example in the Russian Federation), it is by no means clear how such bodies are composed, or, in particular, what criteria are followed, or what effective powers such boards have to determine in practice, in relation to the executive, the actual choice of candidates when their number exceeds the number of posts available.

The same is true of systems where Judicial Councils only have a consultative function in this regard (in, for example, the former Yugoslav Republic of Macedonia, the Czech Republic or Slovakia), even if the perverse effects of a system that accords considerable power to the executive authorities (or to the legislature in systems where judges are elected) may be alleviated by the intervention of the association of judges (as for example in the Czech Republic). Conversely, the intervention in such a process of a High Council for the Judiciary with decision-making powers in this regard (as opposed to a merely advisory function) certainly provides a very reassuring guarantee (such is the case, for example, in Croatia, Poland, Romania and Slovenia)<sup>3</sup>.

## ***2. The Selection of Judges in the Italian Legal System.***

Access to the profession of judge and public prosecutor in Italy takes place through a public competitive examination pursuant to Article 106, paragraph 1, of the Constitution. Rules on the entry to the profession of judge and prosecutor have been changed over the last years, on the one hand to simplify and expedite the examination procedure and, on the other, to promote the development of a cultural basis common to all the members of the legal world connected to the activities linked to the exercise of the judicial function: judges and prosecutors, notaries and lawyers. The legislator has thus constituted Schools of Specialisation for the Legal Professions, which are post-graduate schools set up within the Universities for law-graduate students that want to enter the legal professions (Legislative Decree No. 398/97). Nowadays attendance to this school and the final certificate issued by it, are one of the pre-requisites to apply for the competitive examination to become judge. As an alternative, candidates must have passed the bar exam, or must have successfully passed an internship period of 18 months in a court as an assistant to a judge.

With a view to rationalising and speeding up the relevant procedure, and with a view to implementing the assessment of the candidates in a reasonable time and with the required accuracy, the public examination for entry to the Judiciary has been completely amended by the aforesaid Legislative Decree No. 398/97 and the amendment of Article 123 of the judicial system. The already existing—written and oral exams were temporarily sided by a computerised preliminary test on the subject matters dealt with in the written exam.

The computerised preliminary test was then subsequently set aside within the new framework of the public examination developed by Act no. 48/2001. The whole matter was then

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<sup>3</sup> For further details on this topic see OBERTO, *Recrutement et formation des magistrats en Europe : une étude comparative*, cit.; ID., *La formazione dei magistrati alla luce dei principi internazionali e dei profili di diritto comparato*, cit.

reformed by the Legislative Decree No. 160 of 2006, subsequently amended by the law No. 111 of 2007.

The competitive public examination for judges and prosecutors consists of three written exams (on: civil, criminal and administrative law) and an oral exam on the main legal subjects (see Article 1 of the above mentioned Legislative Decree No. 160 of 2006).

The competitive examination for judges/prosecutors is published by the Minister of Justice, pursuant to a decision of the High Council for the Judiciary, which sets the number of positions. The examining committee, appointed by the High Council, is chaired by a judge/prosecutor with at least twenty-four years of seniority. It consists further of twenty judges/prosecutors with at least twelve years of seniority, five university law professors and three lawyers (see Article 1 of the above mentioned Law No. 111 of 2007). The classification drawn up by the commission, which is based on the total sum of the votes given to each candidate in each individual test, is then approved by the High Council<sup>4</sup>.

### ***3. The Selection of Judges in Recommendation No. R (2010) 12 of the Council of Europe.***

The Recommendation No. R (2010) 12 of the Council of Europe<sup>5</sup> devotes a whole part of Chapter VI (Status of the judge) to the issues of judicial selection and career. As the issues surrounding these two topics do not always coincide, perhaps a distinction should be drawn between the two aspects, considering selection as an issue apart from the career.

Faced with those possible alternatives, that I have explained in previous paragraphs, Articles 44-48 of the 2010 recommendation show a marked preference for the elimination of all executive influence from the appointment of judges. The general rule in this regard is in fact explicitly stated in Article 46: “The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.”

The following Article 47 is, by contrast, clearly conceived as an exception to the rule of Article 46. That is to say, the recommendation appears to view as exceptional a country where “the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges”. Here a very serious problem faces the countries of Central and Eastern Europe, where historical “tradition” has not always been democratically based, and constitutions and laws instituted after the fall of the Berlin Wall—often under the influence of the Common Law systems—have led to systems of appointment and control over judges’ careers that afford them no protection from attempts at undue influence on the part of the political authorities.

It is true that Article 47 tries to suggest, in its second part, some expedients aimed at limiting the discretionary power of the executive (or legislative) authorities. This is particularly the case, for example, with the creation of “an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV).” Unfortunately, it is the very lack of almost any detailed and reliable information on the practice actually followed that gives rise to concern. The author of this essay is well aware—having visited nearly all the countries concerned—that between the letter of the law and the daily reality of the judge’s duties, between official speeches and private conversation, there often lurks an abyss.

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<sup>4</sup> For further details on this topic see OBERTO, *Recrutement et formation des magistrats en Europe : une étude comparative*, cit.; ID., *La formazione dei magistrati alla luce dei principi internazionali e dei profili di diritto comparato*, cit.

<sup>5</sup> See: [https://www.giacomooberto.com/coe\\_raccomandazione\\_2010/coe\\_rec\\_2010\\_12\\_e.htm](https://www.giacomooberto.com/coe_raccomandazione_2010/coe_rec_2010_12_e.htm)

#### ***4. The Selection of Judges in the UN Basic Principles on the Independence of the Judiciary.***

The United Nations Basic Principles on the Independence of the Judiciary, approved in 1985, dedicate a special Article (see Article 10) the issues of “Qualification, selection and training.”

According to this provision, “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.”

Clearly, no stand is taken on the delicate topic of the bodies in charge of selecting and appointing judges.

Furthermore, no directive is given on what should be considered as the best methods. The United Nations were in 1985 and still are now well aware that very different methods are known and practiced all around the world. Not all of them are able to assure posts to the best candidates, nor to ensure a full compliance with the principle of judicial independence. However, the one and only recommendation given by the Basic Principles is that that such methods should “safeguard against judicial appointments for improper motives.”

Unfortunately, no explanation is given on what an “improper motive” should be, although, taken into account the other principles of the document and the general “spirit” of it, it appears evident that “improper motives” are those which could undermine judicial independence.

#### ***5. The Selection and the Appointment of Judges in the Universal Charter of the International Association of Judges. The General Framework of the Charter.***

In the current process of internationalization of the principles on the independence of the judiciary, an increasingly relevant role is played by the International Association of Judges<sup>6</sup>.

The International Association of Judges (IAJ)—founded in Salzburg (Austria) in 1953—is a professional, non-political, international organization, bringing together national associations of judges, not individual judges, approved by the Central Council for admission to the Association. The main aim of this organisation is to safeguard the independence of the judiciary, which is an essential requirement of the judicial function, guaranteeing human rights and freedom<sup>7</sup>. The IAJ currently encompasses 90 such national associations or representative groups, from the five continents<sup>8</sup>.

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<sup>6</sup> All relevant events concerning the International Association of Judges are published in its official web site: <https://www.iaj-uim.org>. Further information (in Italian) on the themes of this article, a comprehensive bibliography on the subject of judicial independence and a full version of this contribution is available in OBERTO, *Un nuovo statuto per un nuovo giudice*, [https://www.giacomooberto.com/Oberto\\_Un\\_nuovo\\_statuto\\_per\\_un\\_nuovo\\_giudice\\_2017.htm](https://www.giacomooberto.com/Oberto_Un_nuovo_statuto_per_un_nuovo_giudice_2017.htm), also in *Contratto e impresa/Europa*, 2019, p. 49 *et. seq.*

<sup>7</sup> According to Article 3 of IAJ’s Statutes, “1. The objects of the Association are as follows:

(a) to safeguard the independence of the judicial authority, as an essential requirement of the judicial function and guarantee of human rights and freedom.

(b) to safeguard the constitutional and moral standing of the judicial authority.

(c) to increase and perfect the knowledge and the understanding of Judges by putting them in touch with Judges of other countries, and by enabling them to become familiar with the nature and functioning of foreign organizations, with foreign laws and, in particular, with how those laws operate in practice.

(d) to study together judicial problems, whether these are of regional, national or universal interest, and to arrive at better solutions to them.”

<sup>8</sup> The list of the 90 member associations available here: <https://www.iaj-uim.org/member-associations/>.

During its 66 years of existence the IAJ has been constantly deploying its efforts to safeguard judicial independence, as a cornerstone of the rule of law, tackling delicate cases and situations in all parts of the world.

Between 1993 and 1995 the different regional components of the IAJ adopted charters on the statute of judges namely: (a) the “Judges’ Charter in Europe” adopted by the European Association of Judges in 1993<sup>9</sup>; (b) the “Judges’ Charter in Ibero-America” (*Estatuto del Juez iberoamericano*) adopted in 1995 by the Ibero-American Group of the IAJ<sup>10</sup>; (c) the “Judges’ Charter in Africa” adopted in 1995 by the African Group of the IAJ<sup>11</sup>. Some years later, in 1999, after a long work of reflection, the Central Council of the IAJ, during its meeting in Taiwan, adopted a universal Charter of the Judge<sup>12</sup>.

As of 1999, a complex work on the minimum standards of judicial independence had been done by the IAJ. This was the case, in particular, for the First Study Commission, which examined after the year 2000 practically all subjects pertaining to judicial independence<sup>13</sup>. Besides this, the four Regional Groups and the Central Council of the IAJ adopted a number of resolutions that, by referring to such standards, have little by little set up a compilation of rules which are specific to our organisation and at the same time contribute to the creation of an international *corpus juris* on the status of judges all over the world.

The need for a new Universal Charter was made evident by the many changes occurring during the last years: the number of IAJ member countries grew from 43 (in 1999) to 87 (in 2017), bringing in new experiences, legal systems and traditions; at the same time several international organisations issued charters, recommendations and declarations on subjects pertaining to judicial *status*<sup>14</sup>.

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<sup>9</sup> See: <https://www.iaj-uim.org/iuw/wp-content/uploads/2013/01/Statuto-Giudice-EAJ.pdf>.

<sup>10</sup> See: <https://www.iaj-uim.org/iuw/wp-content/uploads/2013/01/Estatuto-del-juez-iberoamericano.pdf>.

<sup>11</sup> See: <https://www.iaj-uim.org/iuw/wp-content/uploads/2013/06/Statuto-Giudice-AFR.pdf>.

<sup>12</sup> See: <https://www.iaj-uim.org/universal-charter-of-the-judges/>.

<sup>13</sup> All documents and conclusions issued by the IAJ’s 1<sup>st</sup> Study Commission are available here: <https://www.iaj-uim.org/study-commissions/>.

<sup>14</sup> See e.g. the following documents:

- UN Basic Principles on the independence of the judiciary, adopted in 1985: <http://www.ohchr.org/Documents/Publications/Handouts/Handout4-2.pdf>;

- Recommendation 94/12 of the Committee of ministers of the Council of Europe, elaborated in 1994 and updated in 2010 (Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities): [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true);

- European Charter on the statute for judges, elaborated by the Council of Europe in 1998: <https://rm.coe.int/16807473ef>;

- Various opinions of the Consultative Council of European Judges (CCJE) since 2001 and particularly the “Magna Carta of European judges,” which is a compilation of the above mentioned opinions, drafted in 2010: [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC\(2010\)3&Language=lanEnglish&Ver=original&Site=&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&Site=&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true);

- Bangalore Principles on judicial conduct (2002) and the resolution 2006/23 of the Economic and Social Council of the UN: [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf); [https://www.unodc.org/pdf/corruption/corruption\\_judicial\\_res\\_e.pdf](https://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf);

- Report of the Venice Commission on the independence of the judicial system (study n. 494/2008): [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e);

- Kiev recommendations on the independence of the judiciary in Eastern Europe, adopted in 2010: <http://www.osce.org/odihr/KyivRec>;

- Opinions of the European Network of Councils of Justice: [http://www.ency.eu/index.php?option=com\\_content&view=category&layout=blog&id=24&Itemid=98&lang=en](http://www.ency.eu/index.php?option=com_content&view=category&layout=blog&id=24&Itemid=98&lang=en);

Other associations, such as the Commonwealth Association of Judges, have adopted as well standards aiming at assuring the independence of the judiciary (in particular the “Victoria Falls Declaration” in 1994, or the statute of Commonwealth judges in 2013). For a full list of such declarations see OBERTO, *Un nuovo statuto per un nuovo giudice*, cit., § 3.

Therefore, during the IAJ meeting in Foz do Iguazu in 2014 the Central Council approved the proposal of the Presidency Committee to update the Charter adopted in Taiwan in 1999. During the Barcelona meeting (2015) a working group was set up, with the task of preparing a draft for a new Charter<sup>15</sup>. The draft Universal Charter was discussed within the working group during the meeting in Mexico City in October 2016 and during the springtime Regional Groups meetings in April and May 2017. A discussion and validation of the proposals of the working group were carried out in June 2017 by the Presidency Committee. The formal adoption occurred during the annual meeting of the Central Council on November 14<sup>th</sup>, 2017, in Santiago de Chile.

This is the general framework in which the new Universal Charter of the Judge has been drafted, discussed and adopted by the IAJ.

The document is composed of nine articles, dealing, respectively, with the following subjects: (1) General Principles; (2) External Independence; (3) Internal Independence; (4) Recruitment and Training; (5) Appointment, Promotion and Assessment; (6) Ethics; (7) Discipline; (8) Remuneration, Social Protection and Retirement; (9) Applicability of the Charter.

The main new features of the 2017 Charter, when compared to its 1999 version, may be summarized as follows:

- Devoting a whole new chapter to the aspect of Internal Independence;
- Recognizing and emphasising the role played by Councils for the Judiciary;
- Focusing on the principles of tenure and security of office;
- Banning the so-called “reappointment procedures”;
- Recognizing the pivotal role played by initial and on service training activities;
- Emphasising the role of judicial efficiency;
- Enuclating a series of autonomous principles of judicial ethics, underlying the role of “Judicial Codes of Conduct”;
- Recognizing the applicability of the main rules of the Charter not only to all persons exercising judicial functions, including non-professional judges, but also to members of the public prosecution service.

## ***6. Rules of the Universal Charter of the International Association of Judges on Judicial Selection and Appointment.***

Selection (or recruitment) and appointment of judges are contemplated in two different Articles of the new Charter (4-1 and 5-1, respectively), as in many legal systems they may be the effect of two different kinds of procedures, often made by different organs.

Actually, according to Article 4-1, “The recruitment or selection of judges must be based only on objective criteria, which may ensure professional skills; it must be done by the body described in Article 2.3.

Selection must be done independently of gender, ethnic or social origin, philosophical and political opinions, or religious beliefs.”

According to Article 5-1, “The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification.

The selection should be carried out by the independent body defined by Article 2-3 of this Charter, or an equivalent body.”

It is therefore clear that, as far as selection (or recruitment) and appointment of judges are concerned, what matters is that both proceedings must be inspired by the same basic rules, which is

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<sup>15</sup> The working group was composed of Mr Christophe Régnard, President of the IAJ (France), President of the working group; Mr Giacomo Oberto, Secretary-General of the IAJ (Italy); Ms. Janja Roblek (Slovenia); Ms. Julie Dutil (Canada); Ms. Allyson Duncan (USA); Mr Walter Barone (Brazil); Mr. Mario Morales (Porto Rico); Ms. Marie Odile Thiakane (Senegal); Mr Scheik Kone (Mali). To this work was also associated Mr Günter Woratsch, Honorary President of the IAJ (Austria), in his quality of President of the Council of Honorary Presidents.

to say they must be “based only on objective criteria, which may ensure professional skills” (Article 4-1), or “carried out according to objective and transparent criteria based on proper professional qualification” (Article 5-1). Both proceedings must be done by (or under the supervision of) the Council for the Judiciary, or another independent body described by Article 2-3.

## ***7. Councils for the Judiciary in the Universal Charter of the International Association of Judges.***

It is self-evident, after what has been explained in the previous paragraphs, that a crucial role in the selection and appointment process of judges must be played by the Councils for the Judiciary or by equivalent bodies.

Article 2-3 of the Charter provides for as follows:

“Article 2-3 – Council for the Judiciary

In order to safeguard judicial independence a Council for the Judiciary, or another equivalent body, must be set up, save in countries where this independence is traditionally ensured by other means.

The Council for the Judiciary must be completely independent of other State powers.

It must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation.

The Council for the Judiciary can have members who are not judges, in order to represent the variety of civil society. In order to avoid any suspicion, such members cannot be politicians. They must have the same qualifications in terms of integrity, independence, impartiality and skills of judges. No member of the Government or of the Parliament can be at the same time member of the Council for the Judiciary.

The Council for the Judiciary must be endowed with the largest powers in the fields of recruitment, training, appointment, promotion and discipline of judges.

It must be foreseen that the Council can be consulted by the other State powers on all possible questions concerning judicial status and ethics, as well as on all subjects regarding the annual budget of Justice and the allocation of resources to the courts, on the organisation, functioning and public image of judicial institutions.”

The opening statement on the subject of the Councils for the Judiciary marks a clear difference with the existing international documents in the field of judicial independence. Actually, the IAJ Charter provides that “In order to safeguard judicial independence a Council for the Judiciary, or another equivalent body, must be set up, save in countries where this independence is traditionally ensured by other means” (see Article 2-3, Para. 1).

A comparison with Article 26 of the Recommendation No. R 2010/12 of the Council of Europe may be interesting. Whereas the latter document only says that Councils of Justice are organs “that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system,” with no recommendation or prescription to set up such bodies, the new IAJ Universal Charter is closer to recent European developments. For example, Resolution No. 1685 (2009) of the Parliamentary Assembly of the Council of Europe on “Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states”<sup>16</sup> calls on Germany to “consider setting up a system of judicial self-administration, taking into account the federal structure of the German judiciary, along the lines of the judicial councils existing in the vast majority of European states, as a matter of securing the independence of the judiciary in future.”

As far as the composition of such bodies is concerned, the new Universal Charter clearly states that they “must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation” (Article 2-3, Para. 3). This provision is more

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<sup>16</sup> See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17778&lang=en>.



advanced than its equivalent within the already mentioned Recommendation No. R 2010/12, according to which (only) “Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary” (see Article 27). The rule about a majority of judges is also enshrined in the already mentioned resolution of the Parliamentary Assembly of the Council of Europe, which invited, among other things, France to “consider restoring a majority of judges and prosecutors within the *Conseil supérieur de la magistrature* or ensuring that the members appointed by political bodies also include representatives of the opposition and making the *Conseil supérieur de la magistrature*’s opinion binding also for decisions concerning prosecutors.”

Also Article 13 of the already mentioned “Magna Carta of European Judges” (*CCEJ*) prescribes that “To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions.”

Another important provision of the new Universal Charter approved by the IAJ states that “No member of the Government or of the Parliament can be at the same time member of the Council for the Judiciary” (Article 2-3, Para. 4). Actually, we know that in some legal systems of countries, belonging to the former Communist Block, the Minister of Justice is at the same time member (or even President) of the Council of Justice: a practice which has already been condemned by the European Court for human rights<sup>17</sup>.

Finally, according to the new IAJ Charter, Councils for the Judiciary cannot be merely advisory bodies, as they “must be endowed with the largest powers in the fields of recruitment, training, appointment, promotion and discipline of judges” (Article 2-3, Para. 5). The reference to “the largest powers” marks the need for a body which actually, instead of only issuing opinions, takes binding decisions on judges’ careers.

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<sup>17</sup> See e.g. *Volkov vs Ukraine* (2013), <http://hudoc.echr.coe.int/eng?i=001-115871>; *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia* (2016), <http://hudoc.echr.coe.int/eng?i=001-159769>.