

ENSURING SECURITY OF TENURE: THE ITALIAN AND EUROPEAN EXPERIENCE

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1. The independence of Judiciary: a) preliminary remarks.

The independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component, as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people.

The independence of the judges and – as a consequence – the reputation of the judiciary in a given society depends on many factors. In addition to the institutional rules guaranteeing independence, the personal character and the professional quality of the individual judge deciding a case are of major importance. The legal culture as a whole is also important (Report on the independence of the judicial system part I: the independence of judges, European commission for democracy through law, adopted by the Venice Commission¹ at its 82nd Plenary Session, Venice, 12-13 March 2010, 3).

Institutional rules have to be designed in such a way as to guarantee the selection of highly qualified and personally reliable judges and to define settings in which judges can work without being unduly subjected to external influence. The problem of establishing a comprehensive set of standards of judicial independence has been addressed in a considerable number of documents of differing detail, aimed at establishing reference points. These documents, whether issued by international organisations or official bodies or by independent groups, offer a comprehensive view of what the elements of judicial independence should be: the role and significance of judicial independence in ensuring the rule of law and the kind of challenges it may meet from the executive, the legislature or others.

It must be said at the outset that the independence of the judiciary may be viewed from two distinct but interlinked viewpoints:

- that of the relations of the judiciary as a whole (and of the single judges) with the political power – notably the government, the legislative power and the political parties : the so-called **external independence**;
- that of the relations of each judge with the other judges – the president of the court or the higher judges – that is, the independence and the autonomy in carrying out the judicial functions of each judge in respect of the structure to which he or she belongs: the so-called **internal independence** (European commission for democracy through law, Venice commission, comments on european

¹ The European Commission for Democracy through Law – more commonly known as the Venice Commission as it meets in Venice, Italy – is an advisory body of Council of Europe in the field of constitutional law. The Venice Commission is composed of independent experts, who are nominated by its 61 Member States and it provide opinions on constitutional matters in the large sense (including electoral law, human rights, institutional legislation – on the Judiciary, ombudspersons, etc.). These opinions are provided upon request by its Member State, the organs of the Council of Europe or international organization participating at its work (OSCE/ODIHR, EU)

standards as regards the independence of the judicial system: judges, by Neppi Modona, CDL-JD(2009)002).

As has been underlined in the quoted comment, while great attention has been devoted to the elaboration of standards in respect of the external independence of the judiciary, internal independence has so far received less attention, at least from a quantitative point of view. The fundamental principles of independence at the level of the organisation of the judiciary are at any rate contained in the Recommendation of the Committee of Ministers on the Independence, Efficiency and Role of Judges, later taken up by Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (94)12, in the Opinion 1 (2001) and in numerous opinions of the Venice Commission, set out in Document CDL-JU(2008)002 under the title of “Independence within the judiciary”².

b) basic principles.

At the International and European levels there are many texts on the independence of the judiciary, concerning above all so-called external independence.

International texts are based on Article 10 of the Universal Declaration of Human Rights (“*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*”). Among them, there are the Basic Principles on the Independence of the Judiciary endorsed by the United Nations General Assembly in 1985, according to which Judges, “*whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists*” (Principles 12) and the Bangalore Principles of Judicial Conduct of 2002. These standards often coincide with the Council of Europe standards but usually do not go beyond them. In the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors Practitioners Guide No. 1 of the International Commission of Jurists, it is underlined that while this provision does not unambiguously state that it is preferable for judges to be appointed for life (always subject to their ability to properly discharge their functions), tenure for life provides a safeguard for judicial independence

Tenure for life is provided for in the **Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence**, adopted on 19 June 1998, which clearly state that permanent appointments should be the norm. The *Guidelines* also recognize that certain countries will appoint judges to temporary posts. These appointments, however, must comply with the general conditions of tenure in order to safeguard their independence.

At the European level, the right to an independent and impartial tribunal is first of all guaranteed by **article 6 of the European Convention on Human rights**, according to which «*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...*». According to Article 47 (*Right to an effective remedy and to a fair trial*) of the Charter of fundamental rights of the European union (2000/C 364/01), «*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being*

² European standards could be summarised in the principles of the natural judge pre-established by law and of the judge being subject only to the law, as well as in the exclusively functional distinction among judges. These are principles which are incompatible with any form of hierarchical organisation or supremacy within the judiciary.

advised, defended and represented. Another authoritative text on the independence of the judiciary is **Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges**, later taken up by **Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities**. The first recommendation does not go into much detail. The second one is more specific (see *infra*). Another comprehensive text is **Opinion n. 1 of the Consultative Council of European Judges (CCJE)³ on standards concerning the independence of the Judiciary and the irremovability of judges**. Others opinions of the CCJE are also relevant in this context, e.g. CCJE Opinions no. 6 on Fair Trial within a Reasonable Time, no. 10 on the "Council for the Judiciary in the Service of Society" and no 11 on the Quality of Judicial Decisions. Another Council of Europe text is the **European Charter on the Statute of Judges**, which was approved at a multilateral meeting organised by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998. The Venice Commission's Report on Judicial Appointments (CDL-AD(2007)028) covers issues of particular importance for judicial independence. Other aspects are dealt with in various Venice Commission opinions.

We must underline also some soft laws concerning this issue, and in particular "**The universal charter of the judge**", adopted by the IAJ Central council in Taiwan on November 17th, 1999, updated in Santiago de Chile on November 14th, 2017. As noted by the Secretary-General of the International Association of Judges, Giacomo Oberto in his "Judicial independence in its various aspects: International basic principles and the Italian experience (Turin – 2013) «it is not important that all the relevant instruments do not have binding force (or binding to the same degree): the practical experience of international associations shows, for example, that "private" documents, such as the Universal Charter of the Judges drawn up by the International Association of Judges, have served to persuade the political authorities of certain countries not to implement measures that might have limited the independence of the judiciary».

2. Security of tenure: International and European principles.

The specific aspects of judicial independence are many. We can consider the following: the level at which judicial independence is guaranteed; the basis of appointment or promotion; the appointing and consultative bodies; tenure, with reference to the period of appointment, and irremovability and their discipline and transfers; remuneration of judges; the budget of the Judiciary; freedom from undue external influence; the final character of judicial decisions; independence within the judiciary; the allocation of cases and the right to a lawful judge.

In this report I focus attention only on the level at which judicial independence is guaranteed and on security of tenure.

It is important to underline the level at which judicial independence is guaranteed. Recommendation (94)12 provides (Principle I.2.a): "*The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law.* Opinion No. 1 of the CCJE recommends (at 161), following the recommendation of the European Charter, to go further: "*the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.*" The Venice Commission, in its report "On the independence of the judicial system Part I: the independence of judges" (Adopted by the Venice Commission at its 82nd

³ The CCJE is an advisory body of the Council of Europe on issue relating to the independence, impartiality and competence of judges. It is the only body within an international organization to composed exclusively by judges.

Plenary Session, Venice, 12-13 March 2010) strongly supports this approach. The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts⁴.

When examining “Tenure”, the first aspect to consider concerns the period of appointment. In this regard Principle I.3 of Recommendation (94)12 states: “*Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of the term of office.*” According to Opinion No. 1 of the CCJE adds (at 48): “*European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence.*” and (at 53) “*The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance.*”

This corresponds to the position of the Venice Commission which has, apart from special cases such as constitutional court judges, always favoured tenure until retirement. A special problem in this context is that of probationary periods for judges. This issue is explicitly addressed in the European Charter at 3.3: “*3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement*

⁴ Examples for constitutional provisions are:

Albania - Article 145 of the Constitution

1. Judges are independent and subject only to the Constitution and the laws. ...

Andorra - Article 85 of the Constitution

1. In the name of the Andorran people, justice is solely administered by independent judges, with security of tenure, and while in the performance of their judicial functions, bound only to the Constitution and the laws....

Austria - Article 87 of the Constitution

(1) Judges are independent in the exercise of their judicial office. ...

Czech Republic - Article 81 of the Constitution

The judicial power shall be exercised in the name of the Republic by independent courts.

Georgia – Article 84 of the Constitution

1. A judge shall be independent in his/her activity and shall be subject only to the Constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law.

Germany - Article 97 of the Basic Law - Independence of judges

(1) Judges shall be independent and subject only to the law. ...

Greece - Article 87 of the Constitution

1. Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence. ...

Iceland - Article 70 of the Constitution

Everyone is entitled to obtain a determination of his rights and obligations or of any charge against him for criminal conduct by a fair trial within a reasonable time before an independent and impartial court of law. A court hearing shall be held in public unless the judge otherwise decides pursuant to law in order to protect morals, public order, national security or the interests of the parties.

Italy – Article 101.2 of the Constitution “Judges are subject only to the law” and Article 104.1 of the Constitution “The judiciary is an order that is autonomous and independent of all other powers.”

Latvia – Article 83 of the Constitution

Judges shall be independent and subject only to the law.

Lithuania – Article 109 of the Constitution

In the Republic of Lithuania, the courts shall have the exclusive right to administer justice.

While administering justice, judges and courts shall be independent.

While investigating cases, judges shall obey only the law.

The court shall adopt decisions on behalf of the Republic of Lithuania.

Portugal - Article 203 of the Constitution - Independence

The courts are independent and subject only to the law.

Article 216 of the Constitution - Guarantees and disqualifications

1. Judges have security of tenure and may be transferred, suspended, retired or removed from office only as provided by law.

or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.” The Venice Commission has dealt extensively with this issue in its Report on Judicial Appointments (CDL-AD(2007)028): “40. The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. [...] 41. This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a “refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office”. 42. The main idea is to exclude the factors that could challenge the impartiality of judges: “despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.” 43. In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges.” In brief the Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence (European Commission for democracy through law, Venice commission, report on the independence of the judicial system part I: the independence of judges adopted by the Venice commission at its 82nd plenary session, Venice, 12-13 march 2010).

Strictly connected with tenure is the principle of irremovability and transfers.

The principle of irremovability is implicitly guaranteed by Principle I.3 of the Committee of Ministers Recommendation (94)12. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities states that :«Tenure and irremovability 49. Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists. 50. The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds. 51. Where recruitment is made for a probationary period or fixed term, the decision on whether to confirm or renew such an appointment should only be taken in accordance with paragraph 44 so as to ensure that the independence of the judiciary is fully respected. 52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.

Opinion No. 1 of the CCJE concludes (at 60): “The CCJE considered (a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (see paragraph 16 above); (b) that the intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline; and (c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area.” 41. The issue of transfers is more specifically addressed in the European Charter at 3.4: “3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of

promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.”

This corresponds to the approach of the Venice Commission when examining national constitutions. The Venice Commission’s *Report on the Independence of the Judicial System Part I: The independence of judges* indicates that it **has consistently supported the principle of irremovability in Constitutions. Transfers against the will of the judge may be permissible only in exceptional cases.** As regards disciplinary proceedings, the Commission’s Report on Judicial Appointments **favours the power of judicial councils or disciplinary courts to carry out disciplinary proceedings.** In addition, the Commission has consistently argued that **there should be the possibility of an appeal to a court against decisions of disciplinary bodies.**

In the African system, the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**, adopted as part of the African Commission’s activity report at the 2nd Summit and Meeting of Heads of State of the African Union, Maputo, 4 -12 July 2003, provide that: “Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office” and that “the tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law”.¹⁶¹ The *African Guidelines* are also quite clear on appointments limited in time when they state that “judicial officers shall not be appointed under a contract for a fixed term”.

The Beijing Principles Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (*Adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing in 1995 and adopted by the LAWASIA Council in 2001*) also establish that “Judges must have security of tenure”. However, the *Principles* acknowledge that in different systems “the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure”. In such cases, it is recommended “that all judges exercising the same Jurisdiction be appointed for a period to expire upon the attainment of a particular age”.

A detailed provision is contained in the **Universal Charter of the Judge**, adopted by the International Association of Judges Central Council in Taiwan on November 17th, 1999, updated in Santiago de Chile on November 14th, 2017. According to article 2 – External independence, *«Article 2-1 – Warranty of the independence in a legal text of the highest level. Judicial independence must be enshrined in the Constitution or at the highest possible legal level. Judicial status must be ensured by a law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary. Article 2-2 – Security of office Judges – once appointed or elected – enjoy tenure until compulsory retirement age or termination of their mandate. A judge must be appointed without any time limitation. Should a legal system provide for an appointment for a limited period of time, the appointment conditions should insure that judicial independence is not endangered. No judge can be assigned to another post or promoted without his/her agreement. A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only as the effect of disciplinary proceedings, under the respect of the*

rights of defence and of the principle of contradiction. Any change to the judicial obligatory retirement age must not have retroactive effect».

3. The Italian experience

Italy is characterized by a **rigid and codified Constitution**, so the laws cannot violate the Constitution. It was decided to create a special tribunal or court, operating pursuant to judicial procedures, and made up of legal experts chosen specifically for this function, elected by Parliament or by other supreme State institutions for fixed tenures, not removable at will, and independent of the political branches. This institution was entrusted with reviewing the constitutionality of statutes and of voiding them if they were unconstitutional. In this way constitutional review was established—that is, a judicial rather than a political activity (given the character of the procedures used), and an activity designed to ensure the observance of constitutional provisions. Control over the constitutional consistency of laws may be exercised, directly, by specifically authorised entities (State, Regional Authorities, Self-governing Provinces) (see arts. 37-42 of Const. Law no. 87 of 11th March 1953) but it may also be exercised, incidentally, by a judge, who in the course of a trial considers that the law to be applied to an actual case is of dubious constitutional consistency. In this latter case, the issue of constitutional consistency must be pertinent to the case's ruling and must not be manifestly unfounded (see art. 1 of Const. Law no. 1 of 9th February 1948; arts. 23-30 of Const. Law no. 87 of 11th March 1953). Italian Constitution devotes some important provisions to the independence and autonomy of the judiciary.

According to the Constitution, the judiciary is an autonomous body, independent of the legislative and executive powers (art. 104 Const.). Its autonomy refers to its organisation. It is autonomous vis-à-vis the executive, in that the independence of the judiciary would be undermined if the measures pertaining to the career advancement of the members of the Judiciary, and in more general terms, their status, were assigned to the executive power. The Constitution therefore assigned the task of administering the members of the judiciary (transfers, promotions, assignments of duties and disciplinary measures) to a self-governing body (art. 105 Const.): The High Council for the Judiciary (“Consiglio Superiore della Magistratura”), which thus guarantees the independence of the members of the Judiciary. The Judiciary is also autonomous vis-à-vis the legislative power, in that judges are subject only to the law (art. 101 Const.). Its independence refers to the functional aspect of judicial activity. It does not refer to the judiciary collectively - which is guaranteed by its autonomy, - but to its members when they exercise jurisdiction. Independence stems from, and is implemented on the basis of, the other constitutional principle that a judge is subject only to the law. This substantiates the derivation of jurisdiction from the sovereignty of the people. Independence and autonomy are principles which the Constitution also acknowledges in relation to the public prosecutor (arts. 107 and 112 Const.), especially where the obligatory nature of instituting criminal proceedings is concerned. The obligatory nature of instituting criminal proceedings indeed contributes towards ensuring not only a public prosecutor's independence in exercising his duty, but also the equality of citizens before criminal law. A public prosecutor's autonomy and independence have, however, special characteristics as far as relations "within" the prosecuting offices are concerned, as the office's unitary nature has to be taken into account, along with the power of authority acknowledged to the head of the office over his deputy prosecutors (see art. 70 of Royal Decree no. 12 of 30th January 1941).

The independence of judges requires the absence of interference by other state powers, in particular the executive power, in the judicial sphere. **Art. 107, paragraph 1, of the Italian Constitution** states that: *Judges may not be removed from office; they may not be dismissed or suspended from office or assigned to other courts or functions unless by a decision of the High*

Council for the Judiciary, taken either for the reasons and in compliance with the defence rights established by the law regulating the Judiciary or with the consent of the judges themselves.

The guarantee of security of tenure, established by paragraph 1 of art. 107 of the Constitution, constitutes the oldest of the guarantees. Already provided for by art. 69 of the Albertine Statute for magistrates who had a higher grade than that of “Pretore” and after three years of service, it is extended by the Constitution to all judges, from their access to the profession. Behind this provision lies the intent to protect the Judiciary's security of tenure. The provision seeks to achieve a balance between preventing tenure from becoming an unjustified privilege and avoiding the possibility that loss of tenure could constitute a threat to a judge's independence. Furthermore, in Art. 107.1, of the Italian Constitution, the members of the Constituent Assembly provided an additional guarantee to protect magistrates vis-à-vis the High Council for the Judiciary by stating that the High Council can only act for the reasons and within the guarantees established by law. In so doing, the Constitution placed the Judiciary's need for internal independence from its own self-governing body, alongside its need for external independence. In fact, Art. 105 of Italian Const., assigns all decisions regarding the status of ordinary magistrates, to the High Council for the Judiciary, the self-governing body of the Judiciary.

The constitutional guarantee concerns the office and assignment of a judge to the Court. It does not prevent judges from being temporarily transferred to another office or functions (application or substitution) (Court cost. 156/1963) for reasons of efficiency and functionality, protected by art. 97 of the Constitution. The principle of irremovability can qualify a guarantee of external independence due to the fact that the decisions on the transfers of judges are adopted by the High Council for the Judiciary (Cfr. also sub art. 105 § V), but also as a guarantee of internal independence, as the same High Council for the judiciary can arrange the transfer only in the presence of the reasons that the law provided (absolute nature of the rule of law) and only by ensuring that the judges, unless they express consent to the transfer, could have the right to defend themselves. It is therefore up to the law to identify the cases in which the magistrate can be transferred: among these, we can recall the first assignment of functions to judges who have passed the competitive examination; the necessary transfer of a judge in the event of the abolition of a judicial office; the coverage of posts operated ex officio in the event of lack of aspirants; transfers dictated by the impossibility of remaining in the same office after a certain period of time etc.

A judge's independence could in fact be seriously compromised if he could be dismissed from service or transferred from one office to another. To ensure that this does not occur, the Constitution envisages that a judge's suspension, dismissal or transfer can only be decided by the High Council for the Judiciary either with the judge's consent or for the reasons and with the guarantees of defence established by laws of the judicial system. Normally, therefore, judges/prosecutors can be transferred to another office or made to perform other functions only with their consent, following a decision by the High Council for the Judiciary. Such a measure is taken by the High Council for the Judiciary (C.S.M.) on the basis of the outcome of a competitive procedure between candidates. This starts with the publication of vacancies and the preparation of a classification list, which takes account of seniority, family or health reasons and aptitudes (the relevant rules are set forth in a special circular letter adopted by the C.S.M.: circular letter no. 15098 of 30th November 1993, and subsequent amendments). The cases where enforced transfers may be exceptionally permitted are quite clearly set forth. In this respect, in addition to the case of the first posting of a trainee judge/prosecutor, where enforced transfers are effected to satisfy the administration's need to fill particular positions should also be stressed. Reference is made, in particular, to (i) arts. 4 et seq. of Law no. 570 of 25th July 1966, and subsequent amendments, pertaining to the enforced filling of Court of Appeal positions for which there are no applicants, (ii) art. 10 of law no. 831 of 20th December 1973 concerning the enforced posting to Court of

Cassation posts iii) art. 3 et seq. of Law no. 321 of 16th October 1973, and subsequent amendments, concerning enforced transfers to unwanted vacant positions and (iv) art. 1 of Law no. 133 of 4th May 1998 pertaining to the filling of unpopular posts in Southern Italy and the Islands which are traditionally not sought-after and almost always vacant.

One of the institutions that has always been most discussed is the authority of the High Council for the Judiciary to enforce **the transfer of a judge/prosecutor for "environmental and/or functional incompatibility"** (art. 2 of Royal Legislative Decree no. 511 of 31st May 1946): in that case, a departure from the principle of security of tenure, resulting from the enforced transfer, is indeed justified by the priority of ensuring the proper and peaceful exercise of the judicial activity, which would be prejudiced either by the judge/prosecutor continuing in loco or by the judge/prosecutor exercising specific functions (as far as these rules are concerned, see also the Consiglio Superiore della Magistratura circular letter of 18th December 1991). According to the original wording of art. 2 r.d. lgs. 511/1946, the C.s.m. could decide the transfer of judges (or prosecutors) taking into account the "objective" situation of the judge/prosecutor's "impediment" to performing a specific function and/or performing an efficient activity in a specific place, thus jeopardising the prestige and good operation of the judicial office. Therefore, a judge/prosecutor's "guilt" was disregarded, as the transfer could also be ordered in cases of guiltless incompatibility. Juridical doctrine has often denounced the unconstitutionality of this provision due to the lack of a mandatory codification of the hypotheses of transfer and, therefore, the violation of the absolute nature of the rule of law established by art. 107 of the Constitution. Furthermore, the lack of predetermination of the transfer cases and the reference to the prestige and good operation of the judicial office provoked an interference and overlapped with disciplinary assessments. The criticism of the wording of art. 2 cit. was accentuated by the fact that the decisions concerning the transfers - adopted by the plenum of the High Council for the Judiciary (C.s.m.) – were very often used either as an alternative tool to the disciplinary one, on the basis of an autonomous initiative of the C.s.m. (that is, without the request coming from subjects entitled to take disciplinary action), or as an emergency precautionary measure, pending the decision of the Disciplinary Section, that could arrange the transfer, but only at the end of the trial, as an accompanying sanction (article 21, paragraph 6, legislative decree n. 511 of 1946). With reference to the reasons that justify the transfer of office due to incompatibility it must, however, be pointed out that administrative jurisprudence has always invited the High Council for the Judiciary to keep the assumptions underlying the transfer from office pursuant to art. 2 cit. distinct from those that allow the beginning of a disciplinary proceeding, also in light of the different natures of the two proceedings. Also the Constitutional Court, in judgement n. 457/2002, clarified that in the case of a transfer proceeding, what is highlighted is not the misconduct of a Judge, but « an objective situation that occurs in the office or wherever he exercises his functions», thus stigmatizing the frequent use of transfer in a paradoxical way. These requests have been accepted by the legislator who, with the d. lgs. 109/2006, has modified the text of the art. 2 cit., underlying the non-disciplinary nature of "environmental and/or functional incompatibility". The text has been modified, replacing the reference to "Prestige of the judicial order" with the sentence «with full independence and impartiality», and expressly stating that the transfer can be ordered only in cases of guiltless incompatibility. Now, therefore, judges (and prosecutors) are transferred when «without fault they cannot carry out their own functions with full independence and impartiality». The reform was accompanied by the provision of precautionary measures in the disciplinary procedure. Dealing with an administrative proceeding the guarantees consist of the fact that the person concerned must be given a hearing.

4. European experience.

“Challenges for judicial independence and impartiality in the member states of the Council of Europe”, Information Documents SG/Inf(2016), is a report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe. According to this report it is not acceptable that the executive power is able to intervene in a direct and predominant manner in the functioning of the courts and particularly the selection of judges, their promotion or their transfer, the imposition of disciplinary measures on judges or the dismissal of judges. This is the case, for example, when powers to deal with those matters are given to the Ministry of Justice. However, such interferences can be equally dangerous if they are executed by a Council for the Judiciary under the predominant influence of the executive. Sometimes, legislation directly endangers the status, independence or security of tenure for judges. Even more so, direct intervention or directives to judges are inadmissible, as well as any actions which may give rise to fear of retaliation for judicial decisions rendered.

The security of tenure for judges and their appointment until the statutory age of retirement is a corollary of independence. This implies that a judge’s tenure cannot be terminated other than for health reasons or as result of disciplinary proceedings. However, the existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and the basis upon which, judges may be disciplined.

This kind of guarantee should be extended also, according to the mentioned report, to the prosecutor. Security of tenure is a **safeguard for prosecutors**, who must feel free and unimpaired in their decisions to commence criminal investigations and to bring suspects to trial. Their duty to prosecute where sufficient evidence to support the suspicion of criminal liability is available should not be subject to interventions by the executive, e.g. by a ministry of justice, neither should their decisions where the law gives them discretion. Where the law provides for directives by the executive, such directives should be subject to judicial control, either in the sense that an unfounded case can be dismissed by the court or in the sense that a refusal to prosecute can be examined by the court on the application of victims of an alleged crime. Moreover, it is not enough that the executive does not put pressure on the prosecution. The executive also has a duty to take the necessary steps to protect judges and prosecutors from the attacks of third parties, in particular criminals. Prosecutors and judges who do not feel safe cannot act independently⁵.

The European experience shows many cases of threats to the independence of the Judiciary in recent years. There are various challenges to the independence and impartiality of judges and prosecutors which establish various aspects of undermining public confidence in the independent administration of justice. This begins when the executive can exert direct or indirect influence on the process of appointing judges and prosecutors, for example when security checks are required without the possibility of challenging their results. It continues when seemingly arbitrary changes to relevant laws are enacted by parliament, e.g. with respect to retirement ages or the termination of terms of office of duly appointed judges and prosecutors.

⁵ According to the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors Practitioners Guide No. 1 of the International Commission of Jurists, one of the most **common practices that affects judges’ tenure** is that of appointing “provisional judges”, i.e. judges who not enjoy security of tenure in their positions and can be freely removed or suspended. According to the Inter-American Commission on Human Rights, the provisional character of these judges “implies that their actions are subject to conditions, and that they cannot feel legally protected from undue interference or pressure from other parts of judiciary or from external sources”.¹⁶⁴ On this matter, the Commission has stated that “having a high percentage of provisional judges has a serious detrimental impact on citizens’ right to proper justice and on the judges’ right to stability in their positions as a guarantee of judicial independence and autonomy” Another way to impinge on judges’ tenure is to make them undergo a rectification procedure at certain intervals in order to determine whether they can continue in office.

We can recall the case of **Hungary**, where in 2011, the retirement age of judges and prosecutors was changed from 70 to 62 by Article 12 of the Transitional Provisions for Fundamental Law. With certain exceptions, these provisions required judges who reached the retirement age (62 years at the time but gradually increasing to 65 years) to actually retire regardless of the upper-age limit for judges (70 years). This resulted in forced retirement of 274 judges and prosecutors. The European Commission contested the early retirement, and the Court of Justice of the European Union upheld the Commission's assessment that this mandatory retirement was incompatible with EU equal treatment law. In July 2012, the Hungarian Constitutional Court declared these provisions unconstitutional. According to subsequent legislation, most of the judges who had been retired had a choice between reinstatement into their previous positions with their previous benefits or a considerable monetary compensation. The CCJE member in respect of Hungary stated, on 30 June 2015, that the majority of judges involved had chosen the second option. Most of the related cases are now closed and pending litigation will be concluded shortly

Difficult problems arise in connection with **vetting or lustration proceedings** when, on the one hand, there may be a desire to improve the standing of judges and prosecutors in the eyes of society as a whole, to enhance or create public trust in their impartiality and incorruptibility, and when, on the other hand, the rights of office holders and possible public confidence in their independent work have to be observed. In this context, dismissing all or almost all members of the judiciary (including members of the prosecution) irrespective of individual responsibility would invariably also concern those whose conduct has not given rise to doubt. Therefore, individual examinations seem inevitable. Even such examinations will have to be conducted with great care, observing the principle that, as a rule, judges should not be held liable for their judicial decisions. Therefore, only exceptional cases of intentional violations of the law and of human rights principles should result in a termination of office.

Regarding this aspect, the CCJE received a request from the CCJE member in respect of **Ukraine** on 12 March 2014 for assistance and advice concerning the draft law “on the Restoration of Trust in the Judiciary of Ukraine”, and a representative of the CCJE was invited to participate in the assessment of this draft, which had been produced within the framework of the project “Strengthening the independence, efficiency and professionalism of the Judiciary” of the Council of Europe in Ukraine, in March 2014. The draft proposed that judges had to undergo a **lustration process** if the judges had participated in certain decisions during the “Maidan events” or regarding the elections of the last parliament or if they had issued a decision which was the basis of a judgment finding a violation by the European Court of Human Rights. Most of the proposals resulting from the assessment, which concerned improvements to the procedure and regarding the composition and jurisdiction of a newly established commission that would be entrusted to perform this lustration, were adopted by the Ukrainian legislator. The legislative proposals remained unchanged

The Supreme Court of Ukraine sent its first constitutional motion concerning compliance of provisions of the Law “**On Government Cleansing**” (so called “**lustration**”) in November 2014. The motion argued that provisions about dismissals of judges who had given judgments concerning the protest actions which took place in Kyiv in 2013-2014 were unconstitutional. It was also noted that these judges would already be subject to possible dismissal according to provisions of the Law “On Restoration of Trust in the Judiciary” and consequently there was a situation of double jeopardy. The motion was accepted for consideration by the Constitutional Court of Ukraine in December 2014.

In principle, however, according to the mentioned report, judges should not be required to justify their judicial decision-making. When decisions on reassignment or replacement of judges, even if made by independent bodies, give rise to the impression that they are based on specific judgments, public trust in independence is endangered. This also applies when in a process of regular re-appointment, individual decision-making is questioned. Likewise, where the law provides for the possibility of individual civil liability for negligence in the process of judicial decisions, this

is likely to cause indirect pressure and thereby to prevent independent thinking and adjudicating. Moreover, direct and indirect influence exerted by comments of members of the executive or the legislative on judicial decisions or on judges and prosecutors (individually or as a whole) is likely to undermine public trust, to create a climate of intimidation and to even give rise to retaliation and physical attacks.

In this regard, we can recall a case which occurred in **Turkey**. In May 2015, the CCJE received information about the arrest of two judges, Metin Ozcelik and Mustafa Baser, because of their ruling for the release of Samanyolu Media Group CEO Hidayet Karaka and 63 police officers, arrested on April 30 and May 1 respectively. On 12 June 2015, the CCJE published a commentary on the case (Document CCJE-BU(2015)5 and in the CCJE Situation Report updated Version No. 2 (2015) paras 40-41), expressing great concern over this possible violation of judicial independence and impartiality. The uncontested facts, as they appeared to the bureau of the CCJE, led to the clear inference that these judges may have been removed only or predominantly because of their (intended) decision-making. The CCJE Bureau went on to underline that when the official performance of judges may give rise to criticism or even to disciplinary or criminal investigations, such proceedings must invariably follow the procedure laid down by the relevant acts of the Parliament, in accordance with the due process that was set out in such laws and carried out with the necessary procedural guarantees for all parties involved. To replace such formal proceedings by actions aimed at sanctioning individual judges because of judgments they had rendered, or in order to induce them to render specific judgments, would be absolutely unacceptable.

Moreover, in **Ukraine**, judges are apparently subject to severe criticism by politicians and the media. This criticism seems to have played a role in encouraging violent attacks against judges. The issue of public criticism and debate as a challenge to judicial independence and impartiality is discussed in detail in part D VIII. Recently, in an interview with the press, when asked about judges, the prime minister of Ukraine, Arsenij Jazenjuk, said “A catastrophe. They cannot be influenced by anything except by cash. My proposal: Replace all of them. We have 9000 judges, but every year 12000 law graduates. Capacities, therefore, are available. However, there is a conflict of values. European experts tell us this would be incompatible with the rule of law. But our judges are incredibly corrupt and do not dream of administering justice. Chances to re-educate them by encouragement are next to zero. There are two proposals for changing the Constitution.

According to the mentioned report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE, with respect to prosecutors, it is essential to create a climate of public trust to ensure confidence that crimes will be investigated impartially and independently, that general directives, if any, are clear and unequivocal, that individual directives are transparent in order to allow democratic control, that discretion is exercised equally in a transparent and impartial manner and that, in case of dispute, independent courts can decide.

In some cases the infringement of the security of tenure of judges and prosecutors was assessed by the **European Court of Human Rights in Strasbourg**.

In Hungary there was the interference with judicial independence by parliament. It was the case of **Baka v. Hungary**.

The President of the Hungarian Supreme Court, András Baka, publicly criticised the new retirement age of judges, the Nullification Bill and amendments of the Criminal Code. He stressed the importance of judicial independence. The Fundamental Law of 25 April 2011 prescribed that the highest judicial body should be the “Kuria”. According to later amendments, the mandate of the president of the Supreme Court was to terminate with the coming into force of the Fundamental law. Accordingly, the mandate of András Baka was terminated on 1 January 2012, three and a half years before its normal expiry. A new president of the “Kuria” was elected. András Baka remained a judge at the “Kuria” but not its President. Moreover, press contacts were now only permitted with the prior consent of the president of the court. A law that entitled former presidents to certain benefits was amended so that only former presidents who had reached retirement age before the

amendment came into force could request the benefits. Since András Baka had not reached retirement age, he had no rights to such benefits⁶.

In its decision of 27 May, the ECHR held that Baka's rights under Article 6 of the ECHR to defend his rights before an independent tribunal had been violated. Since the termination of his mandate was an effect of the Fundamental law, there was no possibility to challenge the termination of his mandate in court⁷. The Court also held that the applicant's right to freedom of expression under Article 10 of the ECHR had been violated. The Court held that the president's mandate had been terminated as a reaction to his criticism of the judicial reform of the new political majority and was not a necessary consequence of the reorganisation of the Hungarian judiciary. As president of the Supreme Court and the Judicial Council, András Baka had not only a right, but a duty to speak out in a proportional way in relation to reforms of the judiciary⁸.

Another case **Volkov v. Ukraine** concerns reforms and pressure on judges.

On 25 May 2013, the ECtHR decided the case of Volkov v. Ukraine. The case concerned events of the time before the governmental changes of 2013/2014 in Ukraine, but is reported here as an important recent decision concerning the independence of justice and the separation of powers. Oleksandr Volkov had been a judge since 1983, a Supreme Court Judge since 2003. At the time of his appointment he did not have to take an oath of office. In 2010284, however, he was dismissed for "breach of the oath" by decision of High Council of Justice (HCJ) and by a vote of Parliament. The ECHR held that Volkov's rights under article 6 of the ECHR had been violated because his dismissal had not been decided by an independent and impartial tribunal. The dismissal also led to an interference with his right to respect for private and family life (Article 8) that was not justified. There had been no guidelines to define a breach of oath⁹. The Court pointed out that the case raised general problems of separation of powers and recommended that Ukraine restructure the institutional basis of its legal system. The Court indicated that Mr Volkov was to be reinstated as Supreme Court judge which he eventually was.

Also the **European Court of Justice** recently faced with the violation of the security of tenure. On 15th November 2018, in Case C-619/18, Commission verse Poland, the President of the European Court of Justice adopted an order of suspension of the application of the provisions of polish national legislation relating to the lowering of the retirement age for Supreme Court judges. The Polish law lowered the age of retirement of the judges of the Supreme Court and was applicable with retroactive effect.

On 3 April 2018 the new Polish Law on the Supreme Court ('the Law on the Supreme Court') entered into force. Under that Law, the retirement age for Supreme Court judges has been lowered to 65. The new age limit applies as from the date of entry into force of that Law, including with regard to judges of that court appointed before that date. It is possible for Supreme Court judges to continue in active judicial service beyond the age of 65 but this is subject to the submission of a statement indicating the desire of the judge concerned to continue to perform his duties and a certificate stating that his state of health allows him to serve, and must be consented to by the President of the Republic of Poland. In giving that consent, the President of the Republic of Poland would not be bound by any criterion and his decision would not be subject to any form of judicial review.

⁶ Baka v. Hungary of 27.5.2015, - 200261/12 – para 11-26

⁷ Baka v. Hungary of 27.5.2015, - 200261/12 – para 73-79

⁸ Baka v. Hungary of 27.5.2015, - 200261/12 – para 91 -103

⁹ ECHR Volkov v. Ukraine, (application no. 21722/11) 23.5.2013

Thus, according to the Law, serving Supreme Court judges who reached the age of 65 before that Law entered into force or, at the latest, on 3 July 2018, were required to retire on 4 July 2018, unless they had submitted such a statement and such a certificate by 3 May 2018 inclusive and the President of the Republic of Poland had granted them permission to continue in active service at the Supreme Court.

On 2 October 2018 the Commission brought an action for failure to fulfil obligations before the Court of Justice. The Commission considers that by, first, lowering the retirement age and applying that new retirement age to judges appointed to the Supreme Court up until 3 April 2018 and, second, granting the President of the Republic of Poland the discretion to extend the active judicial service of Supreme Court judges, Poland has infringed EU law.

Pending judgment by the Court, the Commission has requested the Court, in the context of interim proceedings, to order Poland to adopt the following interim measures: (1) suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges; (2) take all necessary measures to ensure that the Supreme Court judges concerned by the provisions at issue may continue to perform their duties in the same post, while continuing to enjoy the same status and the same rights and working conditions as they did before the Law on the Supreme Court entered into force; (3) refrain from adopting any measure concerning the appointment of judges to the Supreme Court to replace the Supreme Court judges concerned by those provisions, or any measure concerning the appointment of a new First President of the Supreme Court or indicating the person tasked with leading the Supreme Court in its First President's stead pending the appointment of a new First President; (4) inform the Commission, one month after being notified of the order of the Court at the latest, and every month thereafter, of all the measures it has adopted or plans to adopt in order to fully comply with that order.

By order of 19 October 2018, the Vice President of the Court provisionally granted all those requests pending the making of an order closing the interim proceedings.

In the quoted order, the Court recalls that the court hearing an application for interim relief may order interim measures only if (1) it is established that such an order is justified, *prima facie*, in fact and in law (*fumus boni juris*) and (2) those measures are urgent in so far as, in order to avoid serious and irreparable harm to the interests of the EU as represented by the Commission, it must be necessary for those measures to be enacted and produce their effects before a final decision is reached. Where necessary, the court hearing the application for interim relief must also weigh up the interests involved.

First, regarding the *fumus boni juris* requirement, the Court emphasises that that requirement is met where at least one of the pleas in law put forward by the applicant for interim measures in support of the main action appears, *prima facie*, not unfounded. In the present case, the arguments put forward by the Commission do not appear, *prima facie*, unfounded and it cannot therefore be excluded that the provisions of national legislation at issue **jeopardise the principles of the irremovability of judges and of judicial independence** and, consequently, infringe Poland's obligation to ensure effective legal protection in the fields covered by EU law.

Secondly, regarding the urgency requirement, the Court recalls that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to ensure that there is no lacuna in the legal protection provided by the Court. For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief. In the present case, the Commission claims that applying the provisions of national legislation at issue pending delivery of the judgment of the Court regarding the action for failure to fulfil obligations brought by the Commission ('the final judgment') is likely to cause serious and irreparable damage to the EU legal order. According to the Court the independence of national courts and tribunals is essential to the proper working of the preliminary ruling mechanism. It is also crucial in the context of EU measures in the field of judicial cooperation in civil and criminal matters, which are based on mutual trust between Member States *vis-à-vis* their respective legal systems. Consequently, the fact that, because of the application of the provisions of national legislation at issue, the independence of the Supreme Court may not be ensured pending delivery of the final judgment is likely to cause serious damage to the EU legal order and, accordingly, to the rights that individuals derive from EU law, and the values, set out in Article 2 TEU,⁶ on which the EU is based, including that of the rule of law. Moreover, because of the authority of the decisions of the Supreme Court over the lower Polish courts, the fact that, in the event that

the provisions of national legislation at issue are applied, the independence of that court may not be ensured pending delivery of the final judgment is likely to undermine the trust of the Member States and their courts in the Polish legal system and, as a result, in that State's observance of the rule of law. The fact that, because of the application of the provisions of national legislation at issue, the independence of the Supreme Court may not be ensured pending delivery of the final judgment could lead the Member States to refuse to recognise and enforce judicial decisions made by the Polish courts, which is likely to cause serious and irreparable damage to EU law. Therefore, the Court considers that the Commission has established that, in the event of a refusal to grant the requested interim measures, the application of the provisions of national legislation at issue pending delivery of the final judgment is likely to cause serious and irreparable damage to the EU legal order. Consequently, the Court considers that the urgency of the interim measures requested by the Commission is established.

Thirdly, the Court examines whether weighing up the interests involved supports granting interim measures. It notes that the general interest of the Union in the proper working of its legal order could be seriously and irreparably affected, pending the final judgment, if the interim measures requested by the Commission were not ordered but the main action were to be upheld. By contrast, Poland's interest in the proper working of the Supreme Court is not likely to be thus affected in the event that the interim measures requested by the Commission are granted but the main action is dismissed, given that that grant would merely have the effect of maintaining, for a limited period, the application of the legal system which existed before the adoption of the Law on the Supreme Court. In those circumstances, the Court considers that weighing up the interests involved supports granting the interim measures requested by the Commission.

Consequently, the Court grants the Commission's request for interim measures

The European Court of Justice will deliver final judgment on the substance of this case at a later date. An order as to interim measures is without prejudice to the outcome of the main proceeding.

In conclusion, many text provide for security of tenure as the key aspect of the independence of the Judiciary, but despite the guarantees stated at the international and European level, the creativity of the other powers of the State is very high in order to infringe this principle. So judges must be always vigilant and ready to react.

Raffaele Gargiulo