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OF THE INSPECTION OF JUSTICE
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# PUBLIC INTEREST IN THE ADMINISTRATION OF JUSTICE AND INDEPENDENCE OF MAGISTRATES

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# PUBLIC INTEREST IN THE ADMINISTRATION OF JUSTICE AND INDEPENDENCE OF MAGISTRATES

PUBLIC INTEREST IN THE ADMINISTRATION
OF JUSTICE AND INDEPENDENCE OF MAGISTRATES

Publication of the institution of the High Inspector
of Justice of the Republic of Albania

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*Concept and legal technical editor:*

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# TABLE OF CONTENTS

# LIST OF ABBREVIATIONS

| | |
|---|---|
| **AOC** | Dutch-speaking Joint Investigative and Advisory Commission |
| **BAC** | Dutch-speaking Appointments and Assignments Commission |
| **EU** | European Union |
| **CEPEJ** | European Commission for the Efficiency of Justice |
| **CSM** | Superior Council of Magistracy |
| **CGPJ** | General Council of the Judiciary |
| **CSJ** | High Council of Justice (Conseil Supérieur de la Justice) |
| **CND** | French-speaking Appointments and Assignments Commission |
| **CAER** | Joint Investigative and Advisory Commission |
| **CAE** | French-speaking Joint Investigative and Advisory Commission |
| **CCJE** | Consultative Council of European Judges |
| **CJEU** | Court of Justice of the European Union |
| **CCUAAFA** | Anti-Corruption and Confiscation of Illegally Acquired Assets Act |
| **CCCCIAP** | Commission Against Corruption and Confiscation of Illegally Acquired Assets |
| **CIPA** | Classified Information Protection Act |
| **CISIA** | General Directorate of Informatics and Automated Systems |
| **CE** | Council of State |
| **CBA** | Central Anti-Corruption Bureau |
| **COPAIRS** | Committee of Colleagues of IGJ |
| **DSJ** | Directorate of Judicial Services |
| **DGSTAT** | General Directorate of Statistics |
| **ENCJ** | European Network of Judicial Councils |
| **ECHR** | European Court of Human Rights |
| **GSP** | Procedural Management Systems |
| **HJC** | High Judicial Council |
| **HIJ** | High Inspector of Justice |
| **IGJ** | General Inspectorate of Justice |
| **ISJC** | Inspectorate of the High Judicial Council |
| **JHC** | Judicial High Council |
| **JSA** | Judiciary System Act |
| **ECHR** | European Convention on Human Rights |
| **CoE** | Council of Europe |
| **LOPJ** | Organic Law on the Judiciary |
| **PDPA** | Personal Data Protection Act |
| **RESIJ** | European Network of Justice Inspection Services |
| **SJC** | Supreme Judicial Council |
| **ICT** | Information and Communication Technology |
| **UNEP** | Office for Notification, Enforcement and Complaints |

# WELCOME MESSAGE

**Artur Metani**
*High Inspector of Justice of Albania*

*Dear reader!*

On the 24th and 25th of June 2022, in Tirana, the International Conference of Justice Inspection Services on "Public interest in the administration of justice and the independence of magistrates" was held.

This conference was carried out by the institution of the High Inspector of Justice of the Republic of Albania with the support of the European Union, and implemented through the Council of Europe, the European Commission for the Efficiency of Justice (CEPEJ) and the European Network of Inspection Services Justice (RESIJ)[ [1] ].

The idea of developing this activity arose quite naturally, sharing some thoughts with my Romanian counterpart, Mr. Lucian Netejoru, on some issues related to the administration of justice, the independence of magistrates, as well as the role of inspection services in this process. We both shared the same position: regardless of the difference and diversity of our political, legal, social, or economic cultures, history in Europe and abroad is showing that the independence of magistrates should not be taken for granted but remains an issue that belongs to all countries. This is the standard of a common dimension of our societies. This is an international standard.

1 In 2017, representatives of the inspection services of 14 European countries agreed on the creation of the European Network of Justice Inspection Services (RESIJ). At the same time, at the RESIJ meeting on December 10, 2021, it was decided that the institution of the High Inspector of Justice of the Republic of Albania (HIJ) will be part of this European network with observer status.

Today, also all countries must increase efforts to strengthen this independence, but on the other side, also increase the efficiency and accountability of the justice system bodies. Both cannot walk, except together. The more responsible a magistrate, the more citizen's rights are guaranteed. The more independent the magistrate, the more democratic the society is. Both standards, the quality of justice and the independence of magistrates are a priority of all countries.

In this context, finding a balance between the public interest in the administration of justice on the one hand and the independence of magistrates on the other, remains a permanent challenge because the independence of magistrates and their accountability are dynamic values. Social developments undoubtedly also bring social and economic transformations, and the independence/ responsibility ratio always remains a professional and institutional challenge.

In these conditions, we must all find the right way to cooperate and identify the best opportunities and methods of communication and exchange of experiences with each other. All of us must analyse, take each other's best models, as well as coordinate methods of control and evaluation of justice institutions in accordance with our common European values.

With this thought in mind, in the framework of the activities that RESIJ could carry out, we estimated that the organization and holding of this international conference in Albania is a valuable initiative. The main purpose of this activity was to stimulate the debate among the participants regarding the problems or challenges faced by European inspectorates related to the administration of justice and the independence of magistrates.

At the same time, the idea of preparing this publication came not

only as a need to have a documented summary of the important topics that were discussed at the conference, but also as a contribution to an in-depth analysis that reflects the framework of general existing organization, operation, as well as important legal or administrative aspects related to inspection services in Europe. I also believe that this publication will serve as an incentive and will constitute an added value for the performance of constitutional and legal functions by inspection services in function of the rule of law and citizens.

In addition, let this modest publication also serve as a means of information for all magistrates, lawyers, legal professionals or students regarding the problems and challenges that are encountered nowadays in European countries, in terms of issues related to the administration of justice and independence of magistrates.

The publication is organized in three sessions, respecting the chronological order of the presentations followed throughout the conference, and is published in Albanian and English. In the first session, several important issues related to the competences, organization and functioning of the justice inspection services were addressed from a comparative standpoint. During the second session, the topics of the presentations related to the independence and responsibility of magistrates, analysed in relation to the guarantees that are offered to them in the framework of the development of disciplinary proceedings. While the third session, no less important, is focused on dealing with issues related to the important role of inspection services as a guarantor for the proper functioning and independence of the justice system in accordance with international and European standards.

I could not end this message without expressing some acknowledgments and thanks. Special thanks go to Mrs. Muriel

Decot, Mr. Roland Gjoni, as well as Mr. Olsi Dekovi from CEPEJ and CoE, for the continuous contribution they give by raising the capacities of member countries on the organization and functioning of judicial systems, by constantly elaborating international legal instruments and mechanisms related to the efficiency, quality, or evaluation of justice systems. At the same time, in addition to the technical support, without the financial support of the Council of Europe, these activities would not have been possible. Thank you for your support and professionalism.

To this occasion, I would like to express my enormous gratitude, to RESIJ, to Mrs. Delphine Agoguet and Mr. Lucian Netejoru and other colleagues. HIJ of Albania is the newest participant in RESIJ, but during this short time we have had an intensive and very useful cooperation with the Network. The organization of this conference is a clear indicator that the Network works and produces concrete results and outcome. For this reason, we must show confidence and have the good will to move this initiative forward.

Special thanks also go to all leaders and representatives of the inspection service, representatives of justice institutions, as well as all the participants in this conference, who very professionally shared the experiences of their countries, the models of organization and functions of inspection services, standards, or best practices that we all must follow.

And finally, special thanks go to the HIJ of Albania staff and my colleagues. I express my gratitude for the commitment, engagement, and support they have given to me in undertaking this initiative.
Dear reader!

When I was considering the undertaking of this conference with my colleagues, we had some big dilemmas. What would be the topic of this conference?! What would be the common issues that unite

us all?! What are the differences?! Or maybe our political, legal, or social diversity creates such large distances and divisions between us, which cannot be approached, or cannot bring us all together to share with each other ideas, similar problems, or appropriate means to their solution?

But no! This conference showed the opposite! Now I can say with all my confidence that this event was worth it and has achieved the goal for which it was conceived. This is due to the fact that it was based and built on our common belief in European values such as democracy and the rule of law, partnership, successful communication, as well as the good will to contribute to the development of the role of inspection services.

Now that this activity has ended successfully, I strongly believe that this tradition should continue and let it be just the beginning of a long process of cooperation and interaction between us.

I wish you a pleasant reading!

# SESSION I:

## COMPETENCIES, ORGANIZATION AND FUNCTIONING OF JUSTICE INSPECTION SERVICES. A COMPARATIVE PERSPECTIVE

## THE JUDICIAL INSPECTORATE OF ROMANIA, VARIOUS FORMS OF ORGANIZATION, FUNCTIONING AND RELATIONS WITH OTHER INSTITUTIONS.

**Lucian Netejoru**
*Chief Inspector of the Judicial Inspectorate of Romania*

Mr. Lucian Netejoru was born in Giurgiu, in October 1966. He married Ms. Mariana Florea in 1991 and they have one child – Serban Mihai. Mr. Netejoru received his degree in law from Ecological University Law School in 1994.

After graduating in 1996, he was first appointed as a judge to the Court of Giurgiu and then, in 2006 to the Tribunal of Giurgiu. From 2002 until 2013, Mr. Netejoru held the position of vice-president and president of these courts. During 2014-2015, he performed the duties of inspector at the Judicial Inspectorate of Romania, and from 2015 onwards he has been performing the duties of Chief Inspector.

**Abstract of the presentation**

Conceptual and practical dependence that exists between the independence of the judiciary, the impartiality of judges and prosecutors, as well as their professional reputation, have been intensively

and consistently addressed in the literature. For this reason, these concepts are already widely known. These values must permanently guide the work of judges and prosecutors, and on the other hand, all citizens have an obligation to respect them. Violations of this obligation cannot be denied, or, in other words, attempts to harm these values, generated by a variety of interests, sometimes visible and sometimes not, cannot be denied.

In Romania, starting with the 1991 Constitution, a series of legislative solutions have been found to protect the independence and impartiality of the justice system, which is not the scope of this presentation, as throughout this presentation we will refer exclusively to the legal norms that are currently in force.

According to the Romanian Constitution, the Superior Council of Magistracy (CSM) is the main body that guarantees the independence of the judiciary in Romania. In order to play this role, the law has defined the rights and obligations of the CSM regarding the protection of the independence, impartiality and professional integrity of judges and prosecutors, as well as appropriate procedures in this regard, to which we will refer below.

## I. REFERRAL AND COMPETENCE

*A. Protection of independence and impartiality*

1. *Ex officio* action. The corresponding sections of the SCM (for judges and prosecutors respectively) have the right, respectively, the corresponding obligation to act ex officio to protect judges and prosecutors against any act of interference or that would create suspicions of interference in/related to professional activity, which could affect the independence or impartiality of judges or prosecutors, in accordance with Law No 304/2004 on

judicial organization, amended, supplemented, and republished afterwards.

2. CSM action upon request. CSM action upon request. Judges or prosecutors, who consider that their independence, impartiality, or professional reputation may be infringed in any way, have the right to submit a request to the CSM for the protection of independence, impartiality or professional reputation. Such right also belongs to other persons in accordance with the following procedural conditions.

   a) requests for the protection of impartiality can only be made by the magistrates concerned, otherwise the requests will be rejected by the chairman of the CSM;
   b) requests for the protection of independence can also be made by persons other than magistrates, but in these cases the requests will first be examined by a specialized commission of the SCM, which, as the case may be, will order the submission of the request (i) to the Chairman of the CSM for the purpose of sending it to the Judicial Inspection to carry out checks or to evaluate the claim, whether or not the issues raised in it are related to the professional activity of the magistrate, or (ii) to the competent section of the CSM if it is not necessary to carry out checks by the Judicial Inspection for its resolution.
   c) requests for the protection of the independence of the entire judicial authority can be made both by the Plenum (Plenary Meeting) of the CSM, ex officio, and by any other person. The resolution of these complaints is done by the Plenum of the CSM.

**B Defending the professional reputation of judges and prosecutors.**

It is the sections of the SCM that defend the professional reputation of judges and prosecutors, upon request if they consider that their

reputation is affected in any way. As with requests for the defence of impartiality, requests for the defence of professional reputation can only be made by the judges/prosecutors concerned, the penalty being identical to that applicable to requests for the defence of impartiality (handling).

## II. SETTLEMENT PROCEDURE

### II A. Preliminary verification of the issues raised.

As a first step, for the issues contained in the ex officio action or in the request made by the magistrates concerned or other persons, it is the Judicial Inspection which, as a rule, carries out the necessary checks. In this respect, the Plenary, the Sections, the President and Vice-President of the SCM shall notify the Judicial Inspection if two conditions are met cumulatively with regard to the issues raised, namely (i) the objective need of a prior check and (ii) the subject matter of the issues to clearly concern the professional activity of the judge. If the first condition is not met, the CSM sections will deal directly with the request and if the second condition is not completed the requests will not be accepted. In both cases, it is the chairperson of the SCM who orders, as appropriate, the transmission of the referrals to the competent section or the treatment. In the latter case, the request shall be analyzed by a specialized committee of the SCM, as I said before. The Judicial Inspection verifies the issues raised under a procedure common to several categories of referrals and the result is recorded in a report to be submitted to the competent section after it is communicated to the judge/prosecutor concerned, who has become aware of the material and, if deemed necessary, he/she has raised objections. The report also includes the proposal of the Judicial Inspection regarding the solution to be given by the SCM to the respective referral, deciding on the acceptance or rejection of the request.

**II B. Solving requests/referrals by the CSM.**

Handling of requests/referrals for the protection of the independence, impartiality or professional reputation of magistrates is done by the sections or plenary of the SCM, as it was emphasized above, based on the analysis of the report of the Judicial Inspection, as well as after the discussion of its content by the magistrate against whom verifications were carried out.

In situations where the independence, impartiality or professional reputation of a judge is affected, the section/plenum of the SCM orders the necessary measures to be taken and ensures their publication on the Council's website. The CSM may refer the matter to the competent body to decide on the measures to be taken or to order any other appropriate measure, according to the law. At the request of the judge/prosecutor concerned, the statement will be displayed at the institution where he/she carries out his/her activity and/or published on the website of this institution.

Handling of the request/referral may be postponed if the issues raised therein are subject to disciplinary proceedings or to a criminal case in which the continuation of the criminal investigation was ordered. In these cases, the postponement takes until the conclusion of the disciplinary or criminal case.

***

The technical aspects mentioned above are obviously irrelevant to those looking from outside the activity carried out in this field by both the CSM and the Judicial Inspection. The summary of the work carried out by the Judicial Inspection in 2021 has highlighted the need for the intervention of the SCM in order to guarantee the independence of the judiciary, as well as the diversity of ways in which it seeks to affect the independence, impartiality and

professional reputation of judges and prosecutors.

In order to protect the independence of the judicial authority, the Judicial Inspection has carried out 9 checks; The SCM plenary has accepted 5 requests on the following grounds: (i) statements from the public premises on how to investigate a criminal case; (ii) how to publicly broadcast the professional reaction of a group of lawyers to a court decision by which a person belonging to the profession of lawyer was sentenced; (iii) the request made by some judges; (iv) received and presented in the media public statements of a person who does not have the status of magistrate.

In order to defend at individual level independence, impartiality and professional reputation, the inspectors of the Inspection Directorate for Judges carried out 9 prior checks and the Section for Judges of the SCM admitted 7 requests taking into account (i) the statements made to a judge regarding the way in which it handled and settled a case; (ii) the statements contained in the press articles and the posting made on the social network Facebook; (iii) statements by a judge; (iv) the request for recusal made by a prosecutor; (v) statements by judges concerning the conduct of a competition for appointment to senior positions; (vi) articles published on the internet; (vii) Facebook posts. Also in this area, the inspectors of the Directorate of Inspection for Prosecutors carried out 17 prior checks and the CSM's Section for Prosecutors admitted 11 requests for reasons similar to those previously set out.

Considering online publications and social media as the main drivers of the dissemination of information that may violate independence, impartiality or professional reputation, it can be concluded that these new categories of information sources affect the professional activity of judges and prosecutors. In this regard, the CSM in its findings expressed in the above decisions has reasoned that these actions go beyond the right to express freely.

*These steps go beyond the right to free expression, in this respect the SCM's findings contained in the previously mentioned judgments. The evolution, the dynamics of such a reality must be followed with special care in order to avoid the amplification of the phenomenon which, although at this time has no critical dimensions, may have uncontrollable effects in the future.*

## CONDUCTING INSPECTIONS AND DISCIPLINARY PROCEEDINGS OF MAGISTRATES IN ORDER TO INCREASE PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM IN GREECE.

**Nikolaos Pipiligkas**
*Vice President of the Supreme Court for Civil and Criminal Cases "Areios Pagos" Greece.*

Mr. Nikolaos Pipiligkas was born in Athens in 1957. He graduated with distinction from the Faculty of Law of the National University of Athens in 1980. Mr. Pipiligkas performed military service for two years. He also graduated from the Faculty of Economics of the same University in 1985.

After written and oral examinations, he was appointed a trainee judge in the First Instance Court of Athens in 1983 and regular judge in 1985. He was granted a one-year educational leave for post –graduated studies in England in 1989. Master of laws (LLM) with merit in the European Community Law and Comparative Law of the University of London [Queen Mary and Westfield College]. From 1985 to 2003, Mr. Pipiligkas served as a judge and as a President of the First Instance Courts of Athens, Rhodes, Kozani, Nafplion, and during the period 2003-2016 he was a judge and President of the Courts of Appeal of Komotini, Athens, Thessaloniki and Piraeus.

In 2016, Mr. Nikolaos Pipiligkas became a member of the Supreme Civil and Criminal Court of Greece and Vice - President of the same Court in 2021. Mr. Pipiligkas was also appointed by draw for one year as an inspector for judges serving at the Courts of Appeal of Athens, Lamia and Euvoea and the next year as a substitute President of the Supervision Board. After the retirement of the President of this Board on the 30th of June 2022, he was appointed the President of the Supervision Board for the following year. He was also appointed as a focal point between the Supreme Civil and Criminal Court of Greece and the European Court of Human Rights.

**Abstract of the presentation**

Greek Constitution provides that inspection and disciplinary process against judges and public prosecutors will be exercised by judges of a higher rank and by Judicial Disciplinary Councils composed exclusively by judges, chosen by draw. The Minister of Justice for all judges and public prosecutors, the Vice-Presidents as Presidents of the Supervision Boards of the relevant Supreme Courts, the General Prosecutor and the Presidents or the Public Prosecutors of the Courts of Appeal have competence to bring a disciplinary against a judge or a public prosecutor serving under their jurisdiction. Judicial Councils composed exclusively by judges chosen by draw, serving at the relevant Supreme Court or one of the Courts of Appeal in biggest cities (for magistrates or judges of the First Instance Courts) have competence to review disciplinary violations of carried out by judges or public prosecutors and to impose any type of disciplinary measure, except for the disciplinary measure of dismissal from office. This disciplinary measure can only be imposed for very serious disciplinary violations by the Supreme Court in a plenary public session and in the presence of all members, regardless of the rank of the magistrate, who is subject to disciplinary proceedings. Before all disciplinary Judicial Councils [and before the plenary session of the Supreme Court],

the accused judge or the accused public prosecutor has the right to present all arguments and evidence, accompanied by a lawyer. His appeal is examined by the Second Instance Judicial Council both in fact and in law. Final decisions of the Supreme Court where the disciplinary measure is "Dismissal" in a public plenary session and in the presence of all members can be reviewed if new evidence is presented to the court. As a conclusion, the relevant legislation and its guaranties provided for, increase public trust to the judicial system and at the same time increase trust to the inspection and disciplinary institutions by the judges themselves.

**Introduction:**

Ordinary judges should enjoy functional and personal independence. In the exercise of their functions, they should be subject only to the Constitution and the law. When adjudicating a case, judges should decide based on the law and according to their inner conviction. However, functional and personal independence does not mean immunity or lack of control. The law should provide as precisely as possible the rules regarding disciplinary violations committed by judges and for disciplinary proceedings against them. These proceedings should be carried out by institutions separated as possible from the legislative and executive powers of the State and in a transparent, independent, and impartial way, so as to increase not only public trust to the judicial system, but also trust to the inspection and disciplinary institutions by the judges themselves.

In this context, the Greek Constitution in paragraph 3, of article 87 expressly provides that the inspection of ordinary judges (judges in the first and second instance and not senior judges serving in one of the High Courts of Greece) will be carried out by judges of a higher rank, as well as by the Prosecutor and Deputy Prosecutor of the High Civil and Criminal Court, while the inspection of prosecutors will be done by judges of the High Civil and Criminal

Court and prosecutors of a higher rank, in accordance with the law and paragraph 3 of article 91, which expressly provides that the examination of disciplinary violations committed by ordinary judges is carried out by councils composed of regular judges chosen by lot, as determined by law. Disciplinary measures can also be initiated by the Minister of Justice.

As I do not have much time in my disposal, I shall refer briefly to the authorities which are competent to bring a disciplinary action against a judge or a prosecutor for a disciplinary offence committed by him and I shall focus on the composition and function of disciplinary councils, which according to the Constitution and the law are entitled to examine disciplinary violations committed by judges and to issue disciplinary measures.

## 1. Authorities competent to bring a disciplinary action against a judge.

On the 6th of June 2022 a new Organization Code for Courts and Judges came into force by Law 4938/2022 (Official Gazette A 109). Its provisions concerning the competent disciplinary authorities, their composition and the way of their function are almost similar (with some changes) to the previous Organization Code for Courts and Judges i.e. L. 1756/1988, as amended by L. 4356/2015 and very recently by L. 4786/2021, with some differences. According to article 117 par. 1 of the new Code (art. 99 par. 1 of the previous one) authorities that are competent to bring a disciplinary action against a judge for a disciplinary violation committed by him are:

a) the Minister of Justice for all judges and public prosecutors,
b) the Senior of the Vice - Presidents of the Council of State (Conseil d'Etat), who was appointed by draw at the Supervision Board, only for the assistant judges and introducer (drafter) judges, who serve at the Council of State,

c) the Vice-President who is the President of the Supervision Board of administrative courts, only for judges who serve at administrative courts,

d) the Vice - President who is the President of the Supervision Board of civil and criminal courts, only for judges and public prosecutors who serve at civil and criminal courts,

e) the Senior of the Vice-Presidents of the Court of Audit, who was appointed by draw at the Supervision Board, only for the assistant judges and introducer (drafter) judges, who serve at the Court of Audit,

f) the President of the Civil and Criminal Court of Appeal or the President of the Administrative Court of Appeal for the judges of the relevant appeal courts, as well as for the presidents and judges of the courts of first instance operating within the territorial jurisdiction of these appeal courts,

g) The Head of the District Prosecution Office attached to the courts of first instance for public prosecutors who exercise their duties at these courts and function within their territorial jurisdiction.

It must be mentioned that the previous Organization Code provided that the General Prosecutor and, [before its last amendment by Law 4786/2021], the Presidents of the relevant Supreme Courts had also the competence to bring a disciplinary action against judges serving at the First Instance Courts or the Courts of Appeal.

**2. Disciplinary Councils: Composition and Function.**

**a) For superior judges serving at the Supreme Courts of Greece.**

According to paragraph 1 of article 91 of the Greek Constitution: "Disciplinary process over judges from and above the rank of the

Supreme Civil and Criminal Court or deputy prosecutors of the Supreme Civil and Criminal Court, or a rank corresponding thereto, shall be exercised by a Supreme Disciplinary Council, as specified by law. Disciplinary action shall be initiated by the Minister of Justice (paragraph 2). The Supreme Disciplinary Council shall be composed of the President of the Council of State as Chairman and two Vice - Presidents or Councilors of the Council of State, two Vice- Presidents or judges of the Supreme Civil and Criminal Court, two Vice- Presidents or Councilors of the Court of Audit and two law professors from the Law Schools of the country's Universities, as members.

The members of the Council shall be chosen by draw among those having at least three years of experience in the respective supreme court or law school. Members of the High Disciplinary Council cannot participate in the review of a case for judges, prosecutors or other subjects who belong to the same court. In cases involving disciplinary action against members of the Council of State, the Supreme Disciplinary Council shall be presided over by the President of the Supreme Civil and Criminal Court (paragraph 4). Disciplinary decisions taken in accordance with the provisions of this article cannot be appealed before the Council of State"

**b) For all other judges:**

As far as it concerns judges who serve at civil and criminal courts:

a) Paragraph 7 of article 113 and paragraph 1 of article 115 of the new Organization Code, provides a Disciplinary Judicial Council, composed exclusively by 7 (seven) judges serving at the Supreme Civil and Criminal Court, chosen by draw, with competence to decide in the first instance about disciplinary offences committed by judges and prosecutors (including the Chairpersons) of the First Instance Courts and the Courts

of Appeal and to impose any kind of disciplinary measures, provided by law (i.e. written reproach, fine from two days up to three months of wage or provisional dismissal from ten days up to six months - paragraph 1 of article 111 of the New Organizational Code). At the same time, the Council does not have the power to decide the disciplinary measure of dismissal, and to adjudicate in the second instance on appeals of disciplinary decisions taken by the Disciplinary Council consisting of 5 (members) of the Court of Appeal (see below),

b) Paragraph 8 of article 113 and paragraph 1 of article 115 of the New Organizational Code provides a Disciplinary Judicial Council of 9 (nine) members, composed exclusively of judges serving at the Supreme Civil and Criminal Court, chosen by draw, with competence to adjudicate in the second instance on appeals of disciplinary decisions taken by the abovementioned Disciplinary Judicial Council composed of 7 (seven) members.

c) Paragraph 11 of article 113 and paragraph 1 of article 115 of the New Organizational Code provides a Disciplinary Judicial Council of the Court of Appeal composed by five members, with location in Athens, Piraeus, Thessaloniki, Patras, and Larissa, composed exclusively of judges serving at the relevant Court of Appeal, chosen by draw and who serve in the relevant Court of Appeal. This Council is competent to decide in the first instance about disciplinary offences committed by magistrates or judges and vice public prosecutors of the First Instance Courts and to impose any kind of disciplinary measures, provided by law (i.e. written reproach, fine from two days up to three months of wage or provisional dismissal from ten days up to six months – paragraph 1 of article 111 of the New Organizational Code). At the same time, the Council does not have the power to decide the disciplinary measure of dismissal. For judges serving as assistant judges

or introducer judges (drafters) at the Council of the State or the Court of Audit or for judges serving at First Instance Administrative Courts or Administrative Courts of appeal, the provisions of the law are similar (paragraphs 5, 6, 9 and 11 of article 113 of the New Organizational Code). All these provisions are the same with those provided by the previous Organizational Code.

**c) Function of the disciplinary Councils:**

All these Disciplinary Judicial Councils take decisions in camera. The accused judge, against whom the disciplinary proceeding is carried out, has the right to appear in the session before the Council with his counsel and has also the right to examine witnesses or submit written evidence, if he wants to do so. The decisions of the Councils must contain the reasoning part, as well as the opinion against, if any. In order to guarantee functional independence of judges, the Supreme Civil and Criminal Court in a plenary session with the presence of all members in its Advisory Opinion 34/1993 stated that a wrongful or injustice or contrary to the law decision may constitute a disciplinary offence only if it was committed by the judge with intent, negligence or gross negligence.

Both the Judicial Disciplinary Council consisting of 7 (seven) members, which processes the appeal against disciplinary decisions taken by the Disciplinary Judicial Council of the Court of Appeal consisting of 5 (five) members, as well as the Judicial Disciplinary Council consisting of 9 (nine ) members, which processes appeals against disciplinary decisions taken by the Judicial Disciplinary Council consisting of 7 (seven) members have competence to examine the case both in fact and in law, for all grounds of appeal, regardless of whether the appeal was submitted to the Disciplinary Judicial Council of the second instance by the convicted judge or not (on the basis of a reason for non-acceptance), or by the Minister

of Justice or by other authorities authorized by law to initiate a disciplinary proceeding against the judge regarding the already mentioned.

As these Discipline Judicial Councils actually constitute "courts" and are exclusively composed by senior judges, [with the exception of the seven members of the Supreme Disciplinary Judicial Council, which is composed of seven members, where the vast majority of its members (five members) are judges], their disciplinary rulings cannot be appealed before administrative or other courts (see also paragraph 4 of article 91 of the Constitution).

**d) Imposition of the disciplinary measure of dismissal:**

The disciplinary measure of "Dismissal" can be given for very serious disciplinary violations (paragraph 2 of article 111 of the New Organizational Code) for all judges serving at Civil and Criminal Courts, only from the Supreme Civil and Criminal Court. The Supreme Civil and Criminal Court decides in a public plenary session with the presence of all its members, regardless of the magistrate's rank, which is subject to disciplinary proceedings, with the exception of its members.

For assistant judges or introducer (drafter) judges serving at the Council of the State or the Court of Audit or for judges serving at First Instance Administrative Courts or Administrative Courts of Appeal, the provisions of the law are similar. For this reason, only the Council of State or the Court of Audit in a public plenary session with the presence of all members have competence to impose the disciplinary measure of "Dismissal" for all judges serving at these courts, irrespectively of the rank of the rank of magistrate, which is subject to disciplinary proceedings, with the exception of their members.

For members who are judges and public prosecutors of the Supreme Courts (i.e. Supreme Civil and Criminal Court, Council of the State, Court of Audit), dismissal as a disciplinary measure for very serious disciplinary offences may be imposed only by the Council of State in a public plenary session with the presence of all members (judges and prosecutors) of the Supreme Civil and Criminal Court or for the members of the Court of Audit.

For the members of the Council of State, dismissal as a disciplinary measure for very serious disciplinary offences may be imposed only by the Supreme Civil and Criminal Court in a public plenary session with the presence of all members (paragraph 2 of article 113 of the New Organizational Code and paragraph 4 of article 88 of the Constitution).

As all judgments (including disciplinary rulings) taken by a Supreme Court in a public plenary session with the presence of all members cannot be appealed, paragraph 5 of article 123 of the New Organizational Code provides the possibility of reviewing the contested disciplinary decision, if new evidence was found. Time for such a review is one year after the disclosure of the new evidence. Supreme Civil and Criminal Court's case — law gives a broad interpretation to that provision and accepts even existing evidence at the time of its initial decision, if that evidence was not set out before the Court at the hearing, when its initial ruling was taken.

**3. Some more information about disciplinary offences:**

It is worthwhile mentioning that the vast majority of disciplinary offences committed by judges (85- 90%) concern unjustified delay in drawing up the decision after the adjudication of the case. Some other disciplinary violations are related to undignified or indecent behavior of the judge usually during his service and sometimes out of service.

## 4. Conclusions:

Although there is a link between the executive power of the State and disciplinary proceedings against judges, as the Minister of Justice is also competent to bring a disciplinary action against all judges or to appeal for reconsideration of a decision taken by a First Instance Disciplinary Council, I assume that the Constitution of Greece and both the previous and the new Organization Code for Courts and Judges provide for enough guarantees to ensure judicial independence in relation with disciplinary proceedings. These guarantees are:

a) the composition of Disciplinary Councils explicitly by judges chosen by draw (with the exemption of the Supreme Disciplinary Court Council, which consists of seven members, where the majority of its members (five members) are judges);
b) the lack of possibility, according the law, for a premature termination of the term of a judge, chosen by draw, as a member of a Disciplinary Council;
c) the limitation of the term of office of a judge appointed as a member of a Disciplinary Council for a period of one year and the prohibition to be reappointed as a member of a Disciplinary Council for a period of those years after the termination of his term;
d) the right of the magistrate to appear at the hearing before the Disciplinary Council, accompanied with a counsel of his choice, to present claims, and to be presented with the evidence;
e) the competence of the Disciplinary Council, when reviewing the appeal, to examine the case both in fact and in law, in relation to all the causes presented in the appeal against the contested decision;

f) the disciplinary measure of dismissal for all judges, irrespectively of the rank of the magistrate, which is subject to disciplinary proceedings, can only be taken by the competent Supreme Court in a public plenary session and in the presence of all members, and this decision can be reviewed in some cases.

And last but not least, the limitation of wrongful decisions as a disciplinary offence only in some extreme cases. I do believe that all these guarantees increase public trust to the judicial system in general, as the judge has no reasons to be afraid or concerned about his judgment and subsequently is not easily influenced by them who are interested about. At the same time, they increase the trust to the inspection and disciplinary institutions by the judges themselves.

## COMPETENCIES, ORGANIZATION AND FUNCTIONING OF THE BULGARIAN INSPECTORATES RESPONSIBLE FOR THE CONTROL OF MAGISTRATES.

**Maria Neykova,**
*Inspector, Inspectorate to the Supreme Judicial Council, Bulgaria*

Ms. Maria Neykova graduated in law in 1980 at the Faculty of Law of the University of Sofia "St. Kliment Ohridski" and acquired the title of "Lawyer".
During the period 1984 – 1995, Ms. Neykova carried out the duty of Legal Adviser and Chief Legal Adviser at the Ministry of Defense, CDIA and other organizations. During the period 1995-2006, she worked as an investigator in the Sofia Investigation Service, and Head of Department in the National Investigation Service.

Ms. Maria Neykova has a long experience as a prosecutor performing several duties, such as: 2006 Prosecutor in the Sofia District Prosecutor's Office and Prosecutor in the Appeal Prosecution Office. 2006 - 2011 Prosecutor in the Sofia City Prosecutor's Office, rank Prosecutor in the Supreme Prosecution Office and the Supreme Administrative Prosecutor's Office. 2011 - 2014 Prosecutor in the Appellate Specialized Prosecutor's Office, rank Prosecutor in SCP and SAP, 2014 - 2016 Deputy Administrative Head - Deputy Appellate Prosecutor

in the Appellate Specialized Prosecution Office. In addition, in 1994, Ms. Maria Neykova attended a postgraduate specialization in the field of European integration, and in that same year she acquired the title “Specialist of patents”.

She completed a qualification course in the urbanization of crime in Aix-en-Provence, France, and a qualification course in the protection of the financial interests of the European Union and in the fight against high-level corruption.

Ms. Maria Neykova was elected by the National Assembly as an inspector in the Inspectorate to the Supreme Judicial Council on February 18, 2016 and she took up the position of “Inspector in the ISJC” on March 14, 2016.

**Abstract of the presentation**

The Inspectorate’s key competences refer to the overall organizational and justice administration /law enforcement/ activity of the courts, prosecutor’s offices and investigation departments. In details, this means inspections of the organization of the administrative activity in courts, prosecutor’s offices and investigation departments, the organization of case and file registration and handling, the observance of statutory time periods, reporting to the competent authorities – upon finding any practices hat are different to one another, any requests for interpretative decisions or enactments, drafting suggestions for imposing disciplinary sanctions to or rewarding of magistrates, sending reports and making suggestions to other government authorities, analytical activity, inspections on applications for violations of the right to hearing and trial of cases within reasonable terms, inspections for integrity and conflicts of interest of magistrates, identifying their actions that are in prejudice of the judiciary image, and inspections related to magistrates’ independence breaches, inspections of their property

declarations and for violations of the Personal Data Protection Act, by the courts, prosecutor's offices and investigation departments. The Inspectorate to the Supreme Judicial Council (ISJC) is organised in accordance with the law. The Inspectorate is an independent legal entity and its functions have been defined in detail by the Regulation on the organization of its work. It was established to guarantee society's trust in justice and transparency in the functioning of the judicial system.

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The ISJC was established by the amendments to the Constitution of the Republic of Bulgaria in 2007. Until then, the non-judicial control over the judiciary authorities was carried out by judicial inspectors at the Ministry of Justice. Initially, their activities have been regulated in 1910 by the Courts' Structure Act. Since then "the inspector judges" have been obligated to identify the obstacles for proper and uniform application of laws and to propose appropriate measures for improvement. To this end, our country has more than 100-years' tradition in the inspection of the judiciary characterised by a good level of succession. The now existing Inspectorate to the SJC continues this tradition. In accordance with the Constitution of the Republic of Bulgaria and the Judiciary Act (JA), the judges, prosecutors and investigating magistrates in the country decide the cases independently and do it in accordance with the law and their core belief. This is only subject to review within the judicial system. Control of this process is impossible. However, the administrative activity, the organization of case registration and handling and the observance of the related time periods fall within the jurisdiction of the Inspectorate to the Supreme Judicial Council. This is to say that the Inspectorate is one of the appropriately established bodies called upon controlling the independent judiciary and having prevention functions in terms of adverse phenomena.

According to the provisions of article 54 of JA, the subject matter of the inspections of ISJC is the overall organizational and justice administration /law enforcement/ activity of the courts, prosecutor's offices and investigation departments. In details, this means inspections of the organization of the administrative activity in courts, prosecutor's offices and investigation departments, the organization of case and file registration and handling, the observance of statutory time periods, reporting to the competent authorities – upon finding practices different to one another, any requests for interpretative decisions or enactments, drafting suggestions for imposing disciplinary sanctions to or rewarding of magistrates, sending reports and making suggestions to other government authorities, analytical activity, inspections on applications for violations of the right to hearing and trial of cases within reasonable terms, inspections for integrity and conflicts of interest of magistrates, identifying their actions that are in prejudice of the judiciary image, and inspections related to magistrates' independence breaches, inspections of their property declarations and for violations of the Personal Data Protection Act, by the courts, prosecutor's offices and investigation departments.

Its main powers are: to ensure discipline in the judiciary authorities, prosecution office and investigations through the organization of inspections of their administrative activities; inspections of registration and handling of court cases, inspections related to the trial of cases within the statutory time periods; to report to the competent authorities upon finding contradictory case law, and to send reports and suggestions for imposition of disciplinary sanctions or rewards to the Supreme Judicial Council and to the administrative executives of the judiciary authorities for imposing disciplinary sanctions or compensations.

This means that the Inspectorate has controlling and ascertaining function, referring function upon finding grounds to enforce

disciplinary liability, reporting function, including suggestions and reports to other government authorities, and sanctioning function – issue of punishment decisions.

The legal framework does not provide the Inspectorate as part of the judicial system, however, it is neither a justice administration body, nor entirely administrative body. Furthermore, the primary principle that we observe in our work is not to prejudice the independence of judges, prosecutors and investigating magistrates. This is the "sanctum sanctorum" for the democratic society and inspectorate's greatest concern. This is why, in the course of all of its inspections, ISJC takes into account the statutory framework and the general principles of law.

ISJC is organised in accordance with the law. The Inspectorate is an independent legal entity and has defined its functions in details with the Rules on the organization of its work.

The chief inspector is in charge of the overall organizational and methodological management of the Inspectorate's work, represents it, gives directions about the budget, controls the inspectors, enters into and terminates the employment contracts with the experts and the employees in the administration. The chief inspector is appointed by the National Assembly after a contest with the votes of 2/3 of the members of the Parliament. The same procedure applies to the appointment of the inspectors. In their work, they are supported by experts with legal and economic education who are appointed after a contest. The work of the Inspectorate is supported by administration. The employees in the Inspectorate's administration are judicial officials. They are organised in general and specialised administration. The number of administration staff should not exceed the fivefold number of inspectors who are 11, including the chief inspector. Judicial officials who are direct subordinates of the chief inspector are the financial controller

and the information security officer. In general, the Inspectorate's administration is managed by a secretary general. The secretary general is also direct subordinate to the chief inspector and reports to them. While taking this position, the secretary general may not be a member of political party or coalition, organization with political purposes and to carry out political activity. The financial controller is another figure in the administration. They mainly apply and observes the Financial Management and Control in Public Sector Act. The other representative of the administration is the information security officer. They are in charge of the information security in the Inspectorate while ensuring the observance of the requirements of the Classified Information Protection Act (CIPA) and its implementing regulation, maintaining the register of classified information, organising the proper creation and receipt, processing, storage and delivery of classified information.

The general administration of the Inspectorate comprises:

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|---|---|---|---|
| Administrative DIRECTORATE | Legal, Public Relations and Human Resources DIRECTORATE | Budget and Finance DIRECTORATE | Computer and Information Security DIRECTORATE |

Specialised administration consists of experts who support the chief inspector and the inspectors in exercising the Inspectorate's powers as stated above.
The experts are assigned to:

1. inspection unit under article 54, paragraph 1, items 1 and 2 of the JA who take part in inspections related to the organization of the administrative activity of courts, prosecutor's offices and investigation bodies;

2. inspection unit under chapter nine, section Ia of the JA who take part in inspections of the property declarations of judges, prosecutors and investigating magistrates;
3. inspection unit under chapter nine, section I6 of the JA who take part in inspections for integrity and conflicts of interest of judges, prosecutors and investigating magistrates, inspections for identifying actions in prejudice of the judiciary image, and inspections related to investigating magistrates' independence breaches;
4. inspection unit under chapter three "a" of the JA who take part in inspections of applications filed by natural persons and legal entities against deeds, actions or omissions of the judiciary authorities being in prejudice of their right to hearing and deciding the cases within reasonable term;
5. Analytical Unit who process and analyse the information from the inspections carried out in the judiciary authorities by all Inspectorate's teams;

With regard to the Inspectorate's work, the administrative executives of the judiciary authorities are obliged by law to assist the chief inspector and the inspectors in exercising their powers and to ensure access to the materials necessary for this purpose. Furthermore, they are obliged to provide information about the actions they have undertaken with regard to every report or suggestion sent by the Inspectorate.

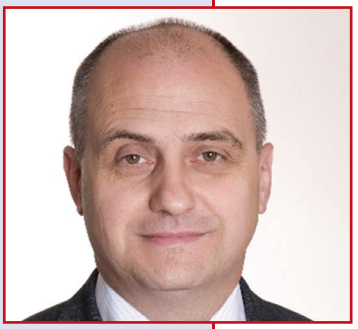
As a conclusion, we must specify that the Inspectorate to the SJC is established with the idea to ensure the faith of the society in justice and transparency in the operations of the judicial system. To this end, the publication of annual reports describing the results achieved by the Inspectorate are a good practice. This is a positive sign for the government and the citizens for ensuring publicity and transparency about the quality of justice.
This is my short presentation about the competences, organization

and functions of ISJC of the Republic of Bulgaria in charge of the control over the magistrates' work.

**Finally, I would like to say a few words on the conference topic.**

Independence is the fundamental value of the judiciary, a prerequisite for the rule of law, and a guarantee for fair trial. It enables the magistrates who are in charge of making crucial decisions about the life, freedoms, rights, obligations and property of citizens, to decide impartially and fairly, and protects them against the direct impact of the parties to the dispute and the illegal interference of government authorities, external organisations and natural persons. Independence is not a prerogative of judiciary and a privilege of the judge, but mainly exists in the interest of those who seek or expect justice, as the legal and objective hearing of criminal, civil and administrative cases is crucial for a peaceful, prosperous and democratic society. Independence must be deserved, won and protected. Judiciary achieves legitimacy and wins the respect of citizens with its irreproachable performance ensuring proper and justified decisions, through reporting, transparency and openness to reasonable criticism. The best defense of independence is the excellent performance of vested powers, which would inevitably suggest a lack of public support for the attacks by representatives of government institutions, media, and citizens against the magistrates, and would bring higher trust in justice and higher reputation of the judiciary. With its work, the ISJC puts the first real barrier against the judiciary authorities' illegal acts. To this end, it also has preventive function in terms of enactment of objective, legal and fair judicial and prosecution acts. While protecting the reputation and independence of magistrates, the Inspectorate does not tolerate any non-ethical acts. This is why, I would like to welcome the topic of this conference and to thank you in advance for the improvement of inspectorates' capacity!

# THE PRACTICE OF THE BULGARIAN INSPECTORATE REGARDING THE DECLARATION AND CONTROL OF THE PROPERTY INTERESTS OF MAGISTRATES AS A GUARANTEE OF THEIR INDEPENDENCE AND INTEGRITY IN ORDER TO INCREASE PUBLIC CONFIDENCE IN THE JUDICIAL SYSTEM.



**Lyubomir Krumov**
*Inspector, Inspectorate to the Supreme Judicial Council, Bulgaria*

Mr. Lyubomir Krumov was graduated in 1994 at the Faculty of Law and acquired the title of "Lawyer" at "St. Kliment Ohridski" University of National and World Economy in Sofia and in 2015 he completed the Master's degree in Economics.
During the period 1995 – 1996, Mr. Krumov worked as a candidate judge at the Court of Sofia District and during the period 1995 – 1999 he was an assistant investigator and investigator in the Sofia Investigation Service.

At the same time, Mr. Krumov is a judge with a long experience and has exercised several duties, such as: 1999 - 2000 Junior Judge at the Sofia District Court. 2000 - 2003 Judge at the Regional Court - Slivnitsa.1996 - 2003 Part-time assistant in criminal law at the Faculty of Law of Sofia University "St. Kliment Ohridski. 2003 - 2006 Chairman of the

Regional Court - Slivnitsa. 2006 - 2016. Judge at the Sofia District Court - Criminal Division. Mr. Lyubomir Krumov was elected by the National Assembly as an inspector in the Inspectorate to the Supreme Judicial Council on February 18, 2016 and he took up the position of "Inspector in the ISJC" on March 14, 2016.
Abstract of the presentation

The Inspectorate of the Supreme Judicial Council (ISJC) is a control body, part of the judiciary system, established by the fourth amendment to the Constitution of the Republic of Bulgaria (prom. SG 12/2007). The Inspectorate consists of a Chief Inspector General and ten Inspectors, who are elected by the National Assembly with a majority of two-thirds of the Members of the National Assembly. The mandate of the Chief Inspector is five years and the Inspectors four years. In carrying out their duties, the Chief Inspector and the Inspectors are independent and are only governed by the law. The main powers of ISJC are provided for in the Constitution and further developed in the Judiciary System Act (JSA) - to carry out checks on the activities of the authorities within the judiciary system while respecting the independence of judges, juries, prosecutors and investigators in the course of the performance of their functions.

By the Act on public declaration of the assets of persons holding senior government positions (prom. SG 38/05/2000; subsequently the title was amended to: Act on Public Declaration of the Assets of Persons Holding Senior Government and Other Positions (The title was amended – SG 30 and 71/2013) it is provided the obligation to declare the property by persons exhaustively listed in the Act, including some senior magistrates, has been introduced. The declaration of income and property by the obliged persons shall be made upon their appointment and annually by 31 May for the previous calendar year at the latest, and, upon their leave from duty, by declarations in a standard form approved by the Minister of Finance.

An addition to the JSA (SG 62/2016, in force from 01.01.2017) provides for an obligation of all judges, prosecutors and investigators to declare their assets before the ISJC. By entrusting new functions to the ISJC in connection with the adoption and checking of the declarations of property and interests of Bulgarian magistrates, changing of the previous legislative model for declaring and checking before authorities outside the judiciary system, the status of ISJC as an independent, well-respected and effective judicial authority with clearly delineated control powers with regard to the activity, property and integrity of judges, prosecutors and investigators has been ensured.

According to the JSA supplement (SG 62/2016, in force from 01.01.2017), judges, prosecutors and investigators are required to submit to the ISJC a two-part declaration of property and interests within the following deadlines:

- annually until 15 May for the preceding calendar year,
- within one month of taking office,
- within one month of dismissal,
- within one month of the expiry of one year of dismissal.

Magistrates should also declare any change in the interests already declared to ISJC within one month of the change occurring.
In the declaration of property and interests, magistrates indicate the particulars provided for in the JSA about their property and interests, the property of their spouses or persons with whom they are in de facto cohabitation on a matrimonial basis, as well as of minor children. In a supplement to the Judicial System Act (SG 7/2018), the scope of the particulars declared by the magistrates has been extended, whereas of 23 January 2018 it is subject to declaration the origin of the funds in case of early repayment of liabilities and loans is subject to declaration. Within one month of the expiry of the time limits for the submission of declarations, the

ISJC should publish on its website the declarations submitted, as well as a list of persons who have not submitted them within the set time limit.

Often in the course of the checks of property declarations of magistrates, ISJC faces the inability to establish certain relevant facts and particulars due to the lack of legal regulation – for example, ISJC cannot request the provision of data about real estate, financial instruments or bank accounts abroad, financial instruments traded through an investment firm, or about gold investments. For the same reason, payments made through companies registered under the Payment Services and Payment Systems Act (which are not banking institutions) and the availabilities in accounts in these companies cannot be verified. Another difficulty in carrying out the checks is the lack of reliable information about the value of the declared property (immovable property and motor vehicles) in the relevant Registers which ISJC has access to and the fact that there is no statutory mechanism by which ISJC can determine it. The absence of such powers makes it difficult to establish all the facts and circumstances relevant for the check.

In conclusion, it can be summarised that the ISJC has proven itself to be an independent supervisory body within the judiciary system, playing an active role in the prevention of corruption, conflicts of interest and undue external influence over judges, prosecutors and investigators. The effectiveness of the powers exercised by the ISJC in this regard could be enhanced both by making the necessary legislative changes and by extending co-operation between the Inspectorate and other bodies and institutions carrying out checks for conflict of interest and for the disclosure of assets of persons holding senior public positions.

## 1. Establishment and powers of the Inspectorate of the Supreme Judicial Council

The Inspectorate of the Supreme Judicial Council (ISJC) is a control body, part of the judiciary system, established by the fourth amendment to the Constitution of the Republic of Bulgaria (prom. SG 12/2007). The Inspectorate consists of a Chief Inspector General and ten Inspectors, who are elected by the National Assembly with a majority of two-thirds of the Members of the National Assembly. The mandate of the Chief Inspector is five years and the Inspectors four years. In carrying out their duties, the Chief Inspector and the Inspectors are independent and are only governed by the law. The main powers of ISJC are provided for in the Constitution and further developed in the Judiciary System Act (JSA) - to carry out checks on the activities of the authorities within the judiciary system while respecting the independence of judges, juries, prosecutors and investigators in the course of the performance of their functions.

Being established as one of the bodies provided to support the implementation of judicial reform, the ISJC's powers have evolved substantially over the years. In 2012, by an addition to the JSA, the Inspectorate was assigned additional obligations - to carry out checks on statements claiming violation of the right to hear and resolve cases within a reasonable time. With the fifth amendment to the Constitution of December 2015 (SG 100/2015), the functions of the Inspectorate were significantly expanded – it was empowered to carry out integrity and conflict of interest checks on judges, prosecutors and investigators, their property declarations, to identify actions that undermine the prestige of the judiciary system and those related to violations of the independence of judges, prosecutors and investigators. The new powers were further developed in Chapter Nine, Section Ia and Ib of the JSA (SG 62/2016) and are in effect from 1 January 2017. The main objective of the powers of the ISJC was to increase the effectiveness of the

authority and to establish real mechanisms for the prevention of conflicts of interest and undue external influence on the judiciary system authorities. Linking the examination of facts and data provided in the property declarations to conflict of interest checks gives rise to a real possibility of detecting undue influence on the activity of judges, prosecutors and investigators, as well as a violation of their functional independence. This also strengthens the preventive effect of the obligation to submit declarations of the existence of private interests and public declaration of property. The new provisions of the Constitution, further developed in the JSA concerning the checks carried out by the ISJC, create opportunities in the institutional and organisational aspect for functioning under the conditions of accountability, transparency and prevention of dependencies in the judicial system. The public effect of their adoption is aimed at increasing public confidence in the judicial system and creating a confidence among citizens that everyone is equal before the law and no one is isolated from accountability and public control mechanisms. The latest legislative change, providing for a new power of the Inspectorate, is pursuant to an amendment to the Personal Data Protection Act (PDPA), SG No. 17 of 2019, which mandated the Inspectorate to supervise and ensure compliance with Regulation (EU) 2016/679, the PDPA and the personal data protection regulations when personal data processing is done by the court, prosecutors and investigative bodies in the performance of their functions as judicial system authorities.

## 2. A brief chronological overview of the obligation to declare the property status by persons holding senior civil positions

By the Act on public declaqration of the assets of persons holding senior government positions (prom. SG 38/05/2000; subsequently the title was amended to: Act on Public Declaration of the Assets of Persons Holding Senior Government and Other Positions (Title

amend. – SG 30 and 71/2013) an obligation to declare the property by persons exhaustively listed in the Act, including some senior magistrates, has been introduced. The declaration of income and property by the obliged persons shall be made upon their appointment and annually by 31 May for the previous calendar year at the latest, as well as upon their release by declarations in a standard form approved by the Minister of Finance. Under the management of the Chair of the Court of Auditors a Public Register has been established for the declaration of property, income and expenses by persons holding senior government positions in the Republic of Bulgaria. Public access to the data from the Public Register is available to the authorities empowered under other acts to receive information, the heads of administrations, which include the persons obliged under the law, and the mass media through their management bodies. Requests for data from the Public Register is made in writing to the Chair of the Court of Auditors, who shall be obliged to provide the relevant information at the latest within a month of receipt of the request. Each year between 1 October and 1 November, the Chair of the Court of Auditors is supposed to disclose the names of the officials required according to this Act to submit a declaration, but who have failed to do so by means of a bulletin to be published in the mass media. Every obliged person shall have the right of immediate access to the Register concerning his or her personal declarations.

An addition to the JSA (SG 62/2016, in force from 01.01.2017) provides for an obligation of all judges, prosecutors and investigators to declare their assets before the ISJC. By entrusting new functions to the ISJC in connection with the adoption and checking of the declarations of property and interests of Bulgarian magistrates, changing of the previous legislative model for declaring and checking before authorities outside the judiciary system, the status of ISJC as an independent, well-respected and effective judicial authority with clearly delineated control powers with regard to the activity,

property and integrity of judges, prosecutors and investigators has been ensured.

In 2018, further decisive steps were taken by drafting and adopting new consolidated legislation to counter corruption among senior public officials. In parallel, through a reform of the procedural law, the jurisdiction of high-level corruption crimes was changed and they became prosecuted in the specialised criminal courts. The capacity of the internal administrative control in the structures in governmental institutions was also strengthened.

The Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act (CCUAAFA – prom. SG 7/2018) established a new single independent anti-corruption body – the Commission for Countering Corruption and For the Confiscation of Illegally Acquired Property (CCCCIAP) as an independent specialised standing governmental body for the implementation of the countering corruption and confiscation of illegally acquired property policy. The focus of the CCUAAFA is a reform of the institutional framework in the field of prevention and counter-corruption aimed at greater efficiency and better coordination between the existing authorities and public administration units. The Commission for Countering Corruption and for the Confiscation of Illegally Acquired Property has acquired the powers of a number of bodies such as the Commission for Prevention and Establishment of Conflict of Interest, the Center for Prevention and Countering Corruption and Organised Crime to the Council of Ministers, the relevant unit of the Court of Auditors related to the activities of the repealed Act on the declaration of the assets of persons occupying senior government and other positions, as well as the relevant specialised directorate in the State Agency for National Security (SANS) to counter corruption among persons holding senior government positions. It is thus aimed at establishing the necessary link between the functions of corruption prevention, checking of property declarations, the establishment of conflicts of

interest and the confiscation of illegally acquired property, where the anti-corruption activities are intensified by collecting, analysing and checking information in connection with and on the occasion of information about corruption of persons, holding senior public positions. This merger of functions is important, as conflicts of interest and corruption are often the key to the inexplicable wealth of the persons concerned. This enables the results achieved so far and the well-established good practices in the field of civil confiscation to be maintained and further developed. The Commission is a collegial body composed of five members, a Chairperson, a Deputy Chair and three other members. The Chair of the Commission is elected by the National Assembly on a proposal from the Members of the National Assembly. The Deputy Chair and the other members of the Commission are elected by the National Assembly on a proposal from the Chair of the Commission. The mandate of the Commission is six years and starts elapsing from the date of appointing of its members. The independence of the Commission is ensured through the proposed principles and procedures for its structuring, while ensuring transparency, accountability and publicity in its activities. Parliamentary control and statutory mechanisms for interaction with the institutions of the other authorities provide legal guarantees for the independence of the newly created body.

The powers and functions of CCCCIAP can be summarised in the following areas:

- Operational – related to the acceptance and checking of declarations of property and interests, to checks on received information from whistle blowers and through the media, to carrying out checks of property situation, proceedings for the establishment of conflicts of interest and proceedings for the confiscation of illegally acquired property; anti-corruption by discovering acts of persons holding senior public positions.
- Analytical – related to preparation of analyses and methodologies

and development of anti-corruption measures. It is expressly provided that the analyses and proposals for anti-corruption measures drawn up by the Commission are made available to the competent authorities who are obliged to rule on them and to inform the Commission of the measures taken.

It should be expressly emphasised that, according to an express provision in the CCUAAFA, the filing and checking of property declarations by judges, prosecutors and investigators is carried out subject to the provisions of the JSA.

### 3. Check of magistrates' property declarations by ISJC teams

According to the JSA supplement (SG 62/2016, in force from 01.01.2017), judges, prosecutors and investigators are required to submit to the ISJC a two-part declaration of property and interests within the following deadlines:

- Zannually until 15 May for the preceding calendar year,
- within one month of taking office,
- within one month of dismissal,
- within one month of the expiry of one year of dismissal.

Magistrates should also declare any change in the interests already declared to ISJC within one month of the change occurring.

In the declaration of property and interests, magistrates indicate the particulars provided for in the JSA about their property and interests, the property of their spouses or persons with whom they are in de facto cohabitation on a matrimonial basis, as well as of minor children. In a supplement to the Judicial System Act (SG 7/2018), the scope of the particulars declared by the magistrates

has been extended, whereas of 23 January 2018 it is subject to declaration the origin of the funds in case of early repayment of liabilities and loans is subject to declaration. Within one month of the expiry of the time limits for the submission of declarations, the ISJC should publish on its website the declarations submitted, as well as a list of persons who have not submitted them within the set time limit.

Within 6 months (initially 3 months) after the expiry of the deadline for submission of the respective declaration, ISJC shall carry out a check in terms of reliability of the declared particulars, consisting in comparing them with the information collected by ISJC from the relevant Public Registers in which the particulars are subject to registration, declaration or verification. The law gives ISJC broad powers to access sources of information about the particulars subject to declaration. Several co-operation agreements have been concluded by and between ISJC and other public authorities and institutions, including those to which the declared particulars are subject to registration, declaration or verification (with the Ministry of Regional Development and Public Works, Ministry of Interior, National Revenue Agency, Executive Agency "Maritime Administration"). Agreements have also been concluded for the exchange of information with all (ten) pension insurance companies in the Republic of Bulgaria, which have established and manage under the Social Security Code funds for supplementary pension insurance.

The check shall end with a Compliance Report where no discrepancy has been established between the facts declared and the information received or the difference found amounts to up to BGN 10 000. (until 10.02.2020 – BGN 5000 with a view to the amendment of JSA - SG 11/2020, in force from 11.02.2020), and in other cases - with a report of non-compliance. In case of a finding of non-compliance of not less than BGN 20 000, which is not remedied within 14

days of the notification of the person, ISJC sends the report to the competent authorities for a further check of the property status of the respective person – the National Revenue Agency and the Commission for countering corruption and for the confiscation of illegally acquired property. In cases of non-compliance in the amount from BGN 10 000 (until 10.02.2020 – BGN 5000) to BGN 20 000, as well as where there are conflict of interest data, the ISJC shall carry out a further check, which may end with a Compliance Report or a Non-Compliance Report, if there is a difference between the data declared and the information received, the property value of which exceeds BGN 10 000. (until 10 February 2020 – BGN 5000). When drawing up a Report of Non-Compliance, the National Revenue Agency shall also be notified to undertake appropriate action.

The Inspectorate's practical experience in the field of checking declarations of property and interests has shown that some legislative amendments are needed. In 2018, at the initiative of ISJC, the JSA framework regarding checking of declarations of property and interests of judges, prosecutors and investigators was amended into the following areas:

- the time limit for carrying out the checks is extended from three to six months (Art. 175e, para 1);
- provision are made for the possibility for the magistrates to agree to the provision of information constituting banking secrecy, where there is no need for a court decision for its disclosure (Art. 175e, para 6);

  the administrative penalty provision of Art. 408a of the JSA, for its application also to persons who have lost the capacity of a judge, prosecutor or investigator, but are obliged to submit a declaration of property and interests within the time limits under Art. 175c, para. 1, item 3 and item 4 of the JSA.

Since the end of November 2018 and throughout 2019, ISJC inspectors and experts have participated in an inter-departmental work group under the leadership of the Deputy Minister of Justice, who has issued a draft amendment and supplement to the JSA. On the part of the Inspectorate, provisions were proposed to remedy legal imperfections in relation to the declaration of property and interests by judges, prosecutors and investigators and the procedure for carrying out the checks on the submitted declarations. In this regard, it should be noted that with the Act on the Amendment and Supplementation of the JSA (prom. SG 11 of 07/02/2020, in force from 11.02.2020) the provisions of Chapter 9, Section Ia of the JSA have been amended and supplemented, concerning the particulars to be declared, the time as of which the property is to be declared, the time limit for submission of the declaration under Art. 175c, para. 1, item 4 of JSA, the prerequisites for submitting a declaration of origin of the funds under Art. 175a, para. 1, item 2 of JSA, etc.

In relation to optimising the ISJC's activities under Chapter Nine, Section Ia of JSA under the Good Governance Operational Programme 2014-2020 (GGOP), under which the Inspectorate is a beneficiary, development of specialised software is envisaged that will allow fully electronic submission of the declarations of property and interests of magistrates; it will provide the opportunity to verify the data declared through machine data exchange by the electronic systems of the central and local authorities and their administrations, as well as other authorities before which the declared particulars are subject to registration, declaration or verification. The aim is, where possible, to minimise the entry of data by an operator and accordingly to maximise the automatic verification of property declarations by ensuring the retrieval and comparison of information electronically.

In 2021, 4,393 property declarations were submitted, including:

4,125 annual declarations for 2020, 114 initial declarations (within one month of taking office), 54 final declarations (within one month of dismissal) and 100 final declarations (within one month of the expiry of one year after dismissal). Also 343 declarations on a change in declared particulars in the declarations under Art. 175a, para. 1, item 1 of JSA with regard to the interests and origin of funds in case of early repayment of liabilities and loans. Checks were carried out on 4391 property declarations, and in fact the property of 9935 persons - magistrates, their spouses, persons with whom they are in de facto cohabitation on matrimonial basis and minor children was checked. 393 non-compliances have been identified, which have been remedied by submitting a corrective declaration within the statutory 14-day term. Currently, the checks on 2 property declarations have not been completed, as not all the information has been received from the authorities and institutions before which the declared facts are subject to registration, declaration or verification and the 6-month time limit for carrying out the checks has not yet expired.

The JSA provides for administrative criminal liability for persons who have not submitted within the statutory term a declaration of property and interests or a declaration of change in the declared particulars with regard to the interests and the origin of the funds in case of early repayment of debts and loans (Art. 408a of JSA), as well as in case of established non-compliance exceeding BGN 10.000 after further verification (Art. 408b of JSA). In 2021, in connection with existing violations of the obligation to submit a declaration of property and interests within the statutory term, 43 administrative penal proceedings were opened, which ended with the issuance of:

- 15 punishment decisions for a total amount of the fines imposed BGN 4700;
- 27 warnings in which the punishing authority, taking into

account the established and non-controversial practice of the Administrative Court of Sofia City, has accepted that the case is minor, since the act reveals a lower degree of public danger than the usual infringements of the same kind, given the small delay in submitting the relevant declaration (one to nine calendar days) or in the presence of numerous or exceptional extenuating circumstances by warning the infringer that, in the case of repeated infringement of the same kind, they will be fined;

- 1 resolution terminating administrative criminal proceedings.

Out of the 15 punishment decisions issued: 9 have entered into force (with a total amount of the fines imposed BGN 2800, which have been paid in full), one has not been served on the offender, and 5 have been appealed before the court, and the legal proceedings have not yet been completed.

## 4. Difficulties in the process of checking property declarations and the challenges faced by the ISJC

Often in the course of the checks of property declarations of magistrates, ISJC faces the inability to establish certain relevant facts and particulars due to the lack of legal regulation – for example, ISJC cannot request the provision of data about real estate, financial instruments or bank accounts abroad, financial instruments traded through an investment firm, or about gold investments. For the same reason, payments made through companies registered under the Payment Services and Payment Systems Act (which are not banking institutions) and the availabilities in accounts in these companies cannot be verified. Another difficulty in carrying out the checks is the lack of reliable information about the value of the declared property (immovable property and motor vehicles) in the relevant Registers which ISJC has access to and the fact that there is no statutory mechanism by which ISJC can determine it. The absence of such powers makes it difficult to establish all the facts

and circumstances relevant for the check.

A serious challenge for ISJC checking teams is also the fact that certain facts and particulars to be declared cannot be established due to the lack of single Registers in which they are subject to registration, declaration or verification. These are, for example: conflict of interest, actual cohabitation on a matrimonial basis, receivables, insurance policies, the permanent use of somebody else's property, the cost of training or travel where they are not paid by their own money.

We should also mention here the lack of legislative regulation with regard to virtual currencies (the so-called 'cryptocurrencies'). Neither the country or the European Union have regulations or a common policy on activities related to virtual currencies, and so far each Member State has introduced its own rules or applies its existing laws by analogy. There is also no legal definition of the term "virtual currency". Nevertheless, in practice it is assumed that trading in virtual currencies is permitted by law, since there are no rules that explicitly prohibit this type of activity. In its Opinion on Virtual Currencies of 04.07.2014 (EBA/Op/2014/08), the European Banking Authority defines virtual currencies as a digital representation of a value that is not issued by a central bank or public authority, nor is attached to an official currency but is used by natural persons or legal entities as a means of payment and can be transferred, stored or traded electronically. In Bulgaria, the opportunity to present their position regarding transactions in virtual currencies have had the Court of Appeal - Sofia, the Bulgarian National Bank, the Financial Supervision Commission and the National Revenue Agency. On the occasion of questions asked by magistrates about the declaration of virtual currencies subject to the provisions of Chapter Nine, Section Ia of JSA at its meeting held on 15.04.2020, ISJC took the following decision: "Virtual currencies do not fall within any of the cases referred to in Art. 175b, para. 1 of JSA, which exhaustively lists the types of property and interests to be declared under Chapter 9, Section Ia of

JSA. Despite the absence of a statutory obligation to declare virtual currencies, the persons obliged under JSA may declare them in Table No 7 "Cash available" of Section III of the standard declaration approved by the Chief Inspector of ISJC under Art. 175a, para. 1, item 1 of the Judicial System Act - "Cash, including deposits, bank accounts and receivables with a total value exceeding BGN 10,000, including in foreign currency" in view of proving the origin of the funds in case of future realisation of profit from their sale". The questions submitted and the answer thereto are published on the official website of ISJC under the heading "Questions and Answers on property declarations" of the section "Checks of Property Declarations".

In 2022, a significant difficulty in carrying out some of the checks on declarations was caused by the fact that various Regional Courts rejected requests by ISJC Inspectors to disclose information constituting banking secrecy within the meaning of the Credit Institutions Act, on the grounds that the requests came from an illegal body because of an expired mandate (the 4-year mandate of inspectors established by the Constitution expired in March 2020). Furthermore, a number of judgments of the Court of First Instance (Sofia Regional Court), which are currently appealed before the Administrative Court of Sofia City, were annulled for being unlawful punishment decisions of the Chief Inspector, which fined magistrates for failing to submit property declarations under the JSA within the time limit, since the court held that they were issued in the absence of jurisdiction due to the expired mandate of the Chief Inspector (the 5-year mandate of the Chief Inspector fixed in the Constitution expired in April 2020). In this regard, it is necessary to point out that in April 2022 the Plenum of the Supreme Administrative Court (SAC) referred the matter to the Constitutional Court (CC) seeking a mandatory interpretation of the provision of Article 132a, with reference to Art. 1, para. 1 and 2, Art. 4, para. 1, Art. 8 and Art. 117, para. 2 of the Constitution of the Republic of Bulgaria, and the CC answered the following questions: "Do the powers of the Chief Inspector and the Inspectors of the

Inspectorate of the Supreme Judicial Council cease upon expiry of their mandate, or do they continue to perform their functions until the election by the National Assembly of a new Chief Inspector and respectively Inspectors? Is it permissible by the Constitution to suspend for indefinite time the activities of the Inspectorate of the Supreme Judicial Council due to the expiry of the mandate of the Chief Inspector and Inspectors, and lack of activity of the National Assembly, which is obliged under the Constitution to elect the Chief Inspector and respectively Inspectors?". A constitutional case No 7/2022 has been initiated on the request made by the Plenum of the Supreme Administrative Court, on which the Constitutional Court is about to pass a ruling.

An up-to-date factor in overcoming deficits making it difficult to carry out checks of declarations effectively is the need to fully update the substantive legal framework in line with the changed social and economic conditions and technological development of the country. Effective protection of these public relations can be ensured through regulatory decisions promoting the diligent procedural conduct of the persons obliged under the JSA and providing ISJC with a wider range of evidence-gathering mechanisms.

In the end, it can be concluded that the ISJC has proven itself to be an independent supervisory body within the judiciary system, playing an active role in the prevention of corruption, conflicts of interest and undue external influence over judges, prosecutors and investigators. The effectiveness of the powers exercised by the ISJC in this regard could be enhanced both by making the necessary legislative changes and by extending co-operation between the Inspectorate and other bodies and institutions carrying out checks for conflict of interest and for the disclosure of assets of persons holding senior public positions.

## INSPECTION AND CONTROL OF WORK OF MAGISTRATES AND COURTS ACCORDING TO THE ITALIAN LEGISLATION. ROLE AND ACTIVITY OF THE INSPECTION SERVICES.

**Maria Rosaria Covelli**
*Head of General Inspectorate, General Inspectorate of the Ministry of Justice, Italy*

Ms. Maria Rosaria Covelli was graduated in law with 110 cum laude from La Sapienza University in Rome, with a thesis on comparative law and she was first appointed as a judge at the Court of Milan. Then, Ms. Covelli was appointed a judge at the Court of Rome; and carried out the duty of the Chairperson of the relevant department which was responsible for corporates, contracts, or litigations with public administration. While for a period of 5 years Ms. Covelli held the position of Chairperson of the Court of Viterbo for 5 years.

From 2021 onwards Ms. Covelli has held the office of the Head of the General Inspectorate at the Ministry of Justice and she is the President of the Ministerial Commission for Justice in Southern Italy. During her experience as an assistant at La Sapienza University of Rome in comparative law, over the years she has produced various publications in the field of civil and commercial law,

commentaries on Treccani legal encyclopaedia on the rules for joint stock companies, the entry "groups of companies in comparative law"; and also writings on the content of court decisions regarding the application of artificial intelligence in justice.

The CSM has validated over 20 good practices implemented at the Court of Viterbo, many of them in collaboration with the University of Tuscia. At the same time, Ms. Covelli has made several references at conferences related to the topic of gender violence and information in the judiciary, or at meetings at the High School of the Judiciary on issues related to the civil responsibility of magistrates. Currently Ms. Covelli acts as the coordinator in relation to the development of inter-institutional meetings in the province of Viterbo regarding the hearings of the victims of crime.

**1. Role and activity of the Inspection services.**

Law no. 1311 dated 12 August 1962 entrusted to the Inspectorate General of the Ministry of Justice the execution of inspections, whose performance was decided by the Head of the General Inspectorate, in relation to:

- ► first instance offices: law courts and public prosecution offices;
- ► district offices: appellate courts, public prosecution general offices, juvenile law courts and juvenile public prosecution offices, execution courts;
- ► Office for Notifications, Executions and Appeals (UNEP).

Traditionally, no inspection shall be ordered at the Court of Cassation and the Public Prosecution General office of the Court of Cassation since these offices have a different autonomy, which must be guaranteed, related to the exercise of their functions.

The staff of the Inspectorate General is composed as follows:

- 19 Inspectors General Magistrates in addition to the Chief and the Deputy Chief;
- 36 Chief Inspectors (23 on duty)
- 18 Director Inspectors

## LEGAL PROVISIONS

*Law no. 1311 dated 12 August 1962*

***Section 7*** *"In compliance with the directives given by the Minister, the Chief of Inspectorate General shall order inspections in all judiciary offices in order to establish whether the services are provided according to the applicable laws, regulations and instructions.*

*The inspections referred to in previous subsection take place, as a rule, every three years; the Chief of Inspectorate General can order to be repeated within a shorter term in the offices where shortcomings or irregularities have been found or reported.*

*At any time the Minister can, whenever it deems appropriate, order inspections in the judiciary offices. The Minister can also order partial inspections in the judiciary offices, in order to establish their productivity and the extent and promptness of work of the individual magistrates".*

***Section 9*** *"At the end of the verification, the inspector shall draft a report where he/she succintly mentions the irregularities and shortcomings found in the services and he/she shall formulate the proposals designed to eliminate them.*

*The Magistrate Inspectors also report on the extent and promptness of the work performed by the magistrates, as well as on the ability, industriousness and conduct of the officers in charge at the inspected office.*

*The Inspection Officers cannot express appreciations in collecting information on the staff serving the inspected office. For what concerns the activity of magistrates, they have to limit themselves to collect statistical data.*

*In cases when a new inspection has been ordered, pursuant to Section*

*7 Subsection 2, and it establishes the persistence of the shortcomings or irregularities previously found, the Chief of Inspectorate General shall inform the Minister by a report for possible, even disciplinary, measures."*

***Section 10*** *Mandatory reporting – "If in the course of inspections serious abuses or irregularities have been established, the Inspector immediately informs the Chief of Inspectorate General, formulating proposals about the measures to be adopted. When belatedness may cause prejudice, he himself/ he herself shall give appropriate instructions so as to eliminate the inconveniences".*

***Section 12*** *Administrative investigation - "The Minister can make use of the Inspectorate General for the execution of investigations on the judiciary staff and on any other category of the staff employed by the Ministry of Justice".*

*.....*

*The magistrate inspector in charge of an investigation involving a magistrate shall, at the end of the investigation and without observing particular formalities, ask for information to the chief of the office and explanations to the magistrate under investigation, and shall report back relating to the service provided by the latter, the attitudes and capability proved by the magistrate under investigation in the exercise of judicial functions, as well as any other fact or element susceptible of evaluation in disciplinary terms.*

*Similar criteria shall be adopted for the investigations to be carried out against officers.*

*At the end of the investigation, the Magistrate Inspector shall draft a detailed report and attach the records and documents acquired for establishing the disciplinary liability of the magistrate under investigation.*

*The Chief of Inspectorate General shall transmit the investigation report to the Minister and formulate, where appropriate, proposals about the measures to be adopted.*

*A copy of the report shall be transmitted to the Director General responsible".*

## 2. Ordinary inspection

The ordinary inspection activity shall take place, in accordance with the law, **every three years,** at the request of the Chief of Inspectorate, according to an **annual program**. Routine inspections

is entrusted to the Magistrates of the Inspectorate (assisted by Chief Inspectors and Director Inspectors and, where necessary, by collaborators of UNEP [ [2]]* for the services of the bailiff [[3] ]).

The purpose of the ordinary inspection activity is to control and verify the functioning and organization of the judiciary offices, concerning both administrative services and the work of Magistrates.

Especially, in addition to control tasks related to regularity of administrative services, the Magistrate Inspectors have the duty to report *"on the extent and promptness of the work performed by the magistrates, as well as on the ability, industriousness and conduct of the officers in charge at the inspected office".*

The Inspection Officers (Chiefs and Directors), coordinated by the Chief of Team Magistrate Inspector, have the duty to verify the single services; in their reports *"they cannot express appreciations or collect information on the staff"* and *"for what concerns the activity of magistrates they have to limit themselves to collect statistical data".*

The checks in the offices of the Justice of the Peace are, as a rule, assigned to chief officers.
In close coherence and harmony with the proposals expressed by the Minister of Justice, the Inspectorate-General has strengthened **checks on the performance of judiciary offices also through the detection of organizational good practices** implemented by each Office and their extension to the other Offices.

The inspection checks imply, in addition to the above-mentioned monitoring activities and the collection of elements for the exercise of any disciplinary action, also an activity of stimulus and support

2 UNEP = Office for Notification of Execution and Protests

3 The NEP offices that are located in the appellate courts shall be inspected when carrying out checks in the appellate courts; the other NEP offices shall be inspected when carrying out checks in the law courts where they are located.

to the services given by the judiciary offices in terms of overall quality and periodical monitoring.

In this perspective, the inspection checks represent a chance to orient the Chiefs of judiciary offices and the Administrative Chiefs to adopt more virtuous organizational modules. In case of irregularities, the inspection teams shall suggest, as a matter of priority, any possible organizational solution in order to regularize services and activities, also with recommendations, limiting recourse to prescriptions to alleged abuses or irregularities so severe to impose the adoption of specific measures in order to eliminate the inconveniences[ [4]].

The stakeholders of ordinary inspection are:

- Inspection Department
- Inspection Team (Magistrates, Chief Inspectors and Director Inspectors)
- Statistics Department, responsable for
  - coordinating all the activitires among the several stakeholders involved in the inspection activity
  - providing advice to the Offices on how to collect inspection data
  - checking the consistency and completeness of inspection reports on the case flow and the productivity of magistrates
  - developing indices on the performance and management of the Office

- The statistical officer delegated by the Director of DGSTAT (Direzione Generale di Statistica; Directorate General of Statistics).

4 "If in the course of inspections serious abuses or irregularities have been established, the Inspector immediately informs the Chief of Inspectorate General, formulating proposals about the measures to be adopted. When belatedness may cause prejudice, he himself/he herself shall give appropriate instructions so as to eliminate the inconveniences". (Section 10 of Act n.1311/1962)

- The CISIA Office (territorial structure of DGSIA - Direzione Generale dei Sistemi di informatizzazione automatizzata; Directorate General of Automated Computerization Systems), which has the task to update the existing computer records (and the related extractors) of the judiciary offices.

### 3. Special inspection

Special inspection shall be ordered before the ordinary three-year deadline from the last check. It can be ordered by the Chief of Inspectorate General[5 ], whenever the Inspectors found or reported irregularities worthy of further investigation, or by the Minister of Justice when he/she deems appropriate[6 ].

### 4. Partial or targeted inspections

Partial or targeted inspections (for individual sectors or services of a judiciary Office) can be ordered exclusively by the Minister of Justice[ 7] in order to assess the productivity of judiciary offices or sectorial irregularities and dysfunctions, as well as the promptness of the work of the offices or individual magistrates.

### 5. Administrative investigation

The Minister of Justice can *"make use of the Inspectorate General for the execution of investigations on the judiciary staff and on any other category of the staff employed by the Ministry of Justice"*

The investigation activity aims, as a rule, to inquire on establish facts or misconducts that may constitute disciplinary offences or, for the Magistrates, a case of environmental or functional incompatibility

5 Ex Section 7 Subsection 2 Law no. 1311/1962
6 Ex Section 7 last Subsection Law no. 1311/1962
7 Ex Section 7 last Subsection Law no. 1311/1962

(Section 2 of the Guarantee-Act, Royal Legislative Decree n. 511 of 31st May 1946). As such, a specific mandate from the Minister and they concern individual persons and not the Offices. During the investigation, also the potential person indicted can be heard, if he/she wishes to undergo examination, with the guarantees of defense assistance.

As a general rule, there is an obligation for the employees of the Ministry of Justice to cooperate in the investigation, that arises from the duties of loyalty and correctness that the civil servant is obliged to observe.

**6. Planning Modes of the inspection mission**

The Head of the General Inspectorate identifies the offices to be inspected approximately every six months, establishes the inspection programme, sets the starting date for each inspection, organises the inspection teams, and signs the letter appointing the selected inspectors.

The inspection process is carried out according to the "general instructions" that the Head of the Inspectorate has established as a general rule and that can be modified on the basis of the annual objectives defined in accordance with the directives provided by the Minister of Justice.

Generally, six inspection cycles are organised during the year. In each cycle approximately 6/7 judicial offices will be inspected.

As already mentioned, inspections in judicial offices will be carried out by a team consisting of an Inspecting Magistrate - the head of the team - or several Magistrates, and inspectors from the administrative staff (Heads and Directors with inspection functions).

The inspecting magistrates are judges or prosecutors. Each of them can be assigned to inspect both courts (adjudicating offices) and prosecution offices (investigating offices). Once appointed, the Team Leader:

- distributes the tasks to the inspectors;
- issues instructions to the inspectors for carrying out the inspection;
- instructs the inspectors to carry out the inspections, in accordance with the guidelines and objectives laid down by the Chief of the General Inspector;
- contacts the Head of the Office (President of the Court and Court of Appeal - Public Prosecutor and Prosecutor General) and asks him to draw up a preliminary report on the state of the office and to fill in a questionnaire with all the data of interest to the inspectors, data that will be verified when the inspection team enters the premises;

For their part, the inspectors make contact with the administrative officials of the office to be inspected and, in the first instance, send them requests for statistical data (standardised requests and schedules).

The duration of the inspections varies depending on the size of the judicial offices to be inspected. As a rule, after the Covid-19 pandemic, the duration of the inspection is four to five weeks; it starts 'at a distance', i.e. 'at a distance' for one week; it continues with an on-site inspection for 10-15 days; it ends with a final 'at a distance' week.

### 6.1 Preliminary Activity

According to a timetable common to all ordinary inspections, which defines the activities to be carried out and the deadlines within which

the activities must be completed, before starting the inspection (pre-audit phase), the collection of inspection documentation begins: the so-called 'mandatory schedules' are sent to the inspected office, for data on:

- the situation of judicial and administrative staff;
- the organisation of judicial activity, the work of judicial staff and the distribution of cases;
- the organisation of administrative services;
- the management and comparison of events and the resolution of proceedings in different areas (civil and criminal), magistrates' worksheets, as well as standardised requests prepared by the Inspectorate, with the main purpose of verifying the performance of the office and any delays in issuing orders;

In recent years, the on-site presence of the inspection team has been reduced in favour of remote reading of data and the exchange of any other documents requested by the inspectors. This is done through remote access to the information systems of the inspected office - authorised by the head of the office - and through the exchange of obligatory prospectuses, standardised questions and documents on the SHAREPOINT platform (a shared digital platform where the inspected judicial office, the inspection team, the statisticians and the head of the inspection can operate).

## 6.2 Technical Tools for the extrapolation of data

The data are extrapolated from the department's information systems used in the different fields of activity of the judicial office:

| Instance of judgement | Function | Judiciary offices | Sectors | Electronic registers | Statistics extractors | |
|---|---|---|---|---|---|---|
| First Instance | Judges | Court | Civil | SICID | Data warehouse | Inspectors packet |
| | | | Insolvency proceedings and Executions | SIECIC | | |
| | | | Criminal | SICP | CONSOLLE | SIRIES / ARES |
| | | | Security measures | SITMP | | |
| | Public Prosecutors | Public Prosecution Office | Criminal | SICP | CONSOLLE | SIRIES / ARES |
| | | | Civil | SICID | | |
| | | | Sentence enforcement | SIEP | Inspection Summary | |
| | | | Security measures | SICP/SIPPI/ SIT-MP | Stastistics Monitoring | |
| Second Instance | Judges | Court of Appeal | Criminal | SICID | Data warehouse | Inspectors packet |
| | | | Civil | SICP | CONSOLLE | SIRIES / ARES |
| | | | Security measures | SICP/SIPPI/ SIT-MP | Stastistics Monitoring | |
| | Public Prosecutors | Public Prosecution Office | Criminal | SICP | | SIRIES / ARES |
| | | | Civil | SICID | | |
| First Instance | Judges | Juvenile court | Civil | SIGMA | SIGMA Statistics | Juvenile Inspectors Packet |
| | | | Criminal | SIGMA | | |
| | | | Surveillance | SIUS (since 2018) | Stastistics Monitoring | |

| Instance of judgement | Function | Judiciary offices | Sectors | Electronic registers | Statistics extractors | |
|---|---|---|---|---|---|---|
| First Instance | Public Prosecutors | Public Prosecution Office of Juvenile Lawcourt | Civil | SIGMA | SIGMA Statistics | Juvenile Inspectors Packet |
| | | | Criminal | SIGMA | | |
| | | | | | | |
| | | | | | | |
| First instance | Judges | Lawcourt and Surveillance Office | Criminal | SIUS | Stastistics Monitoring | |
| First instance | Judges | Judges of Peace | Civil | SIGP | | |
| First instance | Judges | Judges of Peace | Criminal | SIGP | | |

An operational protocol, the so-called 'inspectors' package', will be used to extract data from the civil courts (first instance offices). This is an organic system of data extraction from electronic civil registers to be made available to inspectors, heads of judicial offices and magistrates themselves, in order to create a flexible and immediate tool for constant self-diagnosis of the offices' activity.

On the one hand, this system favours the improvement of activity planning of the various judicial offices and, on the other hand, ensures both the timely identification of non-functional aspects and the optimisation of data collection times. This tool has been extended to the Public Prosecutor's Office and its extension to the entire criminal justice sector is being studied, so as to make it operational for all areas of judicial activity.

Similarly, since 2020, remote data collection has been enhanced, at the pre-inspection stage, by streamlining the collection of case flows in the civil sector at first instance and transferring them to

the civil justice 'data warehouse' (DWGC) instead of to individual court offices.

Remote data transmission ensures: (i) easing the burden on individual offices during periodic inspections and to compare their data over time; and (ii) an increasingly homogeneous data collection, allowing a real and objective comparison between the different offices.

One of the Inspectorate's objectives is to create a single database in which all the results of individual inspections can be entered, according to homogeneous data representation schemes.

This will enable the Inspectorate to better contribute to the proposal and development work of the various ministerial structures and the Cabinet of the Minister, increasing the level of data concentration, which are currently scattered, and they will be collected within the framework of the development of individual inspections.

### 6.3 Inspection Activity

In the course of the inspection activity, data from the information system and some sample files will be examined to verify the proper management of the various services.

Especially, inspectors check:

- **administrative and accounting services:** personnel, court costs, debt collection, evidence lockers, seized assets, services, list of technical advisers and list of experts;
- **civil justice services:** civil litigation, labour proceedings, social security and welfare proceedings, non-contentious civil cases and in camera cases - guardianship - guardianship - support administration - inheritance - assisted negotiation

in separation and divorce, civil enforcement proceedings (against movable property, with or without third parties, and immovable property), insolvency proceedings;
- criminal justice services: the Office of the Preliminary Investigation Judge, the Office of the Criminal Court Session, the Re-examination Court, prevention measures, the Assize Court.

In addition, within the general functioning of judicial offices,observations, the inspectors will check:

- the adequacy of judicial and administrative staff and vacancies;
- the conformity with the organisation charts of the Office drawn up by the responsible official and approved by the Superior Council of the Magistracy;
- the correct allocation of administrative staff;
- the management of civil and criminal cases, the evaluation of events and cases resolved and, consequently, the performance of the office;
- good organisational practices and performance of excellence;
- delays in the processing of cases, with detection of the time taken to judgement;
- late filing of judgments by judges and late releases from prison;
- The state of information technology and the needs regarding the use of these systems.

## 6.4 Irregularities found during inspection

During the inspection, the Inspectors shall report to the Magistrate Inspector the irregularities that the Office cannot solve immediately and/or spontaneously. The Magistrate Inspector shall inform the Office Chief of these irregularities and ask for explanations. In this

framework, the Magistrate Inspector may:

- ► decide to stop the process of obtaining data and explanations, and;
  - if the irregularities are not serious or important, which require taking special measures, it can issue recommendations on how to solve them;
  - if the irregularities are serious or important, it proposes taking "administrative measures" to resolve these irregularities within a six-month term (Article 10, Law no. 1311/1962);
- ► report irregularities or disciplinary violations to the Chief of Inspectorate General;
- ► report to the Chief of the General Inspectorate the opportunity to propose to the Minister of Justice to order:
  - a "targeted inspection", when a complex situation of one or more services has appeared during ordinary inspection and it has not been possible to examine it thoroughly;
  - an "administrative investigation", when serious irregularities have been found in a specific sector of judiciary activity or in the behaviour of the magistrate/s;
- ► in case of a proven financial damage, can report back to the Public Prosecution Office of the Court of Auditors and ask the Office for adopting measures to prevent such situations from occurring in the future.

### 6.5 Final Report

The final results of the inspection shall be documented:

- in an individual report of each inspector, who was responsible for controlling the provision of services. In cases where the irregularities related to the provision of services do not have any serious nature, then the responsible inspector shall draw up the relevant recommendations for their solution,

- in the “General remarks” drafted by the chair of the inspection group,
- in a summarized framework, where it is reflected in a schematic way and graphs, data in relation to the activity, or the capacities of the office in relation to the workload.

In the framework of “General remarks”, the chairperson of the inspection group shall analyze and handle cases which are related to:

- the building situation, furnishings and instrumental equipment,
- health and workplace safety (with a specific questionnaire to the Office Chief)
- personal data processing and handling,
- agreements and protocols undersigned by the Office (with the Bar Association, professional Orders, local Authorities, Universities.)
- office composition (magistrates and administrative staff) and certain organizational results, including the distribution of tasks and the assignment criteria of cases to magistrates;
- considerations on the relation between organization and functions of the office;
- workload, productivity and processing times for data related to criminal and civil sectors (Registration of proceedings; Office capacity to handle incoming cases; Analysis of the collected data; Average rate of case handling and their change in relation to the cases registered, handled, and completed, according to each sector; Productivity; Remote Proceedings; Average time of definition of the proceedings and time of filing the decisions; Organizational measures to guarantee timeliness and timely completion of individual cases; State of information, Good practices and excellence in performance; Final Considerations on the whole performance of the Office).

The results shall be communicated to the different structures of the Ministry of Justice, the Superior Council of Magistracy, or the Chiefs of the district offices. Remarks of a general nature and summaries of the report, which can be made public, (at the moment, only for offices of the first instance) are published on the website of the Ministry of Justice.

# SESSION II:

## INDEPENDENCE AND ACCOUNTABILITY OF MAGISTRATES. GUARANTEES AND DISCIPLINARY PROCEEDINGS OF MAGISTRATES.

## THE RIGHT OF EXPRESSION OF MAGISTRATES AND ITS RESTRICTION ACCORDING TO THE REQUIREMENTS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR). DISCIPLINARY LIABILITY IN THESE CASES.

**Darian Pavli**
*Judge at the European Court of Human Rights*

Mr. Darian Pavli was born on April 7, 1975 in Vlora, Albania. During the period 1993-1997 he attended the Bachelor of Laws, Faculty of Law, University of Tirana, and during the years 1997 – 1998 he attended the Master of Laws (LL.M.), Central European University, Budapest, Hungary.

Mr. Pavli is a Senior Attorney and has performed several duties, such as: Organization for Security and Cooperation in Europe (OSCE) in Tirana, 1998-2000; Adjunct lecturer of constitutional law, University of Tirana, 1998 - 2000; Master of Laws (LL.M.), New York University Law School, United States of America, 2000-2001; Researcher on the human rights situation in Southeast Europe, Human Rights Watch, 2001-2003; Senior Attorney, practice of international human rights law before major international courts and mechanisms, Open Society Justice Initiative, 2003-2015; Member of the drafting group of the Council of Europe Convention on Access to Official Documents,

2006-2008; Member of the drafting group of the Right to Information Model Law for the Organization of American States, 2010; Lead drafter of the Albanian defamation law reforms (Criminal Code and Civil Code), 2012; Advisor, Special Parliamentary Committee on Justice Reform, Parliament of Albania, 2015-2016; Expert on human rights law and policy for the Council of Europe and other international organizations, Tirana, 2017-2018; Senior expert for a European Union project on the consolidation of the Justice System in Albania, 2018; Member of the Council of Europe's Committee of Experts on Quality Journalism in the Digital Age (MSI-JOQ), 2018; Judge of the European Court of Human Rights since 7 January 2019.

**Abstract of the presentation**

The aim of this short presentation is to present the main principles developed by the jurisprudence of the European Court of Human Rights in cases involving sanctions imposed on judges and prosecutors in relation to public statements made by them or that otherwise implicate their free speech rights. While placing great emphasis on the ability of magistrates to speak up on various matters of public interest, and especially those related to upholding the integrity and independence of the judiciary, the Court has also recognised that magistrates in the European legal space are subject to duties of discretion that are necessary to maintain public trust in the authority and impartiality of the judiciary (as the second paragraph of Article 10 ECHR expressly provides for).

Procedural guarantees – including the right of access to a court, under Article 6 § 1 ECHR, to challenge sanctions imposed on magistrates – have become an essential aspect of the Court's analysis. Especially so in a European context in which systemic threats to judicial independence appear to be multiplying, calling

for stricter scrutiny to be applied in Strasbourg.
I will start with a discussion of the leading Grand Chamber case on the topic -- Baka v. Hungary -- to be followed by brief references to a number of other cases in which the Court has found similar violations of Article 10; and a few cases in which, conversely, no violation of that Article has been found. Some concluding remarks will then be offered.

Longer case summaries and some additional resources can be found in my written remarks, which have been made available to the organisers of this conference.

## A. Baka v. Hungary (GC, 2016): a leading case on judicial freedom of expression

*Article 6-1: Access to court - civil rights and obligations*

Inability of Supreme Court President to contest premature termination of his mandate: *Article 6 applicable; violation*

*Article 10 -- Freedom of expression*

Premature termination of Supreme Court President's mandate as a result of views expressed publicly in his professional capacity: violation

*Facts*

The applicant, a former judge of the European Court of Human Rights, was elected President of the Supreme Court of Hungary for a six-year term ending in 2015. In his capacity as President of that court and of the National Council of Justice, he expressed his views on various legislative reforms affecting the judiciary. The transitional provisions of the new Constitution (Fundamental Law of Hungary of 2011) provided that the legal successor to the

Supreme Court would be the Kúria [8] and that the mandate of the President of the Supreme Court would end following the entry into force of the new Constitution. As a consequence, the applicant's mandate as President of the Supreme Court ended on 1 January 2012. According to the criteria for the election of the President of the new Kúria, candidates were required to have at least five years' experience as a judge in Hungary. Time served as a judge in an international court was not counted. This led to the applicant's ineligibility for the post of President of the new Kúria.

*Article 6 § 1*

The GC concluded that Mr Baka had had an arguable right to remain in his position for a full 6year term; and that this right was civil in character under the Vilho Eskelinen test. The first prong of that test (for excluding the applicability of Article 6) had not been met as national law did not expressly exclude access to court prior to the constitutional amendments. National legislation excluding access to court had to be compatible with the rule of law, which forbade laws directed against a specific person.
On the merits, it was found that the very essence of the right of access to a court had been impaired in effect by the constitutional amendments.

[Post-Baka *case law: in cases involving interferences with the status of judges – involving their immediate judicial function but also other roles they play in the justice system -- the first prong of the Vilho Eskelinen test has become largely irrelevant as the ECtHR has increasingly found that the second prong of the test (fidelity to the State in certain public functions) does not apply as the judges' first responsibility is fidelity to the rule of law. See in particular the recent judgment in Grzeda v. Poland, GC. As a result, Article 6 (1) requires that judges should able to challenge interferences with their status-related civil rights before a judicial body.]*

8 Historical name of the highest court in Hungaryi

*Article 10*

a) *Existence of an interference*

In the present case, no domestic court had ever examined the applicant's allegations or the reasons for the termination of his mandate. The facts of the case therefore had to be assessed and considered "in their entirety" and, in assessing the evidence, the Court adopted the standard of proof "beyond reasonable doubt".

In this connection, the Court noted that in 2011 the applicant, in his professional capacity as President of the Supreme Court and the National Council of Justice, had publicly expressed critical views on various legislative reforms affecting the judiciary. The proposals to terminate the applicant's mandate were made public and submitted to Parliament shortly after he gave a parliamentary speech in November 2011 and were adopted within a strikingly short time. Having regard to the sequence of events in their entirety, there was prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate. Thus, the burden of proof shifted to the Government.

As to the reasons put forward by the Government to justify the impugned measure, it was not apparent that the changes made to the functions of the supreme judicial authority or the tasks of its President were of such a fundamental nature that they could or should have prompted the premature termination of the applicant's mandate. Consequently, the Government had failed to show convincingly that the impugned measure was linked to the suppression of the applicant's post and functions in the context of the reform of the supreme judicial authority. Accordingly, it could be presumed that the premature termination of the applicant's mandate was prompted by the views and criticisms he had publicly expressed in his professional capacity, and thus constituted an interference with the exercise of his right to freedom of expression.

b) *Whether the interference was justified*

Although it was doubtful that the legislation in question complied with the requirements of the rule of law, the Court proceeded on the assumption that the interference was prescribed by law. State Parties could not legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for reasons that had not been established by law and which did not relate to any grounds of professional incompetence or misconduct. In these circumstances, the impugned measure appeared to be incompatible with the aim of maintaining the independence of the judiciary.

1. In the present case, the impugned interference had been prompted by criticisms the applicant had publicly expressed in his professional capacity as President of the Supreme Court and of the National Council of Justice. It was not only his right but also his duty to express his opinion on legislative reforms which were likely to have an impact on the judiciary and its independence.
2. The applicant had expressed his views and criticisms on questions of public interest and his statements had not gone beyond mere criticism from a strictly professional perspective. Accordingly, his position and statements called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the domestic authorities.
3. Furthermore, he was removed from his office more than three years before the end of the fixed term applicable under the legislation in force at the time of his election. This could hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which was a

key element for the maintenance of judicial independence.

4. The premature termination of the applicant's mandate undoubtedly had a chilling effect in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.
5. Finally, in the light of the Court's findings under Article 6 § 1, the impugned restrictions had not been accompanied by effective and adequate safeguards against abuse. In sum,
6. the reasons relied on by the respondent State could not be regarded as sufficient to show that the interference complained of was necessary in a democratic society.

## B. Other selected cases finding violation of freedom of expression of judges and prosecutors[9]

Kudeshkina v. Russia (2009)

Applicant resigned from judicial office and ran for parliamentary election, but was not elected. She gave media interviews during the election campaign that were highly critical about pressures on the judiciary from court presidents and outside actors, lack of judicial independence, and even direct interference with her own judicial function in a high-profile case.

Her judicial status was terminated after disciplinary proceedings for making false statements and causing loss of public trust in the Russian judicial system.

The ECtHR found a violation of her Article 10 rights on the basis that the applicant's statements were in the nature of opinions and

9 See Annex for more detailed summaries. I am grateful to my trainee, Ayse Guzel Ozturk, for her assistance in preparing this annex.

did not disclose any deliberative secrets. They touched on matters of great public interest and did not amount to unfounded personal attacks. The fact that her case was heard by the Moscow City Court, which she had criticised in her public statements, amounted to a grave procedural flaw. The penalty was severe and capable of having a chilling effect on other judges.

### Brisc v. Romania (2018)

A senior prosecutor also acting as press liaison made a statement to the media on an ongoing criminal investigation on influence peddling within the penitentiary system. A judge who oversaw the prison in question filed a disciplinary complaint, arguing that the applicant's statements, which cited allegations made by a suspect, had created the impression that the judge had been part of the corruption scheme. The applicant was reprimanded and demoted from his position.

The ECtHR found a violation of Article 10 on the basis that the applicant's statements, made in the exercise of his duties as a press officer, had not disclosed any investigative secrets and had not named any individuals, after several arrests had been made. The domestic courts had not carried out a proper balancing of the applicant's rights with the supposed reputational damage to the affected judge.

### Zurek v. Poland (2022)

The applicant was a regional court judge and member of the national council of the judiciary, and also the NCJ spokesperson. In that capacity, he made critical comments about the government's legislative proposals about reforms to the Constitutional Court, the NCJ and ordinary courts. He complained that the judiciary had not

been consulted about the proposed reforms.

The anti-corruption bureau carried out an audit of the applicant's financial declarations. The Ministry of Justice ordered an inspection of his judicial decision-making based on an anonymous letter. The new president of the regional court dismissed the applicant from his role as spokesperson of that court.

The court found an interference with the applicant's Article 10 rights based on the accumulation of the different measures, which were found to have been aimed at silencing him. It was particularly important that his statements, which did not attack any judicial peers, were made in his capacity as spokesperson of the NCJ, a body tasked with safeguarding the integrity and independence of the judicial branch. They did no go beyond criticism from a strictly professional perspective.

### C. Selected cases resulting in a finding of no violation of Article 10: magistrates' duties of discretion and other permissible grounds of limitation

Harabin v. Slovakia (2012)

The applicant was the president of the Supreme Court at the relevant time. He repeatedly refused to allow a group of auditors from the Ministry of Finance to carry out an audit of the Supreme Court, arguing that the authority to undertake such audits rested with the supreme audit office.

The Minister of Justice initiated disciplinary proceedings before the Constitutional Court, which found the applicant guilty of a serious disciplinary offence and imposed a disciplinary sanction (salary reduction). The applicant claimed that he was sanctioned because of his legal opinions.

The ECtHR declared the complaint inadmissible as it did not concern an interference with the applicant's freedom of expression. The sanctions were related to his discharge of his administrative duties as chief justice and did not stem from views expressed by him on matters of public interest.

Di Giovanni v. Italy (2013)

The applicant, the president of a Naples court at the time, gave a media interview regarding a pending criminal investigation into an alleged interference with the results of a judicial competition. She stated that this had been to favour a relative of another judge and former member of the CSM, who she did not name but who was identifiable from her statements.

The public prosecutor at the Court of Cassation initiated disciplinary proceedings for failure in her duty of discretion and respect for her peers. The applicant was given a warning.

The ECtHR found no violation of Article 10. The applicant had made serious accusations involving a colleague, based on rumours that later proved to be unfounded, and without qualifying their truthfulness. The disciplinary body had given convincing reasons for their findings and the sanction imposed was the least serious among those provided by national law. The case therefore was distinguishable from Kudeshkina, where the applicant's criticism of other judges was based on her own direct experience and was confirmed by witnesses.

**D. Conclusions**

Some of the leading cases in this field relate to situations in which senior judges have been sanctioned by disciplinary bodies or had their mandates terminated for, essentially, speaking up against legislative or executive policies that they considered to pose a threat

to judicial independence and the rule of law. Both Baka and Zurek cases are illustrative of this trend.

It is therefore unsurprising that, faced with a situation of erosion of rule of law in certain Member

States of the Council of Europe, the court's jurisprudence has been strongly and increasingly protective of the ability of judges to voice their concerns and engage in public debate about perceived threats to the integrity of the judicial branch.

The strengthening of procedural guarantees, under Article 6(1) ECHR (access to court), which safeguards the right of magistrates to seek judicial protection against a wide range of measures that adversely affect their status, has developed in a similar direction. These procedural safeguards apply broadly to the "determination of civil rights and obligations", including in principle any sanctions imposed in relation to the magistrates' exercise of freedom of expression.

At the same time, the Court's jurisprudence has consistently recognised that the special status of judicial office also places certain legitimate restrictions on the ability of judges and other justice professionals to speak out in public. These limitations are not only permissible, but also necessary to preserve the dignity and authority of the judicial function, public trust in the system as well as the rights of litigants in judicial proceedings.

In 2021, the Strasbourg Court updated and improved its own Resolution on Judicial Ethics. Principle VI of the Resolution provides as follows:

**VI. Expression and contacts**

"Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office and their loyalty to the institution of the Court. They shall refrain from expressing themselves, in whatever form and medium, in a manner which may undermine the authority and reputation of the Court or give rise to reasonable doubt as to their independence or impartiality. This applies equally to the exercise of judicial function, representation of the Court, and to academic or other public or private activities outside of the Court. They shall proceed with the utmost care if using social media."

## E. Further ECHR resources

1. Protection of judges (Article 6 - civil limb): https://echrlink/dm?document=6309761
   The summary includes brief references to the Court's case-law under Articles 8 and 10 that are relevant to the free speech and right to private life of judges.

2. Case-law Guide on Article 10: https://echr.coe.int/Documents/Guide_Art_10_ENG.pdf
   It includes a chapter on "protection of the authority and impartiality of the justice system and freedom of expression: the right to freedom of expression in the context of judicial proceedings and the participation of judges in public debate" (pp. 74-84).

3. ECHR Resolution on Judicial Ethics (2021): https://echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf.

# ANNEX

## SELECT CASE-LAW ON FREEDOM OF EXPRESSION OF JUDGES

### *1. Kudeshkina v. Russia, 29492/05, 26 February 2009 (violation)*

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**The applicant's speech**

The applicant, who had been working as a judge for 18 years and held judicial office at the Moscow City Court, run for a general election to the State Duma. She gave interviews to two newspapers and a radio station during her election campaign, which included a program for judicial reform. She highly criticised the Russian judiciary, expressed her doubts about the existence of independent courts in Russia and mentioned "instances of a court being put under pressure to take a certain decision". She stated that "the courts of law are used as an instrument of commercial, political or personal manipulation", that "a judge, although defined by law as an embodiment of judicial power and independent in this capacity, in fact often finds himself in a position of an ordinary clerk, a subordinate of a court president", "no one can rest assured that his case – whether civil or criminal or administrative – will be resolved in accordance with the law, and not just to please someone" and that "if all judges keep quiet this country may soon end up in a [state of] judicial lawlessness". She also said: "in Siberia … the courts are much purer than in Moscow. There you cannot imagine such brutal manipulation and would not be talking about corruption to such an extent". The applicant also mentioned that the public prosecutor and the President of the Moscow City Court exerted pressure on her in a high-profile case concerning abuse of powers by a police investigator,

Mr Zaytsev, and that the President then decided to withdraw the case from her without any explanation. The applicant was not elected and reinstated to her previous judicial office.

**Sanctions and motives provided**

The Judiciary Qualification Board of Moscow charged the applicant with a disciplinary offence on account of a number of statements made in the course of her three media interviews and decided to terminate her office as a judge in accordance with the Law on the Status of Judges in Russia. Some parts of the reasoning read as follows:

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> "[She] knowingly and intentionally disseminated in civil society false and untruthful fabrications about the arbitrariness allegedly prevailing in the judicial sphere…
>
> …dissemination by a judge of such information poses a great public danger … [it] leads to the loss of public trust in the fairness and impartiality of examination of cases brought before the courts of law.
> …
> Besides, …[she] disclosed specific factual information concerning the criminal proceedings in the case against Zaytsev, before the judgment in this case had entered into legal force.
> …
> In choosing the disciplinary sanction to be imposed on [the applicant] the qualification board takes into account that in making her statements [she] dishonoured the judges and the judicial system of Russia; she disseminated false information about her colleagues; she traded the dignity, responsibility and integrity of a judge for a political career; demonstrated bias when hearing a case; preferred her own political and

other interests to the values of justice; abused her status as a judge in propagating legal nihilism and causing irreparable damage to the foundations of judicial authority."

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The applicant applied to the Moscow City Court, which then upheld the decision of the qualification board, concluding that the applicant had abused the right to freedom of expression out of political ambition, that she had publicly denied the rule of law and that such conduct was incompatible with holding judicial office. It also held that during the suspension of her judicial office for her election campaign, she was still bound by the rules of conduct applicable to judges.

**The Court's reasoning**

The Court found a violation of Article 10, holding that the domestic authorities failed to strike the right balance between the need to protect the authority of the judiciary and the protection of the reputation or rights of others, on the one hand, and the need to protect the applicant's right to freedom of expression on the other. Having assumed that the measure at stake complied with the first two conditions, the Court proceeded to examine whether it was "necessary in a democratic society".

The applicant's comments on pending proceedings in the Zaytsev case should be regarded as statements of fact which, in the given context, were inseparable from her opinions in the same interviews. There was nothing in these interviews that would justify the claims of "disclosure".

The applicant made the public criticism regarding the Russian judiciary and raised a very important matter of public interest, which should be open to free debate in a democratic society. Even

if the applicant allowed herself a certain degree of exaggeration and generalisation, characteristic of the pre-election agitation, her statements were not entirely devoid of any factual grounds, and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance.

The manner in which the disciplinary sanction was imposed on the applicant fell short of securing important procedural guarantees. Although the applicant requested both Moscow City Court and the Supreme Court to have the case transferred from the Moscow City Court to another court of first instance on the grounds that the members of that court would lack objective impartiality, they disregarded this request. In the Court's view, this failure constituted a grave procedural omission.

The Court found the penalty imposed on the applicant "disproportionately severe", and it was, moreover, capable of having a "chilling effect" on judges wishing to participate in the public debate on the effectiveness of the judicial institutions.

### 2. Tosti v. Italy
### (dec.), 27791/06, 12 May 2009 (inadmissible)

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**The applicant's speech**

The applicant, who is a magistrate, had an affair with a married woman, who became pregnant. The child was recognised by the woman's husband, and the woman ended her relationship with the applicant. The applicant, having been convinced that he was the father of the child, filed a complaint to determine the paternity of the child. In the course of this procedure, the applicant sent a psychologist to the home of the married couple to inform the

husband that the child was not his son. The case was widely publicised, and the applicant gave several interviews and appeared on a television show to claim the paternity.

**Sanctions and motives provided**

Upon a complaint by the married couple, the Superior Council of the Magistracy *(le Conseil supérieur de la magistrature, CSM)* initiated disciplinary proceedings against the applicant on the grounds that he had behaved in a persecutory manner towards the couple and not in compliance with the dignity of the office. The CSM decided to transfer the applicant to another city for reasons of incompatibility. Le Conseil d'Etat upheld the decision, from which it was clear that the disputed transfer met the need to prevent and limit the risk of undermining the independence and prestige of the judicial function.

**The Court's reasoning**

Having noted that the applicant's transfer was decided because of his conduct - including interviews - towards the couple in question, the Court stated that the applicant's transfer could be analysed as an interference with his right to freedom of expression. The Court found that the measure met the legitimate aim of guaranteeing "the authority and impartiality of the judiciary". As to whether the transfer of the applicant was "necessary", the Court considered that the measure at issue was not disproportionate to the aim pursued. It follows that this part of the application is manifestly ill-founded and must be rejected. (Internal note: I did not understand why the Court did not decide that there was no violation, but it rather found the complaint as manifestly ill-founded.)

### 3. Harabin v. Slovakia, 58688/11, 20 November 2012 (inadmissible)

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**The applicant's conduct**

The applicant, who is the President of the Supreme Court, did not allow a group of auditors from the Ministry of Finance to carry out an audit at the Supreme Court, arguing that it was the Supreme Audit Office which had the authority to supervise the administration of public funds by the Supreme Court. There were differing views as to which body was entitled to carry out the audit at the Supreme Court. The applicant argues that the disciplinary proceedings initiated against him pursued the aim of sanctioning him for his legal opinions, contrary to his right to freedom of expression and opinion.

**Sanctions and motives provided**

Upon a submission by the Minister of Finance indicating that the applicant had four times prevented a group of auditors from the Ministry of Finance from carrying out an audit, the Minister of Justice initiated disciplinary proceedings against the applicant before the Constitutional Court. The Constitutional Court found the applicant guilty of a serious disciplinary offence, stating that he had failed to comply duly, conscientiously and in timely fashion with his obligations relating to court administration. The Constitutional Court imposed a disciplinary sanction on the applicant, which consisted of a 70% reduction of his annual salary (corresponding to EUR 51,299.96).

**The Court's reasoning**

The Court concluded that the disputed measure did not amount to

an interference with the exercise of the applicant's right to freedom of expression, and therefore, the complaint is manifestly ill-founded and must be rejected.

The applicant's professional behaviour in the context of administration of justice and in respect of a different State authority represented the essential aspect of the case. The disciplinary proceedings related to the discharge by the applicant of his duties as President of the Supreme Court, and therefore lay within the sphere of his employment in the civil service. The disciplinary offence did not involve any statements or views expressed by him in the context of a public debate or in the media. The Court distinguished the present case from other cases, in which the measures essentially related to the freedom of expression *(Wille v. Liechtenstein [GC],* views expressed by the President of the Liechtenstein Administrative Court in the course of a public lecture; *Kudeshkina v. Russia*, a judge's statements to the media; Kayasu v. Turkey, the form and contents of texts drafted by a public prosecutor and a civil servant then disseminated to the press).

**4. Di Giovanni v. Italy,**
**51160/06, 9 July 2013 (no violation)**

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**The applicant's speech**

After a public competition for the recruitment of judges, a criminal investigation was opened against a member of the jury of the competition, accused of having falsified the results of the competition to favour a candidate. The applicant, who was the President of the Court of Execution of Sentences of Naples at that material time, gave an interview to a daily newspaper, which published the following statements of the applicant:

> "…In the last few days, we have learned of the extremely serious news concerning the intervention of a member of the jury of the last competition [for access to the judiciary] in favour of an acquaintance of a well-known Neapolitan magistrate, who is obviously already a member of the CSM [Superior Council of the Magistracy] and, even more naturally, current prominent member of the ANM [National Association of Magistrates]."

The daily newspaper published a second interview with the applicant in which she clarified her previous statements. Following the publication of the interviews, other articles appeared in the press associating a Neapolitan magistrate, E.F., with the criminal acts related to the public competition.

**Sanctions and motives provided**

The public prosecutor at the Court of Cassation initiated disciplinary proceedings against the applicant on the ground that she had failed in her duties of respect and discretion vis-à-vis the members of the CSM and one of her colleagues. The Disciplinary Section of the CSM found the applicant partially guilty of the acts of which she was accused and issued her with a warning.

The Disciplinary Section considered, first, that the applicant's criticisms of the activity and functioning of the CSM and the ANM constituted the free expression of a personal conviction, which could not as such be subject to sanctions. On the other hand, the applicant's statements concerning one of her colleagues had the character of a disciplinary offence. The details provided by the applicant unquestionably referred to E.F., the only former member of the CSM and current prominent member of the ANM whose

daughter had taken part in the competition for the recruitment of judges in question. The statements in question thus tended to confirm to the public opinion unfounded rumours about a colleague.

**The Court's reasoning**

The Court concluded that there was no violation of Article 10. The measure at issue was not disproportionate to the aim pursued (the protection of "the reputation or rights of others" and the guarantee of "the authority and impartiality of the judiciary") and that the interference could be regarded as "necessary in a democratic society" within the meaning of Article 10 § 2.

The Court noted that the subject of the applicant's conviction consisted essentially of her statements to the press concerning the alleged actions of a magistrate to favour his own daughter in the context of a public competition. The applicant did not spare the possibility of doubt as to the truthfulness of the information and thus contributed to presenting to public opinion a rumour that later proved to be unfounded.

The Court noted that if the balancing of the right to respect for private life and the right to freedom of expression by national authorities was carried out in accordance with the criteria laid down in the Court's case-law, there must be serious reasons for the Court to substitute its opinion for that of the domestic courts. In the Court's view, there were no such reasons in the present case.

The Court held that the reasons given by the Disciplinary Division to justify the sanction were both relevant and sufficient. Moreover, the sanction was the lowest of those provided for under domestic law, namely a warning, which could not therefore be regarded as disproportionate. The Court also observed that the present case differed from the case of *Koudechkina v. Russia*, in which it had

found a violation of Article 10. Unlike the applicant, Ms Koudechkina had been penalised for having made general criticisms of the functioning of the Moscow courts and the judicial system during her election campaign. The allegations she had made against identifiable individuals (in particular, the president of the Moscow court) were based on her direct experience and had been confirmed in part by certain witnesses. In addition, the sanction imposed on Ms. Koudechkina resulted in the loss of her position and any possibility of serving as a judge.

### 5. Brisc v. Romania, 26238/10, 11 December 2018 (violation)

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**The applicant's speech**

At the relevant time, the applicant was the chief prosecutor and the staff member in the prosecutor's office tasked with providing information to the media in relation to criminal proceedings. In relation to a flagrante delicto operation related to a criminal investigation into influence peddling, the applicant issued a press release, which reads as follows:

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> "After being informed by police that V.F. seeks and receives money from individuals in exchange for intervening in favour of the conditional release of detainees held in Baia Mare Prison, the prosecutor's office … organised a flagrante delicto operation on 21 October 2009.
>
> V.F. was caught red-handed while accepting the sum of 1,650 euros (EUR) from a detainee's relative... A criminal investigation into influence peddling was opened and, according to the initial findings in the case, it was found that the suspect had received EUR 9,850 of the EUR 11,000

she had sought for intervening to influence favourably the conditional release of that detainee or the allocation of his work placements.

According to the detainee, the suspect claimed that the intended recipients of the money were prison employees with responsibility for the allocation of work to the detainees or members of the commission for conditional release. Moreover, the suspect told the detainee that part of the money was to go to the magistrates, judges and prosecutors responsible for the conditional release of detainees.

As the object of the offence of influence peddling was a sum of money exceeding EUR
10,000, the file was transferred to the National Anticorruption Department."

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The applicant also gave a short statement to a local television channel providing mainly the same information as was contained in the press release.

**Sanctions and motives provided**

Judge G.E. lodged a complaint against the applicant, arguing that at the time she had been the judge delegated to Baia Mare Prison and because of the applicant's press release and interview, the media suggested that she might be the alleged recipient of the money. The disciplinary commission for the prosecutors instituted an investigation against the applicant in connection with two disciplinary offences: (i) failure to observe the secrecy of deliberations or the confidentiality of documents that are of a secret nature, and (ii) adopting a disrespectful attitude towards colleagues in the exercise of his duties. The disciplinary commission found the

applicant guilty of these two offences and imposed a disciplinary sanction in the form of reprimand. It also found that the applicant breached a provision concerning the restriction of citizens' access to information in relation to criminal proceedings at the investigation stage. The reasons stated by the commission: while providing information about the alleged recipient of the money from V.F., the applicant did not check the accuracy of the detainee's statements, and this information led to the identification of judge G.E. as one of the alleged recipients of the money.

On the day the decision became final, the disciplinary commission for prosecutors removed the applicant from his position as chief prosecutor. According to the domestic law, the removal of a prosecutor/magistrate from a leading position following imposition of a disciplinary sanction was mandatory.

**The Court's reasoning**

The Court found a violation of Article 10, holding that the domestic courts did not adduce "relevant and sufficient" reasons to show that the interference complained of was necessary in a democratic society for the protection of the authority of the judiciary and the protection of the reputation or rights of others. He provided information to the media in the context of discharging his professional duty as a staff member designated in this regard, a position that he had occupied for the preceding five years. The subject matter of the press release was a matter of public interest.

The impugned statements did not breach the secrecy of the criminal investigation. The applicant proceeded with caution, refraining from identifying by name any of the individuals involved pending completion of the judicial investigation. The applicant did not adopt any stance as regards the guilt of any of the persons involved but simply provided a summary description of the prosecution case at

its initial stage. Furthermore, the applicant did not use or cite any documents protected by the secrecy of a judicial investigation. The information about the operation was not confidential anymore as two journalists who were present at the incident had published articles, accompanied by photographs taken on that occasion.

As regards the alleged impact on Judge G.E.'s professional reputation, the Court was not convinced that the press release and interview could be considered as an attack reaching the requisite threshold of seriousness and capable of causing prejudice to G.E.'s professional reputation. The domestic authorities did not heed the fact that the statements did not emanate from the applicant but were clearly identified as having been made by another party (the media). The Court held that there was no evidence that the domestic authorities conducted a balancing exercise between the need to protect the reputation of judge G.E. and the applicant's right to impart information on issues of general interest concerning ongoing criminal investigations. They confined their analysis to a mere discussion of the damage to the plaintiff's reputation without answering the applicant's point that the impugned statements had been made by a third party and without taking into account the criteria set out in the Court's case-law.

### 6. Żurek V. Poland, 39650/18, 16 June 2022 (violation)

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**The applicant's speech**

The applicant was a judge at the Cracow Regional Court, the spokesperson of that court, the judicial member of the National Council of the Judiciary (NCJ), the constitutional organ tasked with safeguarding the independence of courts and judges, as well as the spokesperson of the NCJ since 2014. In the latter's capacity, he

was one of the main critics of the changes to the judiciary initiated by the legislative and executive branches of the new Government elected in 2015. He publicly commented in various fora on the government's legislative proposals regarding the Constitutional Court, the NCJ, the Supreme Court and the ordinary courts. He pointed to threats to the rule of law and judicial independence stemming from the Government's proposals.

He gave interviews to different newspapers and portals; published an article on an Internet portal entitled "Is this about taking over the Supreme Court?"; presented the NCJ's opinions on its official YouTube channel; and appeared on television news channel. Some excerpts of the applicant's statements in these fora can be found below:

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> "The judges are to be appointed to the NCJ and not elected [by their peers] as at present. We will contest this project. …"
>
> "…Unfortunately, [the Government's draft amendment to the Act on the NCJ] contains several solutions which are incompatible with the Constitution. … You cannot prepare a huge reform without discussing it with the judges of the higher courts …The ministerial team is doing all this without any consultations with the NCJ, forgetting that the judicial members on the current Council were elected by an overwhelming majority of delegates from all courts…"
>
> "The authorities are using the problems of the judiciary as a pretext to dismantle the justice system…"
>
> "I would like to tell you about several fundamental flaws of [the proposed] bills [concerning the judiciary], which in the opinion of the NCJ are contrary to the Constitution… The Minister also wants to extinguish the term of office of

the judicial members of the NCJ. Despite the fact that the Constitution speaks of a four-year term, the Minister wants to do this by an ordinary law, so clearly [there will be] a direct violation of the Constitution…"

"We are just at the threshold of destroying the rule of law and the separation of powers…
I may be dismissed from my job, but I will not break my oath as a judge…"

"I do not want to use the word 'reform', because in my opinion it is a deconstruction of the legal system. It will lead to the politicisation of the courts, to a complete takeover of the courts by politics. We have not yet had such a situation since we regained independence."

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**Sanctions and motives provided**

a) In 2016 the Central Anti-corruption Bureau (CBA) carried out an audit of the applicant's financial declarations, which concerned the accuracy and veracity of his financial declarations made in the years 2012-2017. The CBA also extended its audit to the applicant's wife and the prosecution service questioned the applicant's parents. Furthermore, on a few occasions the applicant was summoned to the CBA to provide explanations. The CBA never provided the applicant with information (other than referring to "the routine activities" of the CBA) requested by him as to the grounds for the audit and its length. The CBA prepared an audit report and transmitted it to the prosecution's office. The applicant was never informed about any investigation by a prosecutor into his financial or tax affairs.
b) Upon a request submitted in an anonymous letter about

irregularities in performing judicial duties by the applicant in 2017, the Ministry of Justice ordered the inspection of the applicant's judicial work at the Regional Court (it wished to be informed whether the applicant had decided cases in accordance with the established schedule and whether there were complaints about the efficiency of proceedings in his cases. It also asked for statistical information on the number of sessions conducted by the applicant and the number of cases assigned to and terminated by him against the average in his division).

c) After the appointment of a new President of the Cracow Regional Court by the Ministry of Justice in 2018, the applicant was dismissed from his position of spokesperson of the Cracow Regional Court by the President after allegedly obtaining a favourable opinion of the Board of that Court (six out of eight members of the Board later explained that this matter had not been put to a vote and had not even been in the agenda of the Board's meeting).

d) The applicant requested the President of the Court of Appeal to grant his financial declaration, which is publicly available on the Internet, confidential status due to his concerns for his and his family's safety owing to threats received by email and telephone. Although the President granted this request, the Ministry of Justice reversed that decision without providing any reasons (declassification of the applicant's financial declaration).

In 2018, the applicant's term of office as member of the NCJ was prematurely terminated ex lege following the entry into force of new legislation in the context of wide-scale reform to the judiciary in Poland (especially the amendment granting to the Sejm (the lower house of the Polish Parliament) the competence to elect the NCJ's judicial members). As a result of that measure the applicant ceased to act as the NCJ's spokesperson. (Note: The measures in this

paragraph were dealt under Article 6.)

**The Court's reasoning**

The Court found a violation of Article 10. Having regard to the accumulation of measures taken against the applicant – including (i) the auditing of his financial declarations; (ii) the inspection of his judicial work; (iii) his dismissal from his position as spokesperson of the Cracow Regional Court; and (iv) the declassification of the applicant's financial declaration –, the Court stated that they could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence.

The Court found that the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in exercising his right to freedom of expression. The Court attached particular importance to the office held by the applicant, whose functions and duties included expressing his views on the legislative reforms which were to have an impact on the judiciary and its independence.

The Court distinguished the present case from other cases in which the issue at stake was public confidence in the judiciary and the need to protect such confidence against destructive attacks *(see Di Giovanni v. Italy, § 81, and Kudeshkina v. Russia, § 86).* The views and statements publicly expressed by the applicant did not contain any attacks against other members of the judiciary (compare Di Giovanni); nor did they concern criticisms with regard to the conduct of the judiciary dealing with pending proceedings *(see Kudeshkina v. Russia, § 94).*

On the contrary, the Court stated that the applicant expressed his views and criticisms on legislative reforms related to the functioning

of the judicial system, the status of the NCJ and the independence and irremovability of judges, all of which are questions of public interest (See Baka, § 171). His statements did not go beyond mere criticism from a strictly professional perspective. Accordingly, the Court considered that the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.

## DISCIPLINARY RESPONSIBILITY OF MAGISTRATES IN RELATION TO THEIR INDEPENDENCE

**Vitor Manuel Ribeiro**
*Judicial Inspector, High Council of Magistracy, Portugal*

Mr. Vitor Manuel Ribeiro was born on 14.11.1966, in Oporto, Portugal. Mr. Ribeiro graduated in law in July 1990, and during the period September 1990 - July 1991 he completed the training in the field of Law offered by the Portuguese Association of Lawyers. During the period May-September 1992, he exercised the duty of Inspector of the Military Judicial Police, and in September 1992, he was admitted to the Center for Law Studies.

During the period September 1993 - August 1994, Mr. Ribeiro held the position of Auditor of Justice and during the period September 1994 to May 1995 as a Trainee Judge. For the period May 1995 - August 2012 Mr. Ribeiro served as a judge in several district courts throughout the country, and during the period September 2012- May 2015, he held the position of Vice President of the Council of Bailiffs. From September 2016, he has held the position of Deputy Judge at the Court of Appeal of Lisbon, and that of judge from September 2017. From September 2015 onwards, he has held the

position of Inspector at the Supreme Judicial Council.

## A. Disciplinary liability of magistrates in relation to their independence

### A.1. The independence of courts and the independence of judges.

In accordance with the provisions of article 203 of the Constitution of the Republic of Portugal, the courts, which are the sovereign bodies empowered to administer justice on behalf of the people, are independent and subject only to the law. The independence of the courts also means the independence of the holders of such bodies, namely, the judges.
The independence of judges is manifested in the role of judges. Thus, judges only judge in accordance with the Constitution and the law and are not subject to orders or instructions, except for the obligation of lower courts to comply with decisions handed down by the court of appeal, by higher courts.

### A.2. Guarantees of independence of judges

A.2.1. The judges' irresponsibility for their decisions.

To guarantee the independence of judges, Article 216, paragraph 2 of the Constitution of the Republic of Portugal, enshrines the judges' irresponsibility, establishing that judges cannot be held responsible for their decisions. Such lack of responsibility means that the only way to challenge a judicial decision is by way of an appeal to a higher court, and not by any other means, namely disciplinary.

The principle of irresponsibility underlies the idea that a judge cannot exercise his/her function in the hope that he/she will be favored or punished in connection with his/her decision-making.

A.2.2. Lack of disciplinary responsibility regarding the interpretation of law and assessment of facts and evidence.

Independence in the interpretation of law and in the assessment of facts and evidence are key indicators of the principle of independence of judges. Therefore, as regards such acts, which constitute the core of the judicial function, the hypothesis of disciplinary liability of the judge is ruled out. However, the activity carried out by the judge in the exercise of the jurisdictional function has rules and limits.

A.2.3. The limits of the lack of disciplinary responsibility during the exercise of judicial functions, non-observance of fundamental principles and non-performance of functional duties.

Judicial functions must be exercised in accordance with the principle of legality and impartiality, and in fulfillment of the judge's functional duties. By exceeding these limits, the activity of the judge is not considered as a fair exercise of the function of the judge within the independence that he/she is guaranteed and therefore, the judicial activity may be subject to investigation and the judge subject to disciplinary responsibility.

Once these limits are exceeded, the judge's activity is no longer included in the pure exercise of the function of judging and, consequently, under the scope of the guarantee of independence, which he or she is assured, and becomes subject to inquiry and may be subject to disciplinary liability.

This results from article 82, 1st part, of the Statute of Judicial Magistrates, which states that:

*"Acts, even if merely culpable, performed by judicial magistrates in violation of the principles and duties enshrined in this Statute constitute a disciplinary offence".*

Therefore, there may be disciplinary liability of the judge, with regard to the content of the decision he or she rendered, when he or she is faced with a decision that could not be handed down or taken on any grounds, under any prism or in the light of any plausible understanding.

In these conditions, the actions and acts of the judge, instead of constituting the exercise of the function of judging, constitute a violation of the principle of legality, because the decision is not based on an objective assessment of the facts and a valid and impartial interpretation of the law, and a breach of the functional duty of diligence, by disregarding the principle of quality that should guide the judge's activity.

## B. Investigation and disciplinary procedure of magistrates in accordance with the guarantees of a due process of law provided for in Article 6, paragraph 1, of the European Convention on Human Rights (ECHR).

### B.1. The application of Article 6(1) of the ECHR to disciplinary proceedings against judges.

Article 6, paragraph 1, of the ECHR, explicitly provides as follows: *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".*

The scope of article 6 (1) of the Convention is the determination of civil rights and obligations or a criminal charge. As disciplinary proceedings, in particular that against judges, are in essence administrative and the offence in matter is an administrative, as it is related to a breach of professional obligations, it is important to know whether article 6 of the Convention is applicable.

With regards to disciplinary proceedings against judges, the European Court on Human Rights concluded, as it is clear from its settled case-law *(Oleksandr Volkov v. Ukraine; Kamenos v. Cyprus; Ramos Nunes de Carvalho e Sá v. Portugal),* that the proceedings fell within the civil aspect of article 6 (1) of the Convention. By contrast, the European Court held that the criminal aspect of Article 6 did not apply *(see Xhoxhaj v. Albania).*

### B.2. The disciplinary procedure model provided for in the Statute of Judicial Magistrates.

According to the Statute of Judicial Magistrates the relevant features of disciplinary proceedings of magistrates before the Judicial High Council are as follows:

The procedure before the Judicial High Council from the moment of submission of the request and thereafter is carried out in accordance with the principle of contradictoriality. The judge in question has the right to give evidence; he or she can be represented by a lawyer and can study the indictment and submit arguments in that regard. He or she also have the right to participate in the proceedings by contesting the charges, submitting requests, adducing evidence and raising grounds of nullity. Furthermore, the final decision must be reasoned. The judicial investigator who conducted the investigation does not participate in the decision-making process by Judicial High Council (JHC). Moreover, the decisions of the JHC are subject to an appeal to the Supreme Court.

## B.3. Conduct of the disciplinary procedure in accordance with the requirements set out in Article 6(1) of the ECHR

Let's, now, examine whether the way of conducting the disciplinary procedure is in accordance with requirements regarding the right of access to a court, the right to an independent and impartial court and the right to a public hearing set out in Article 6(1) of the European Convention on Human Rights (ECHR).

## B.4. The right of access to a court

The Judicial High Council is the disciplinary body for judges. The Judicial High Council is an administrative body. It is not a judicial body. In this regard, the European Court's settled case-law determines that, a violation of the Convention cannot be established according to the requirements of Article 6 (1) thereof where an administrative body decides upon "civil rights and obligations", does not comply with Article 6(1) in some respect, no violation of the Convention can be found if the proceedings before that body are *"subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)" (see Albert and Le Compte v Belgium; Tsfayo v. the United Kingdom).*

In the disciplinary proceedings against Portuguese judges there is the possibility of appealing against the JHC decisions to the Judicial Division of the Supreme Court. Thus, the right of access to a court is guaranteed.

## B.5. The right to a fair trial by an independent and impartial court

In the case *Ramos Nunes de Carvalho e Sá v. Portugal,* the Grand Chamber of the European Court, attending to the guarantees that exist regarding the protection of the activity of the Judicial Division

of the Supreme Court from outside pressures, has considered that the system in force in Portugal for reviewing disciplinary decisions by the JHC did not breach the requirement of independence and impartiality under article 6 (1) of the Convention.

**B.6. The right to a public hearing.**

The entitlement to a "public hearing" in Article 6(1) necessarily implies a right to "participate" a right to "express verbally and be heard" *(see Döry v. Sweden, § 37).* The right to an oral hearing is one factor to ensure the overall equality of arms between the parties in the proceedings (see Margaretić v. Croatia).

In the disciplinary proceedings against Portuguese judges, before the amendments made to the Statute of Judicial Magistrates by the law 67/2019, dated 27.08, the proceedings before the JHC's plenary were in writing and the judge could not attend its sittings; under the national legislation, those sittings were not open neither to the judge envisaged nor to the public. The JHC was not bound by law to hold public hearings.

Regarding the proceedings before the judicial body - the Judicial Division of the Supreme Court - the person concerned by the proceedings had the right, and still has, to request a public hearing. Although, since the Judicial Division of the Supreme Court does not have jurisdiction to re-examine the facts and the evidence, holding a public hearing before the Judicial Division is not a common practice and, when requested, it is often refused because it is deemed pointless.

So, until the above amendments to the Statute of Judicial Magistrates by the law 67/2019, dated 27.08, no hearing was held neither before the Judicial High Council and, for the said reasons mentioned above, nor before the Judicial Division of the Supreme

Court.

In view of what it is at stake, namely the impact of the possible penalties on the lives and careers of the persons concerned and their financial implications, the Grand Chamber of the European Court has considered, in case *Ramos Nunes de Carvalho e Sá v. Portugal,* that, in the context of disciplinary proceedings not holding a hearing should be an exceptional measure and should be duly justified in the light of the Convention institutions' case-law.

Consequently, the Grand Chamber of the European Court has concluded, in the above mentioned case, that the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial review stage, meant that the case was not heard in accordance with the requirements of Article 6 (1) of the Convention.

With the law 67/2019, dated 27 of August, a new article was introduced in the Statute of Judicial Magistrates. Article 120-A, which explicitly provides that the judge, against whom a disciplinary proceeding is conducted, may request the holding of a public hearing to present his or her defence. Thus, the violation of Article 6(1) of the Convention detected by the European Court has been remedied.

## INVESTIGATION AND DISCIPLINARY PROCEEDINGS OF MAGISTRATES IN ACCORDANCE WITH THE GUARANTEES OF A FAIR TRIAL PROVIDED FOR IN ARTICLE 6/1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

**Béatrice Del Volgo,**
*General Inspector, General Inspectorate of France*

Ms. Béatrice Del Volgo entered the justice system with a competitive exam after graduating with a master's degree in private law. At first, she worked as a judge for preliminary hearings in Corsica and Marseille, where she specialized in organized crime and, later on, in the Financial and Economic Affairs.

Ms. Del Volgo continued to work in the same field as an adviser to the court of Appeal Aix en Provence in the Correctional Chamber specializing in Financial and Economic matters, and for several years she has been practicing her profession in a public prosecutor's office, where she has mainly dealt with juvenile cases.

Ms. Del Volgo has worked as an Inspector in the General Inspectorate of Judicial Services, and later as a General Inspector in the General Inspectorate of Justice. Currently, she is the Head of the

Department of Ethics and Administrative Inspections.

**Abstract of the presentation**

A pillar of democracy, Justice is embodied by the magistrate; its place in society is essential. To live up to their mission, they must be exemplary in the performance of their duties. If they are entitled to a private life, this must not affect the trust placed in them; the same applies to their other commitments.

The magistrate suspected of not respecting the fundamental ethical principles must present their explanations before responsible institutions. In the exercise of their prerogatives, the disciplinary institutions charged with the investigation and judgment on the commission of disciplinary violations by the magistrate must be established, organized, and function on the basis of the law. At the same time, they must also observe the right of defense for the magistrate.

They must, while performing their duties, act completely independently in order to prevent them from being suspected of contributing to the dismissal of magistrates for unfounded reasons, for example in connection with decisions that they have taken or that they may be required to take.

In practice, it is the people in charge of the investigations, their ethics, the methodology and the control mechanisms established by their department that reflect the quality of the handling of each case.

In terms of the conducting the disciplinary proceedings, the issue of time to handle the case, material and human resources, and the relationship between the body that conducts the disciplinary investigation and the body that decides on the disciplinary violation should also be discussed.

The creation of a fair balance between the realization of a reliable disciplinary investigation in relation to the disciplinary violations, which may have been committed by the magistrate and the guarantees that are provided to him during the conduct of the disciplinary investigation, result in the conduct of a due legal process.

The French example with the methodology developed over the years by the General Inspectorate of Justice, the disciplinary procedure before the Superior Council of the Judiciary defined by the organic law relating to the status of the judiciary and the control exercised by the Council of State, is an illustration of this continuous process for establishing this balance.

**Introduction**

Article 6/1 of the European Convention on Human Rights (ECHR) provides that every person has the right to have his case heard in an orderly, public manner and within a reasonable time by an independent and impartial court established by law. The decision must be given in public, but access to the courtroom may be prohibited to the press and the public.

If in the French system the trial of the magistrate before the Supreme Council of the Judiciary (CSM) and the Council of State (CE) is strictly regulated by law that meets the conditions of a regular process, the preliminary investigation procedure entrusted to the General Inspectorate of Justice (IGJ) ) is regulated for the most part, not by a legislative corpus, but by a practice established in accordance with disciplinary law. This practice has evolved widely to respond to the requirements of a due legal process.

## 1. AN INVESTIGATIVE PROCESS THAT ENSURES ITS INDEPENDENCE AND IMPARTIALITY

In most cases, the proceedings initiated against a magistrate are based on the administrative investigation conducted by the IGJ. For this reason, it is important that this administrative investigation entrusted to the Minister of Justice respects the basic principles of a regular process: impartiality, independence, the right of defense. Only inspectorate magistrates are authorized to conduct an administrative investigation in relation to a magistrate. Like the head of the IGJ, they are appointed after a prior approval of the CSM.

The IGJ is not a directorate that is an integral part of the Ministry of Justice, but has a status of its own [10]: it is placed under the Ministry of Justice. This special status allows general inspectors and inspectors charged with conducting administrative investigations to ensure their independence and impartiality.

### 1.1 Inspectors are subject to deontological rules

Competent to judge their colleagues, inspectors must apply the deontological rules defined in the legal act, which regulates the activity of the inspectorate, inter alia, in the first place, independence and impartiality are listed. [11] These rules take shape every day, in correspondence, determining the investigation strategy, oral and written communication and of course in the analysis of the situation and the case they are handling.

Observance of these obligations is an important value, because it inspires confidence at that moment and in the future, and gives authority and reputation to the inspection process. In order to implement these high-level requirements, each inspectorate must

10 Article 1 of the Decree of December 5, 2016 for the establishment of the IGJ.

11 As well as integrity, confidentiality and professional discretion, justice, loyalty, prudence and courtesy, these criteria are also provided in the RESIJ statute for its members.

simultaneously define its methodological principles, apply them and draw the necessary conclusions.

### 1.2 A predetermined methodological line

The methodology defined by the French IGJ [12] is in the form of a practical guide for use by inspectors. This document in written form serves as a guide (pedagogical tool) and a reminder of the obligations defined at all stages of the investigation.

This document is regularly updated in the context of the development of jurisprudence, practice and relations with the unions of magistrates.

The publication of instructions and guarantees given to magistrates [13] contributes to the transparency of the methodology and helps in its implementation.

This methodology publication ensures equal treatment of magistrates subject to an investigation.

### 1.3 Evidence search tools and their administration

Conducting an administrative investigation requires knowledge (know-how) and experience.

It always consists of questioning and listening to superiors according to the hierarchy, work colleagues, secretarial employees and most often the persons involved. This process often creates discomfort in the person being interrogated, which requires building trust and an ability to listen.

Depending on the nature of the acts, which must be proven,

12 In accordance with the provisions of Article 13 of the Decree on the establishment of the IGJ, the IGJ freely determines the principles of the methodology of its activity.

13 This published act is available on the intranet page of the IGJ.

documenting or recording in the minutes the statements of the interviewed person may have evidentiary value. Specifically, this means recording the questions asked and the answers given in a document signed by the inspectors and the person being questioned. For greater security, the interrogation process is always carried out by at least two people.

It is important that the minutes accurately reflect all statements that are important and take into consideration that the statements of the person who was interrogated and heard are reflected accurately and without distortions. This is a process that is learned over time. In order to use the data collected through statements, they must be analyzed and compared with other facts and data collected from: hearings, documents, other facts. This process is also learned over time.

All file documents are inventoried in order to refer and identify any sources cited therein.

### 1.4 In IGJ, a quality control body and a department dedicated to administrative investigation methodology

The purpose of the administrative investigation is to verify the complaints presented to the magistrates, collecting the evidence for and against, comparing them with each other, and analyzing them in relation to the activity and professional career of the magistrate, in order to reach a conclusion if we are facing a disciplinary violation. The Committee of Colleagues of the IGJ (Copairs) established in September 2019 is a collegial body composed exclusively of members of the inspectorate, inspectors and general inspectors, responsible taking care of the observance of the methodology, and the quality and unification of the content of the acts produced. [14] At the beginning of each investigation process, the committee shall

14 All IGI reports are subject to review by Copairs. Only members who are magistrates have the right to give their opinion regarding investigations conducted against a magistrate Copairs. Only members who are magistrates have the right to give their opinion regarding investigations conducted against a magistrate.

examine the draft reports and analyze them in accordance with the framework documents of the work. Drafters of the draft report, committee members may or may not consider Copairs' opinion.

A department dedicated to ethics and administrative investigations also operates under the General Inspectorate of Justice. Its role consists especially in providing advice on the various functions of the administrative investigation, in analyzing reports and practices, in analyzing jurisprudence in the disciplinary field, and in updating methodological guidelines.

The activity of these two bodies contributes to the quality of the investigations, and to the observance of the guarantees given to the magistrate.

## 2. AN INSPECTION SERVICE THAT HAS THE MEANS TO STRENGTHEN INDEPENDENCE AND ENSURE ITS MISSION

### 2.1 Means

Ideally, an inspection body tasked with carrying out an investigation should investigate all the necessary facts and circumstances, which it considers relevant, and in compliance with the principle of confidentiality.

The tools and resources needed to conduct the investigation are directly related to the quality of the investigation. At the same time, financial and human resources are needed, which are closely related to each other. The officials in charge of conducting the investigation must be profilized and be sufficient in number.

The quality of an investigation also depends on the professionalism or ability of the persons who are in charge of carrying it out.[ [15]]

15 In the last paragraph of Article 16 of the Decree on the establishment of the IG, it is provided that: "The inspection staff has general powers of investigation, verification or control over the courts, directorates, institutions, services and bodies provided in Article 2. These subjects are obliged to provide their assistance,

When professionalism is lacking, the investigation may suffer both in terms of the expected outcome and in terms of the ethics applied, if an incorrect and honest methodology had been applied. Such lack can be particularly harmful when the complaint against the magistrate is related to his honesty. Although rare for French magistrates, this risk should not be underestimated.

### 2.2 The issue of reasonable timelines

2.2.1.1 At the investigation level

The administrative investigation must be completed within a reasonable timeline. If it is too short, it risks being incomplete. If it is too long, it may lose interest, especially when the magistrate is at the end of his career.

Administrative investigations conducted by the IGJ are closed on average within four to eight months. They are handled with speed and special care when the magistrate is temporarily suspended from exercising his duties.

The time of decision-making is added to the time of the investigation, by the Minister of Justice, who, based on the inspection report, can decide whether or not to refer to the CSM, and the time of the CSM when the case is submitted for consideration by him.

2.2.1.2 At the level of the disciplinary body

The CSM is in charge of many tasks, the most important of which is the appointment of magistrates. Although the cases of dealing with disciplinary matters are few in number compared to the totality of other tasks, the handling of disciplinary matters constitutes a

and to make available all the necessary information, and to let them know, regardless of the means available, about all the documents, information or data necessary for the fulfillment of the inspection mission. The staff may interrogate, in particular or jointly, magistrates and civil servants, public officials or employees in ministries, as well as employees or directors of public or private legal entities mentioned in Article 2. The inspection staff has full and free access to courts, directorates, institutions or bodies which are subject to control by them." They do not have specific powers to carry out administrative inquiries such as requesting information from, for example, a bank.

significant part of its activity, as it was emphasized in the activity report for the year 2021.[ [16]] Since there is no dedicated structure to deal with referrals from the heads of courts and requests from litigants [[17]], the CSM conducts its own investigation of these files, which are added to those referred by the Minister of Justice.

This situation necessarily affects the terms of their treatment, which are of course limited in time, but can reach, under certain conditions, two years after referral to the CSM [[18]].

The disciplinary body must have sufficient means to handle within a reasonable time the cases of magistrates who are subject to disciplinary proceedings. This is related to the interest of magistrates subject to disciplinary proceedings of the jurisdictions in which they are assigned and, more broadly, of the Ministry of Justice.

## 3. THE ISSUE OF REFERRAL TO THE INSPECTORATE BY THE DISCIPLINARY BODY

After the completion of the investigation report, the IGJ does not interfere with the Directorate of Judicial Services (DSJ)[[19]] of the Ministry of Justice, neither with the CSM, to defend its conclusions. It is up to the DSJ to represent the Minister of Justice before the CSM. So, in any case, there is no connection between the IGJ[[20]] that investigates the file, the Minister of Justice that refers the disciplinary violation to the CSM, and the CSM that examines the

16 In 2021, 17 requests were presented to the CSM for consideration, where 14 were for judges and 3 for prosecutors, while from 2016 to 2020, these requests were from 3 to 6. Activity report of the 2021.

17 These complaints, which are subject to review exclusively within the competence of the CSM, must be related to the behavior of a judge during the exercise of his functions and which may constitute a disciplinary violation.

18 The CSM's decision on the merits must be taken within 12 months of the referral, unless extended for a 6-month period, which can be renewed by reasoned decision.

19 One of the sub-directorates of the DSJ is responsible for ethical issues and the processing of disciplinary files of active or honorary magistrates.

20 The CSM in the opinion dated September 24, 2021 addressed to the President of the Republic on the responsibility of magistrates had recommended that the presidents of the courts may address the IGJ.

case. This situation protects the IGJ from any doubts about its independence and impartiality.

Recently, the CSM has asked to be able to address the IGJ directly. This situation presents some difficulties that have to do with the status of the members of the inspectorate who exercise their duties under the Minister of Justice,[21] and with the principle of separation of investigative bodies from those of judgment.

## 4. GUARANTEES GIVEN TO THE MAGISTRATE IN THE INVESTIGATION PROCESS WHICH ENSURE A DUE LEGAL PROCESS

In accordance with the provisions of the organic law on the status of the magistrate for a long time, the principle of adversariality and the possibility for the magistrate to defend himself were provided only for the disciplinary process, which took place before the CSM. In 2016, the IGJ made a big change, giving the magistrate the opportunity and the right to defend himself and be presented with all the documents immediately after the notification of the start of the administrative investigation, and before the trial of the case on the merits.

In January 2021, these guarantees were expanded, notably allowing the magistrate's counsel to ask questions, and giving the magistrate the opportunity to be defended by several persons. In addition, the magistrate may request to be presented with the acts from the beginning of the investigation. At the end of the process, he can request additional acts and submit observations.

By undertaking this belated change the IGJ distinguished itself from many French inspectorates by going beyond the scope of

21 The IGJ can be set in motion by the Prime Minister or by several ministers to carry out thematic or institutional inspections, but when it comes to conducting administrative investigations, the IGJ is always set in motion by the Minister of Justice.

the CSM's decision and the requirements of the Council of State, which had overturned the investigation process by a magistrate's inspectorate in a case reviewed in 2013[22].

In February 2020, the Council of State affirmed the importance of observing the principle of adversariality by specifying in the principle aspect a case that did not involve a magistrate, that the report and minutes of the interrogated persons must be notified and public servants are communicated.[23] As a result, it canceled the disciplinary measure imposed on a subordinate, who was not familiar with them.

The current practice of IGJ is the fruit of a slow evolution. Following a path that is much more respectful of the rights of the defense, it is involved in a fairer approach that responds to the challenges of impeaching a magistrate.

22 CSM Headquarters S207 dated 11 July 2013.

23 CE 5 February 5, 2020 no. 433130 published in the Lebon summary: When an administrative investigation on the conduct of a public official has been entrusted to inspection bodies, the report drawn up on the result of this investigation, as well as the records of the persons questioned about the conduct of the public official under investigation are part of the documents that the latter must recognize and must take in accordance with Article 65 of the law dated April 22, 1905, except in cases where the communication of these records could seriously harm the persons who testified.

## DISCIPLINARY RESPONSIBILITY AND THE LIMITS OF CONTROL OF WORK OF MAGISTRATES.

**Emanuela Aliverti**
*Inspector, General Inspectorate of the Ministry of Justice, Italy*

Ms. Emanuela Aliverti was graduated in Foreign Languages (English-French) in 1978 and in 1983 she was graduated in Justice at the University "Cattolica del Sacro Cuore" in Milan. In 1986 she was appointed justice auditor.

She has been a judge in matters of work, guardianship, non-appealable procedures, execution of sentences and during the period 1987-1989 she held the position of President at the Court of First Instance of Lecco.

During the period 1992-2004, Ms. Aliverti served as a judge at the Court of Como in the First Civil Chamber (cases related to real estate rights, family relations, commercial law, liabilities, inheritance and labor relations), and in the Second Chamber Civil (cases related to property rights, intellectual and industrial law, contractual and non-contractual liability, inheritance, entrepreneurship, procedures related to the recognition of paternity, adoption of adults, and those related to the change and determination of gender, termination of pregnancy

for minors, and summary judgments and appeals).

During the period 2004 – 2010, Ms. Aliverti was an employee and then worked as a judge at the Juvenile Court for Bologna and Milan, and during the period 2010-2014 she held the position of advisor in the First Civil Chamber at the Court of Appeal in Milan. During the period 2014 – 2022, Ms. Aliverti worked as Inspector General at the General Inspectorate of the Ministry of Justice, and from March 2022 she has been the Coordinator of the International Group of the General Inspectorate of the Ministry of Justice.

During her career, Ms. Emanuela Aliverti has been part of the Examinations Board of the candidates for the title of lawyer, and magistrates; was a mentor-judge in Vocational training school for magistrates, referrer in the training courses for peace judges, lawyers, the judicial auditor in the Italian General Inspectorate and has referred in a lot of seminars and international conferences for justice like in Rabat, Marakesh, Tirana, Paris, Casablanca and in the framework of RESIJ.

## A. An Independent Judiciary

### a) **An Independent Judiciary**

The Italian Constitution, which came into force on 1 January 1948, gave the justice system an efficient independence from the political power and protected from any interference by the executive power. The anticipated constitutional structure responds even today to the important achievement of the creation of the liberal legal state, i.e. the concept of no longer perceiving the individual at the service of the state, but rather the state apparatus at the service of the individual.

The constitutional set-up responds, even today, to the fundamental

achievement of the advent of the liberal rule of law, i.e. that of conceiving no longer the individual at the service of the State but, on the contrary, the State apparatus at the service of the individual.

Recognition of this fundamental achievement can be found in Article 3 paragraph 1 of the Constitution, where it is explicitly stated that "all citizens (...) are equal before the law".

The constitutional structure chosen is the result of extensive discussions and debate, which were nevertheless based on basic principles common to all, such as:

a) State character of law, in the sense that judicial functions can be exercised exclusively by state instances, which have the same binding character and authority as other branches of government;
b) Unity of law - in the sense that the administration of justice, in any matter (civil, criminal and administrative), must be entrusted exclusively to bodies provided for and regulated by the law on the judicial system, i.e., to ordinary judges - inasmuch as it is preordained to the equality of all citizens.
c) Independence of the judge, both in the concrete exercise of the judicial function and as regards the legal status of the bodies holding jurisdiction;
d) Autonomy and independence of the judicial system.

There is no doubt that the independence of the judiciary constitutes a *"central value of a State based on the rule of law",* expressly sanctioned by the Italian Constitution in Article 101 *("... judges are subject only to the law")* and in Article 104 *("The judiciary constitutes an autonomous order, independent of any other power..... ).*

Thus, on the one hand, in the exercise of his functions, the judge is subject only to the law (so-called functional independence) and, on

the other hand, the judicial organisation as a whole is completely autonomous, in the sense that it must not be dependent on any other power and must be able to determine its own status *(so-called structural independence).*

Judges, therefore, are protected from the interference of other powers and are subject only to the law. While structural independence consists in terms of:

- Selection of magistrates through competition procedures (Article 106);
- Remuneration of magistrates based on seniority and not career progress;
- The existence of judicial administration and the determination of the status of magistrates by providing rules regarding: recruitment, employment, mandate, transfer, professional evaluation, career progression, application of disciplinary sanctions, including security measures (Article 105 of the Constitution) - on the part of a body completely separate from the executive power and more than half of its members must be magistrates (two-thirds): the Supreme Judicial Council is the guarantor of the so-called external independence of magistrates;
- In the guarantee of immunity from duty (Article 107) which can only be applied within a disciplinary measure given by the Disciplinary Commission of the the Superior Council of the Magistracy (SCM).

The Superior Council of the Magistracy - defined, in common parlance, as the body of *"self-government"* of the Magistracy, i.e. of self-organisation or, better, self-administration of the magistrates, and therefore, of the independent judicial administration - on the one hand it enjoys a special form of independence so that, for the most part, the magistrates act themselves and on the other hand it

is chaired by the President of the Republic as a neutral power and guarantor of the Constitution.

The Minister of Justice, on the other hand, according to Article 110 of the Constitution, has the task of providing for the organisation and functioning of the justice services *("without prejudice to the competences of the Superior Council of the Magistracy, the Minister of Justice is responsible for the organisation and functioning of the justice services"),* as well as the "power to take disciplinary action" (Article 107 of the Constitution).

In this context, from the systematic interpretation of the above provisions, it results that:

a) The minister is no longer in charge of the judicial power, but only performs functions that complement the efficiency of justice;
b) Any final decision on the appointment of magistrates, which may affect the organization and operation of the justice system, their career, or the taking of a disciplinary measure, is taken exclusively by the SCM;
c) The form of control over magistrates by the political power is exercised only within the framework of the proposal of disciplinary measures (this reasoning derives from the a contrario interpretation of the article 107(2)), on which the disciplinary commission of the SCM in any case decides.

**B. Disciplinary responsibility to protect the image of the magistrate and the prestige of the judiciary**

Within the Superior Council of the Magistracy there is the Disciplinary Section, a judicial body made up of six members, delegated to adopt, at the request of the Attorney General at the Court of Cassation or the Minister, disciplinary measures, which

can be challenged before the Court of Cassation in unified sections.

The Italian legal system provides for a system of disciplinary justice for ordinary magistrates - with the exception of administrative, accounting and military justice - i.e. for judges and public prosecutors, including members of the CSM, prosecutors of the General Prosecutor's Office of the Court of Cassation and councillors of the Court of Cassation. The basic rules are laid down in Legislative Decree No. 109 of 2006, both as regards procedure and cases of disciplinary offences and sanctions.

Article 1 of Legislative Decree No. 109/2006 establishes, first of all, the duties of the magistrate who: <<*...performs the functions assigned to him with impartiality, fairness, diligence, assiduity, reserve and balance and respects the dignity of the person in the exercise of his functions*>>.

The disciplinary offences - which the 2006 legislature wanted to typify - have been identified precisely because they concretise the violation of these duties and, therefore, the injury to the image of the magistrate and the prestige of the judiciary, interests that the legislation specifically intended to protect and whose injury must be ascertained for the magistrate's conduct to be sanctioned.

So much so that in Article 3 bis of Legislative Decree no. So much so that in Article 3 bis of Legislative Decree No. 109 of 2006, the legislator introduced the exemption of the insignificance of the fact *("The disciplinary offence cannot be committed when the fact is insignificant"),* recurring in the hypothesis that, once the specific disciplinary breach contested has been ascertained, both objectively and subjectively, it is considered that in an overall ex post assessment of the matter and in the light also of other profiles characterising the magistrate's figure and professional career, the fact, understood in its entirety (and not, therefore, with reference

only to the specific charge), has not in concrete terms harmed the interests protected by the legislation, i.e. it has not compromised the image of the magistrate and the prestige of the judiciary.

**A few examples:**

- the Supreme Court (Sec. U, Judgment no. 1416 of 18/01/2019) confirmed the acquittal, on the grounds of insignificance of the fact, of a president of the review panel who had signed an order filed the day before the hearing set for discussion, on the grounds that, despite the serious breach of the obligation to control the procedural act connected with the presidential function, however, the ordinary reliance on the probable correctness of the order as drafted by the Judge-Rapporteur, together with the episodic nature of the conduct, legitimised, also in the light of a professional career path free from censure, the recognition of the exemption;
- the Supreme Court (Sec. U, Judgment no. 31058 of 27/11/2019) in the disciplinary proceedings concerning a deputy public prosecutor accused of having seriously misbehaved with the public prosecutor ff., 109 of 2006, consisting in the good performance of the judicial office and its functional unity, and, secondly, of that of the image of the magistrate, protected by Article 3 bis of the same decree, remaining instead on a level of not allowed abstractness in postulating only a potential injury to the image of the judicial power.
- again, Article 3 bis. has been applied: when the behaviour of the accused has not caused any unfair prejudice or undue advantage to anyone and is characterised by the absence of neglect and indeed by the conviction, albeit wrongly, that he has acted for the good of the offended parties (CSM sez. disc. no. 5/2010);
- when the magistrate, in adopting a judicial measure, violates a provision whose meaning cannot be overcome by any interpretation, if the error is perfectly repairable through the

ordinary means of appeal and the matter does not cause any further effect other than that, precisely, of a successful appeal (CSM sez. disc. no. 153/2009).

The typical cases of disciplinary offence were then distinguished in relation to the context in which the conduct took place, i.e. in the exercise of functions (functional liability [24]), outside the exercise

**24** **Article 2: 1.** The following shall constitute disciplinary offences in the performance of duties
- (a) without prejudice to the provisions of subparagraphs (b) and (c), conduct that, in breach of the duties referred to in Article 1, causes unjust damage or unfair advantage to one of the parties;
- b) failure to inform the Superior Council of the Judiciary of the existence of any of the situations of incompatibility referred to in Articles 18 and 19 of the Judicial Order, Royal Decree 12 of 30 January 1941, as amended, as amended by Article 29 of this Decree;
- c) the conscious failure to comply with the obligation to abstain in cases provided for by law;
- d) habitual or gross misconduct towards the parties, their defence counsel, witnesses or anyone who has relations with the magistrate within the judicial office, or towards other magistrates or collaborators
- e) unjustified interference in the judicial activity of another magistrate;
- f) the failure to inform the head of the office, by the magistrate to whom the interference is addressed, of the interference that has occurred;
- g) the serious breach of law caused by ignorance or inexcusable negligence;
- (h) misrepresentation of facts caused by inexcusable negligence;
- (i) LETTER REPEALED BY LAW No 269 of 24 OCTOBER 2006;
- l) the issuance of measures without a statement of reasons, or the reasons for which consist only in the assertion of the existence of the legal prerequisites without any indication of the factual elements from which such existence results, when the statement of reasons is required by law
- (m) the adoption of measures taken in cases not permitted by law, due to grave and inexcusable negligence, which have harmed personal rights or, to a significant extent, property rights
- (n) repeated or serious non-compliance with the rules of regulations or provisions on the judicial service or organisational and IT services adopted by the competent bodies;
- (o) undue entrustment to others of activities falling within one's duties;
- p) failure to comply with the obligation to reside in the municipality where the office is located in the absence of the authorisation provided for by the regulations in force if this has resulted in concrete prejudice to the fulfilment of the duties of diligence and diligence
- q) repeated, serious and unjustified delay in the performance of acts relating to the exercise of duties; a delay not exceeding three times the period prescribed by law for the performance of the act shall be deemed not to be serious, unless proven otherwise
- (r) habitual and unjustified avoidance of duty;
- (s) in the case of the head of an office or the President of a Chamber or the President of a panel, failure to assign business to himself and to draw up the relevant orders;
- (t) failure to comply with the obligation to make himself available for the requirements of the office when required to do so by law or by lawful order of the competent body;
- u) the disclosure, also due to negligence, of procedural documents covered by secrecy or forbidden to be published, as well as the breach of the duty of confidentiality concerning the business being dealt with, or the business being settled, when it is likely to unduly prejudice the rights of others
- (v) public statements or interviews concerning persons involved in the business being dealt with, or dealt with and not defined by a measure not subject to ordinary appeal, when they are intended to unduly prejudice the rights of others, as well as the breach of the prohibition referred to in Article 5(2) of Legislative Decree no. 106 of 20 February 2006;
- (z) LETTER REPEALED BY LAW No 269 of 24 OCTOBER 2006;

of functions (extra-functional liability [25]), resulting from a crime

aa) soliciting the publicity of news pertaining to one's office activity or the establishment and use of confidential or privileged personal information channels;
bb) LETTER REPEALED BY LAW NO. 269 OF OCTOBER 24, 2006;
cc) the wilful adoption of measures affected by an obvious incompatibility between the dispositive part and the motivation, such as to manifest a pre-constituted and unequivocal contradiction at the logical, content or argumentative level
(dd) the omission, by the head of an office or the President of a Chamber or Panel, of the communication to the competent bodies of facts known to him that may constitute disciplinary offences committed by magistrates of the office, Chamber or Panel;
ee) the omission by the head of the office or by the magistrate with supervisory powers to inform the High Council of the Judiciary of the existence of any of the situations of incompatibility referred to in Articles 18 and 19 of the Judicial Order, Royal Decree no. 12 of 30 January 1941, as most recently amended by Article 29 of this Decree, or situations that may give rise to the adoption of the measures referred to in Articles 2 and 3 of Royal Legislative Decree no. 511 of 31 May 1946, as amended by Article 29 of this Decree. 12 of 30 January 1941, as most recently amended by Article 29 of this Decree, or of the situations that may give rise to the adoption of the measures referred to in Articles 2 and 3 of Royal Legislative Decree No. 511 of 31 May 1946, as amended by Articles 26(1) and 27 of this Decree;
ff) the adoption of measures that are not provided for by the rules in force or on the basis of a macroscopic error or serious and inexcusable negligence;
gg) the issuance of a measure restricting personal liberty outside the cases permitted by law, determined by gross and inexcusable negligence.
((gg-bis) failure to comply with Article 123 of the implementing, coordinating and transitional provisions of the Code of Criminal Procedure, referred to in Legislative Decree No 271 of 28 July 1989))

**25 Article 3: 1.** The following shall constitute disciplinary offences outside the performance of duties
a) the use of the office of Magistrate in order to obtain unfair advantage for oneself or others;
b) the association with a person subject to criminal or preventive proceedings, however dealt with by the Magistrate, or a person who is known to the Magistrate to have been declared a habitual, professional or trendy delinquent or to have been sentenced for non-culpable offences to a term of imprisonment of more than three years or to be subject to a preventive measure, unless rehabilitation has taken place, or the maintaining of conscious business relations with one of such persons;
(c) taking up extra-judicial posts without the prescribed authorisation of the Superior Council of the Judiciary;
d) the performance of activities incompatible with the judicial function referred to in Article 16, paragraph 1, of Royal Decree No. 12 of 30 January 1941, as subsequently amended, or of activities such as to be concretely prejudicial to the performance of the duties governed by Article 1;
e) obtaining, directly or indirectly, loans or facilities from persons whom the magistrate knows to be parties to or under investigation in criminal or civil proceedings pending at the judicial office to which he belongs or at another office located in the district of the Court of Appeal in which he exercises judicial functions, or from the defence counsel of such persons, as well as obtaining, directly or indirectly, loans or facilities, on exceptionally favourable terms, from injured parties or witnesses or in any case from persons involved in such proceedings;
(f) ((LETTER REPEALED BY LAW NO. 269 OF OCTOBER 24, 2006))
(g) participation in secret associations or associations whose ties are objectively incompatible with the exercise of judicial functions;
((h) membership or systematic and continuous participation in political parties or involvement in the activities of persons operating in the economic or financial sector that may condition the exercise of functions or in any case compromise the image of the magistrate))
((i) the instrumental use of the quality that, due to the position of the magistrate or the way it is carried out, is aimed at conditioning the exercise of constitutionally provided functions));
l) ((LETTER REPEALED BY LAW NO. 269 OF OCTOBER 24, 2006)).

(criminal liability [26]).

This is a typification that represents a significant step forward compared to the previous discipline under Article 18 of Royal Decree Law no. 511/46, which limited itself to defining the offence every time the magistrate failed in his duties or behaved in a manner undeserving of merit or compromising the prestige of the judicial order, entrusting the identification of individual cases to the disciplinary section of the SJC.

## C. The 'safeguard clause' as a guarantee of the magistrate's independence

The second paragraph of Article 2 introduces a "safeguard clause" in functional responsibility hypotheses.

The provision establishes that the activity of interpreting the rules of law and that of evaluating facts and evidence do not entail disciplinary liability, unless they have been dictated by conduct attributable to typical cases of disciplinary offence (e.g. serious violation of the law determined by ignorance or inexcusable negligence, misrepresentation of facts determined by inexcusable negligence, failure to state reasons, etc.).

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**26 Article 4: 1.** The following shall constitute disciplinary offences
- a) the facts for which there has been an irrevocable conviction or a sentence has been passed pursuant to Article 444, paragraph 2, of the Code of Criminal Procedure, for an intentional or unintentional crime, when the law establishes imprisonment alone or jointly with a fine;
- b) the facts for which an irrevocable conviction has been obtained or a sentence has been passed pursuant to Article 444, paragraph 2, of the Code of Criminal Procedure, for a culpable offence, to the penalty of imprisonment, provided that they are of a particularly serious nature on account of their manner and consequences
- c) facts for which there has been an irrevocable conviction or a sentence has been pronounced pursuant to Article 444, paragraph 2, of the Code of Criminal Procedure, to the penalty of imprisonment, provided that they present, due to the manner in which they have been carried out, a character of particular gravity
- d) any fact constituting an offence capable of damaging the image of the magistrate, even if the offence is extinguished for any reason whatsoever or the criminal prosecution cannot be commenced or continued.

The United Civil Sections of the Court of Cassation and the Disciplinary Section of the Superior Council of the Magistracy are univocally oriented in affirming that disciplinary liability does not have the function of preventing and/or punishing magistrates' errors, which find their physiological solution in the trial, but the different function of ensuring that jurisdiction is exercised in compliance with the fundamental duties incumbent on the magistrate.

Therefore, the conduct that is censured has disciplinary significance when it reveals an attitude that may compromise the judge's credibility and the prestige of the judiciary.

To this end, it is therefore necessary to assess whether the interpretation of the rule provided by the magistrate is so grossly different from those envisaged or reasonably possible (Cassazione SSU no. 1161/2000), as to integrate conduct of poor consideration, approximation, haste or limited diligence, such as to adversely affect, in concrete terms, the prestige of the judiciary (Cassazione SSU no. 12268 of 2004 and no. 7379 of 2013).

In short, disciplinary action does not concern the result of judicial activity, but the ethically deviant behavior of the magistrate in the exercise of his function (Supreme Court, SSU no. 1628 of 2010 and no. 20730 of 2009), except in cases where the measure is abnormal, in the sense that it is adopted outside any procedural scheme, or on the basis of a macroscopic error or serious and inexcusable negligence (CSM Order no. 90 of 2011).

**To give examples:**

**1)** a public prosecutor had failed to enter in the register of offences, pursuant to Article 335 of the Code of Criminal Procedure *("The public prosecutor shall immediately enter, in the special register kept*

*at the office, every report of an offence of which he has knowledge or which he has obtained on his own initiative, as well as, at the same time or as soon as he becomes aware of it, the name of the person to whom the offence is charged"),* the name of a person heard on summary information, against whom circumstantial elements had emerged: the Disciplinary Section of the SJC (Order of the SJC No. 47 of 2019) held that conduct based on a legal interpretation that is not agreeable, but not entirely implausible or macroscopically incorrect, does not constitute a disciplinary offence in the performance of duties; **the review of the activity of interpreting rules and assessing facts directly affects the constitutional principle of the independence of the magistrate and, therefore, the cases and limits of such review must be defined and applied with extreme rigour;**

**2)** a Public Prosecutor (P.M.) and a Judge for Preliminary Investigations (G.I.P.), respectively in the application and in the order to grant precautionary measures against the suspects, had transcribed some telephone interceptions in which the interlocutors indicated the 'quaestor' as the person protecting one of the suspects, without however ordering his registration in the register of crime reports: the United Sections of the Court of Cassation excluded the disciplinary offence provided for in Article 2(1)(g) of Legislative Decree no. 109 *(serious breach of the law resulting from inexcusable ignorance or negligence)*, in that the assessment of the suitability of such transcript to clarify the probative picture against the suspects - which leads to the formulation of a judgement on the probative value of the body of evidence produced in support of the request and, subsequently, to the granting of the precautionary measure - was to be left to the discretion of the magistrates concerned and was therefore outside the scope of the disciplinary court's control;

In particular, the Court of Cassation established the following legal principle: *"The conduct of the magistrate, which takes the*

*form of an activity of interpretation and application of the rules of law, is censurable under the disciplinary profile only in the event that the jurisdictional measure has been adopted on the basis of a "macroscopic error" or a "serious and inexcusable negligence", revealing a lack of thoughtfulness, approximation, haste or limited diligence, liable to have negative repercussions on the credibility of the magistrate or the prestige of the judicial order"* (Cass. Sec. U, Judgment No. 11586 of 02/05/2019);

**3)** when faced with an application for a proposal for an arrangement with creditors concerning a limited liability company, the judge, applying the provision relating to an ordinary company and not to a limited liability company, and without carrying out any cross-examination or preliminary investigation, had limited himself to appointing the liquidator of the company, with an unreasoned, sloppy and unreasoned measure, limiting himself to signing a form prepared by the registrars and relating to a type of decision that did not correspond to the applicant's petitum: according to the opinion of the Disciplinary Chamber of the SCM (Judgment of the SCM No 109 of 2010), the conduct constitutes a disciplinary offence in the performance of duties, for the adoption of measures not provided for by the rules in force or on the basis of a macroscopic error or serious and inexcusable negligence;

observed in this regard, on the one hand, that the fact that judicial measures and interpretations adopted are not subject to disciplinary review merely excludes the possibility that their technical-legal inaccuracy may in itself constitute a breach of ethics, but does not prevent the magistrate's overall conduct from being assessed in this respect, that is to say, his intellectual and moral commitment and dedication to the judicial function, which must always be exercised with respect for the duties of the office and, consequently, with respect for the rights of the parties and, therefore, does not prevent the review of the inaccuracy that is the

consequence of serious negligence and failure to take into account the effects of the measure; on the other hand, that the assessment of the seriousness and inexcusability of the negligence is the consequence of the breach of fundamental duties, such as the duty of loyalty in dealings with applicants and the duty of diligence, which always requires an adequate verification of the factual and legal prerequisites that allow the issuance of a jurisdictional measure, as well as the impossibility of justifying the conduct put in place;

**4)** the judge signed orders to pay expenses to a clerk in charge of drawing up inventories, charging them to the Treasury and not to the estate or the applicant, as provided for in Article 511 of the Civil Code, and remunerating the work carried out not in accordance with the provisions of Circular 1801/61 of 28 June 1958 of the Ministry of Justice, i.e. as overtime work, but without any correlation with the time spent, and to an extent significantly higher than that due: according to the opinion of the Disciplinary Section of the SCM (SCM ruling no. 30 of 2010), the conduct of a magistrate who signs several orders for the payment of sums in favour of a registrar, contrary to the law and to a ministerial circular, and which are materially prepared by the same registrar without any prior directive or verification of the legitimacy of the arrangements for the orders adopted, nor any effective control of their content, also in the part relating to the direct responsibility of the member of the judiciary, constitutes a disciplinary offence in the exercise of his functions, for serious breach of the law caused by ignorance or inexcusable negligence, for repeated failure to comply with the provisions relating to the judicial service adopted by the competent bodies, and for improperly entrusting to third parties activities relating to his functions.

In fact, the conduct described, on the one hand, evidences the commission of serious errors in the application of the law, referring not to interpretations, however debatable, of the rule, in

respect of which the control of the disciplinary court would find an insurmountable limit, but to a simple failure to comply with the rules laid down by the system, due to ignorance of them or to impermissible superficiality; on the other hand, it is also not justified by the heavy workload to be dealt with, inasmuch as the signing of orders implies not only an assumption of personal responsibility, but also a specific scope of the act in its external effects, as a manifestation of the particular authority that the legal system recognises to the magistrate's decision-making.

## JUSTICE INSPECTION SERVICE, BETWEEN THE INDEPENDENCE AND ACCOUNTABILITY OF MAGISTRATES.

**Michail Pikramenos**
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Mr. Michail Pikramenos is the Vice President of the Supreme Administrative Court (Council of State). Professor of Administrative Law at Law School of Aristotle University of Thessaloniki. During the period 2013-2016 he was the General Director at the National School of Judges. Mr. Pikramenos held the position of the President of the Special Court for the liability of Judges (art.99 of the Constitution). President of the Inspection Board of Judges at the Council of State. In addition to the above duties, Mr. Pikramenos has participated in a series of work processes as the President of the Working Group for the new judicial map of administrative courts. President of the Working Group for the drafting of the Code of Conduct for the Judges of administrative courts. He has participated in several European organizations (European Committee for the Efficiency of Justice, European Training Network, Venice Commission, EU Justice Scoreboard, focal point of the Council of State with the European Court of Human Rights). He has written monographs and articles in the fields of Constitutional Law and Administrative Law.

**Abstract of the presentation**

The one side of the coin is independence and the other side is accountability. Judicial independence is not any longer likely to be accepted without clear accountability. Judicial independence and impartiality are essential prerequisites for the operation of justice. The Consultative Council of European Judges (CCJE) declares that individual judges and the judiciary as a whole are accountable at two levels. Firstly, they are accountable to the particular litigants who seek justice. Secondly, they are accountable to the other powers of the state and, through them, to society at large. According to CCJE the individual evaluation of judges is a mechanism of explanatory accountability. The quality of justice cannot be understood as if it were a synonym for mere "productivity" of the judicial system. Evaluators must consider all aspects that constitute good judicial performance, in particular legal knowledge, communication skills, diligence, efficiency and integrity.

**A. The role of the judiciary in the modern democracy**

In Opinion 18/2015 of CCJE "The position of the judiciary and its relation with the other powers of state in a modern democracy" there are very important remarks about the role of justice in the state and its position under the constitutional principle of the separation of powers. According to this Opinion over recent decades, the relationship between the three powers of the state (legislative, executive and judicial) has been transformed. The executive and legislative powers have grown more interdependent. At the same time, the role of the judiciary has evolved. The number of cases brought to the courts and the number of legislative acts the courts must apply have increased dramatically. The growth of executive power in particular has led to more challenges to its actions in court and this in turn has led some to question the scope of the role of the judiciary as a check on the executive. There has been an increasing number of challenges in the courts to legislative

powers and actions. As a result, the judiciary has increasingly had to examine and has sometimes even restrained the actions of the other two powers. Today, for parties in litigation, and for society as a whole, the court process provides a kind of alternative democratic arena, where arguments between sections of the public and the powers of the state are exchanged and questions of general concern are debated. Courts rule on issues of great economic and political importance. International institutions, especially the Council of Europe and the European Court of Human Rights (ECtHR), the European Union and the Court of Justice of the European Union (CJEU) have all had a considerable influence in member states, particularly in strengthening the independence of the judiciary and in its role in the protection of human rights. Moreover, the application of European and international rules and standards and the implementation of decisions of the ECtHR and the CJEU have provided new challenges for the judiciaries in the member states and sometimes their application by courts has been challenged by politicians or commentators.

**B. Judicial independence**

Judicial independence and impartiality are essential prerequisites for the operation of justice. The basic principles on the independence of the Judiciary adopted by the 7th United Nations Congress on the prevention of crime at Milan (26.8.-6.9.1985) to assist member states in their task of securing and promoting the independence of the judiciary. The principles have been formulated principally with professional judges in mind but they apply equally to lay judges where they exist. According to the Magna Carta of Judges judicial independence must be statutory, functional and financial and shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence. According to the European Network of Judicial Councils (ENCJ),

Judicial independence stems from the need for impartial adjudication of all cases, whether criminal, civil or administrative law cases. The judge should not be affected by differences of power between litigating parties. Protection of the citizen against the power of the government of the state is obviously central. But the issue is broader. The judge must be incorruptible and able, in a proper case, to decide cases in ways that contravenes both media and public opinion. Impartial adjudication is an essential component of the rule of law. The citizens' ability to have confidence in impartial adjudication provides the certainty that their rights will be protected. This is a solid basis for all social and economic activity.

**C. Accountability of judges**

The one side of the coin is independence and the other side is accountability. The general importance of accountability is accepted across all public services. The legitimacy of most kinds of public power now depends on satisfactory accountability mechanisms. ENCJ declares that Independence brings with it the responsibility to demonstrate to society the use to which judicial independence has been put. In most European societies, authority is no longer accepted at face value as it once was. Similarly, judicial independence is not any longer likely to be accepted without clear judicial accountability. Professor Stephen Colbran notes the importance of judicial accountability: *"Firstly, it relates to traditional forms of judicial accountability including the principle of "open justice", parliamentary accountability and appellate review. Secondly, it relates to analysis of judicial attributes such as legal ability, impartiality, independence, integrity, temperament, communication skills, management skills and settlement skills, based on the opinions of those directly involved with the legal system. Thirdly, it relates to court and administrative performance measurement—with its focus on time and motion of judicial activity. This is an approach often linked with case management initiatives.*

*While all three approaches to judicial performance evaluation strengthen judicial accountability, the traditional approaches and analysis of judicial attributes focus on the work of individual judges, while court and administrative performance measurement focuses on the aggregate work of the court".* It is obvious that several parameters and functions of the judiciary play significant role in the building of public confidence. According to Professor Stephen Burbank *"Judicial accountability should run to the public, including litigants whose disputes courts resolve, and who therefore have a legitimate interest in court proceedings that are open to the public and in judicial decisions that are accessible. Judicial accountability should also run to the people's representatives, who appropriate the funds for the judiciary and whose laws the courts interpret and apply, and who therefore have a legitimate interest in ensuring that the judiciary has been responsible in spending the allotted funds and that, as interpreted and applied by the courts, public laws are functioning as intended. Finally, judicial accountability should run to courts and the judiciary as an institution, both because individual judicial independence exists primarily for the benefit of institutional independence and because appropriate intrabranch accountability is essential if potentially inappropriate inter- branch accountability is to be avoided. In each instance, proper regard for the other side of the coin—that is, for judicial independence—requires that accountability not entail influence that is deemed to be undue".* Proffesor Stefan Voigt makes a very interesting remark: *"But judges who are independent from most other decision-makers can also constitute a danger: they could render decisions only with hefty delays, render decisions that neglect much of the available evidence, render decisions that rely on irrelevant legislation, or render decisions that are patently false. Independent judges are not only a necessary condition for the rule of law, they also constitute a threat to the rule of law: if there is a rule of judges, the rule of law will not be realized".*

The ECHR has emphasized the prominent place among State organs that the judiciary occupies in a democratic society. The Court has emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties and in this framework judges have more duties and responsibilities than the ordinary civil servants. Judges have also restrictions in their fundamental rights which ensure that they exercise their duties with respect to the principles of neutrality and impartiality. It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. Under these circumstances the State can impose on judges, on account of their status, a duty of discretion and the ECHR examine in every case if a fair balance has been struck between the fundamental right and the legitimate interest of a democratic State in ensuring that its judiciary properly furthers the purposes enumerated in a certain article of the Convention.

CCJE declares that individual judges and the judiciary as a whole are accountable at two levels. First, they are accountable to the particular litigants who seek justice in particular judicial proceedings. Secondly, they are accountable to the other powers of the state and, through them, to society at large. judges are made to account for their decisions through the appeal process ("judicial accountability"). Secondly, judges must work in a transparent fashion. By having open hearings and by giving reasoned judgments which are made available to the public, judges will explain their actions and their decisions to the litigants who are seeking justice, the judge is also rendering an account of his or her actions to the other powers the state and to society at large (explanatory accountability). Thirdly, if a judge has engaged in improper actions he/she must be held accountable in a more robust way, e.g. through

the application of disciplinary procedures and, if appropriate, the criminal law (punitive accountability).

According to CCJE the individual evaluation of judges is a mechanism of explanatory accountability. Evaluation can be a useful means to hold judges accountable. As explained by the CCJE, the individual evaluation of the judges' work can help to gain information on the abilities of individual judges and of the strength and weaknesses of a judicial system. Evaluation can help to identify the best candidates for promotion thereby maintaining or even improving the quality of a judicial system.

**D. Principles and procedure of inspection**

The quality of justice cannot be understood as if it were a synonym for mere "productivity" of the judicial system. The CCJE believes that the quality, not merely the quantity, of a judge's decisions must be at the heart of individual evaluation. In the Opinion 11/2008, the CCJE discussed the importance of high quality judgments. In order to evaluate the quality of a judge's decision, evaluators should concentrate on the methodology a judge applies in his/her work. Evaluators must consider all aspects that constitute good judicial performance, in particular legal knowledge, communication skills, diligence, efficiency and integrity. To do that, evaluators should consider the whole breadth of a judge's work in the context in which that work is done. Therefore, the CCJE continues to consider it problematic to base evaluation results on the number or percentage of decisions reversed on appeal, unless the number and manner of the reversals demonstrates clearly that the judge lacks the necessary knowledge of law and procedure. It is noted that the ENCJ Report 2012-2013 reach the same view. The Opinion 11/2008 of CCJE "The quality of judicial decisions" notes that the evaluation of the quality of judicial decisions must be done above all on the basis of the fundamental principles of the ECHR. It cannot be done only in the light of considerations of an economic or managerial nature.

The use of economic methods must be considered carefully. The role of the judiciary is above all to apply and give effect to the law and cannot properly be analysed in terms of economic efficiency. Any quality evaluation system should strictly aim at promoting the quality of judicial decisions and not serve as a mere bureaucratic tool or an end in itself. It is not an instrument of external control of the judiciary.

According to CCJE the formal individual evaluation of judges, where it exists, should help to improve and maintain a judicial system of high quality for the benefit of the citizens of member states. This should thereby help maintain public confidence in the judiciary. This requires that the public must be able to understand the general principles and procedure of the evaluation process. Therefore, the procedural framework and methods of evaluation should be available to the public. Moreover, in the view of the CCJE, the individual evaluation process for career or promotion purposes should not take account of public views on a judge. The process and results of individual evaluations must, in principle, remain confidential and must not be made public. To do so would almost certainly endanger judicial independence, for the obvious reason that publication could discredit the judge in the eyes of the public and possibly make him/her vulnerable to attempts to influence him/her. In addition, publication may mean the judge is subjected to verbal or other attacks.

In the Opinion 19/2016 "The role of court Presidents" CCJE declares that the main duty of court presidents must remain to act at all times as guardians of the independence and impartiality of judges and of the court as a whole Court presidents are responsible for managing the operation of the court, including managing court staff and material resources and infrastructure. It is crucial that they have the necessary powers and resources to fulfil this task efficiently. In general, the performance of court presidents is subject

to evaluation in the same way as the work of ordinary judges, with all the necessary safeguards to be respected. In addition, based on the specific role of the court presidents, appraisal can take place to assess the overall work done, including the managerial functions, in order to explore the possibility of improvements, and in order to learn from experience. Such appraisal should be appropriate for the presidents' tasks and responsibilities.The same notes that Presidents of the highest courts have different roles and duties which arise from the specific role of these courts and their role as a figure which is somehow the personification of the whole judicial system, especially in those member states where there is one Supreme Court.

In the Opinion 21/2018 "Preventing Corruption among Judges" CCJE notes that a system of evaluation is a very effective means to make promotion and advancement decisions more objective and reliable. This also contributes to the transparency of the judicial system as a whole.Corruption among judges is one of the main threats to society and to the functioning of a democratic state. It undermines judicial integrity which is fundamental to the rule of law and is a core value of the Council of Europe.

## E. The new law in Greece for the organisation of courts and the status of judges and prosecutors

The Constitution of Greece provides that justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence (art. 87 par. 1). Regular judges shall be inspected by judges of a superior rank (art. 87 par. 3). This mounth has been published in Greece the new law for the organisation of courts and the status of judges and prosecutors. The parliament voted the law taking into account the international and european trends for the judicial independence and accountability. Especially in the field of evaluation and inspection there are provisions which allow substantial and in-depth examination by the inspecting judges

in two levels: at the level of judges and at the level of the courts as organisations. At the level of judges the inspecting judges examine the quantity and the quality of the judicial work, based on specific criteria. They examine also the performance of judges who have the responsibility of administration of the courts. The inspection reports have reasons for each criterion and the evaluated judge may appeal to the inspection board.

There are inspecting judges for each jurisdiction. For civil and penal judges and prosecutors the inspecting judges are members of Areios Pagos, the supreme court of civil and penal justice. For administrative justice the inspecting judges are members of the Counsil of State. The plenary sessions of the supreme courts ensure equality in the evaluation of judges with guidelines which applied by the inspecting judges. The inspection board collects the inspection reports, makes comparative remarks taking into account the reports of previous years and formulates proposals to the Minister of Justice for the judicial system.

**F. Conclusions**

The judicial power is part of the state power and the judges are state functionaries but their duty is not to follow the decisions of the other state powers. Their duty is to control the legislative and the executive power.

The judicial power is very closely connected with the fundamental right of judicial protection. The access of everyone in the courts guarantees the exercise of all the basic rights and the fundamental freedoms.

ENCJ in Sofia Declaration notes that an independent and accountable judiciary is essential for the delivery of an efficient and effective system of justice for the benefit of the citizen and is an important feature of the rule of law in democratic societies. The

judiciary must be accountable, comply with ethical guidelines and be subject to: a) an evaluation system which motivates the judge to improve his performance, b) an impartial disciplinary system which imposes sanctions when the judge shows behavior that is unworthy of his position in a democratic state and society.

# SESSION III:

## THE ROLE OF INSPECTION SERVICES AS A GUARANTOR FOR THE PROPER FUNCTIONING AND INDEPENDENCE OF THE JUSTICE SYSTEM, IN ACCORDANCE WITH INTERNATIONAL AND EUROPEAN STANDARDS METHODS AND CHALLENGES OF THE FUTURE

## THE ROLE OF INSPECTION SERVICES, AS A GUARANTOR OF THE PROPER FUNCTIONING AND INDEPENDENCE OF THE JUSTICE SYSTEM IN ACCORDANCE WITH EUROPEAN LEGISLATION AND BEST PRACTICES.

**Valérie Delfosse,**
*Magistrate (Judge)*
*President of the French Speaking Commission of Inquiry of the Superior Council of Justice, Belgium*

Ms. Valérie Delfosse has been a magistrate at the Brussels Police Court since 2013. She deals with cases of trafficking offenses, civil liability cases related to road accidents and appeals against administrative fines.

Before becoming a judge, during the period 2001 – 2011, Ms. Delfosse served as Deputy Public Prosecutor in Brussels and during 2011 – 2013 she headed the Brussels Prosecutor's Office. Ms. Delfosse has been a member of the Magistrates Advisory Council from 2014 to 2020 and she is currently a lecturer at the Brussels Police School (criminal procedure) and a trainer at the Judicial Training Institute (civil procedure, civil law, and criminal procedure).

Since December 2020, Ms. Delfosse has been the Chair of the Advisory and Investigation Commission of the High Council of Justice. She has been performing

this function full-time, for a period of 4 years. In this capacity, since February 2022, she is the project manager for the twinning between Belgium and Morocco. The twinning is part of a cooperation program between Morocco and the European Union and aims to provide Morocco with European expertise, in order to strengthen the independence of the Moroccan Supreme Judicial Council.

## I. I. Belgium

Belgium is a state of law, based on the separation of powers (legislative, executive and judicial). The founding act of Belgium is the Constitution of 1831. Belgium is a constitutional monarchy. It ranks among the founding countries of the Council of Europe. In this capacity, it has signed the European Convention on Human Rights (hereinafter ECHR). The Belgian law and, in particular, the rules of civil and criminal procedure are inspired by Article 6 of the ECHR which enshrines the right to due process (especially the impartiality and independence of magistrates).

## II. Judiciary: Independence of magistrates

Article 151 of the Constitution sanctions the independence of magistrates. § 1 provides that: *"Judges are independent in the exercise of their jurisdictional powers. The prosecution is independent in the exercise of individual criminal investigations and prosecutions, without affecting the right of the competent Minister to order criminal prosecutions and to issue restrictive directives of criminal policy, including the field of criminal investigation and prosecution policy".*

§ 2 establishes the High Council of Justice: *"For the entire Belgium there is a High Council of Justice. In exercising its powers, the High Council of Justice respects the independence provided in § 1." (Law of 1998).*

## 1. High Council of Justice (hereinafter CSJ): www.csj.be

### A. Context of the CSJ establishment

The High Council of Justice was established in 1998 in the wake of the 1996 "White March" (a powerful citizen's movement following the Dutroux case), but plans for its establishment belong to a much earlier period of time. The Government and the Parliament had previously realized the serious breach of trust between the citizen, the police and the judicial authorities.

The political leaders decided to create a High Council of Justice, which, in addition to magistrates, also includes members of civil society. The High Council of Justice (CSJ - Conseil Supérieur de la Justice) can rightfully be described as a democratic forum where all opinions on the judicial function are expressed, due to its dual linguistic and socio-professional equality.

The CSJ functions completely independently from the executive power, the legislative power and the judicial power. So, the CSJ is a federal body, firmly based on the Constitution, autonomous in its operation and in taking initiatives.

### B. CSJ objectives

The objective of the establishment of the CSJ is to strengthen the citizen's trust in justice and improve the functioning of the judicial order. The role of the CSJ is to take an objective and independent look at the functioning of the judicial order by concretizing the assignments and appointments of magistrates (this is the role of the assignments and appointments commissions) and developing the external control of the judicial power (this is the role of the advisory and investigative commissions).

### C. CSJ powers

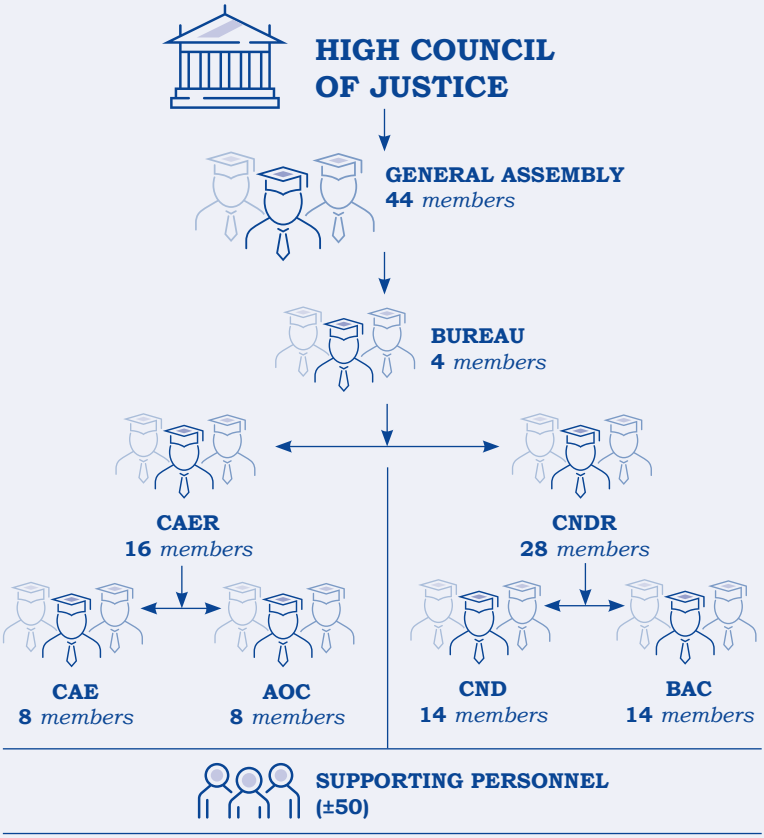
The CSJ's scope of competence is twofold:

1. Its Assignments and Appointments Commission (CND) organizes the selection of magistrates (organization of oral and written tests within the framework of the skills test or competition) and the appointment of magistrates to vacant positions, and the appointment of magistrates to posts of director.
2. Its Joint Investigative and Advisory Commission (CAER) exercises external control of the judicial order (audit, special investigation, appeals) and has an advisory competence.

The CSJ has no competence in the criminal or disciplinary field. The disciplinary field is the competence of the disciplinary jurisdictions. In Belgium there are two disciplinary courts of first instance (one French-speaking and one Dutch-speaking) and two disciplinary courts of appeal (one French-speaking and one Dutch-speaking). These are non-permanent jurisdictions, composed of effective magistrates who participate in them without payment, in addition to their main activity.

In addition to its two main competences, the CSJ also deals with topics that appear in its several-year plan (requirements for magistrates, barometer of Justice, digitalization of Justice, alternative ways to dispute resolution).

## D. Structure and composition of the CSJ



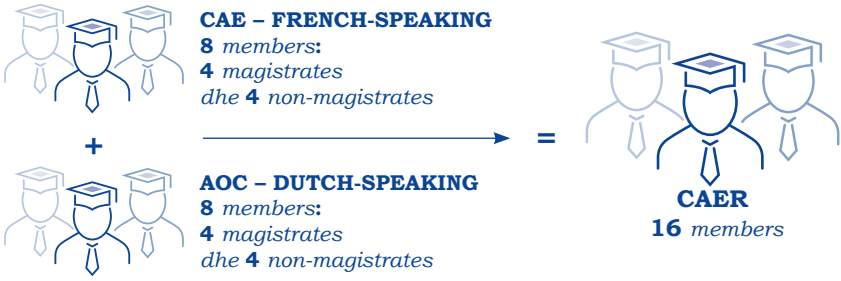

The CSJ is composed of 44 members, of which 22 are magistrates elected by their colleagues, and 22 non-magistrates (lawyers, university professors, members of civil society). 22 members are French speakers and 22 are Dutch speakers. All 44 members work within a 4-year mandate. Currently, the mandate started on 10 December 2020 and will end on 10 December 2024. 4 members out of 44 form the Bureau and work there full time. The Bureau is a management and execution body. It meets every week.

The chairmanship of the CSJ is ensured in turn during 4 years by the 4 members of the Bureau.

The General Assembly is the decision-making body of the CSJ. It convenes on average 3-4 times a year. All 44 members are divided in 4 commissions that meet on average every week. (French-speaking Assignments and Appointments Commission - CND, Dutch-speaking Assignments and Appointments Commission - BAC, French-speaking advisory and investigative commission - CAE - and Dutch-speaking advisory and investigative commission - AOC). All 44 members benefit from the support of the CSJ administration, whose members are permanent (+/-50 people).

## E. CSJ Joint Investigative and Advisory Commission

### 1. Composition of CAER




### 2. Operation of CAER

CAER meets as often as necessary and at least twice a year. The Chairman convenes the CAER when requested by at least four members. In practice, it is convened periodically every 2 - 3 weeks. CAER Presidency during the 2020-2024 term: (i) 10/12/2020 - 9/12/2022: Frank FRANCEUS; and (ii) 10/12/2022 - 9/12/2024: Valérie DELFOSSE.

## 3. Powers of CAER

CAER is competent to give opinions and make proposals. It conducts special investigations in case of malfunction and audits of the judicial system. It is also provided with other powers, such as the supervision and promotion of internal control, the determination of general profiles of directors and the formulation of recommendations. In the end, it handles the complaints of the litigants from each commission.

### a) **Advisory competence**

CAER prepares opinions and proposals on laws related to the general functioning of the judicial system. The request for opinion often comes from the Minister of Justice and sometimes from the Chamber.

CAER is not obliged to give an opinion. It may not give an opinion because it does not have sufficient capacity at a given moment or because the deadline given is too tight, or because the law does not concern the judicial system. The opinion has no suspensive effect on the legislative process and is not binding.

When an opinion is drawn up and approved by CAER, then by the general assembly, it is communicated to the interested parties (minister, chamber, senate, first presidents and general prosecutor) and, as the case may be, other interested authorities (the Consultative Council of Magistracy, College of courts and tribunals, College of Prosecution, or other).

The Opinion is also published on CSJ's website, CSJ's Twitter account and LinkedIn account and is sometimes the subject of a press release.

b) **Special investigations**

CAER can undertake a special investigation on the functioning of the judicial system (259bis16 of the Judicial Code) regarding certain malfunctions or violations, excluding any competence related to criminal or disciplinary liability.

Since January 1, 2020, files in process can be consulted (e.g. EP Chovanec), without interference or influence on their content. The CAER may decide to undertake a special or ex-officio investigation (for example, following a complaint or on the basis of information released to the media), or at the request of the Minister of Justice, the Chamber or the Senate. In 22 years, CAER has conducted 14 special investigations, of which, 7 on its own initiative and 7 at the request of the Minister.

Example: the investigation into the Chovanec case and the Steve B case.

The head (= the head of the jurisdiction or the head of a prosecution office) is in principle the one who leads the investigation, but in practice, it is the CAER that carries it out. Specifically, it is the auditors who go to the field and do so under the guidance of a CAER member magistrate. Auditors follow a methodology similar to that used in audits and in observance of professional secrecy and RGPD.
After the investigation, a report is drafted that is approved by the CAER and then by the general assembly. The report is published on the CSJ website. The report contains findings, an analysis, an assessment and recommendations regarding the interested subjects (jurisdictions, prosecutors, colleges, ministers, IFJ, legislators, SPF of Justice, or others) in order for justice to function optimally. The recommendations are not binding, but have a moral weight and do not in any case infringe the independence of the magistrates.

A follow-up of the recommendations (follow-up) can be carried out about 2 years later, to verify what initiatives have been taken by the structures to which the recommendations were addressed in order to implement them. A new report is then drawn up. Example: EP's follow-up in the Steve B case.

c) **Audits**

In exercising its powers, CAER has the right to conduct an audit of the functioning of the judicial system. Since 1/1/2020, the files in the process can be examined, however, without being able to intervene in handling the files on the merits. The difference with a special investigation is that the latter is related to specific malfunction or violation.

Audit topics are selected by CAER and must be of interest to the judicial system. The topic can also come from a jurisdiction's request. For example, the first president of the Brussels Court of Appeal recently requested the CSJ to conduct an audit of the court in order to propose recommendations to eliminate the judicial delays accumulated since 20 years in the Court.

CAER plans audits and conducts them following a precise methodology that reflects international standards in the field of auditing (Intossai standards). This methodology has been adapted as a practical guide for internal use.

Specifically, the scope of the audit is determined by CAER, then the auditors are tasked with the field phase (interviews). The auditors then draft a report, which is discussed by the CAER and then approved. The General Assembly is not competent to approve audit reports. The audit report contains recommendations for stakeholders. (SPF of Justice, Ministry of Justice, Colleges, legislators, IFJ, managers, or others). These recommendations are

not binding and observe the independence of magistrates.

Within two years, a follow-up of the recommendations can be carried out (follow-up) to verify what initiatives have been taken by the structures to which the recommendations were addressed in order to implement them.

Example: audit on the impact of the Covid crisis on Justice; on the evaluation system of magistrates; property administration control; Namur prosecution office, Brussels Court of Appeal.
Audit reports and special investigation reports are published on the CSJ website, but it may be decided that some reports will be partially published.

d) **Complaint handling**

CAER is competent for any commission to receive and examine complaints filed by litigants. Complaints are essential to understand citizen perceptions and learn from them. To be admissible, a complaint must be in writing, dated and signed by the complainant and contain their full identity. An anonymous complaint is unacceptable.
A complaint will not be handled if it: (i) belongs to the criminal or disciplinary powers of other instances; (ii) relates to the content of a court decision; (iii) if its scope can be achieved or could have been achieved through the exercise of the right of recourse in an ordinary or extraordinary manner; (iii) has been handled in the meantime and does not contain any new elements; (iv) is obviously unfounded.
The decision not to handle a complaint must be reasoned and there is no possibility of recourse. When it is the case, the complainant addresses to the competent instances that must inform the advisory and investigative commissions in a reasonable manner regarding the progress of handling the complaint.

Complaints are made known to the head of the jurisdiction or the prosecution office and the directors or superiors according to the hierarchy of the persons who are part of the scope of the complaint. Persons who have been notified of the complaint have the right to make oral or written statements. The advisory and investigative commissions may request more information from these persons, provided that they simultaneously notify their director or superior according to the hierarchy.

The advisory and investigative commissions inform the complainant in writing about the progress of handling the complaint. When the complaint is well-founded, the advisory and investigative commissions can address to the interested bodies and the Minister of Justice any recommendation that may offer a solution to the problem raised, and any proposal that aims to improve the general functioning of the judicial system.

Example: Report on the welfare of inmates. Each advisory and investigative commission prepares at least once a year a written report on the follow-up of complaints received.

In the report published in 2021, it can be seen that in 2020, the CSJ closed 254 complaint files. Admissible complaints contained a total of 496 claims, where 35.28% of these claims were related to decisions taken by the magistrate and contested by the complainant. The CSJ stated 36 well-founded claims, which consisted of: (i) the slowness of the procedure; (ii) the long term for solving the case; (iii) slowness in the decision-making time; (iv) lack of responses to requests; (v) unilateral conduct of the magistrate.

## DEVELOPMENT OF CONTROL AND INSPECTION PROCEDURES OF THE JUSTICE SYSTEM THROUGH THE APPLICATION OF NEW TECHNOLOGIES.

**Amparo Camazon Linacero**
*Head of the Inspection Service,*
*High Council of Judiciary, Spain*

Ms. Amparo Camazon Linacero has been part of the judicial system since 1980. She was first appointed to the Presidency of the 14th Section of the Madrid District Court and then in accordance with the Decision dated March 27 of the Plenary Meeting of the General Judicial Council (published in the Official State Bulletin, March 28) carried out the duty of magistrate at the Inspection Service institution. With the decision dated 6 February 2020 of the Plenary Meeting of the General Council of the Judiciary, Ms. Amparo Camazon Linacero was appointed the Head of the Inspection Service.

**Elena Burgos Herrera**
*Inspector,*
*High Council of Judiciary, Spain*

**Ms. Elena Burgos Herrera** has been part of the judicial system since since 2000. She was initially appointed to the Social Court no. 21 of Madrid and then in accordance with the Decision dated 24 February 2016 of the Plenary Meeting of the General Judicial Council (published in the Official State Bulletin, dated March 7) she has exercised the duties of the delegated inspector at the Inspection Service. With Decision no. 8, dated 27 February 2020, of the Plenary Meeting of the General Judicial Council, Ms. Elena Burgos Herrera was appointed Assistant Magistrate at the Inspection Service institution.

## I. The mission of the CGPJ Inspection Service in Spain

The task of the General Council of the Judiciary (CGPJ, hereinafter) of Spain is to control the functioning of the courts and tribunals through the conduct of inspections, which have been approved by the General Judicial Council. At the same time, the scope of this control is the fulfillment of the duties of the judicial staff, paying special attention to the requirements for a quick and efficient handling of all court cases.

Therefore, one of the main functions of the IS is to carry out inspection visits, whether ordinary, extraordinary, pre-scheduled or on-the-spot inspections, which, traditionally, are carried out in person for which a team composed of delegated inspectors and lawyers (at least one of each category) travel to the inspected judicial body to meet with the people who serve in the body (judges and magistrates, lawyers of the Administration of Justice and officials), check the state of the facilities, examine the proceedings,

books and accounts and everything else related to the activity of the judicial body.
On its negative side, it should be noted that the inspection does not cover issues of a jurisdictional nature, nor the way in which judges and courts apply and interpret laws and the legal system. Judges and courts are subject to the Constitution and the Law (articles 9.1 and 117.1 of the Constitution and 1 of the Organic Law on the Judiciary - LOPJ), without the General Council of the Judiciary issuing instructions, of a general or particular nature, addressed to judges and magistrates, on the application or interpretation of the legal system that they carry out in the exercise of their jurisdictional function, as expressly provided in article 12.3 of the LOPJ.

## II. The implementation and use of information and communication technologies (ICT) in the administration of justice.

In the last decade, in Spain, a firm commitment has been made to the implementation and enhancement of the use of information and communication technologies in the Administration of Justice.
The first steps were taken in Organic Law 16/1994, of November 8, which reforms Organic Law 6/1985, of July 1, on the Judiciary, which introduced, for the first time in our legal system, the possibility of using technical, electronic and computer means for the development of the activity and the exercise of the functions of courts and tribunals. The reform included the possibility of providing new documents or communications with the validity and effectiveness of the originals, provided that the authenticity, integrity and compliance with the requirements of the procedural laws were guaranteed.

On 22 April 2002, the Plenary Session of the Congress of Deputies approved a non-legislative proposal on the Charter of Citizens' Rights before the courts. This Charter states in its preamble

that, on the threshold of the twenty-first century, Spanish society urgently demanded a more open justice system that would be able to respond to citizens with greater agility, quality and efficiency, incorporating more modern and advanced methods of organization and procedural instruments. Entitled 'Modern justice open to citizens', the first part of the Charter sets out the principles that should inspire the achievement of that objective: transparent and comprehensible justice. Paragraph 21, delving into the need for justice to be technologically advanced, recognises the right 'to communicate with the Administration of Justice by means of e-mail, videoconferencing and other telematic means in accordance with the provisions of procedural laws'.

In response, Law 18/2011, of July 5, regulating the use of information and communication technologies in the Administration of Justice was approved, which, among other aspects, regulates the electronic judicial file defined as the set of electronic documents corresponding to a judicial procedure, whatever the type of information it contains.

Since then, all the administrations involved have made an important effort to implement and deploy the electronic judicial file, which has resulted in the files that must be examined in face-to-face inspections being increasingly electronic, without physical support.

## III. Telematic inspections

In line with this, since 2018, the SI was evaluating the possibility of using new technologies in the performance of inspections and introducing a new modality of inspections: telematic inspections.
The main obstacle to its implementation was the unique organization of justice in Spain, in which the CGPJ, the Ministry of Justice and the autonomous communities that have competences in matters of Administration of Justice transferred (Andalusia, Aragon, Principality of Asturias, Canary Islands, Catalonia, Cantabria,

Galicia, Madrid, Navarra, Basque Country, La Rioja and Valencian Community) participate.
In the aforementioned organization is the Ministry of Justice, with respect to the autonomous communities that do not have transfers in matters of Administration of Justice (Balearic Islands, Castilla-La Mancha, Castilla y León, Extremadura and Region of Murcia), and the autonomous communities with transferred competences are the holders of the material means of courts and tribunals, including the different Procedural Management Systems (GSP) in which the electronic judicial files containing all the information related to the judicial procedures are integrated and processed, so that all the members of the judicial body involved in the processing of a certain procedure can access the information associated with it with reservation guarantees, control and confidentiality.

In these conditions, in order for the SI of the CGPJ to be able to access the judicial files, it was essential to sign agreements with the Ministry of Justice and the autonomous communities with transferred competences in matters of Administration of Justice, with the aim that the delegated inspectors and lawyers of the SI, in the exercise of the functions attributed to them, they can access remotely, from their own computer terminals, the judicial files and electronic books of each of the courts and tribunals that have their headquarters in the territory of those, as well as the implementation of a new inspection modality (telematic inspections), through the use of new technologies, which was used a novelty and a great advance for the organization of the IS by allowing inspections to be carried out in which the judicial proceedings and electronic books are examined and interviews to be carried out by videoconference, and, therefore, to evaluate the situation and determine the dysfunctions presented by the inspected body, with similar amplitude that is carried out in face-to-face inspections, but without the need for the inspection team to travel to the headquarters of the inspected judicial bodies.

As a result of the declaration of the state of pandemic, the signing of the above-mentioned agreements was promoted and at the beginning of July 2020, the elaboration of a protocol for the realization of telematic inspections was finalized, which was approved by agreement 6-8 of the Permanent Commission dated July 16, 2020.

Since then, the inspection service has carried out numerous telematic inspections (53 in 2020 and 25 in 2021) in those territories where there is an agreement (Andalusia, Aragon, Asturias, Cantabria, Valencian Community, Galicia, La Rioja and Navarra), with very good results.

The usefulness of the implementation and carrying out of telematic inspections was especially highlighted by allowing the performance of the primary activity of the SI to continue, during the health emergency and the declaration of the state of alarm, eliminating displacements and respecting the sanitary measures recommended by the health administration, with a low cost. For this reason, the assessment of this new way of carrying out inspections is very positive.

## IV. Virtual inspections

Telematic inspections are not the only type of inspection in which information technologies are used in Spain.

In 2012, the so-called virtual inspections were introduced, which are carried out twice a year and include the evaluation of all the judicial bodies of the national territory (with the exception of the Supreme Court and military courts and tribunals), through the information contained in the General Council of the Judiciary, fundamentally, that which appears in the statistical bulletins and in the documents of the Council. This process consists of analyzing the significant differences that each organ presents with respect

to the averages of the organs of the party or, where appropriate, of the province, of the autonomous community or at national level, in relation to a series of established parameters.

This was the first major advance in the use of the technological means that are available to the SI, but this type of inspection is limited since it does not include the examination of the actions or the books and accounts which is essential for the verification and control of the functioning of the Administration of Justice, however, it makes it possible to check the situation of all the organs of the national territory and to detect those that present deviations from the established parameters by carrying out comparative studies of the situation of each organ in relation to those of the same class of its territory and national.

## V. Conclusion

In short, the performance of virtual and telematic inspections is a firm commitment to the use of information and communication technologies (ICT) to optimize the operation of the IS and is aligned with the mission, vision, values and quality policy of the organization that, inter alia, provides that the inspection service is committed to efficiency, quality and the spirit of creativity and innovation of the resources used in carrying out inspection activities, social responsibility and respect for the environment, to which the reduction of the use of paper contributes, and the rationalization of public expenditure.

# TRANSITION FROM INSPECTION BODIES BASED ON THE EVALUATION OF JUDGES AND PROSECUTORS (INSPECTIONS TO MAGISTRATES) TO SERVICES RESPONSIBLE FOR EVALUATING THE QUALITY AND PERFORMANCE OF COURTS (COURT-BASED INSPECTIONS). SOME LESSONS FROM PROJECTS IN COUNCIL OF EUROPE MEMBER STATES AND BEYOND. POSSIBLE METHODS AND CHALLENGES FOR THE INSPECTION SERVICES.

**Vincent Delbos**
*General Inspector of Justice (honorary), member of the Committee for the Prevention of Torture, Council of Europe*

Mr. Vincent Delbos has been a judge for years, and a member of the Commission for the Prevention of Torture at the Council of Europe.

At the same time, Mr. Delbos has held the position of General Inspector, at the General Inspectorate of Justice at the Ministry of Justice of France. Mr. Delbos also held the position of General Controller of Places on the Prohibition or Restriction of Freedom at the Ministry of Justice.

**Abstract of presentation**

How to go from "inspection bodies responsible for evaluating judges and prosecutors" ("judges-based inspections") to services that are responsible for evaluating the quality and performance of courts (court-based inspections)?

During my presentation, I would like to take you on a short trip to some member countries of the Council of Europe and beyond. A journey through several justice systems that are in trouble, even in crisis, where citizens seek to strengthen them.

We live in a strange paradox: never has the demand for justice been so strong and never have justice systems been in such a bad shape. Six months ago in France, more than half of the judges and prosecutors signed a petition to report working conditions, which led to the establishment by the executive of general assemblies of justice, as at the time of the French Revolution.

In Armenia, one of the foundations of the 2018 velvet "revolution" was the demand for a less corrupt, more independent and impartial judiciary.

In the southern Mediterranean countries, the social movements of recent years have put the citizens' demand for justice at the center of their claims.

There is a starting point: the need to evaluate justice, a key element of citizens' trust in the rule of law.

Who evaluates justice systems? external auditors? civil society organization? citizens? the executive? the legislative?

The need for this assessment is important, since overall, if we look at

CEPEJ's reports, justice as a public service is still in high demand, is still underfunded and often does not perform its function. Under these conditions, the question arises: In which directions should the resources for financing the justice system be increased?
In this context, the activities of the bodies, which are competent in this field, are under discussion in several aspects:

- Which bodies have knowledge about the functioning of the justice system;
- What impact do a series of processes such as the administrative investigation or the evaluation of the work of magistrates have in relation to the functioning of the justice system. Rights and obligations;
- What are some of the lessons learned from recent projects;
- How can one go towards the process of inspection of the justice system in order to improve the functioning of justice systems.

**1. What impact do a series of processes such as administrative investigation or evaluation of the work of magistrates have in relation to the functioning of the justice system. Rights and obligations.**

The measures taken so far show that the main activity of competent bodies for the inspection of justice systems is focused on conducting administrative and disciplinary investigations into the work of magistrates. These measures consist of working methods or practices, which aim to respect the principle of adversariality, transparency, effective protection or the definition of deontological rules of the professional behavior of magistrates.

These measures indirectly reflect the expectations of the justice councils as bodies responsible for the management of the justice system, but do not necessarily reflect the expectations of citizens or other users of the justice system.

The manner in which administrative investigations are initiated, which have an individual character (and are carried out on a case-by-case basis), and the reasons for which the administrative investigation was initiated partially reflect the shortcomings or difficulties faced by the justice systems. Such information obtained through the conduct of disciplinary investigations can be supplemented with additional information from the activity of the inspection bodies related to the work evaluation or the professional evaluation of judges and prosecutors. Such information is an important indicator for the functioning of justice systems, but they are not clear and complete.

Since the indicators related to the assessment of the work of judges and prosecutors aim to measure the compliance of the activity of magistrates with the rules and procedures, they reflect only a part of the activity of the justice system. Inspection services, which apply full 360° assessment methods and are generally carried out by Councils of Justice, are still rare. In these conditions, it is concluded that the conduct of disciplinary investigations or processes of evaluation of the work of magistrates are useful but insufficient to give an exhaustive picture of the functioning of justice systems.

## 2. Some lessons learned from recent projects

In order to improve the performance of justice systems, to reduce timelines, to understand the workload of judges, and to make possible the distribution of cases in the most objective way, it is necessary to take further measures. Justice systems must be provided with special structures, which make possible this "endogenous" review of their functioning.

Many recent projects show the need to go further, but also that it is possible to move from inspections based on judges to inspections

based on the analysis of the functioning of courts and tribunals and that this approach is promising.

- In Jordan, the European Union supports a project to strengthen the judicial inspectorate, whose main function is the inspection of judges, their assessment, but also that of courts and tribunals. At the same time, for disciplinary purposes, this body has been entrusted with the handling of citizens' complaints regarding the justice system. Si mund të bëhet e mundur kjo? How can this be possible? Analyzing these complaints based on several criteria such as: (i) is it an individual malfunction that has been reported or a structural issue? (ii) Does the repetition of complaints and allegations regarding some kind of dispute not raise issues of misuse of human resources? (iii) useful elements for the High Judicial Council (HJC) in order to better provide some courts with judges and personnel. Only an inspection based on a detailed analysis of the functioning of the courts is able to bring data, an objective and impartial panorama that will help the decision-making of the HJC, or other legislative bodies.
- In Armenia, the issue is somewhat different: there is a request to co-build a court evaluation instrument useful for judges and support services. The evaluation culture is new and therefore the data assurance culture is weak. The set of tools exists, it is that of CEPEJ, in relation to decisions, inventories, complex cases, or workload. To implement or pilot the necessary training of actors, there is certainly an inspectorate, but it has an exclusive mandate and is defined only for disciplinary procedures, and is concentrated in the hands of the executive power. Under these conditions, the question arises, who will do it? Who will produce the necessary guides and dashboards? The Supreme Judicial Council (SJC), the equivalent of the justice council that is simultaneously charged with the quadrennial evaluation of judges, should have been initially charged with conducting this evaluation as well.

- The main activities of RESIJ, firstly undertaken through the project of evaluation of civil cooperation instruments and then within the framework of cross-border measures for the protection of vulnerable persons were an indicator of the need and usefulness of the application of the thematic approach, more comprehensive and with a global character.

The activity of some inspectorates is mainly focused on controlling the activity of the courts according to a bottom-up approach, but this process is not followed by all inspectorates. My opinion is that all inspectorates should follow this path. From recent experience, it appears that there is a tendency that inspectorates are increasing and strengthening their new powers in this regard.
Since the inspectorates are mostly made up of magistrates, who have knowledge about judicial processes and decisions, the principle of adversariality, the principle of equality of arms, these bodies have played a key role in improving the efficiency of the justice system.

### 3. How to go further?

Many examples show that there are other paths that can be followed that guarantee safety, such as:

- In-depth inspections related to the functioning of courts and tribunals. But is this always possible? In this case, we can refer to the example followed in Jordan regarding the inspection of trial procedures and the activity of the national criminal court.
- Conduct of thematic analyzes related to the internal functioning of the justice systems, such as:

- Analysis of the impact of a reform: for example the appointment of specialized judges, the effects of removing from the judicial jurisdiction a particular category of cases or other.
- By examining a problem, from the point of view of organization and structure, human resources, the organization and operation of a certain jurisdiction, or the division of labor.

- Assessing the role that justice systems can fulfill in the regulation of a number of new cases or disputes such as justice and environment.

As per above, it is concluded that this path is not only possible, but also necessary. Of course, it changes the profession of the justice inspector, who nevertheless does not become a form of super-consultant because he is part of the justice system, but can be a useful advisor to the justice system and play a stimulating role in the changes that are happening.

## CONCLUSIONS OF CONFERENCE

**Artur Metani**
*High Inspector of Justice of Albania*

Mr. Artur Metani completed his studies at the Faculty of Law, University of Tirana in 1996. During the years 2002-2012, Mr. Metani worked as a Legal Advisor to the President of the Republic of Albania, as well as during 1998-2008 was engaged as an assistant professor/lecturer of Constitutional Law at the Faculty of Law, University of Tirana.

For the period 2013 - 2017, led the Department of Legislation, Program Monitoring and Anticorruption at the Council of Ministers. While during 2017-2018, was a substitute member of the Venice Commission whilst held the position of Director General, Regulatory and Compliance Department, Council of Ministers. During 2018 - 2020, Mr. Metani held the position of State Advocate General, as well as being a member of the Steering Council of the School of Magistrates. Currently holds the position of High Inspector of Justice elected by the Assembly of Albania with decision no. 2/2020.

**Abstract of presentation**

The quality of justice is a priority for all countries. The concept of "quality of justice" does not only include the quality of judicial decisions, which are generally subject to control within the judiciary itself but includes several elements related to the proper functioning of the justice system. This important mission, regarding the guarantee of these standards, has been entrusted to our institutions, the inspection institutions.

The basic principles applied in the organization of the judiciary are based on the universal principle of judicial independence. It must be

acknowledged that the increase of competence and independence of magistrates must be accompanied by an accountability system. This is because independence is not a privilege, but a responsibility. In this case, there must be a continuous process of balancing independence and accountability. On the other side, the level of citizens' trust in the judiciary is a very important element of the justice system. However, gaining public trust does not mean that the judiciary must be under constant pressure to make decisions that the public must like or necessarily accept them.

A court decision can provoke public opposition and even rage or a sense of protest. But, in this case, the reaction is important. Court decisions may be the subject of public discussion and debate, but they are always binding for implementation. The highest form of public trust in the justice system is respect and recognition of the "legitimacy" of the judicial power.

***

***Dear colleagues,***

Improvement of justice quality, beyond the differences between countries, is not a final station for anyone, but a dynamic and an constantly evolving process. However, finding a balance between the public's right to know how justice is administered by courts and prosecutors, and on the other side, the independence of judges and prosecutors, has been and remains fundamental for all countries. Finding this balance is not at all simple, it is not written somewhere, but it derives from the best experiences, studies and analyses, evaluation of the issues before us, in relation to these constitutional principles.
In this perspective, the conference program was intensive, and the issues discussed were numerous. But I believe it was a necessary and very fruitful debate for all of us. And in an effort to synthesize some thoughts and feelings that came from this conference, but

personal too, I consider that my thoughts are expressed in the format of some basic concepts or factors that are closely related with each other and which affect the proper functioning of the control system of magistrates and, as a result, of the justice system.They are as follows:

## ► QUALITY OF JUSTICE

- The quality of justice is a priority for all countries. There are problems which are the same for European Union countries. Some of them are the same for all Council of Europe countries and others are specific to each of them.
- Improving the quality of justice is a dynamic and constantly evolving process. Achieving this goal requires an ongoing need to respond to the challenges of identifying new mechanisms to protect them.
- The activity of magistrates, but also courts, prosecutors' offices or other justice institutions should be subject to control or evaluation in terms of quality and efficiency of their activity.
- The concept of "justice quality" does not only include the quality of court decisions, which are generally subject to control within the judiciary itself but includes a number of elements related to the proper functioning of the justice system such as clarity of court proceedings and decisions, access of individuals to the organs of the justice system, infrastructure, deadlines or mechanisms made available to the public.
- The efficiency of the work of magistrates on the one hand and of the justice systems on the other is a necessary condition for protecting human rights, respecting requirements of a fair trial, having legal certainty and guaranteeing public trust in the rule of law.

## ► PUBLIC TRUST

- The level of citizens trust in the judiciary is a very important element of the justice system. In a democracy, justice is done on behalf of the citizens. Public trust is essential for the rule of law and this legitimacy requires the commitment of all societies to maintain this trust.
- Public trust and respect for the judiciary are guarantees of democracy and stability in a democratic society. The level of citizens trust in the judiciary is a very important element for the justice system, as it is an important indicator to evaluate how the justice system works and the rule of law in a country.
- In this context, not only should a magistrate be responsible for respecting or not the legal norms, but should also be responsible for the people, society, and state authorities, having in this way a direct effect on the public perception and trust in the justice system.
- However, gaining the trust of the public does not mean that the judiciary must be under constant pressure to make decisions that the public must like, or necessarily agree with. On the contrary the courts should be independent and should not be influenced by the public perception on a particular issue.
- A court decision may provoke public opposition and even anger or a sense of protest. But in this case the REACTION matters. The way the public reacts to a court decision, as well as the debate created, serves not only as inspiration and as an aid to building the social and political character of a country's society, but also as an indicator of its level of trust in the justice system.
- Judicial decisions can be subject to public discussion and debate, but they are always binding. The highest form of public trust in the justice system is the respect and recognition of the "legitimacy" of the judiciary. This is achieved when the citizens of a country devotedly recognize, implement, and

respect the decisions of the judiciary, acknowledging its "legitimacy" in every case, regardless of whether they agree with it.

- Now our common challenge is no longer the time to gain the public's trust in the justice system, but to build a justice system that is respected by the public.

## ► INDEPENDENCE OF MAGISTRATES

- The justice system, in addition to the features and specifics that it may have in different countries, is characterized by the same values, and it operates on the same international standards and principles of its organization and functioning.
- The basic principles applied to the organization of the judiciary are based on the universal principle of judicial independence. An independent and impartial judiciary is the institution with the highest value in any society and constitutes an indispensable pillar of democracy and the rule of law.
- The independence of the judiciary can be accompanied by structural, institutional and legal changes, but it can only succeed when a country's society has faith in the legitimacy of the judiciary and shows a real commitment to this standard.
- There is an important tendency to ensure the independence of the judiciary through formal guarantees and fixed procedures. However, it is important to acknowledge that the judicial systems in different countries have evolved or have had different paths of their consolidation. Thus, it is debatable whether a uniform international standard should be applied.

## ► ACCOUNTABILITY SYSTEM

- It should be acknowledged that increasing the competence and independence of magistrates should be accompanied by

an effective accountable system.

- This is because independence is not a privilege, but a responsibility. In this case, there must be a continuous process of balancing independence and accountability. These processes must be characterized by action and counter-reaction at the same time. The more powers the judiciary possesses, the higher the demands for accountability must be.
- The function of independent magistrates charged with interpreting and enforcing the law is universally recognized as the fundamental feature of the modern democratic state, the cornerstone of the rule of law itself, but this power is not absolute. This is because magistrates are representatives of public bodies and they have only that power which is assigned to them by the legal order.
- To this end, it is necessary for the governing bodies of the judiciary to have an active approach to the **accountability system** of magistrates by applying new approaches, which consist in the combined application of the standards of their **accountability** and **liability**.
- The accountability system of magistrates should not be misused by other bodies of government in order to control and violate judicial independence.
- The accountability system should be guided primarily by the notion of magistrates' liability, as a preventive mechanism that ensures the development of an independent and impartial judicial system.

## ► LIABILITY SYSTEM

- If these remedies are not effective, then in exceptional cases, as well as depending on certain circumstances, measures on their criminal, civil or disciplinary liability may be applied, always within a regular legal process, pursuant to Article 6/1

of the ECHR

- The most important consequence of the principle of independence of magistrates is immunity for the decisions they deliver according to their conviction, based on law. However, the consequence of the power and trust that society gives to magistrates is such that there must be several ways to hold them accountable, including removal in the event of violations that justify this action.

## ► ORGANIZATION AND FUNCTIONING OF INSPECTION SERVICES

- The national legislations of different countries provide different models of organization, functioning, or relations that the inspection bodies of the justice system have with other institutions.
- Each selected model must be understood as a result of the historical developments, the legal and constitutional tradition, or the political and social one of each country. These factors also dictate the result achieved.
- While the exercise of the right to appeal and control by a higher court and within the judiciary itself is the mechanism traditionally implemented by justice systems to guarantee the control, the quality of a judicial process, or the merits of the law, today this mechanism is complemented by other external forms of control to measure or monitor the quality of justice in the context of the proper conduct of court proceedings and the effective management of the justice system organs.
- This important mission, regarding the guarantee of these standards is entrusted to our institutions, inspection institutions.
- Inspection services should adapt and apply special control methodologies, and this process should be carried out gradually and based on a set of well-defined criteria, standards

and guarantees.

- The rules regarding their organization and functioning should be clearly and exhaustively defined in the highest hierarchical legislative acts such as the Constitution or at least in the primary legislation of each country. This serves as a guarantee and stability for their activity.
- Another important aspect related to the organization and functioning of inspection services is the guarantee of independence and impartiality of its activity. The inspection service should be independent of the executive and the legislature and of the body that decides on the imposition of disciplinary sanctions. This should be achieved through the application of policies or measures aimed at guaranteeing the substantial, structural, and financial independence of these bodies. On the other hand, in order to ensure credibility and legitimacy, the recruitment or selection of employees should be done on the basis of merit.

## ► COOPERATION BETWEEN INSPECTORATES

- To achieve these things, we all need to work together. We all need to analyse and coordinate methods of controlling and evaluating justice institutions.
- This should be done through periodic meetings; exchange of experiences; unification of best methods and practices in accordance with the standards of democracy and the rule of law; creation of legal, administrative or practical mechanisms of cooperation; data exchange and mutual legal assistance between states.
- At the same time, this process should be carried out taking into account the implementation of European Union standards transposed into national legislation; principles, spirit and jurisprudence of the European Court of Human Rights, or the European Court of Justice; acts of the Council of Europe;

as well as in applying the methods, instruments and best practices of the European Commission for the Efficiency of Justice (CEPEJ), to increase the quality and efficiency of the judicial system.

- In doing so, we will all contribute to the proper functioning of the organs of the justice system and to the improvement of the quality of the justice system, thus, achieving our common goal.

***Dear colleagues,***

*Dear reader,*

Justice has its own contribution to life and quality of every society. Establishing or consolidating the rule of law is not an easy process. In any country, this is a dynamic and constant evolving process of finding the appropriate mechanisms to ensure compliance with a set of standards or values for an efficient, accountable, and independent justice system.

An efficient and accountable justice system, and a functioning democracy cannot be established nor succeed if they are not firmly based on the long-term vision of balancing the public interest in the work of magistrates and their independence. This independence is not and should not be seen as a principle to defend law infringements that magistrates may commit or as an excuse to avoid their legal responsibility. Not at all! But, if a judge or prosecutor is held accountable today, because society does not agree with his decision or because society does not orient itself to institutions, which the Constitution, the law and the rule of law have established, precisely for the treatment of objections against judicial system or worse, because other powers want to benefit from the legal impossibility of public reaction of judges and prosecutors, then we cannot have a functional democracy, but only prolong our agony in efforts for development.

On the other side, this principle of the separation of powers cannot succeed, and then the rule of law itself cannot succeed, if we do not nurture justice as a social value, we do not nurture the separation of powers, as a system that guarantees impartiality and self -possession. Justice cannot be statistics. It should be standards. Judges and prosecutors come from our societies, which we together are trying to consolidate. So even magistrates reflect the good and bad of our societies, our character, and our problems. For this reason, I think, that justice cannot simply be numbers of dismissed and prosecuted judges and prosecutors, but only nurtured and established standards for the future. And for this reason, the consolidation of the rule of law is not a battle of justice institutions alone. Undoubtedly, they have the biggest role and responsibility. But it is the moral responsibility of us all, also of other institutions, of politics, of the media, of society in general, to nurture the sense of right and separation of duties in a democratic state.

For this reason, conferences, or meetings like the one held this June in Tirana, serve best to the exchange of opinions on these issues, finding the best practices as a response to the dynamism of social developments and above all in accordance with the standards and the vision of separation of powers. This, not only for the increase of cooperation between our offices. But, I would like to highlight that respect for human rights, democracy and the rule of law constitute a main asset for the European Union and their preservation constitutes a common responsibility for all EU institutions, as well as its member states. However, the approach to them should not be seen as a limit, obstacle, or condition to other non-member states, but as a symbol that unites us all. Before being a political project, Europe is a system of human values. In the words of Jean Monnet, the European Union does not aim merging of states, but above all merging of people who believe and live in the European value system.