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REPORT

INDEPENDENCE THROUGH THE APPOINTMENT PROCEDURE, STATUS OF JUDGES AND ADOPTION OF THE BUDGET OF THE JUDICIARY

by

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I. THE INDEPENDENCE OF THE JUDICIARY AS ONE OF THE PILLARS OF THE STATE GOVERNED BY RULE OF LAW; THE BASIC PRINCIPLES IN THEIR INTERNATIONAL CONTEXT

1. The Independence of the Judiciary: Basic Principles

1. The independence of the judiciary is certainly an essential principle which underpins what today is termed the "state governed by rule of law" in accordance with the proposition of the separation of powers, as defined by Montesquieu in the XVIII century. As that great philosopher stated in his work "The Spirit of the Law" (Book XI, § 6), "There is no (…) freedom if the power to judge is not separate from the legislative and executive powers". "All would be lost," he added, "if the same man, or the same body of rulers, nobles, or people exercised all three powers: that of making the laws, that of executing public resolutions and that of judging the crimes and disputes of individuals".

2. The French Declaration of the Rights of Man and of the Citizen of 26 August 1789 (Article 16) proclaimed that: "*Any society in which there is no guarantee of rights or clear separation of powers is without a constitution.*"

3. It is for this reason that independence is bestowed on judges purely for the protection of the rights of individuals seeking justice. It is not a judicial privilege. Dependence on political power or hierarchical superiors means peace and the guarantee of a quiet life for judges who adapt themselves to such a role: independence means responsibility, the confrontation of differing points of view, the acceptance of being the subject of public discussion, the challenge of being able to convince not by force of the principle of authority but through rational argument, together with firmness and professional skill.

4. On the other hand, it is evident that independence requires a separate status for judges that sets them clearly apart from public servants. That most distinguished Italian exponent of comparative law, Gino Gorla, observed as much in the course of the preliminary drafting of the Italian Constitution, which entered into force in 1948: "The judge cannot be placed on the same level as other public servants (…). Judges should be regarded as being set apart from the ordinary run of public servants because they are not, in reality, dependants of the state but are themselves the state in one of its constitutional organs; they are the living symbol, not of the "dependent" public servant, but of autonomy, of the exercise of personal rights, and their very life should be autonomy in every sense of the word".

5. The principle of the separation of powers, to which judicial independence is closely linked, is not accepted and understood in the same way in the various legal and court systems that exist in Europe today. Nobody could seriously deny, for example, that the judiciary in the United Kingdom enjoys a situation of total and perfect independence; and yet it is the same system in which until not so long ago the person considered as being Head of the Judiciary, the Lord Chancellor, at the same time exercised the functions of Minister of Justice, Speaker of the House of Lords and the country's leading judge.

6. While every legal system recognises, at least in its legislation, the independence of the judiciary in relation to the legislative and executive powers, in practice such independence cannot yet be considered as having been attained satisfactorily and lastingly in every part of our continent. The need to implement measures for guaranteeing the independence of the judiciary raises a very complex range of serious issues relating to widely varying aspects of the status of judges, ranging from their appointment to training, assessment, career, transfer, disciplinary measures, etc. It is therefore against this background that we have to measure the efficiency and relevance of national and international standards in the light of the attempts that have

made (more or less openly here and there in Europe) by other state authorities to restrict this fundamental requirement of any society that regards itself as civilised.

2. The Independence of the Judiciary: its Various Forms

7. First of all it should be observed that it is not merely the judiciary as a whole that has a problem of autonomy and independence, but each individual judge. It is for this reason that we may talk in terms either of the autonomy and independence of the judiciary, or of the autonomy and independence of judges. Indeed, the systems of the different countries should seek to guarantee not only the independence of the judiciary in relation to other public authorities, but also the independence of the judge in relation to other aspects of economic and social life and even within the judiciary.

8. There is in fact more and more discussion of the "internal" independence of the judiciary. Clearly, the application to the judiciary of the hierarchical rules that govern, for example, the organisation of the executive, or certain branches of it (army, local government, police, etc.) would compromise judicial impartiality. In this framework, I personally find quite convincing the wording of the Report prepared by the Venice Commission in 2008 about judicial independence (point No. 62), according to which "the principle of judicial independence means independence of each individual judge" and "a hierarchical organisation of the judiciary is incompatible with judicial independence."

9. As we shall see later, one possible solution to this problem might be to transfer the powers that would normally be exercised by the chief executive to another body, such as, for example, a Higher Judicial Council, which expedient would kill two birds with one stone: it would safeguard the "external" independence of the judiciary (particularly in relation to other public authorities) and it would protect the "internal" independence of the judiciary (particularly in relation to their "superiors").

10. The never-ending problem of the independence of the judiciary in relation to the economic and financial authorities may also be mentioned here. La Fontaine (in *The animals sick with the plague*) lamented the fact that "You may be great Sir John or simply wretched Jack, and accordingly the court will pronounce you white or black". Here it will suffice to observe that everywhere, or virtually everywhere, in the world the rules governing the judiciary prohibit judges from exercising activities such as that of entrepreneur, businessman, member of the board of directors of a company, etc. But it is for precisely this reason that judges should be guaranteed adequate remuneration as well as a personal, special (I would go as far as to use the word *privileged*) status, which would shield them from any outside influence.

11. Another form of judicial independence is independence in relation to political parties. Europe finds itself divided on that question; on the one hand, the countries of Central and Eastern Europe, reacting against a tradition that obliged judges to be members of the party in power, totally prohibit judges from belonging to any political party whatsoever; on the other hand, the other systems, and particularly the *Common Law* and Northern European countries, by contrast prefer to regard the judge as an ordinary citizen who as such should not be deprived of the right to join a political organisation.

12. A "compromise" solution is being considered in other countries. In Italy, for example, Article 98 of the Constitution envisages the possibility for the ordinary law to set limits on judges' membership of political parties. Such a law was passed only in recent times (2006). However, the "Judicial Code of Ethics" approved by the National Association of Italian Judges requires judges belonging to that association (more than 90% of Italian judges) to "avoid any connection with the executive bodies of authorities, parties or companies that might influence them in the exercise of (their) functions or affect (their) image." In any case, it is clear that merely limiting membership of political parties, or even imposing a total prohibition, is not enough. The thing to

avoid–and here there seems to be a general consensus in Europe–is for the judge to be closely and actively involved in political activity.

13. In conclusion to this first introductory overview, I should like to mention two completely new forms of independence.
First, the independence of judges in relation to the media. The tendency for the judge's activities, particularly in criminal matters, to be given media coverage, has recently assumed worrying proportions more or less throughout the world, but particularly in Western countries: examples are to be seen in a number of prosecutions brought against major political figures in Italy and also France and Spain, or the enormous uproar caused by the publicity given to certain issues (for example those surrounding the cases of the actor O.J. Simpson or the boxer M. Tyson in the United States). The risk remains that the judge may be influenced in his functions by the press, particularly in the case of judges aspiring to a career in politics or even election to the Higher Judicial Council.

14. The last form of independence that I would like to mention here is freedom from ignorance. "If the judge is ignorant," said La Fontaine (*The donkey carrying relics*), "it's the robes that carry respect." If we want those robes to be worn by a judge who is respected by the people in court, and entirely free in reaching his decision, the judge must have a thorough knowledge of the subject matter with which he is dealing. A well trained judge is a more independent judge.

15. On the other hand, we must not forget that training constitutes a veritable right for a European judge, according to Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges. Principle III-1.*a* of that recommendation calls for the "recruiting (of) a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts."

3. The Independence of the Public Prosecutor's Department.

16. An independent judge will not suffice to achieve judicial independence if the court, the public prosecutor's department and the authority empowered to turn the wheels of justice, at least in criminal matters, lack independence.

17. It is precisely because public prosecutors safeguard the equality of citizens before the law that they must be able to exercise their functions independently of political power. Accordingly, the principle that judges are subject only to the law must equally apply to public prosecutors.

18. Experience in a number of countries has shown that inquiries into corruption often involve investigation of offences committed by centres of economic, financial and political power. It is imperative, therefore, that the court should be able to carry out its inquiries (and direct the judicial police) in a way that is completely independent of the government. It is of little use guaranteeing the independence of the judiciary if the possibility remains that the executive power can exercise control over prosecutors so as to prevent them from carrying out their inquiries.

19. The principles of democracy and the equality of citizens before the law require that any abuse of political power be exposed and punished. It is for this reason that even in countries where there is still a connection between the executive authority and the courts, increasing efforts are being made to cut the umbilical cord. It is interesting in this connection to point out that Article 18.2 of the *Corpus Juris* imposing penal provisions for the protection of the financial

interests of the European Union provides that the Public European Ministry "is independent both from the national authorities and the community organs."
20. Profiles of independence are taken into account as well by the Recommendation of the Council of Europe Rec(2000)19 on «the Role of Public Prosecution in the Criminal Justice System» (see e.g. Articles 9, 14, 36 b).

4. The Internationalisation and Trans-Nationalisation of the Principles Concerning the Independence of the Judiciary: Instruments.

21. The second half of the 20th century saw an international awakening to the importance of the independence of the judiciary. This movement began with the Universal Declaration of Human Rights, adopted by the Assembly of the United Nations in 1948, which provides in Article 10 that "in the determination of his civil rights and obligations or of any criminal charge against him" everyone has the right to be judged by "an independent and impartial tribunal." This same principle was included in the European Convention on Human Rights and Fundamental Freedoms signed in Rome in 1950 (Article 6).

22. Numerous conferences and congresses organised by international associations and bodies (including, in particular, the International Association of Judges) have devoted efforts to studying the systems guaranteeing the independence of the judiciary. Several binding declarations on this topic are to be found in the documents of international congresses, conferences and seminaries. The models and the law-making principles have begun to circulate throughout Europe and the entire world, with the result that today one can speak of not only international law for the protection of the independence of the judiciary, but also trans-national law on the subject. I would go as far as to say that 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 Judge 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.

23. The most interesting results of this process of internationalisation and trans-nationalisation based on the principles of human rights protection are to be found in the following instruments:

- The European Convention on Human Rights, 1950, already mentioned;
- The International Convention on Civil and Political Rights, 1966;
- The Basic Principles on the independence of the Judiciary drawn up in 1985 by the UNO and the Procedures for their effective implementation (1989);
- The Statute of the Judge in Europe, drawn up and approved in 1993 by the European Association of Judges - Regional Group of the International Association of Judges;
- Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges;
- The resolution on the role of the judiciary in a state governed by rule of law, adopted in Warsaw on 4 April 1995 by the ministers participating in the Round Table of Ministers of Justice of the countries of Central and Eastern Europe;
- The European Charter on the status of judges, approved by the Council of Europe in Strasbourg, 8-10 July 1998;
- The Universal Charter of the Judge, unanimously approved by the Central Committee of the International Association of Judges at its meeting in Taipeh (Taiwan) on 17 November 1999;
- The European Parliament resolution on the annual report on respect for human rights in the European Union (1998 and 1999) (11350/1999 - C5-0265/1999 - 1999/2001(INI), adopted on 16 March 2000 (which "recommends that Member States guarantee the independence of judges and courts from the executive and ensure that appointments to the judiciary are not made on political grounds");

- The “Charter of Fundamental Rights of the European Union” adopted in Nice on 7 December 2001 (which in article 47 - Right to an effective remedy and to a fair trial”, subparagraph 2, stipulates, in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”).
- The opinions given by the Consultative Council of European Judges (CCJE) of the Council of Europe on different issues concerning judicial independence and the status of judges.

24. Among the Basic Principles on the Independence of the Judiciary drawn up by the UNO in 1985, the following are of particular interest:

a. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

b. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

c. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

d. There shall not be any inappropriate or unwarranted interference with the judicial process(…)

e. (…)

f. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
g. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”

5. Internationalisation and Trans-Nationalisation of Principles Governing the Independence of the Judiciary: General Principles.

25. I shall now try to summarise the basic principles and the crucial requirements for the exercise of a truly independent justice system:

a. The judiciary is an autonomous body. It is not subject to either of the other state authorities. Public prosecutors should enjoy the same statutory guarantees as judges.

b. Judges and public prosecutors are subject only to the law.

c. Judges and public prosecutors should be appointed for life or for such period as is consistent with guaranteeing their independence. No change introduced in regard to the compulsory retirement age should have a retroactive effect.

d. Judges and public prosecutors should be selected by public competition. The selection and appointment of judges and public prosecutors should be carried out according to objective and transparent criteria and on the basis of the professional qualifications of the persons concerned.

f. There should be no interference by the legislative or executive authorities in the selection of judges and public prosecutors.

g. A Higher Judicial Council should be established with responsibility for appointments, assignments, transfers, promotions and disciplinary procedures in relation to judges and public prosecutors. This body should be composed of judges and public prosecutors, or at the very least should include a majority of judges and public prosecutors.
h. Judges and public prosecutors should only be transferred, suspended or removed from office in circumstances prescribed by law and then only as the result of a disciplinary finding reached by the competent body through the appropriate procedure.

i. Disciplinary proceedings should be brought before an independent council which includes a substantial representation of judges. Disciplinary proceedings against judges should only be brought under the provisions of a pre-existing law and in accordance with pre-established rules of procedure.

j. Judges and public prosecutors are entitled to an effective system of initial and in-service training. The training of judges should be carried out by an independent establishment (such as a school established specifically for the initial and/or in-service training of judges), or by an independent body (such as the Higher Judicial Council), which would include a substantial representation of judges.

k. Judges should have appropriate working conditions.

l. The salaries of judges and of public prosecutors should be established by law (and not by administrative decision) and be linked to the salaries of members of parliament or ministers. They should on no account be reduced.

m. Judges and public prosecutors should have full freedom of association. Service within such an association should be officially recognised as having the same status as the ordinary work of judges.

26. I must admit that none of the instruments or declarations cited above includes all of the rules that I have just proposed, but it is nevertheless clear that those international documents must be read and interpreted today as forming part of a patchwork structure, constituting a veritable “international and trans-national *corpus juris on the status of judges*.” This system has already been applied to some extent at national level in Europe. One example I might quote is that of the Italian constitution: this text–although it was drawn up over half a century ago, at the end of a period of dictatorship, conflict and civil war–has nevertheless managed to protect the independence of the judiciary over the past 60 years.

6. The independence of the Judiciary in the Countries of Central and Eastern Europe.

27. If we now take a look, from this standpoint, at the development of the law in the former communist countries, we are bound to observe that the transition to democratic government has not always involved full acceptance of Montesquieu’s doctrine on the separation of powers. Unfortunately, as a general rule, it must be said that the influence of the executive authorities in that part of Europe is still too strong. I hasten to add that this situation cannot be attributed solely to the lack of democratic tradition in a number of the countries concerned. Indeed, that would be untrue for a substantial number of states which enjoyed democracy and democratic freedoms before the communist regime. Furthermore, the example of certain countries in Southern Europe (such as Spain, Greece, Italy and Portugal) indicates that a period of dictatorship may end in “a democratic reaction” that prompts full implementation of the principles of the state governed by rule of law, including the complete independence of the judiciary.

28. There is a somewhat negative factor which I would like to mention, namely the influence on the Central and Eastern part of Europe after the fall of the Berlin Wall of the Common Law systems. Of course, nobody could deny the importance of the role played by the American Bar Association (formerly through the Central and Eastern European Law Initiative, currently Europe and Eurasia program - CEELI) or by other institutions (such as the Soros Foundation, for example) in this area: we have only to think of the training centres set up, the meetings and conferences organised, the impressive efforts made to provide judges with every type of information and training.

29. But it is equally undeniable that all this results in a tendency to transplant judicial institutions–and, in more general terms, a certain type of mentality–into a completely different legal environment. I would go as far as to say–at the risk of being blunt–that the question whether appointing judges is in the hands of the Lord Chancellor or of the Government of Her Majesty the Queen of England, by the Government of the United States or of the President of the United States, does not give rise to any concern within those systems (although the problems arising in the 2000 U.S.A. election campaign between the two candidates for the White House, Mr Bush and Mr Gore, gives a clear indication of how crucial an issue the reliability of a judicial system can be where the members are appointed by political parties). The same is true of the lack of an institution such as the Higher Judicial Council within the Common Law systems.

30. But we must never forget that the Anglo-Saxon systems–and before them, Anglo-Saxon culture–are historically based on a deeply entrenched and age-old respect for the judiciary, to the point where a Higher Council could be seen as a threat to, rather than a bastion of, the independence of the judiciary.

31. This is absolutely not true of Southern Europe (of which Italy is a striking example), where bodies such as the Higher Judicial Council have been set up (and have to be maintained) in order to protect the judiciary from the insatiable appetite of politicians. From that point of view, I think that the situation in the Eastern countries is closer to that obtaining in Southern Europe. That is why the outstanding action taken by the Council of Europe following the fall of the Berlin Wall for the complete establishment of the principles of the rule of law in the post-communist countries should be continued and intensified. In this context we should applaud the creation of a body such as the Consultative Council of European Judges. The context in which this new body is to function will certainly enable a richer sharing of experience and will also convince the most hesitant of our colleagues of the need to set up, within the legal and juridical systems of Europe (and especially in its Central and Eastern regions), Higher Judicial Councils with a majority of judges elected by their peers who are competent to give a ruling (as opposed to giving advice) on such subjects as the selection, training, career, transfer and disciplining of judges.

7. The Internationalisation and Trans-Nationalisation of Principles Governing the Independence of the Judiciary: the Role of the International Association of Judges.

32. Within the process of internationalisation and trans-nationalisation of the principles governing the independence of the judiciary, the International Association of Judges is playing an ever-increasing role.

33. I would simply say in this regard that the International Association of Judges (IAJ), of which I have the honour to be one of Deputy Secretaries General, was founded in 1953, just after the Second World War, to bring about a better understanding of the judicial systems of member countries. At present it includes the representatives of seventy-four member states. The IAJ is a

non-governmental organisation, membership of which is open not to individuals, but to national associations of judges. More precisely, associations belonging to it must be judges' associations that have been freely formed and which represent the judiciary of their country. Furthermore, the domestic legal systems of the member countries must guarantee real independence of the judiciary.

34. The main purpose of the IAJ is to reinforce the independence of the judiciary as an essential attribute of the judicial function, together with the protection of the constitutional and moral status of the judiciary and the guarantee of fundamental rights and freedoms.

35. The IAJ is governed by its Central Council, composed of representatives of the member associations, and also by the Executive Committee, which is the administrative organ under the leadership of a President who is elected every two years, as are the members of the Executive Committee, consisting of the president, six vice-presidents and, for a period of two years, the immediate past president.

36. The Association has four Study Commissions whose task it is to study a different topic each year in various fields:

- The first is engaged in the study of the status of judges, the independence of the judiciary, judicial administration and the protection of individual freedoms.
- The second commission is involved in the study of civil law and procedure;
- The third commission is engaged in the study of criminal law and procedure;
- The fourth commission is involved in the study of public and social law.

37. At meetings and congresses, the member countries try to gain a better knowledge of the country where the conference is being held, of its legal system, and of the problems encountered by its judges. Petitions and recommendations are produced at the conclusion of each congress.

38. Within the IAJ there are four Regional Groups whose aim is to monitor closely specific questions relating to the judiciary in different parts of the world:

- the European Association of Judges (EAJ);
- the Ibero-American Group;
- the African Group
- the "ANAO" (Asian, North American and Oceanian) Group.

8. The Role of the Council of Europe in the strengthening of Judicial Independence: The Opinions of the CCEJ.

39. Since 2001 a new actor has made its appearance in the European scenario of the institutions devoted to the protection of judicial independence. I'm referring here to the already mentioned Consultative Council of European Judges (CCJE).

40. The CCJE is an advisory body of the Committee of Ministers which prepares opinions for that Committee on general questions concerning the independence, impartiality and competence of judges. For that purpose, the Consultative Council works in co-operation with, in particular, the European Committee on Legal Co-operation (CDCJ), the European Committee on Crime Problems (CDPC), the Committee of Experts on the Efficiency of Justice (CJ-EJ) and also, depending on the subjects dealt with, other committees or bodies.

41. The main task of the CCJE is to contribute to implementation of the Framework Global Action Plan for Judges in Europe adopted by the Committee of Ministers on 7 February 2001 to strengthen the role of judges in member States.

42. To discharge its terms of reference, the Consultative Council may set up working parties and organise hearings. It may also make use of scientific specialists. The CCJE may be called upon to provide practical assistance to help States comply with standards relating to judges. It is required to take measures to encourage partnerships in the judicial field between courts, judges and judges' associations. Although the opinions given by the CCJE take account existing national situations, they mainly contain innovative proposals for improving the status of judges and the service provided to members of the public seeking justice.

43. All member states may be represented on the CCJE. Members should be chosen, in contact, where such authorities exist, with the national authorities responsible for ensuring the independence and impartiality of judges and with the national administration responsible for managing the judiciary, from among serving judges having a thorough knowledge of questions relating to the functioning of the judicial system and personal integrity.

44. It has an advisory function on general questions relating to independence, impartiality and competence of judges. This leads it to prepare opinions for the attention of the Committee of Ministers. The CCJE may also receive requests for opinions from other Council of Europe bodies.

45. So far following opinions have been approved by the CCJE:
- Opinion N° 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges
- Opinion N° 2 (2001) on the funding and management of courts
- Opinion N° 3 (2002) on ethics and liability of judges
- Opinion N° 4 (2003) on training for judges
- Opinion N° 5 (2003) on the law and practice of judicial appointments to the European court of human rights
- Opinion N° 6 (2004) on fair trial with a reasonable time
- Opinion N° 7 (2005) on "justice and society"
- Opinion n° 8 (2006) on "the role of judges in the protection of the rule of law and human rights in the context of terrorism"
- Opinion n° 9 (2006) on "the role of national judges in ensuring an effective application of international and European law"
- Opinion n° 10 (2007) on "Council for the Judiciary in the service of society"
- Opinion n° 11 (2008) on "the quality of judicial decision."

9. Towards a New CoE's Recommendation on the Independence, Efficiency and Role of Judges.

46. In 2008, after a previous attempt made in 2007, the Council of Europe has decided to set up a Group composed of 15 specialists with a thorough knowledge of questions relating to the functioning of judicial systems and chaired by one member of the CDCJ, all appointed by the Secretary General. This Group has been charged of drafting a new version of the 1994 Recommendation on Independence, Efficiency and Role of Judges. Terms of reference for this panel will expire on 31st December 2009. During the year 2009 three meetings of the Group have been scheduled and the panel is working on a draft which will be hopefully finalised at the end of 2009 and submitted to the Committee of Ministers for possible approval.

47. Being myself a member of that Group of experts I do really hope that we'll be able to seize this occasion to prepare a document which completes and updates the already relevant benchmarks set by the Recommendation in 1994. During these last 15 years since the

approval of the Recommendation Europe has witnessed many important events, such as the accession on "new democracies" to the Council of Europe and to the European Union, new issues such as judicial training and, unfortunately, new (or renewed) attempts by the Executive power to limit judicial independence both in Eastern and in Western European countries, even where judicial independence was almost taken for granted. These new challenges are now meeting a quite unprecedented profile: I'm referring to the issue of judicial efficiency or effectiveness. This urgent need is witnessed by the setting up of the CEPEJ at the level of the Council of Europe, but it is also shown by the attempts, all over Europe, to use the ineffectiveness of justice as a heavy "tool" against judicial independence, in order to discredit judges putting on them the blame for every possible malfunctioning of the legal system, whereas we all know that judges are the less accountable category for such situation.

48. So the main challenge for the new Recommendation is the effort to strike a balance between independence, efficiency, effectiveness and (usually very poor) material means put by Governments at the disposal of justice. In this framework a particular accent should be put on the relevant role which heads of courts can play in this field.

49. As it has been shown by the experience of the Civil Court in Torino, whose President Mario Barbuto first invented and then managed to implement the so-called "Strasbourg Programme," there is no need to "force" or to alter the very special kind of relations existing between heads of courts and judges. Everybody knows that the "Chief judge" of a certain judicial office is not comparable to a hierarchical superior in the Army or within any other branch of the Public Service, being rather a sort of *primus inter pares*. This peculiar situation has been rendered even more evident by recent reforms that in several European Countries (like France some years ago and recently Italy) have reduced to a certain period of time the tenure in office by heads of courts.

50. However, the President has the right (and maybe also the ethical duty) to issue "recommendations" and "prescriptions" which, although not binding, pursue uniformity in certain fields, which do not touch the core of judicial independence. Let us think to the way judicial work is organised, or the priority to assign to the decision of cases and to the reduction of backlogs. The spirit of the "Strasbourg Programme" is exactly this one: to persuade (rather than force) judges of the same office to pursue certain common objectives, such as the progressive elimination of backlogs, starting from cases lasting for longer than three years, paying special attention to such "old" files, assigning them to a sort of "priority list," or "faster track," while dedicating to them more hearings in shorter time than the time usually cast in between hearings in other (more recent) cases.

51. An important role in the Court of Turin has been played by the periodical (every 6 months) release of comparative statistics to all judges of the office. Each statistic has been commented by the President and published in the "internal" electronic. By acting in this way, the President explained the progresses reached and "encouraged" judges to go on in that way, thus achieving a sort of "emulation effect" among judges of the concerned Court. This is, in my opinion, one of the features that the new recommendation could encompass, in order to try to combine a greater extent of efficiency with a staunch reaffirmation of the principle of judicial independence.

II. INTERNATIONAL STANDARDS AND THE ITALIAN EXPERIENCE ON SELECTION, APPOINTMENT, TRAINING AND CAREER OF JUDGES

10. The Selection of Judges in Recommendation No. R (94) 12.

52. Principle I-2.c. of the above mentioned Recommendation No. R (94) 12 of the Council of Europe is concerned at one and the same time with selection and with the careers of judges. As the issues surrounding these two topics do not always coincide, perhaps a distinction should be drawn between the two aspects, considering first selection and then career.

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

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

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

b. Election by the electorate is the method that confers on judges the highest level of legitimacy, as it comes straight from the people. However, this system obliges the judge to conduct a humiliating, and sometimes demagogic, electoral campaign, inevitably with the financial backing of a political party, which sooner or later might ask for a favour in return. Furthermore, the judge might be tempted to tailor his judgments to his electorate.

c. Co-option by the judiciary itself offers the advantage of being able to choose the judges who are best prepared technically, but there is a strong risk of conservatism and cronyism.

d. Nomination by a committee of judges and legal academics (preferably appointed by an independent body representing the judiciary) following a public competition, constitutes the final system, as currently applied in a number of countries.

55. Faced with these alternatives, Principle I-2.c. of the recommendation shows a marked preference for the elimination of all executive influence from the appointment of judges. The general rule in this regard is in fact explicitly stated in the first part of the said Principle I-2.c.: “The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.”

56. The second part of Principle I-2.c. is, by contrast, clearly conceived as an exception to the rule of the first sub-paragraph. That is to say, the recommendation appears to view as exceptional a country where “the constitutional or legal provisions and traditions allow judges to be appointed by the government”. Here a very serious problem faces the countries of Central and Eastern Europe, where historical “tradition” has not always been democratically based, and constitutions and laws instituted after the fall of the Berlin Wall–often under the influence of the Common Law systems–have led to systems of appointment and control over judges’ careers that afford them no protection from attempts at undue influence on the part of the political authorities.

57. While it is true that Principle I-2.c. tries to suggest, in its second sub-paragraph, some expedients aimed at limiting the discretionary power of the executive (or legislative) authorities–this being particularly the case, for example, with the creation of "a special independent and competent body to give the government advice which it follows in practice"–it is the very lack of almost any detailed and reliable information on the practice actually followed that gives rise to concern. The author of this essay is well aware–having visited nearly all the countries concerned–that between the letter of the law and the daily reality of the judge's duties, between official speeches and private conversation, there often lurks an abyss.

11. The 2007 Opinion of the Venice Commission on Judicial Appointments

58. Opinion No. 403 / 2006 (CDL-AD(2007)028) of the European Commission for Democracy Through Law (Venice Commission) of the Council of Europe deals with the matter of judicial appointments. I would like to sum up here some of the main aspects and topics of this important document.

59. First of all the Venice Commission points out (see points No. 2 and 3) that "Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective," acknowledging that international standards in this respect are more in favour of the extensive depolitisation of the process.

60. A very good point is made (see points No. 5 and 6) where old and new democracies are compared, warning that "New democracies (…) did not yet have a chance to develop (…) traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges."

61. As far as the role of Parliament in the process of judicial selection is concerned, point No. 10 provides for that "The involvement of parliament in the process may result in the politicisation of judicial appointments. In the light of European standards the selection and career of judges should be 'based on merit, having regard to qualifications, integrity, ability and efficiency.' Elections by parliament are discretionary acts, therefore even if the proposals are made by a judicial council, it cannot be excluded that an elected parliament will not self-restrain from rejecting candidates. Consequently, political considerations may prevail over the objective criteria."

62. Therefore the Venice Commission found that "the parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge". Furthermore, "Appointments of ordinary judges are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded" (see point No. 12).

63. According to point No. 17 of the above mentioned document of the Venice Commission, "To the extent that the independence or autonomy of the judicial council is ensured, the direct appointment of judges by the judicial council is clearly a valid model." In this framework is interesting to point out that, according to the same Opinion, "A substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications" (see point No. 50).

64. Subsequently the Venice Commission expressed the advice "that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available" (see point No. 25).

65. Points No. 36 and 37 underline the urgency and the relevance of the respect of objective criteria in the selection of candidates, irrespectively whether judges are appointed on the results of a competitive examination, or selected from the experienced practitioners.

66. A relevant stand is taken also on the issue of the appointment for a probationary period. After having pointed out that the European Charter on the statute for judges states as follows "Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed", and after having remarked that the Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: "The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually," the Venice Commission considers (see point No. 40) that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.

67. The same document cites a decision of the Appeal Court of the High Court of Justice of Scotland (Starr v Ruxton, [2000] H.R.L.R 191; see also Millar v Dickson [2001] H.R.L.R 1401), which illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent.

12. The Selection of Judges in the Different European Legal Systems.

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

69. The first thing to note is that a university qualification in legal studies is required nearly everywhere. A minimum age together with "good character" is also a requirement laid down by law nearly everywhere. Having said this, the system of competition is certainly preponderant in Western and Southern Continental Europe (with some notable exceptions such as, for example, the Swiss cantons, where judges are elected by the people or by parliament). Such a competition may be open, in some cases, to any person with a law degree (subject to the conditions established by the various laws), or else to persons whom one could term "specialists", in that they not only have a legal qualification, but also some form of specialisation or practical experience. Moreover, depending on the country concerned, the competition can give either direct access to the judiciary, subject to the completion of a period of initial training under the supervision of the Higher Judicial Council (such is the case, for example, in Italy), or

access to a training institution (such is the case, for example, in France, the Netherlands and Portugal; the result is practically the same in Germany, although there the training precedes the choice of career and is common to judges, barristers and solicitors; the system of competition is also to be found in the Baltic states and in Turkey).

70. By way of contrast, the Common Law systems and those of the Nordic states are characterised either by the complete absence of any competition for access to the judiciary, or by the absence of a competition in the strict sense: here, appointment to the judiciary is primarily the culmination of a training process, a *cursus honorum*, which candidates complete in the field (even if the newly-established Commission for Judicial Appointments–which provides, for the first time in the U.K., an independent mechanism for applicants for judicial office who feel that their candidacy has not been considered fairly–would appear to open new perspectives in this field).

71. Obviously, under the first type of system it is the boards appointed to carry out the task of selecting candidates and the initial training institutions which play the determining role in selecting new judges, even if the formal instrument of nomination carries the signature of the Minister of Justice or the President of the Republic. In the other systems, however, the influence of the executive is (or can be) very considerable. However, in the Anglo-Saxon countries and the Scandinavian countries, other factors already mentioned guarantee, on the one hand, the quality of the selection and, on the other hand, the maintaining of a situation of separation between the authorities and an independent judiciary.

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

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

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

13. The Selection of Judges in the Italian Legal System

75. Access to the profession of judge and public prosecutor in Italy takes place through a public competitive examination pursuant to article 106, paragraph 1, of the Constitution. Rules on the entry to the profession of judge and prosecutor have been changed over the last years, on the one hand to simplify and expedite the examination procedure and, on the other, to promote the development of a cultural basis common to all the members of the legal world connected to the activities linked to the exercise of the judicial function: judges and prosecutors, notaries and lawyers.

76. Legislative Decree 398/97 has set up post-graduate Schools for Legal Professions within the Universities to complete the training of law-graduate students who want to exercise the professions of judge, prosecutor, lawyer and notary public. The said Schools, which started operating as from the 2001-2002 university year, at the end of two-year courses, confer a diploma which is required to participate in the public examination, and also have the clear aim of training the people who want to perform the above professions in the future.

77. Access to the Judiciary is today regulated by Legislative Decree no. 160/2006, Chapter I, which sets forth the conditions for participating in the exam, the modalities for presenting the application, the composition and functions of the examining committee, the conduction of the written and oral exams and the modalities to be followed by the examiners. The legislator has thus constituted Schools of Specialisation for the Legal Professions, which are postgraduate schools set up within the Universities for law graduate students that want to enter the legal professions (Legislative Decree No. 398/97).

78. With a view to rationalising and speeding up the relevant procedure, and with a view to implementing the assessment of the candidates in a rea-sonable time and with the required accuracy, the public examination for entry to the Judiciary has been again amended by Law No. 111 of the year 2007.

79. The competitive public examination for judges and prosecutors consists of three written exams (on: civil, criminal and administrative law) and an oral exam on the main legal subjects.

80. The competitive examination for judges/prosecutors is published by the Minister of Justice, pursuant to a decision of the Higher Judicial Council, which sets the number of positions. The examining committee, appointed by the Higher Council, is chaired by a judge/prosecutor with at least 24 years of seniorship. It consists further of twenty judges/prosecutors with at least 12 years of seniorship, five university law professors and three lawyers. The total number of the members of this panel is thus of 29 members. The classification drawn up by the commission, which is based on the total sum of the votes given to each candidate in each individual test, is then approved by the Higher Council.

81. The said examination is thus organised like second level public exams. The law provides for given pre-requisites for being admitted to take the examination so as to ensure that the candidates are technically qualified and their number is reduced. In fact, only candidates who have a law degree and the diploma issued by the post-graduate Schools for Legal Professions are admitted to take the written examinations. Furthermore, administrative and accounting judges, State employees who have given qualifications and at least a five-year seniority, university professors, civil servants of the public administration having a law degree and at least a five-year seniority, practicing lawyers who have not been subjected to disciplinary sanctions, honorary judges or prosecutors who have practiced the profession for at least six years and have had no demerits, and law graduates who have a PhD in legal matters, or a specialisation diploma in a post lauream School, are also admitted to take the exam. In view of the growing importance of European training of judges and prosecutors, both community and international law with specific reference both to the public and private sectors have been included in the curriculum of the oral exam.

82. Those candidates who pass the examination are appointed judges, with the status of “judge in training.” The aforesaid people have to undergo a training period of 18 months. The said training involves following in-depth theory-practical courses and sessions at the judicial offices. The theory courses are organised at the Superior School of the Judiciary, a body set up by the recent reform of the judicial system. As the School is at present not yet functioning, the Higher Council provides for the organisation of training. A newly appointed judge undergoing training does not exercise judicial functions. At the end of the training, The Higher Council of the

Judiciary (CSM) assesses whether these people can be conferred judicial functions. In case of a favourable appraisal, a newly appointed judge is conferred judicial functions by the C.S.M. The last reform stipulates that candidates at the end of the training cannot carry out the functions of a prosecutor, a criminal single judge, a pre-trial investigation judge and a preliminary hearing judge before they undergo their first professional assessment, four years after their appointment. With an adverse assessment, a newly appointed judge is admitted to a new training period of one year. A second negative assessment implies being dismissed from employment.

83. As an exception to recruitment by competitive examination, the Constitution prescribes that regular university law professors and lawyers of at least fifteen years standing and registered in the special Rolls entitling them to practise in the higher jurisdiction courts may be appointed Counsellors of the Supreme Court of Cassation on exceptional merit (Article 106 Const.). This measure has recently been enforced by Law n. 303 of 5 August 1998, and in this regard the C.S.M. issued circular letter no. P. 99-03499 of 18.2.1999. This form of appointment concern a very limited number of judges of the Supreme Court (actually less than 10% of them).

14. International Standards on Judicial Training. Opinion No. 4 of the Consultative Council of European Judges.

84. The subject of judicial training figures more and more prominently in international documents concerning the status and independence of judges.

85. For example, Article 10 of the Basic Principles on the Independence of the Judiciary drawn up by the UN in 1985, stipulates that: “Persons selected for judicial offices shall be individuals of integrity and ability with appropriate training or qualifications in law.” The European Charter on the Statute for Judges approved by the Council of Europe in 1998 stipulates, inter alia, that “The statute ensures by means of appropriate training at the expense of the sate, the preparation of the chosen candidates for the effective exercise of judicial duties” and that “an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary ensure the appropriateness of training programmes and of the organisation which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties” (Art 2.3 and 1.3).

86. Before the adoption of this document, the Council of Europe had organised a multilateral meeting of training bodies in the different member countries, together with those of the countries of Central and Western Europe; that conference was held in Lisbon 27-28 April 1995 and the delegates affirmed “the need to give special priority to the training of judges and public prosecutors and expressed the need to extend and improve training methods taking into account the different legal systems’ traditions and to respect and encourage the intellectual independence of judges.” The delegates participating in that discussion forum had also stressed that “the necessity for judges and public prosecutors to ensure that the efficiency of justice should not be prejudiced by the requirement of developing the qualifications and the professional conscience of members of the judiciary.”

87. The wishes of the Council of Europe became reality in 1992 in France, at least in relation to the existence of a genuine right to judicial training, which was created by law No. 92-189 of 25 February 1992. This text, amending Act No. 58-1270 of 22 December 1958 (constitutional law on the statute of the judiciary), expressly confers on judges “the right to further training.” In Italy, on the other hand, the “Judicial Code of Ethics” approved on 7 May 1994 by the National Association of Judges, stipulates in Article 3 that “the judge shall carry out his duties diligently and thoroughly. He/she shall maintain and add to his professional experience by undertaking to

use and extend his knowledge in the areas in which he exercises his activities." This provision is part of a body of rules that has no binding force; however, it calls upon each judge from the point of view of professional ethics constantly to monitor his own professionalism standards.

88. The Italian Law of 30 July 2007, No. 111 has provided for (see Article 25 of the legislative decree of 2006, as amended in 2007) that all judges and prosecutors have the duty to "attend at least once every four years one of the training courses provided for by the Superior School of the Judiciary;" same provisions prescribes that newly appointed judges, during the first four years of exercise of judicial functions, have to participate at least once every year in one of the training courses organised by the School.

89. Also in France Art. 1 of the *loi organique n° 2007-287* of 5 March 2007, "relative au recrutement, à la formation et à la responsabilité des magistrats," while amending the second paragraph of Art. 14 of the *ordonnance* No. 58-1270 of 22 December 1958, provides for that «Les magistrats sont soumis à une obligation de formation continue».

90. The subject of judicial training has been dealt with by the Consultative Council of European Judges (CCEJ) in its opinion No 4 (2003) "On Appropriate Initial and In-Service Training for Judges at National and European Levels."

91. As for initial training, CCEJ approved following recommendations:

"i. that all appointees to judicial posts should have or acquire, before they take up their duties, extensive knowledge of substantive national and international law and procedure;

ii. that training programmes more specific to the exercise of the profession of judge should be decided on by the establishment responsible for training, and by the trainers and judges themselves;

iii. that these theoretical and practical programmes should not be limited to techniques in the purely legal fields but should also include training in ethics and an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, foreign languages, social sciences and alternative dispute resolution (ADR);

iv. that the training should be pluralist in order to guarantee and strengthen the open-mindedness of the judge;

v. that, depending upon the existence and length of previous professional experience, training should be of significant length in order to avoid its being purely a matter of form."

As far as in-service training is concerned, CCEJ approved following recommendations:

"i. that the in-service training should normally be based on the voluntary participation of judges;

ii. that there may be mandatory in-service training only in exceptional cases; examples might (if the judicial or other body responsible so decided) include when a judge takes up a new post or a different type of work or functions or in the event of fundamental changes in legislation;

iii. that training programmes should be drawn up under the authority of the judicial or other body responsible for initial and in-service training and by trainers and judges themselves;

iv. that those programmes, implemented under the same authority, should focus on legal and other issues relating to the functions performed by judges and correspond to their needs (see paragraph 27 above);

v. that the courts themselves should encourage their members to attend in-service training courses;

vi. that the programmes should take place in and encourage an environment, in which members of different branches and levels of the judiciary may meet and exchange their experiences and achieve common insights;

vii. that, while training is an ethical duty for judges, member states also have a duty to make available to judges the financial resources, time and other means necessary for in-

service training."

92. As to the matter of the assessment of training, CCEJ approved following recommendations:

"i. that training programmes and methods should be subject to frequent assessments by the organs responsible for judicial training;

ii. that, in principle, participation in judges' training initiatives should not be subject to qualitative assessment; their participation in itself, objectively considered, may however be taken into account for professional evaluation of judges;

iii. that quality of performance of trainees should nonetheless be evaluated, if such evaluation is made necessary by the fact that, in some systems, initial training is a phase of the recruitment process."

93. As far as the position of training centres is concerned, the above-mentioned opinion outlined the following principles:

"16. The judiciary should play a major role in or itself be responsible for organising and supervising training. Accordingly, and in keeping with the recommendations of the European Charter on the Statute for Judges, the CCJE advocates that these responsibilities should, in each country, be entrusted, not to the Ministry of Justice or any other authority answerable to the Legislature or the Executive, but to the judiciary itself or another independent body (including a Judicial Service Commission). Judges' associations can also play a valuable role in encouraging and facilitating training, working in conjunction with the judicial or other body which has direct responsibility.

17. In order to ensure a proper separation of roles, the same authority should not be directly responsible for both training and disciplining judges. The CCJE therefore recommends that, under the authority of the judiciary or other independent body, training should be entrusted to a special autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise training programmes and ensure their implementation.

18. Those responsible for training should not also be directly responsible for appointing or promoting judges. If the body (i.e. a judicial service commission) referred to in the CCJE's Opinion N° 1, paragraphs 73 (3), 37, and 45, is competent for training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks.

19. In order to shield the establishment from inappropriate outside influence, the CCJE recommends that the managerial staff and trainers of the establishment should be appointed by the judiciary or other independent body responsible for organising and supervising training.

20. It is important that the training is carried out by judges and by experts in each discipline. Trainers should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills.

21. When judges are in charge of training activities, it is important that these judges preserve contact with court practice.

22. Training methods should be determined and reviewed by the training authority, and there should be regular meetings for trainers to enable them to share their experiences and enhance their approach."

94. Let me finally point out that this opinion has taken a clear stand, banishing any possible (mis)use of judicial training for purposes of assessing judges' skills. Of course this does not mean that periodical assessment of judges should be banned. Quite on the contrary, with the respect of safeguards of judicial independence, judges should be periodically assessed. But the assessment of quantity and quality of judicial work is something which with the in-service training has nothing to do. Of course this remark applies only to in-service training, as assessment of candidate judges or of newly appointed judges in the framework of the initial

training process is something different and, of course, thoroughly expedient.

95. No other sentences can express this feeling better than the ones used by the CCJE in the above-mentioned opinion:

"38. In order continuously to improve the quality of judicial training, the organs responsible for training should conduct frequent assessments of programmes and methods. An important role in this process should be played by opinions expressed by all participants to training initiatives, which may be encouraged through appropriate means (answers to questionnaires, interviews).

39. While there is no doubt that performance of trainers should be monitored, the evaluation of the performance of participants in judicial training initiatives is more questionable. The in-service training of judges may be truly fruitful if their free interaction is not influenced by career considerations.

40. In countries that train judges at the start of their professional career, the CCJE considers evaluation of the results of initial training to be necessary in order to ensure the best appointments to the judiciary. In contrast, in countries that choose judges from the ranks of experienced lawyers, objective evaluation methods are applied before appointment, with training occurring only after candidates have been selected, so that in those countries evaluation during initial training is not appropriate.

41. It is nevertheless important, in the case of candidates subject to an appraisal, that they should enjoy legal safeguards that protect them against arbitrariness in the appraisal of their work. In addition, in the case of States arranging for the provisional appointment of judges, the removal of these from office at the end of the training period should take place with due regard for the safeguards applicable to judges when their removal from office is envisaged."

15. Right to Judicial Training and Judicial Training Structures.

96. The discussion that is taking place internationally concerning texts on the subject of training leads us to the following conclusions:

a. training is increasingly perceived today as the something which a judge is entitled to receive from the state;
b. however, it is also a responsibility on the part of each judge;
c. it is closely bound up with the independence of the judiciary.

97. Those three principles enable us to reply to the question: who should be responsible for training? But in dealing with this subject, another point has to be considered:
What is training and, in particular, what is involved in the training of judges? In its report to the Italian Parliament on the state of the justice system for the year 1994, the Italian Higher Judicial Council defined training as "organised communication of technical, practical and ethical skills to supplement knowledge gained from the exercise of one's own profession; such imparting of knowledge is carried out in an organised and systematic way using a programme in which the operator is pro-active." That means that training is, above all else, teaching. But it is also a great deal more than that, as training is not limited to communication of theoretical knowledge, but also includes sharing a corpus of operational knowledge (know-how) and presenting models of behaviour (life skills).

98. If all this is true, then it is hard to see why the training of judges should be exempt from respect for freedom of education, a principle that is in fact fully recognised by the Constitutions of a number of European countries; see for example Article 33 of the Italian Constitution: "Art and science, together with their teaching, are free. (…) Institutions of higher learning, universities and academies are free to adopt autonomous forms of organisation, within the limits established by State law"; see too Article 5 of the German *Grundgesetz*, which in its third

subparagraph stipulates that “Art and sciences, research and teaching are free. (...)”.

99. Independence of the judiciary and freedom of education: those are the two pillars of the training of judges. If one accepts these two propositions, the reply to the question as to responsibility for training can only be as follows: the body whose task it is to train judges should not only be independent of other state authorities, but also have a remarkable degree of autonomy in relation to the institution responsible for administering the judiciary.

100. With these remarks in mind, it would be desirable to affirm the principle that the training of judges should be carried out by an institution which truly represents the judiciary and which is effectively independent of any other authority (in particular the Ministry of Justice). This structure should be drawn up by the law, which should specify how its managing committee should be composed. Members of this panel should be mainly judges appointed by the Higher Council, even though some representatives of other legal professions should be included (university professors at law schools, attorneys, notaries). The managing committee should be responsible for the setting up of yearly training programmes, as well as for the detailed programme of each training course for judges. They should appoint experts to teach as well as to lead practical workshops and discussions inside each training course. The panel should be accountable to the Higher Council and should draw up an yearly detailed report on the training activity for judges.

101. Training activity should be open to all kind of judges (and of public prosecutors) who desire to improve their professional skills. Attendance of training activities should be made compulsory for young judges as well as for judges who change their functions after a certain period of time (e.g. for a judge who has been dealing for years only with civil law and who wants to be transferred to a post in penal law division of a court). A special statute should allocate resources for this institute, providing for that inside the annual state budget a certain amount of money be exclusively dedicate to the financing of this structure and to the training activities for judges.

102. The participation in training initiatives should be considered as an activity regarded as being on a par with judicial activities in the ordinary sense; furthermore, this participation should be taken into account each time a judge applies for transfer or promotion. Finally, the process of self-tuition should also be regarded as one of the pillars of the training of the modern judge. Incentives should therefore be provided (for example, tax exemptions) for the purchase of books and CD-ROMs or DVDs containing legal data bases, for on-line access to legal data bases on the Internet, etc.

16. Initial Training for the Judiciary in Italy

103. As far as initial training is concerned, one must bear in mind that the successful candidates of the competitive public examination for trainee judges and prosecutors are appointed trainee judges and posted to a first instance judicial office attached to a Court of Appeal for the prescribed training.

104. Before the Superior School of the Judiciary (dealt with in the following paragraph) was set up, and still today, until the School actually enters into operation, the training is organised by the Higher Council of the Judiciary, with the contribution of the Scientific Committee – body provided for by Article 29 of the Internal Rules – a collegiate body made up of 16 members (12 judges or prosecutors and 4 university professors in legal matters) appointed by the C.S.M. In fact, the C.S.M., as the body safeguarding the autonomy and independence of all the members of the Judiciary, provides a training aimed at enhancing the expertise and sensitivity for professional ethics both of judges and public prosecutors, representing the same conditions needed to ensure that the judicial functions are exercised in an autonomous and independent way.

105. Over the last years, both the initial and continuous training has been aimed at providing an in-depth study of the procedural institutions, but also at enhancing and promoting greater commitment on behalf of judges vis à vis the trial - by studying the case file before the trial, attempting a conciliation and enhancing the principle of hearing both parties – and at encouraging judges and prosecutors to acquire virtuous organisational and interpretation practices within their respective offices. The C.S.M. has introduced European law in the yearly training programmes and has promoted EJTN, convinced that the Judiciaries have to contribute to creating a European judicial area through mutual collaboration and dialogue**.**

106. In 2000, the C.S.M. set up a network of decentralised trainers. In every Court of Appeal district an office has been set up for decentralised training, consisting of judges or prosecutors chosen by the Council. They work together with the Scientific Committee and the Council itself. Decentralised training is entirely part of the overall training provided by the C.S.M. Lastly, with regard to methodology, the C.S.M. has adopted new training modules like e-learning, as part of a specific remote training programme, which is based essentially on topic discussion forums coordinated by experts.

107. As already said, Legislative Decree No. 26 of 30 January 2006 has established the "Superior School of the Judiciary," which should be exclusively competent for updating and training judges and prosecutors, and has a different function and structure from the Superior Council of the Judiciary (C.S.M.). The School has three venues to be determined by decree of the Minister of Justice, in agreement with the Minister of the Economy and Finance. The organisation of the School is regulated by its statute and regulations that the School itself will enact.

108. Bodies of the School are: the steering committee, the president and the secretary general. The steering committee is made up of twelve members, namely: seven judges or prosecutors, also in retirement, who have at least their third professional appraisal, three university professors, also in retirement, and two lawyers with at least ten years experience. The C.S.M appoints six judges or prosecutors and one university professor; the Minister of Justice designates one judge or prosecutor, two university professors and two lawyers. The members of the steering committee remain in office for four years and cannot be immediately reappointed.

109. The steering committee appoints the secretary general among Judges or prosecutors who have at least the fourth professional assessment. The secretary general remains in office for five years. During this term the appointee is placed out of the rolls of the Judiciary.

110. The School should be in charge of the vocational training and updating of both honorary and career judges and prosecutors, as well as the training of foreign judges or prosecutors in Italy or participating in the training activity conducted within the European Judicial Training Network. It also should collaborate, at the request of the competent Government authority, in the activities aimed at organising and operating the justice system in other countries. When working out the yearly curriculum the School has to keep account of the guidelines on training developed by the C.S.M. and the Minister of Justice, as well as the proposals made by the *Consiglio Nazionale Forense* (National Bar Council) and the *Consiglio Universitario Nazionale* (National University Council).

111. Courses organised by the School aim at the professional training and updating of judges and prosecutors; the change from functions of judge to functions of prosecutor and viceversa; and the executive functions. The professional training and updating courses are held at the School's venues and should consist of study sessions held by highly professional and competent teachers, identified in the list drawn up by the School. The list is updated annually by the steering committee on the basis of the availabilities notified to the School and the appraisal

made of each teacher, also keeping account of the opinions expressed by the participants in the assessment forms. The courses are both theoretical and practical. Each and every judge or prosecutor has to attend one of the courses organised by the School on legal matters, and updates, at least once every four years, pursuant to the internal rules of the School.

112. The initial training is addressed to newly appointed judges in training. The School has to organise in-depth theoretical-practical courses on topics identified by the C.S.M. for these judges or prosecutors. Courses are held by highly competent and professional teachers appointed by the steering committee with a view to ensuring a wide-ranging cultural and scientific pluralism. Some of the teachers are designated as tutors to help the newly appointed judges in training in their studies. With reference to the initial training of judges-in-training, the steering committee is in charge of approving the training curriculum to be implemented at the judicial offices of the main town of the district of residence of each newly appointed trainee judge.

113. At the end of the training the steering committee drafts a report on each newly appointed trainee judge. The Superior Council of the Judiciary assesses whether the trainee concerned can be conferred the judicial functions, keeping account of the reports drawn up at the end of the sessions transmitted by the steering committee, the final report drawn up by the same body and the appraisal of the judicial council, as well as any other information that can be objectively verified. A favourable assessment specifically refers to the aptitude of the newly appointed trainee judge to carry out the functions of a judge or prosecutor. A newly appointed trainee judge who is adversely assessed is admitted to a new period of training of one year, consisting of a session at the School of two months, carried out pursuant to Article 20, and a session at the judicial offices.

114. The session at the judicial offices is divided into three phases: the first phase, which lasts three months, is conducted at the court and consists in the following activities: participating in the activities of the court sitting as a panel of judges and as a single judge, dealing with the criminal and civil matters falling under it jurisdiction; participating in the activity of the court convened in chambers. Efforts are made to give newly appointed judges a balanced experience in the different sectors; the second phase, which lasts two months, is carried out at an Office of the Prosecutor of the Republic attached to a Court; the third phase, which lasts five months, is carried out at the office corresponding to the first assignment of the newly appointed trainee judge.

115. Following a second adverse assessment the newly appointed trainee judge is dismissed from employment. In the first four years after having been assigned the judicial functions, newly appointed judges have to attend professional training sessions at least once a year.

17. On-the-Job Training for the Judiciary in Italy.

116. The above described “Superior School for the Judiciary” should also be in charge, according to the mentioned decrees and laws of 2006 and 2007, of the in-service (or continuous, or on-the-job) training for acting judges and prosecutors. As long as the School will not yet be in function, also this kind of training is provided by the Higher Council (C.S.M.), as it has been done over the past 40 years.

117. Some years ago the Council set up a special commission, which is assisted by a Scientifical Committee composed of 16 members (12 judges/prosecutors and 4 university professors). The task of this committee is that of setting up training activities in the most various fields of the law and of the judicial practice, with the help of “teachers” and trainers coming from different professional experiences, like judges, prosecutors, professors, lawyers, notaries, experts, psychologists, sociologists, journalists, etc.

118. As for the "offer" of initiatives organised during these years, we can remark that they are yearly in the number of 50-60 at the centralised level. Each training course is usually addressed to about 100 judges/prosecutors. Attendance to these conferences has been opened also to some lawyers, upon invitation by the Higher Council. Subjects dealt with are the most various: international and comparative law, civil law, civil procedure, penal law and criminal procedure, family and juvenile law, commercial law, labour law, computer and law, etc.

119. The training offer by the Higher Council is also diversified as regards the training methods. Some courses are organised in a traditional way, with rapporteurs delivering speeches, followed by a public discussion. Some other courses follow patterns which are more "agile": so, for instance, during the "workshops on professional practice" the participants use to immediately pass to a system of discussion and exchange of experiences.

120. A quite new "frontier" of judicial training is represented by the so called "local" training, upon which the Higher Council adopted a resolution on 26 November 1998. The aim of this initiative is that of bringing the training activities close to those judges/prosecutors who for personal reasons (i.e. pregnant women, or colleagues with very little children) cannot reach Rome, where training courses use to be held. In order to organise such initiatives a special "network" has been set up, composed of judges who at local level organise training courses and other activities. Among these latter we can mention "first aid" counselling by elder and more experienced colleagues, who offer their help to younger judges/prosecutors who would like to have an exchange of views on certain topics.

18. The Career of Judges in Recommendation No. R (94) 12 and the Italian Experience.

121. As far as the career of judges is concerned, the already mentioned Recommendation No. R (94) 12 of the Council of Europe expresses a very clear preference for a system based on merit: "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration." The reality of rule making in many European countries presents a stark contrast, inasmuch as there is an almost total lack of objective criteria established by law for the career of judges. In this field (as in that of the selection of judges), there is a need for procedures and criteria whereby judges can be assessed in order for them to advance as desired in their careers.

122. However, from a more general point of view, some doubt might be cast on the efficiency of a wholly career-based system in a body such as the judiciary, which by definition should not have a hierarchy in the strict sense. The experience of Common Law countries in this regard, on the one hand, and the discussion currently under way in a number of continental countries on imposing time limits for service as senior court judge, on the other hand, suggest that the time may have come for a pyramid-shaped structure in the

123. Some thought should also be given subsequently to the desirability of a mechanism where advancement in one's career (and salary received) is closely linked with the actual duties performed. It might be helpful, perhaps, to outline here the salient points of the Italian system, the only one (as far as I know) to have achieved a complete separation between grade and function.

124. It should be borne in mind from the start that in Italy there is a single career structure for judges and public prosecutors: the only requirement for moving from one function to the other is an aptitude test, which is very rarely negative. Advancement now takes place through the following stages: trainee judges (who in Italy are already regarded as part of the judiciary), after a training period of one and a half years, can be assigned to any of the posts in a court of first

instance: judge of the court (exercising the functions of a judge sitting alone or a judge sitting as part of a bench of judges), deputy principal prosecutor, judge responsible for execution of sentence, children's judge. The Higher Judicial Council prepares a list of posts from among the available vacancies and interviews the trainees, who state their preference according to their place in the competition pass list.

125. Until 2006 the career system of Italian judges was the following one: the seniority required for appointment to the grade of judge of the court was two years following appointment to the position of trainee judge. After eleven years in service (thirteen counting from appointment to the position of trainee), judges of the court could be appointed to the grade of judge of the Court of Appeal. The seniority required for a declaration of aptitude for the grade of judge of the Court of Cassation was seven years from appointment as judge of the Court of Appeal. After a further eight years, judges could be declared competent to exercise higher administrative functions (heads of higher courts).

126. Also according to the reforms approved in 2006 and 2007 career advancement is the same for judges and prosecutors.

127. The reform of the judicial system by Legislative Decree no. 160/2006, as amended by Law no. 111/2007, provides for all judges and prosecutors to be assessed every four years, until they pass their seventh professional assessment, after 28 years of employment. These recurring assessments stress that the professionalism of judges and prosecutors, under its various profiles, is repeatedly and thoroughly monitored during their whole professional career.

128. Assuming that independence, impartiality and balance are indispensable conditions for a proper exercise of the judicial functions, these professional assessments mostly concern: professional capacity, hardworkingness, diligence and commitment. The indicators used for assessing judges and prosecutors are: legal expertise, mastery of the techniques used in the different judicial sectors; the outcome of the judicial decisions issued in subsequent instances of the proceedings; the quantity and quality of judgements issued; compliance with deadlines for drafting and filing provisions; degree of participation and actual contribution to the proper operation of the office (if available for replacing colleagues, frequency of attendance of refresher courses, contribution to solving organisational issues, etc.).

129. In particular, the reform provides for the identification of average standards for settling proceedings to which to compare the activity carried out by every individual judge or prosecutor. In order to safeguard the autonomy and independence of judges and prosecutors, in no case can a professional assessment reconsider the law applied to individual cases. When collecting information needed to make a professional assessment, particular importance is given to the reports drafted by the heads of the judicial offices

130. The Higher Council of the Judiciary makes professional assessments on the basis of the opinion expressed by the Judicial Council and the documents acquired. The C.S.M. expresses a favourable professional assessment when the assessed judge or prosecutor is given a pass mark on each of the above mentioned parameters. In that case, the judge or prosecutor gets the professional appraisal corresponding to his seniority. A "non favourable" appraisal is expressed when there are shortcomings in respect of one or more of the above parameters. A "negative assessment" is expressed when there are serious shortcomings in respect of one or more of the above parameters.

131. As far the conferring of functions in the different judicial offices and instances is concerned, all "promotions" take place, once the necessary seniority has been attained, by decision of the Higher Judicial Council, on the basis of a report by the competent Judicial Council (a local consultative body, constituted in association with each court of appeal).

132. This system, set up between 1966 and 1973, dissociated grade from office and eliminated competition for the rank of appeal judge and judge of the Court of Cassation. Thus a judge may progress all the way up the career (and salary) scale on the basis of seniority, subject to assessment by the Higher Judicial Council. As this method is based on the separation of grade from office, promotion takes place irrespective of whether or not there is actually a position available at the grade obtained. The only immediate consequence of promotion is an increase in salary.

133. The system described above has had the advantage of overcoming the drawbacks of advancement by selection or by competition: that was basically a system of co-option that implied a state of psychological subordination on the part of "inferiors" and no doubt encouraged an attitude of conformity. The hierarchical principle is incompatible with the principle of independence. Two provisions of the Italian Constitution: "judges are subject only to the law" (Article 101 (2)) and "judges differ from each other only in the diversity of their functions" (Article 107 (3)), have served to guarantee not only the independence of the judiciary in relation to the government, but also "internal" independence, that of every judge in relation to the hierarchy and the judiciary. And indeed, every judge, whatever his place in the hierarchy, is exercising the same authority to judge.

134. The conferring on the Higher Judicial Council of the final decision in respect of assessments, assignments and appointments is a true guarantee of the independence of each judge. Furthermore, one consequence of dissociating grade and function has been that judges with a certain seniority and professional experience have been able, without fearing any detrimental effect on their career, to remain in key posts in the lower courts, dealing with big criminal organisations, business crime, the Mafia and terrorism. Otherwise, the only alternative would have been to allocate these posts to newly appointed trainee judges.

135. The provisions as per Chapter IV of Legislative Decree no. 160/06, issued to implement enabling law no. 150/05, later amended by law n 111/07, have introduced some important restraints on judges or prosecutors wanting to change from the functions of judge to the functions of prosecutors, and viceversa.

136. Before the provisions set forth in Chapter V of Legislative Decree no. 160/06 entered into force, there were no restraints on judges or prosecutors wanting to change from the functions of judge to the functions of prosecutors, and in order to do that it was enough, under Article 190 of Royal Decree no. 12/1941, to have an aptitude appraisal by the Judicial Council of the district of employment.

137. In 2003, a circular letter issued by the Higher Council of the Judiciary (Circular no. P-5157/2003 of 14 March 2003 – Deliberation 13 March 2003) regulated the modalities for making an appraisal and envisaged limitations on changing from the functions of prosecutors to the functions of a criminal judge within the same district (*circondario*). Furthermore, the functions of judge or prosecutor could be irrespectively conferred on newly appointed on judges or prosecutors entering the Judiciary.

138. Following the 2007 reform of the judicial system, the functions of prosecutor of first instance can only be conferred on judges or prosecutors who have passed their first professional assessment, that is four years after appointment. The reform has also limited the possibility for on judges or prosecutors to change from one function to the other from an objective point of view, and has forbidden it in the following cases: a) within the same district; b) within other districts of the same region; c) within the district of the court of appeal established by law as holding jurisdiction in the matter of criminal liability of judges or prosecutors of the district where hold office when changing functions.

139. From a subjective point of view, by law a judge or prosecutor can change from one function to the other four times at the most during his whole career, and has to exercise a given function for at least five years before changing again. In order to be able to change the following is required: a) having attended a vocational training course; b) a favourable appraisal by CSM, issued on the basis of the opinion by the Judicial Council that the applicant is suitable to exercise the different functions. A change in functions is also possible in the same district, as long as it occurs in a different *circondario* and a different province from the one of origin, if a) the judge or prosecutor asking to change to the functions of prosecutor has exclusively exercised functions of judge in civil and labour courts for five years; or b) a judge or prosecutor asking to be changed from functions of prosecutor to functions of judge in civil or labour courts divided into divisions and with vacant positions, and be assigned to a division exclusively dealing with civil and labour affairs.

140. In the first case, the judge or prosecutor cannot be assigned, not even as a deputy, to civil or mixed functions before his subsequent transfer or change in functions. In the second case, the judge or prosecutor cannot be assigned, not even as a deputy, to mixed or criminal functions before his subsequent transfer or change in functions. In all the above cases, a change in functions can only take place in a different *circondario* and in a different province from that of origin. The assignment to the rank of second instance judge or prosecutor can only occur in a different district from that of origin. The assignment to civil or labour judicial functions of a prosecutor has to be expressly indicated in the list of vacant positions published by the Higher Council of the Judiciary (CSM) and in the relevant transfer provision.

141. Coming to the appointment of Heads of the Courts, the President of the Court of Cassation, the Prosecutor General attached to the same Court and the judges or prosecutors holding executive posts within the courts of first and second instance, whether exercising the function of judge or prosecutor, are in charge of running the offices, carrying out tasks of jurisdiction management in compliance with the guidelines of the judicial councils, and administrative functions with regard to the exercise of the judicial functions.

142. The executive positions are decided by the C.S.M., with the agreement of the Minister of Justice (see. Article 11, Law 195 of 24 March 1958; Article 22 of CSM internal rules). The criteria used to choose the heads of the offices are aptitude and merit, as well as seniority, taken together. The recent reform of the judicial system has basically changed the criterium of assessment to a criterium of legitimation for applying for given executive positions. The comparative appraisal of applicants aims at choosing the most suitable candidate for the position to be filled, with regard to the functionality and, possibly, specific environmental requirements of the office (see C.S.M. circular letter no. 13000 of 7 July 1999 and later amendments).

143. With regard to the assignment of top positions within the Court of Cassation and the High Court of Public Waters, the comparative appraisal procedure is limited to judges or prosecutors who, in the last fifteen years, have held senior executive positions for at least two years; have exercised Court of Cassation functions for at least four years and who, when convened by the CSM, have accepted to be assigned to the said post (see circular letter no 13000 of 7 July 1999, as supplemented by decision of 7 March 2001).

144. The law reforming the judicial system has provided for executive and semi-executive positions to be temporary. Executive and semi-executive functions are now temporary in nature and are conferred for four years. At the end of the term the said office can be confirmed only for another four years following a favourable appraisal by the Superior Council of the Judiciary (CSM) on the past activities.

145. Should a negative assessment be issued, the concerned judge or prosecutor cannot apply for other executive jobs for at least five years. At the end of the term, a judge or prosecutor who has exercised an executive function is assigned to a non-executive function in the same office, even if staff is in excess, which excess is to be reabsorbed at the first coming holiday. Executive and semi-executive functions may be exclusively conferred on judges or prosecutors who, on the date that the position is made open, have at least four years of service before retirement. In Italy, retirement is at the age of 70, extendable to 75 at the request of the concerned judge or prosecutor, to be submitted six months before they are 70.

146. Some remarks can now be added on the organisation of the prosecuting offices.
The new rules in the matter of organisation of the Offices of the Public Prosecutor, set forth by Legislative Decree 106/2008, provide for criminal proceedings to be instituted exclusively by the Prosecutor of the Republic. The said organisational choice while establishing the role of the Prosecutor of the Republic, highlights its hierarchical role. By so doing, the law maker has pursued the aim of giving full uniformity and effectiveness to criminal prosecutions, as set forth by the Constitution. From an organisational point of view, the Prosecutor can designate one of his deputy prosecutors to replace him in case of absence or impediment.

147. The Prosecutor may delegate one or more of his deputy prosecutors to deal with specific sectors of activity to give a uniform approach to similar proceedings or areas of activities that so require. The Prosecutor of the Republic, since exclusively in charge of prosecutions, exercises the said power either personally or by assigning a case to one or more prosecutors of his office. The Prosecutor of the Republic has the power-duty to establish the general criteria for his Office's organisation, set up working groups, possibly coordinated by a deputy prosecutor of his office, and identify types of offences for which the assignment of cases can occur automatically. The role of individual deputy prosecutors has in any case been enhanced. The law, in fact, ensures some margin of autonomy to individual deputies vis-à-vis handling the cases assigned by the head of the office. In given circumstances, the Prosecutor can revoke the assignment of a case; and the deputy can then submit written observations to the Prosecutor of the Republic.

148. A judge or prosecutor cannot be subjected to disciplinary proceedings because an assigned case has been revoked. The law confers on the Prosecutor specific competences in the matter of judicial orders limiting the personal liberty of citizens or those affecting property rights. Relations with the media are personally kept by the Prosecutor of the Republic, or by a prosecutor of his office he has delegated. Prosecutors of the Office of the Prosecutor of the Republic are forbidden to issue statements or provide information to the media on the judicial activity of the office.

149. The law does not provide for the organisational plan of the office worked out by the Prosecutor of the Republic to be approved by the C.S.M.; however, the Prosecutor is expected to send the adopted organisational provisions to C.S.M. Both primary and secondary legislation in any case provides for the executive functions of the Prosecutor of the Republic to be appraised at the end of his first four years of office, so that he may, if any, be confirmed. By this appraisal, the C.S.M. can check the organisational plan's compliance with the principles that should underlie the activity of prosecutors.

19. The Career of Judges in the Different European Legal Systems.

150. I could reiterate here most of the comments made before, on the subject of judicial selection. Under systems where recruitment is conducted on the basis of a competition, the Higher Judicial Council tends to make decisions about the career of judges on the basis of a series of objective criteria (or criteria that are being rendered objective through the drawing up of regulations and directives). However, a large number of legal system do not have any

objective legal criteria in this regard (such is the case in, for example, Cyprus, Estonia, the Russian Federation, Finland, Iceland, Lithuania, Luxembourg, Norway, the Netherlands and the Czech Republic), while others have regulatory criteria (see e.g. Germany or Slovakia).

151. Moreover, in certain common law systems (to the extent, of course, to which we can speak here in terms of judges' careers), a tendency can be seen towards greater objectivity in the rules for promotion: thus, for instance, in Britain, where no competitive examination is held, the appointment of judges follows however well publicised criteria.

152. As for the countries of Central and Eastern Europe, I can only refer once again to the distinction between systems where the Judicial Councils (or Councils of Judges, Councils of Justice, etc.) are given real decision-making powers (in particular Croatia, Poland, Romania, Slovenia and the Baltic countries) and others where, in my opinion, it is very difficult to speak in terms of the self-regulation of the judiciary in relation to the career of judges.

III. INTERNATIONAL STANDARDS AND THE ITALIAN EXPERIENCE ON THE STATUS OF JUDGES: THE PROTECTION OF JUDICIAL INDEPENDENCE THROUGH A HIGHER JUDICIAL COUNCIL

20. Irremovability of Judges in Recommendation No. R (94) 12 and in the Legal Systems of European Countries.

153. Coming now to some of the main rules concerning the judicial status we shall remark that one of the most crucial principles to safeguarding the independence of the judiciary is that of irremovability. In this context Principle I 3 of the above mentioned Recommendation No. R (94) 12 states that "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office." The rule neither recognises nor allows for any exception, either in the event of changes in the jurisdiction of the courts or in the event of a disciplinary offence (see Principle VI 1.b., which makes provision only for "moving the judge to other judicial tasks *within the court*").

154. Some European legislations are in conflict with the rule set out in the recommendation. What gives rise to the greatest concern is not, of course, the possibility of removal as the result of a disciplinary offence (even if one might challenge the validity of a principle that allows a judge to be at one and the same time a "bad judge" in one area and a "good judge" in another) but, once again, the actual law-making situation in certain countries of Central and Eastern Europe. Some cases show that a pure and simple reference in the Constitution to the ordinary law for the purpose of determining exceptions to the principle of irremovability (a principle that is established by the Constitution itself) can lend itself to attempts to limit the independence of the judiciary.

155. In many European countries the irremovability of judges is enshrined within the country's constitution (such is the case, for example, with Andorra, Croatia, the Russian Federation, France, Ireland, Iceland, the former Yugoslav Republic of Macedonia, Lithuania, Luxembourg, Malta, Norway, Poland, the Czech Republic, Romania, Slovakia, Slovenia and Turkey; to this list of countries one might add Italy) or in an ordinary law (such is the case in Belgium, the Netherlands, Switzerland and, of course, the United Kingdom, which does not have a written constitution).

156. As far as exceptions to this principle are concerned, a number of constitutions refer back to the ordinary law. In most cases, this would involve transfers following disciplinary proceedings, although there are situations where transfers may be made even outside the scope of such proceedings. Here one might mention Iceland, where under Article 15 of Law No. 15 of 1998 the "Council for Judicial Affairs" is allowed to "move judges between jurisdictions, if it deems it necessary, for a period up to six months every ten years."

157. I would like to recall in this framework that in fact, neither the Basic Principles on the Independence of the Judiciary drawn up by the UN in 1985 (see Article 12, which states: "12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office"), nor Principle I 3. Recommendation No. R (94) 12, which has already been mentioned, cites any instance in which it is permissible to derogate from the rule of irremovability.

158. The question of judicial irremovability is one of the most relevant in the field of the protection of judicial independence. Unfortunately the very notion of it does not seem to be clearly defined in international documents. Let us consider e.g. the U.N. Basic Principles, whose Art. 12, in the English version, provides for that "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." If we now read the French version we discover that the concept referred to is the "inamovibilité."

159. Also the case-law of the European Court of Human Rights seems to intend the concept of "irremovability" as referred to life tenure, requiring, for instance, that at least a fixed term of office under Article 6 ECHR (see the Incal v. Turkey judgment of 9 June 1998, §§ 67,68, where the circumstance that the judges' term of office was of only four year and renewable rendered, in the Court's eyes, their independence questionable). According to the Eur. Comm. HR, "according to the principles of the rule of law in democratic states, which is the common heritage of the European countries, the irremovability of judges during their term of office, whether it be for a limited period of time or for lifetime, is a necessary corollary of their independence from the Administration and thus included in the guarantees of Article 6 ECHR (Eur. Comm. HR, decision in No. 7360/76, Zand v. Austria, pp. 70, 82). Irremovability must be guaranteed either in the law or, at least, in fact (Campbell and Fell v. UK judgment of 28 June 1984, § 80).

160. Of course such sentences can only be subscribed, but *inamovibilité* in French has to do more with the right not to be transferred from one to another judicial office without his/her own consent, rather than with life tenure. Therefore the principle enshrined in the new Recommendation of the Council of Europe should be clear in asserting not only the rule concerning life tenure, but also the standard according to which each and any judge has the right to stay on in the judicial office in which he/she performs his/her duties, until he/she does not decide otherwise. Actually, Opinion No. 1 of the CCJE provides for (see No. 57) that transfer (of a judge) to other duties may be ordered by way of disciplinary sanction.

161. Finally in this context it must be said that in some countries judges are nominated for a predetermined length of time: this happens, for instance, for the first appointments/nominations of judges in Croatia (5 years), Slovakia (4 years) and Romania (6 years but only for Supreme Court judges). Likewise in Norway's "temporary judges" can be appointed for a specific period to fill temporary needs, in case of illness, leaves or backlog of cases in the court. It is also in this field that the principle of the independence of the judiciary might be infringed, particularly where the "confirmation" of the appointment (or "re-appointment" or "re-election") of judges is left to the executive or legislative authority. Clearly, in such a case there would be reason to fear that the conduct of the judges in question and, especially, a decision in any case(s) involving some politicians, or some political power centre, might inevitably be regarded as decisive by those required to decide on the applications of the judges concerned.

162. In this framework let me again recall Opinion No. 1 issued on the topic of judicial independence by the Consultative Council of European Judges of the Council of Europe on 21-23 November 2001:

"50. Certain countries make some appointments for a limited period of years (e.g. in the case of the German Federal Constitutional Court, for 12 years). Judges are commonly also appointed to international courts (e.g. the European Court of Justice and the European Court of Human Rights) for limited periods.

51. Some countries also make extensive use of deputy judges, whose tenure is limited or less well protected than that of full-time judges (e.g. the UK and Denmark).

52. The CCJE considered that where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that:
(i) the judge, if he or she wishes, is considered for re-appointment by the appointing body and
(ii) the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations.

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 (see also paragraph 3.3 of the European Charter).*"

163. I'd like also to point out that a clear stand against such form of temporary appointments has been taken by the Venice Commission in already mentioned (and commented) opinion of 2006 on judicial appointments.

21. Protection of Judges Against all Undue Influence in Recommendation No. R (94) 12. The Question of Judicial Immunity.

164. Principle I 2.d. of the Recommendation No. R (94) 12 of the Council of Europe deals with the problem of protecting the judge against "restriction, improper influence, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason". For an efficient implementation of that rule, the text further stipulates that: "The law should provide for sanctions against persons seeking to influence judges in any such manner.". This rule should be seen in conjunction with Principle II - the authority of judges, which stipulates that: "1. All persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge. 2. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court."

165. It would be no exaggeration to see here an incipient acknowledgement at European level of the contempt of court rule, which has as its basis the need to prevent any form of interference with the independence of the judge in deciding a case. Furthermore, the principles we have just been discussing cannot be enforced otherwise than through the imposition of a sanction that the judge concerned should be able to apply (of course, subject to a form of appeal against any such decision).

166. Actually, in those systems, contempt of court is a court ruling which, in the context of a court trial or hearing, deems an individual as holding contempt for the court, its process, and its invested powers. Often stated simply as "in contempt," in the common law systems it is the highest remedy of a judge to impose sanctions on an individual for acts which want only or excessively disrupt the normal process of a court hearing.

167. A finding of contempt of court may result from a failure to obey a lawful order of a court, showing disrespect for the judge, disruption of the proceedings through poor behaviour, or publication of material deemed likely to jeopardize a fair trial. A judge may impose sanctions such as a fine or jail for someone found guilty of contempt of court.

168. Taking as an example the English legal system, the law on contempt is partly set out in case law, and partly specified in the Contempt of Court Act 1981. Contempt may be a criminal or civil offence.

169. Under the Contempt of Court Act 1981 it is criminal contempt of court to publish anything which creates a real risk that the course of justice in proceedings may be seriously impaired. It only applies where proceedings are active, and the Attorney-General has issued guidance as to when he believes this to be the case, and there is also statutory guidance. The clause prevents the newspapers and media from publishing material that is too extreme or sensationalist about a criminal case until the trial is over and the jury has given its verdict. Section 2 of the Act limits the common law presumption that conduct may be treated as contempt regardless of intention: now only cases where there is a substantial risk of serious prejudice to a trial are affected.

170. In civil proceedings there are two main ways in which contempt is committed: (1) Failure to attend at court despite a subpoena requiring attendance. (2) Failure to comply with a court order. A copy of the order, with a "penal notice" i.e. notice informing the recipient that if they do

not comply they are subject to imprisonment is served on the person concerned. If, after that, they breach the order, proceedings can be started and in theory the person involved can be sent to prison. In practice this never happens as the cost on the claiming of bringing these proceedings is immense and in practice imprisonment is never ordered as an apology or fine are usually considered appropriate.

171. Recent attempts to introduce contempt of court in countries not belonging to the common law tradition have brought about some draft laws which could be of a certain interest. Let me quote as an example the provision envisaged by a recent Armenian draft law on this subject ("draft Judicial Code of the Republic of Armenia"), in which powers conferred to the judge are quite extensive, in the following way, that I personally fully subscribe:

"Article 61. Sanctions applied by court:
In case of contempt of court, obstruction of the normal course of a court session, abuse of procedural rights, disrespectful or improper performance of procedural obligations, a defence attorney's or prosecutor's lodging a manifestly unfounded claim or appeal, the court may apply the following sanctions in respect of parties to the proceedings, parties to the case, and others present at the court session:
- Warning;
- Removal from the courtroom;
- Judicial fine; or
- Filing a request with the Prosecutor General or the Chamber of Advocates, respectively, concerning punishment.

A sanction must be proportionate with the gravity of the act and pursue the aim of safeguarding the normal functioning of the court.

An act of warning and removal from the courtroom shall be recorded in the court session minutes.
If a decision on removal from the courtroom is not immediately voluntarily complied with, compulsory removal shall be performed through the judicial police.
A judicial fine may be applied in respect of parties to the proceedings and parties to the case. A judicial fine may be applied in the amount of up to one million drams. The amount of the judicial fine shall be determined by the court at its sole discretion; however, in addition to the gravity of the act, the personal characteristics of the perpetrator of the act must be taken into account. A judicial fine shall be applied by means of a court decision. A decision on applying a judicial fine shall be subject to compulsory execution in accordance with the procedure set forth in the Law on Compulsory Execution of Judicial Acts.
If the sanction prescribed in Paragraph 1(2) of this article may be applied in respect of the accused in a criminal case, the session shall be postponed for a period of up to two weeks. For persons on remand, the postponement period shall not be included as served punishment time.
The sanction prescribed in Paragraph 1(4) of this article may be applied in respect of a prosecutor involved in the examination of the case or an advocate taking part in the examination of the case as a representative or a defence attorney. A request may be filed with the Prosecutor General or the Chamber of Advocates by decision of the court. A judicial sanction shall necessarily trigger the instigation of disciplinary proceedings against the prosecutor or advocate in question.
A court decision on applying a judicial sanction shall be final and not subject to an appeal."

172. Let me therefore, once again, strongly advocate that in the draft a special provision be inserted, aiming at recommending the adoption of "contempt of court" as an effective mean for the protection of judicial independence.

173. Coming back to the Recommendation R (94) 12 of the Council of Europe, we should also see in a very positive light the final sentence of Principle I-2.d, according to which: “Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.”

174. There might also be some risk of influence where the allocation and withdrawal of cases is concerned. In this connection, Principle I-2.e. deals with the distribution of cases, which “should not be influenced by the wishes of any party to a case, or any person concerned with the results of the case.” It appears excessive, however, to exclude any system of distribution other than one based on a “drawing of lots or a system for automatic distribution according to alphabetical order”, which might well prove detrimental to specialisation, particularly in courts with a large number of trainee judges. In fact, the recommendation mentions this system purely as an example and we should not therefore exclude such systems as, for example, allocation–by the head of the court concerned and/or the president of each division–on the basis of the special expertise of each civil or criminal division and of each judge.

175. As far as immunity of judges is concerned, almost all legislations in Eastern European countries extensively provide for rules on this topic. The western tradition doesn’t know this kind of guarantee for the independence of judges and international documents are silent on this subject. So, for instance, in Italy, in France, in Spain or in Germany judges are accountable for their actions according to the principles of criminal and civil law, exactly as any other citizen. But I understand very well that in societies where the respect for judges and their independence are still not so deeply rooted, it may seem preferable to protect the judiciary also by these means.

22. The Higher Judicial Council: International Standards.

176. It is sure that, as far as judicial status is concerned, the best protection for judicial independence, both “internal” and “external”, can only be assured by a Higher Judicial Council.

177. According to western European standards, a Higher Judicial Council should be the autonomous self-administration body in charge of safeguarding the independence of the judiciary. It should be composed exclusively of a majority representation of judges and public prosecutors. The Higher Council for the Judiciary should be entrusted with the appointment, assignment, transfer, promotion, and disciplinary measures concerning judges and public prosecutors. It should have the power to take decisions in all these matters and not to merely submit proposals to the administrative or legislative powers of the State.

178. A reference to this body is to be found already in the Recommendation No. R (94) 12 of the Council of Europe, whose Principle I 2.c. provides for that “The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.” Principle VI 3. of the same document states that “Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. ”

179. Much more than a mere hint to the self-governing body of the judiciary can be found in the European Charter on the status of judges, approved by the Council of Europe in 1998. A first direct reference to it is contained in Articles 1.3 and 1.4, respectively stating that “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the

executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary" and that "The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy."

180. In the field of judicial selection, recruitment and initial training the Charter says that (paragraph 2.1) "The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity" and that (paragraph 2.3) "The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties."

181. As far as appointment and irremovability are concerned the same document provides for that (paragraph 3.1) "The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion" and that (paragraph 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 or following its opinion."

182. As well in the field of career development the Charter states that "Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement," whereas, in the field of judicial liability, paragraphs 5.1, 5.2 and 5.3 provide for as follows: "The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority." (paragraph 5.1).

183. "Compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof." (paragraph 5.2).

184. "Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference." (paragraph 5.3).

185. Finally, paragraph 7, dealing with the issue of termination of office, provides for that "A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof," (paragraph 7.1) and that "The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof" (paragraph 7.2).

23. The Higher Judicial Council: The Italian Experience (Members and Electoral System).

186. The Italian Constitution of 1947 stipulates in its Article 104 as follows:

"The Judiciary is an autonomous body. It is not subject to any other power of the State.
The President of the Republic is Chairman of the Higher Council for the Judiciary.
The Chief Justice of the Supreme Court of Cassation and the Chief Public Prosecutor of the same Court are ipso jure members of it.
As for the other members, two-thirds of them are elected by all regular judges of different categories, and one-third by Parliament in joint session, selection being made among professors of law faculties and lawyers of at least fifteen years standing.
The Council elects an Assistant Chairman from among the members elected by Parliament.
The elected members hold office for four years and are not immediately re-eligible.
While they are in office they may not be registered on the Rolls of the legal profession, nor be members either of Parliament or of a Regional Council."
The Minister for Justice is not member of the Council. However he/she can attend its meetings when it appears necessary in order to give explanations or information. He/she can not take part in the vote. According to Article 110 of the Italian Constitution the Minister is entrusted only with "the organization and operation of services concerning the administration of justice."

The Higher Judicial Council (*Consiglio Superiore della Magistratura – C.S.M.*) is therefore the self governing body of the ordinary judiciary. Under the judicial system's laws, the C.S.M. is entrusted with the appointment, assignment, transfer, promotion, and disciplinary measures concerning Judges and Public Prosecutors (see Art. 105 Const.).
Currently the Council is composed of twenty-seven members:
- the President of the Republic, who chairs the C.S.M.;
- the Chief Judge of the Supreme Court of Cassation;
- the Prosecutor General of the Supreme Court of Cassation;
- eight members appointed by Parliament (the so-called "laymen");
- sixteen members appointed by the judges and prosecutors (the so-called "togati"–from toga, which means "robe"–or professional judges and prosecutors); of them
- 2 are Justices of the Supreme Court of Cassation;
- 4 are public prosecutors;
- 10 are judges from first instance or appeal courts.

187. The Constitution (Art. 104 Const.) envisages that the President of the Republic and the Chief Judge and Prosecutor General of the Court of Cassation should be members of the Council "by right." The only other restriction it imposes is to require two thirds of the other members to be elected by the ordinary judges and prosecutors belonging to the various ranks and one third by Parliament in joint session chosen from among regular university law professors and lawyers with fifteen years experience in the legal profession. Therefore, the number of elected members and the election procedures are regulated by ordinary law.

188. As mentioned earlier, the number of elected members is currently set at 24 (16 judges and 8 “laymen”). The eight “lay” members are elected by Parliament in joint session by secret ballot and by a majority of three fifths of the members forming the assembly. After the second ballot, a majority of three fifths of voters is, however, sufficient.

189. The members to be elected by the judges and prosecutors are chosen as follows: two from the judges/prosecutors with the rank and function of Court of Cassation judge/prosecutor, four from among the prosecutors performing their duties as prosecutors before first instance or appellate courts, ten from among judges performing their duties within first instance or appellate courts.

190. Before the last reform of the C.S.M. electoral system (Statute of 28 March 2002, No. 44) the elections of the members chosen from among the Judiciary took place on the basis of an adjusted proportional election system in which all judges and prose-cutors participated. Candidates formed electoral lists to be submitted to the colleagues. These lists reflected the four “wings” belonging to the National Judges and Prosecutors Association (Associazione Nazionale dei Magistrati – A.N.M.), thus acting as a sort of political parties.

191. This system was radically changed through Statute of 28 March 2002, No. 44, which reduced from 33 to 27 the total number of the C.S.M. members. The old proportional system was replaced by a majority one. As usual all judges and public prosecutors have the right to vote, but “regional” constituencies (or electoral districts) have now been abolished. Currently there are only three constituencies concerning respectively:

a. judges and prosecutors of the Supreme Court of Cassation,
b. prosecutors before first instance and appellate courts and
c. judges of first instance and appellate courts.

192. Any voter receives three ballots and has to cast a vote (just one vote) for any of the three ballots:

- one for one candidate of the Supreme Court,
- one from a candidate from a public prosecutor office before a first instance or an appellate court, and finally
- one for a judge from a first instance or an appellate court. Elected are those candidates who have received the most votes.

193. Under the Italian Constitution, C.S.M.’s elected members hold office for four years, and are not immediately eligible for reappointment (Art. 104 Const.).

194. The Constitution (Art. 104 Const.) also provides for the C.S.M. to elect a Vice President from among the members designated by Parliament. The Vice President, who chairs the Presidency Committee, is entrusted with the task of promoting the C.S.M.’s activity and implementing its resolu-tions, as well as managing the funds in the budget. Furthermore, the C.S.M.’s Vice President will replace the President if he is absent or unable to attend and will exercise the functions delegated to him by the President.

24. The Higher Judicial Council: The Italian Experience (Constitutional Position and Activities).

195. As far as the C.S.M.’s posi-tion is concerned, the Constitutional Court has established that, although the C.S.M. is an organ that performs basically administrative functions, it is not part of the public administration, as it is extraneous to the organi-sational system directly under the control of the State or Regional governments.

196. With reference to the functions assigned to it by the Constitution, the C.S.M. has been defined as “a body of clear constitutional impor-tance.” Its functions may be defined as the “administration of the activities of the judiciary”: as already said, they consist in the recruitment, assignment, transfer, promotion and disciplinary measures concerning judges and prosecutors, including also the organisation of the judicial offices with a view to ensuring and guaranteeing that each and every member of the judiciary is subject “only to the law” when exercising his/her office. In this latter respect, it should be stressed that at the proposal of the Presidents of the Appeal Courts, and after consulting the Judicial Councils, every two years the C.S.M. approves the personnel “tables” of the judicial offices of each district (i.e.: in how many sections each court is divided and to which of any section judges are assigned) and at the same time approves objective and predetermined criteria for assigning the case files to individual judges.

197. The C.S.M. is thus the highest ranking body in charge of the admin-istration of judicial activities. Local judicial Councils and the heads of indi-vidual judicial and prosecuting offices also co-operate, with different, mostly advisory, roles.

198. Works within the Council are always carried on through two phases. Any decision has to be first discussed within one of the Commissions of which the C.S.M. is composed. So e.g. the decision of appointing a candidate to the post of President of a court has to be discussed within the relevant C.S.M. Commission, which will issue a proposal. This proposal shall be brought before the plenary session, which shall take the final decision on it. Any commission is composed of six members (two “laymen” and four professional judges or prosecutors).

199. The law setting up the C.S.M. entrusts it the power to issue quasi-statutory measures which may be divided into three categories:
- internal regulations and administrative/accounting regulation, both of which are envisaged by the law;
- regulations covering the training of trainee judges and prosecutors, which is also expressly envisaged by the law constituting the C.S.M. It regulates the training of the judges/prosecutors once they have passed the entrance exam;
- circular letters, resolutions and directives. Circular letters are used to self-discipline the exercise of the administrative discretionary power assigned to the C.S.M. by the Constitution and by ordinary laws. The resolutions and directives are used to propose and implement the application of judicial system laws pursuant to a systematic interpreta-tion of the sources.

200. As far as the disciplinary power of the C.S.M. is concerned, it should be remarked that the Council cannot start before itself any disciplinary proceedings. This power is entrusted only to the Minister of Justice and to the Chief Prosecutor before the Supreme Court of Cassation. The proceeding is later carried on by a special Disciplinary Section of the Council. According to Statute No. 44 of 28th March 2002, members of this Section are:

- The Vice President of the C.S.M., who chairs this Section,
- One of the members elected by the Parliament,
- One member elected from among the judges or prosecutors of the Supreme Court of Cassation,
- One member elected from among the prosecutors performing their duties before a first instance or an appellate court,
- Two members elected from among the judges performing their duties within a first instance or an appellate court.

201. The total number is therefore of six. In case of parity the most favourable solution for the accused judge will prevail. Rules concerning judicial liability are provided for by Statutes as well as by the C.S.M. case law. The Council plays as well a relevant role in the field of judicial selection and training, as in Italy no school for the judiciary exists: this topic has already been dealt with.

IV. INTERNATIONAL STANDARDS ON THE BUDGET OF THE JUDICIARY

25. Opinion no 2 (2001) of the Consultative Council of European Judges (CCJE) on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights.

202. The Consultative Council of European Judges (CCJE) has devoted a special opinion on the budgetary issues of the judiciary: see Opinion No. 2 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights.

203. Summing up the main features of this document, we can remark that the CCJE recognised that the funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions. Moreover, there is an obvious link between, on the one hand, the funding and management of courts and, on the other, the principles of the European Convention on Human Rights: access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has appropriate funds and resources at its disposal in order to perform efficiently.

204. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

205. In the majority of countries, the Ministry of Justice is in turn involved in presenting the court budget to, and negotiating it with, the Ministry of Finance. In many countries, prior judicial input takes place in the form of proposals made either directly or indirectly by courts to the Ministry of Justice. However, in some cases, courts present budget proposals to the Ministry of Finance direct. Examples are the Supreme Courts of Estonia and of Slovakia for their own budgets and the Supreme Courts of Cyprus and of Slovenia for courts of all levels. In Switzerland the Federal Supreme Court has the right to submit its own budget (approved by its Administrative Commission, consisting of three judges) to the Federal Parliament, and its President and Secretary-General have the right to appear to defend its budget before Parliament.

206. In Russia, the Federal Budget must make separate provision for the budget of the Constitutional Court, the Supreme Court and other common law courts and the Federal Court of Arbitration and other arbitral tribunals, and the Council of Russian Judges has the right not only to participate in the negotiation of the federal budget, but also to be represented in its discussion in the chambers of the Russian Federal Assembly.

207. In the Nordic States recent legislation has formalised the procedure for co-ordinating court budgets and submitting them to the Ministry of Justice – in Denmark the Court Administration (on whose steering committee the majority of the members are representatives of different courts) fulfils this role. In Sweden the National Courts Administration (a special governmental body, with a steering committee, the minority of whose members are judges) fulfils a like function, with obligations to prepare rolling three-year budgets.

208. In contrast, in other countries there is no formal procedure for judicial input into the budget negotiated by the Minister of Justice or equivalent to fund court costs, and any influence is informal. Belgium, Croatia, France, Germany, Italy (save for certain disbursements), Luxembourg, Malta, Ukraine and the United Kingdom all provide examples of legal systems within this category.

209. One problem which may arise is that the judiciary, which is not always seen as a special branch of the power of the State, has specific needs in order to carry out its tasks and remain independent. Unfortunately economic aspects may dominate discussions concerning important structural changes of the judiciary and its efficiency. While no country can ignore its overall financial capability in deciding what level of services it can support, the judiciary and the courts as one essential arm of the State have a strong claim on resources.

210. The CCJE agreed that it was therefore important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.

211. One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists – a co-ordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees.

212. In conclusion, the CCJE considered that States should reconsider existing arrangements for the funding and management of courts in the light of this opinion. The CCJE in particular further draws attention to the need to allocate sufficient resources to courts to enable them to function in accordance with the standards laid down in Article 6 of the European Convention on Human Rights.

26. Opinion no. 10(2007) of the Consultative Council of European Judges (CCJE) on the Council for the Judiciary (Issues Related to Budget Of Courts).

213. Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society has a special parts devoted to budgetary questions.

214. First of all points 37 and 38 concern budget and staff issues related to the functioning of the Self-government body of the judiciary, as follows:

"IV. A. Budget and staff

37. The CCJE stresses the importance of ensuring that the Council for the Judiciary is financed in such a way that it is enabled to function properly. It should have appropriate means to operate independently and autonomously as well as power and capacity to negotiate and organise its own budget effectively.

38. The Council for the Judiciary should have its own premises, a secretariat, computing resources and freedom to organise itself, without being answerable for its activities to any political or other authority. It should be free to organise its sittings and set the agenda for its meetings, as well as have the right to communicate directly with the courts in order to carry out its functions. The Council for the Judiciary should have its own staff according to its needs, and each member should have staff in accordance with the tasks assigned to him or her."

Points 73, 74 and 75 deal with the issues of the budget for the judiciary in the following manner:

"V. E. Budget of the Judiciary

73. Although the funding of courts is part of the State budget, such funding should not be subject to political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence. The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary. If the Council for the Judiciary does not have a role of administration and management of the courts, it should at least be in a position to issue opinions regarding the allocation of the minimal budget which is necessary for the operation of justice, and to clarify its needs in order to justify its amount.

74. The CCJE is of the opinion that the courts can only be properly independent if they are provided with a separate budget and administered by a body independent of the executive and legislature, whether it is a Council for the Judiciary or an independent agency.

75. Although it is advocated by some States that the ministry of justice is better placed to negotiate the court budget vis-à-vis other powers, especially the ministry of finances, the CCJE is of the opinion that a system in which the Council for the Judiciary has extended financial competences requires serious consideration in those countries where such is not the case at present. It must be stressed that extended financial powers for the Council for the Judiciary imply its accountability not only vis-à-vis the executive and the legislature, but also vis-à-vis the courts and the public."

27. Public Budget allocated to Courts According to the Report of the CEPEJ.

215. The 2008 Edition of the Report of the CEPEJ (*Commission Européen pour l'Efficacité de la Justice*-European Commission for the Efficiency of Justice of the Council of Europe) on the European judicial systems (data 2006) devotes a chapter to the issue of "The budgetary process for financing all the courts." Conclusions of this enquiry are expressed in the following way.

216. The budgetary process (from preparation, adoption and management to evaluation of the budget expenditure) is, in the majority of the member states, organised in a similar manner. It is mostly the Ministry of Justice which is responsible for the preparation of the budget (proposals). In some countries however, other ministries can also be involved: this is especially the case for countries where specialised courts are not under the responsibility of the Ministry of Justice - for example, where a labour court is financed by the Ministry of Social Affairs (Germany). The role of the Ministry of Finances (27 countries) is often mentioned in the comments to this specific question, as being involved in (a part of) the budgetary process of the courts. To a lesser extent, the courts themselves (20 countries), a Council for the judiciary (15 countries) or a Supreme Court (14 countries) play a central role in the preparation process.

According to the result of the study the following table has been drawn:

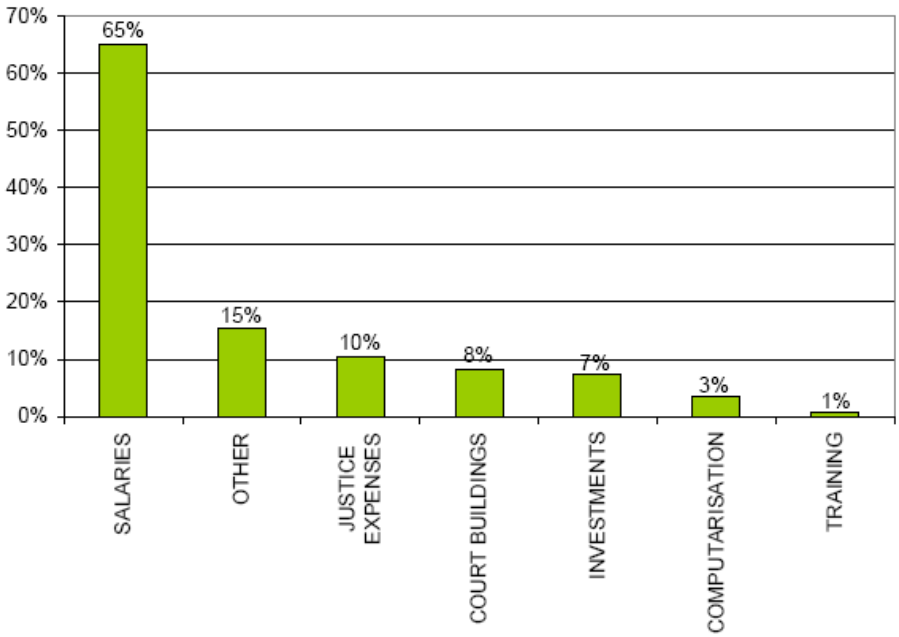
Authorities formally responsible for the budget allocated to all courts	Preparation	Adoption	Management	Evaluation
Ministry of Justice	27	5	22	20
Other Ministry	21	5	4	12
Parliament	2	39	1	15
Supreme Court	14	2	11	10
Council for the Judiciary	15	1	6	6
Courts	20	2	13	9
Inspection body	0	0	2	11
Others	14	4	12	15

217. The adoption of a budget proposal is the key responsibility of a parliament (39 countries out of the 46 responding entities). Concerning the management of court budgets at a general level, the Ministry of Justice is involved in the majority of countries (22). To a lesser extent, courts (13 countries) or the Supreme Court (11 countries) are involved in the management of the general court budget.

218. Concerning the evaluation, authorities can be involved at different levels: mostly, it is the Ministry of Justice which evaluates (20 countries), followed by the Parliament (15 countries), an inspection body (11 countries), the Supreme Courts (10 countries) or another authority (15 countries). In a majority of countries, the evaluation of the budgetary process is carried out by an auditing body. Countries which explicitly mention this are: Denmark (General Auditing Bureau), Finland (National Audit Office), France (*Cour des Comptes*), Germany (Court of Auditors), Hungary (State Audit Authority), Iceland (National Auditor Office), Ireland (Office of the Controller and Auditor General), Latvia (State Audit Office), Luxembourg (Directorate of Financial Control, General Inspectorate of Finances, *Cour des Comptes*, parliamentary Commission for the execution of the budget), Sweden (National Audit Office), Turkey (Court of Accounts) and Ukraine (Accounts Chamber).

219. As to the comparison among European countries about the various components of the budget devoted to justice, at a European level, significant variations between the countries are apparent, on average. However the main expenditure of courts is linked to the remuneration of judges and court staff (65%). A significant part of the budget (15%) is allocated to premises (operational costs 8%) and investment (new buildings and renovation of the old ones 7%). Judicial fees represent 10% of the court budget. 3% is allocated to IT. This last budgetary component will necessarily increase in the coming years. Less than 1% (0,8%) is allocated to training.

Figure 4. Average percentage of the main components of the court budget at European level in 2006 (Q8)



220. Coming to the comparison among European countries about the percentage of national budget devoted to justice, at a European level, significant variations between the countries are apparent. In most of the member States of the Council of Europe, the budget allocated to the courts has increased over the last five years. Reasons for this increase are related to the rise in personnel costs, higher costs for renting, the functioning and/or maintenance of court buildings, inflation or a rise in the living standards, or the implementation of a judicial reform programme.

221. Concerning the budgetary components of the court budget, most of the costs are related to the payment of the salaries of judges and court staff. To a much lesser extent, judicial expenses contribute to the court budget. Maintenance and investment in court buildings is a substantial share of the total court budget in Cyprus, Ireland, Georgia and UK-Scotland.

222. With a growing computerization of society, it is expected that courts will invest more in IT. Large shares of the IT budget related to the total court budget can be found in the Netherlands, Ireland, Austria, Denmark and Romania. In the majority of the countries, a budget for legal aid is available. As it is the case with the court budget, this budget varies from country to country. In the Netherlands, Norway, Ireland and in the United Kingdom, a relative high budget for legal aid is available. As regards the budget for public prosecution, a high proportion of the budget is allocated to this end, especially in central and eastern European countries. A high number of public prosecutors, the organisation of the public prosecution in a given country, differences in the powers of the public prosecutors may lead to the variation in the budget.