



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

ENCJ WORKING GROUP

The Status of Judges Report 2009-2010

GROUPE DE TRAVAIL RECJ

Le Statut du Juge Rapport 2009-2010

Coordinator country: Italy

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1. European Statute for Judges.

The analysis of the contributions of the Countries participating in the WG has enabled us to identify a number of features which are common to all the judicial systems, with respect to the constitutional position of the judiciary, in the context of widely differing systems.

Given the time limitations and the particularly delicate issues, which were further underlined over the course of the three meetings, connected to the subject of the Judge's Statute, it was deemed opportune to adopt an essentially comparative approach for analysing the working group's activities. In that perspective and in the light of the material collected, it is possible to envisage a second phase in the working group's activities, which is aimed at the development of a proposal for a European Statute for Judges; indeed, it is specifically these identified features of the judge's statute, common to the various systems, that constitute a starting point in conducting a study on the constitutional position of the judiciary in European democracies. More specifically, however, the working group activities could become part of the new Network projects, being suitably included in the third objective of the strategic plan: "To promote the development of independent Councils for the Judiciary".

With this in mind, we need to provide an illustration of the results of the activities conducted by the WG.

2. Introduction on the working method.

First of all, in order to introduce the discussion held during the first meeting, a proposal was made to undertake a reasoned reconnaissance of all the international sources that have dealt with the issue of the judge's statute; at the same time, and with the collaboration of all the delegates, a comparative analysis was carried out of all the regulatory sources which, in the legal systems of the various Countries participating in the working group, are responsible for controlling the independence and autonomy of the Judiciary. The above mentioned meetings witnessed the participation of Italian judges specialised in the fields under examination; in particular, Mr. Raffaele Sabato, member of the Bureau of the Consultative Council of European Judges, and Mr. Nicola Lettieri, Co-agent of the Italian Government before the

European Court of Human Rights participated with specific presentations in the meeting of 13 November 2009; Mr. Armando D'Alterio, former Secretary General of the European Judicial Training Network, participated in the meeting of 15 January 2010 with an interesting presentation on issues related to the training of judges in Europe.

During the meetings, a number of issues inherent to the judge's career were developed using a comparative approach, with particular reference to the problems of selection and recruitment, initial and continuing training, career advancement and professional evaluations, and the appointment of directors. During the third meeting, held on 4 and 5 March 2010, the issue of external independence within the Judiciary was tackled, with particular reference to the composition and prerogatives of the Councils for the Judiciary, to the financial autonomy of the Judiciary, and to the problems connected with the judges' civil and criminal liability; furthermore, the issues inherent to the emoluments, freedom of association and freedom of expression of the members of the judicial system were the object of an in-depth analysis.

A number of datasheets were obtained for all the aforementioned issues analysed with reference to the different situations of the various groups participating in the working group.

A collection of the summary datasheets on the issues analysed during the three meetings, produced by the delegates of the various Countries, is enclosed as annex to this final summary document; this will make it possible to conduct a comparative analysis of the essential aspects of a Statute for judges.

The position of the Judiciary in relation with the other state powers: the guarantee of independence and autonomy

European democracies, whether in the form of Republic or constitutional Monarchy, are all founded on the principle of separation of powers. With specific regards to the Judiciary, all Countries adhering to the WG have underlined the fact that the independence of the Judiciary from the executive – as well as from the legislative branch - constitutes a necessary precondition for guaranteeing the protection of the personal and property rights of European citizens.

In this respect, note that also the Countries adhering to the WG which do not have a written Constitution have in any case adhered to the Convention for the protection of human rights and fundamental freedoms; consequently, the principle set forth by Art. 6 of the EHR Convention, which states that “*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...*” constitutes a parameter applicable to the domestic legislation of the aforementioned Countries. It may therefore be stated that the principle decreed by Art. 6 of the EHR Convention, with respect to the position of independence and impartiality of the Judiciary,

has become a principle of “*European common law*”, applicable to the various national systems of the EU Area Countries.

In other words, the *autonomy and independence* of judges and public prosecutors is safeguarded by the legal systems of the Countries adhering to the WG project.

In this respect, it is important to note that *autonomy*, in the strict sense of the word, pertains to the organizational structure, as it is exercised vis-à-vis the executive branch, given that the independence of the Judiciary would be undermined if the adoption of measures related to the judges’ status were to be attributed to it, that is, to the legislative branch. Otherwise, *independence* is related to the functional aspect of the judicial activity. It is not related to the system as a whole – guaranteed through autonomy as explained above – but, rather, to the judges and public prosecutors at the time of discharge of their duties.

In other words, the political principle decreeing the independence of the judicial body differs from the principle of independence which is similarly responsible for overseeing the actual practise of the judicial profession; the value of independence, in fact, must qualify the activities of every judge, upon the latter’s administration of the law, which is by nature general and abstract. At that time, the judges and public prosecutors who analyse the tangible cases put before them, implement the positive law and acknowledge the legal protection of the subjective position of each disputing party.

In this respect, the Countries adhering to the WG have underlined the need to guarantee the so-called *internal* independence: judges and public prosecutors must not be influenced, while making decisions, either by the Court managers or by their colleagues.

Also in this perspective, therefore, the analysed datasheets lead one to believe that there is consistent uniformity in the way the question is framed in the various legal systems of the Countries adhering to the WG.

Also worthy of note is the fact that, in all these Countries, the value of the judges’ independence is not considered a privilege but, rather, a guarantee for the citizens. And, indeed, in a number of systems, the judges’ independence is qualified by ordinary legal provisions, known as the Judge’s Statute, which provides a detailed analysis of the judge’s rights and duties.

The analysis of the contributions made by the Countries adhering to the WG has also underlined the differences that still exist today between the various national systems, with specific reference to the methods of implementing the judiciary’s independence and autonomy.

In this respect, note that the guarantee of independence – as analysed above - in the majority of the aforesaid Countries concerns mainly judges and not public prosecutors. That, however, is not the case in other government systems where the judicial body includes both judges and public prosecutors.

Independence implies the guarantee against the judge's *removal from office*. Judges may be transferred only upon their request, except for particular cases in which they are affected by circumstances of incompatibility: in such case, their transfer may be decreed against their will, following a measure adopted by the Council for the Judiciary or other guarantee institution.

Note that, in some Countries, in order to guarantee real independence the law also prohibits anyone to demonstrate on the street within a distance of 75 metres from the courts.

Generally, the judges' emoluments and the permanence of their jobs is established by ordinary law, with the aim to effectively safeguard their autonomy and independence. It is a common belief that wage conditions help to guarantee the real social and existential autonomy of judges and public prosecutors; and this is the reason why wages can only be reduced by law, based on the Country's general economic situation. In some Countries, the law expressly provides for the judges' obligation to make their financial position completely transparent (including that of their spouse and dependent children).

As guarantee of independence also from the legislative branch, some legal systems envisage the obligation for reform laws on matters concerning the judicial system to be approved strictly through qualified majorities.

Councils for the Judiciary

Numerous countries provide for the establishment of self-governing bodies – the so-called Higher Councils for the Judiciary – which are responsible for safeguarding the independence and autonomy of the judiciary; whilst, in other countries, the independence of the judiciary from the government is generally decreed by law and effectively guaranteed by various institutions.

The Higher Councils of the Judiciary, as already mentioned, consist in the majority of cases of judges elected by judges, as well as by “secular” members appointed by the President or by Parliament. The presence of *secular* members is an important aspect, as it prevents the judiciary from representing an order “separate” from the other powers of the State; also, it sets the favorable conditions for the establishment of a real coordination between judicial activity and civil society. In this perspective, some legal systems provide for the Councils for the Judiciary to be chaired by the President of the Republic, as the supreme guarantee institution.

In some Higher Councils the Ministry of Justice is a non-voting member.

As concerns duties, note that the Councils for the Judiciary are responsible for administering the judges' entire career; the related duties concern, in general, the appointment, professional evaluation and career advancement of managers as well as the judges' disciplinary responsibility.

Numerous Higher Councils formulate opinions on reform draft bills addressing judicial matters. The Councils, moreover, are generally vested with the power of secondary legislation: in the exercise of such powers the Councils administer and govern the legal requirements on matters related to the judicial system.

In particular, as regards the administration of public prosecutors, numerous Countries have established specific institutions which often report to the General Prosecutor at the Supreme Court. Generally, public prosecutors enjoy lesser guarantees of independence than those accorded to judges.

Financial autonomy

Many Countries have underlined the need to allocate to the Councils for the Judiciary also the duty to determine the amount of funds allocated in the State budget laws to the judicial system as a whole. The reason being that, in this way, it is possible to guarantee the real independence of the judiciary from the legislative and executive branches. With respect to this specific issue, in fact, it has been shown that in the majority of Countries, the amount of resources allocated on a yearly basis to Courts and Tribunals is determined exclusively by the Ministry of Justice.

In this respect, it is important to note that some Councils, by virtue of their being independent institutions, enjoy financial autonomy exclusively with regards to their own budget; and that, conversely, the allocations for the functioning of the Courts and tribunals are, in the majority of Countries, the exclusive responsibility of the Ministry of Justice, as shown above. The WG participants have underlined that the duties of the Ministry with respect to allocations for justice-related services, although fulfilled in a spirit of fair institutional collaboration, may in fact lead to a limitation of the independence of the judiciary.

With reference to the additional topics that were specifically examined by the working group, the following are worthy of mention.

Recruitment of judges

According to continental European tradition, the recruitment of judges and prosecutors in the majority of Countries participating in the WG occurs through public competition. The competition winners become professional judges, with guaranteed security of tenure until retirement. In the majority of cases, there is a single competition; the winners must then choose, and normally this is an irreversible decision, between the role of judge and the role of public prosecutor.

In many Countries, the requirements for admission to the competition include not only a degree in law, but also a diploma or certificate giving the right to practise law, or the acquisition of specific academic titles.

All WG participants have underlined that, in order to be appointed as judge or public prosecutor, candidates must pass a very strict technical and legal selection process. Apart from this, in order to be approved for the performance of the duties of judge or prosecutor, candidates are generally required to successfully complete a long training period. Such training has a double purpose: a) oversee professional training for the judges and prosecutors who have won the competition; b) verify their qualifications and their ability to carry out judicial duties.

In the majority of Countries judges are required to take an oath of office upon assuming their post, in which they undertake to practise the legal profession under conditions of true independence and abide by domestic law.

Another important aspect concerning the legal systems of various Countries is that candidates are required to take an aptitude test, an IQ test or a personality test; in this respect, note that some Countries expressly provide for the selection of well-balanced candidates, having positive character traits, social skills and the ability to make decisions also under stressful conditions. Some Countries require candidates to take several psychological tests throughout their career.

Initial and continuing education and training

The fundamental consideration on which the policies concerning the training of judges and prosecutors of all the Countries adhering to the WG are based is that judges cannot be influenced by any one institution or authority or by any specific guidelines as to how they should interpret the law; in other words, judges are alone before the law, which they must interpret without any external aid.

Such circumstances determine the need for judges and public prosecutors to undergo initial and continuing education and training of the highest standards, such as to enable them to acquire the technical and cultural skills necessary to interpret the law, while assuming full responsibility. Various Countries place emphasis on the fact that professional training must enrich the judges' cultural life, in a way such as to enable them to discern the true needs of the civil society in which they operate.

In the majority of Countries, specific national facilities have been set up to deal with the initial and continuing education and training of judges and public prosecutors; depending on the Country, these facilities are the "Schools of the Judiciary", that is, Centres for the training of judges and judicial Documentation, which work together with the respective Ministries of Justice. In many cases, these

facilities are divided into two separate entities, one providing the training for judges and one for public prosecutors.

The training facilities of the various Countries differ greatly between them, in terms of their legal nature and sphere of application; generally, Schools guarantee the procurement of training courses for judges and public prosecutors, with a substantial degree of independence from the executive branch. In some Countries, apart from the training provided by the central government, a number of peripheral institutions have been set up to provide training at local level. Thus, a permanent service has been established to provide continuing assistance to the professional needs of judges and prosecutors in the same place where they operate.

Some Countries provide for the professional judges' obligation to undergo continuing education and training and to participate on a periodical basis in training courses.

With respect to the topics of study, note that the training facilities oversee not only the technical and specialist aspects of training, based on the various professions (juvenile judges, bankruptcy and corporate judges, family judges and so on), but also the development of management and organization techniques for judicial activities. There are also specific courses dedicated to judges who wish to perform managerial duties within the courts.

As a rule, training facilities are not responsible for evaluating technical skills, thanks to the principle generally accepted by all Countries adhering to the WG that training and evaluation of judges should not be mixed together. The feedback on service quality obtained from training course participants is carefully considered in selecting the teaching methods and trainers. The teaching staff employed by training facilities also includes representatives of the academic world.

As mentioned above, the continuous professional education and training of judges and public prosecutors, which provides the latter with the technical skills necessary to tackle the issues submitted to them, is a guarantee of an independent practise of law. In this respect, various Countries have also underlined the need for a judicial specialisation; only judges and public prosecutors who are specialised in a specific subject are able to acquire the technical knowledge and expertise (according to the principle: *learning by doing*) necessary to deal with disputes on specialist subjects, under conditions of true independence from the parties, which are increasingly often assisted by attorneys specialised in the various trade sectors.

The WG Countries also agree on the importance of providing a European training for national judges and public prosecutors, given that the decisions on disputes require on an increasingly frequent basis the application of supranational positive law or jurisdictional sources. Closely connected with the

European and Community training of judges and public prosecutors is the issue of language training and of the dissemination of the use of modern IT technologies.

Said skills, in fact, make it possible to “bring together” the judges and public prosecutors of the various Countries, who operate in different states although in the same European context. And also the potential intrapersonal contacts between judges and prosecutors form the basis for the establishment of a European judicial body, qualified by common standards of independence and autonomy, which is fit to guarantee the best protection of the rights of the parties involved, to be qualified as “European citizens”.

Career advancement

The subject of judges’ and prosecutors’ career advancement is the one that presents the greatest differences between the various national legal systems of the Countries adhering to the WG.

Some systems do not provide for career advancement at all: judges and public prosecutors, once appointed, perform their judicial duties until retirement.

In other Countries, the various career echelons are achieved essentially according to seniority of service.

In the majority of cases, a competitive examination is required in order to obtain career advancement. In some Countries, such transition is possible only if there are vacant posts available; in others, on the contrary, advancement to the other “category” (for example: from judge of first instance to court of appeal judge), does not require the actual performance of the corresponding duties.

The competition procedures for career advancement are highly diversified: in some Countries, competitions are used strictly for obtaining a title; in others, they require the participation in written tests, or the documented possession of organizational skills.

Professional evaluations

Closely connected to the subject of career advancement is that of periodical professional evaluations.

The subject of professional evaluations has also pointed out significant differences between the various legal systems.

In some Countries and, in particular, in those which do not provide in any way for career advancement, the periodical professional evaluation of judges and prosecutors is also not envisaged. In this respect, some participants have underlined that a periodical professional evaluation may determine the inadmissible violation of the judges’ independence. This issue is not so critical with respect to the position of public prosecutors. Generally, the possibility of re-opening a closed case during the

examination of the work conducted by the judge is excluded; in this way, in fact, there would be an interference in the latter's decision, and therefore a breach of the judge's independence.

In the legal systems which provide for the performance of periodical professional evaluations, account is taken of the confirmation of the judicial orders in any subsequent claim and plea in law: a large number of reforms of the measures on appeal is considered an indication of poor professionalism on the part of the judge of first instance.

As regards professional evaluations, a key role is generally played by the Presidents of the Tribunals and Courts; the managers, in fact, hold evaluation meetings with the judges of the district Court and draw up specific reports on the work carried out by the same judges.

At the end of the evaluation, a score is given which may vary from positive, satisfactory to unsatisfactory. An average or low score requires that the judge or prosecutor participate in specific professional training and requalification courses. In general, a second negative evaluation determines the latter's removal from office.

Appointment of managers

The various national systems adopt different methods for appointing court managers.

In some Countries, the managerial duties are performed on a shift by the judges and prosecutors in office, for a predefined amount of time, and without the need for any specific approval.

In the case where, on the other hand, a formal appointment is required, the procedures change also according to the type of post: the methods for appointing the first President of the Supreme Court vary, as opposed to the procedure for the appointment of a court judge of first instance.

Generally, managers are appointed by the Councils for the Judiciary, although there have been cases in which the appointment of managerial staff was submitted to the Minister of Justice, and the Council was called to express an opinion on the candidate.

The principle whereby a time limit is set on the term of office of managers and cadres is quite common: that is, an expiry of the term of office is provided for (usually set at three or five years), with the possibility to renew only once.

The criteria adopted for approving the new post is based primarily on the assessment of the organizational and managerial results achieved by the manager; upon renewal of the term of office, that is, the efficiency and functionality of the management methods adopted by the manager are verified.

Indeed, there exists a widespread culture of organization, mindful of the importance of the results of the activities conducted by the courts and tribunals: managers are the first persons responsible for the justice-service provided to citizens, a service which must be provided in a reasonable amount of time,

according to the needs of modern civil society. And, as already shown above, organizational skills are an essential element of any single judge's or public prosecutor's professional background.

Note, in this respect, that in various legal systems, the responsibility for the organizational management of the tribunals and courts does not rest exclusively with the President; in fact, a *board* is established – responsible for dealing with any of the office's organizational and budget needs – which is composed of both clerks and professional managers. Said *boards* are also regulated according to temporal criteria, and the renewal of their terms of office depends on the management results achieved by each individual.

Liability of judges and public prosecutors for judicial errors and deontologically inappropriate behaviour.

The legal systems considered herein generally exclude the possibility to claim damages directly against judges or public prosecutors in the event of damages caused by judicial error; in such case, citizens may act against the State. And the State, if necessary, may obtain relief against the judge or public prosecutor who has committed the wilful misconduct or gross negligence.

The legal systems provide for the disciplinary liability of judges and public prosecutors, with reference to acts committed during the performance of their duties or which are in any case incompatible with their *status*.

Citizens have the right to report any acts committed by judges or public prosecutors which are considered punishable by law to the Courts, to the Councils for the Judiciary or to other Institutions.

Generally, the following disciplinary sanctions are provided for, in order of gravity: warning, loss of seniority, suspension from duty and removal from office.

Judges and public prosecutors are criminally liable for their actions as any other citizen, with the exception of legal systems which provide for specific immunity cases, as analysed below.

Immunity

In some Countries judges and public prosecutors enjoy immunity guarantees. Arrest, searches of premises, seizure of documentation and the same practise of criminal acts against judges and public prosecutors are permitted strictly – except where an offence is presently being committed – with the prior authorization of specific regulators. The orders providing for immunity qualify such guarantee as the consequence of the protection offered to the judges’ or public prosecutors’ independence.

With specific reference to the members of the Councils for the Judiciary, various forms of immunity are generally provided for, as regards the opinions expressed in the performance of their duties and concerning the subject matter of the dispute.

Extra-judicial activities

A common provision involves the prohibition for judges and public prosecutors to perform extra-institutional activities; arbitration is generally prohibited; this is due to the fact that the private administration of justice is considered incompatible with an independent practice of judicial activities, as well as with the standard of impartiality that must be met by every judge or public prosecutor. Apart from this, said tasks divert the judge or public prosecutor from their own institutional duties and create inequality of emoluments and internal competition.

Other extra-judicial activities must be declared beforehand: an example of this is University teaching. Note, in this respect, that in some Countries judges and public prosecutors are allowed to teach only free of charge.

Freedom of association; freedom of expression

The freedom of association of judges and public prosecutors is generally guaranteed. In numerous Countries, the professional associations of judges and public prosecutors perform both cultural duties, aggregating judges and public prosecutors on account of the various sensibilities, vis-à-vis the judicial duties performed, and duties strictly related to trade unions, in the context of industrial action.

A problem may arise in connection with the position of judges and public prosecutors who are not enrolled in any trade association and for which a deficit of representation is registered.

The prohibition to enroll in political parties and of the direct involvement on the part of judges and public prosecutors in political activities is common; the purpose being that of safeguarding the standard of impartiality that every judge and public prosecutor must meet. Some systems provide that judges and

public prosecutors cannot hold appointive offices, not even if previously placed outside the normal hierarchical framework, whether at the local administrations or in parliament.

The relationship between judges and public prosecutors and the media is characterised by particular caution, in the aim of protecting the image of independence of judges and public prosecutors and on account of their specific duties of confidentiality.