International Forum "High Culture of Jurisdiction"

IMPARTIALITY AND QUALITY OF THE JUDGE: ORDINARY AND PROFESSIONAL PROFILES IN COMPARATIVE PERSPECTIVE

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PARAGRAPH 3: AT THE MICRO LEVEL, THE QUALITIES OF THE JUDGE (Ethics, Professionalism, Recruitment)

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1. The International Association of Judges (IAJ) and its Role in Defence of the Principles of Judicial Independence.

In the very few minutes available for this presentation it will not be possible to describe the richness of the debates, the variety of the positions and the number of experiences that can be summarized under this title.

We'll therefore try to tell about the experience, on such issues, of one of the organization that stand among the organisers of this event: which is to say the International Association of Judges (IAJ).

The IAJ was created in 1953, after the end of the Second World War, to establish a better understanding between the judicial systems of the member Countries. It currently includes representatives from 92 member Countries from all the five Continents. The IAJ is a nongovernmental organization that does not admit as members individuals, but only national associations of judges.

The associations must be associations of judges: which means that in those countries where prosecutors are part of the judiciary (as in Italy, in France and in

many French-speaking legal systems) they can participate as well, because of their membership of their respective associations, in the life of the IAJ.

IAJ member associations must demonstrate (at the time of admission and every three years thereafter, within a special monitoring procedure) that the judicial system in that country ensures a true independence of the judiciary, or that, if this is not the case, that at least the associations in question are fighting for the achievement of such independence. The main purpose of the IAJ is to contribute to strengthening the independence of the judiciary, as an essential attribute of the judicial function, as well as the protection of the constitutional and moral status of the judiciary and of the guarantee of fundamental rights and freedoms.

In this context, between 1993 and 1995, the various regional components of the IAJ adopted Charters on the statute of the judge:

- the "Judges' Charter in Europe," adopted by the European Association of Judges –European Regional Group of the IAJ in 1993;
- the "Statute of the Ibero-American Judge" (*Estatuto del Juez Iberoamericano*), adopted in 1995 by the Ibero-American Group of the IAJ;
- the "Judges Statute in Africa," adopted in 1995 by the African Group of the IAJ.

A few years later, in 1999, after a long process of reflection, the Central Council of the IAJ, during its annual meeting, held in Taiwan, adopted a Universal Charter of the Judge, subsequently revised, integrated and updated in Santiago de Chile, in 2017. Starting, therefore, from 1999 and since the adoption of the Universal Charter, the IAJ has conducted long and intense work on the minimum standards for guaranteeing the independence of the judiciary.

In addition, the various Regional Groups and the Central Council of the IAJ have specific rules for this organization. This, obviously, also in the wake of the approval, in the last few decades, of various international documents, many of which promulgated under the aegis of the Council of Europe: from the European Charter on the Statute for Judges, launched in 1998, to the Recommendation N°. R 2010/12 ("Judges: Independence, Efficiency and Responsibilities"), to the various opinions of the Consultative Council of European Judges (CCJE) and the Magna Charta issued by that body in 2010, to the biannual reports and works of the European Commission on the Efficiency of Justice (CEPEJ).

We may also add a reference of the effective contribution that the IAJ has provided to the Council of Europe since the end of the nineties of the last century, in the activity of assistance to the countries of Central and Eastern Europe, to assist them, with various study and support missions, in the drafting of new regulatory instruments, as well as in launching related initiatives of initial and continuing training of judges, also by effectively contributing to the creation of schools, academies, institutes and training centres for the judiciary in step with the times and compliant with international standards on the independence of the judiciary.

2. Judicial Ethics and Professionalism in the IAJ's Universal Charter.

Focusing now on the subjects of judicial ethics and professionalism, we must recognize that such themes are dealt with by a number of international documents (UN Basic Principles, Bangalore Principles, Recommendation No. R 2010/12 of the CoE, Opinion Nr. 3 (2002) – and the upcoming Opinion Nr. 27 (2024) of the CCJE, etc.).

As far as the IAJ's Universal Charter is concerned, we must first of all say that an important, clear distinction between judicial ethics and judicial discipline is drawn by Articles 6 and 7 of it. As to judicial ethics, the golden rule is enshrined in Article 72 of the Recommendation No. R 2012/10 of the Council of Europe, according to which such "principles not only include duties sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves." In other words, principles of judicial ethics do not constitute per se rules the breach of which automatically brings with it a disciplinary liability. They are, on the contrary, rules which should inspire the conduct of the judge; they should be laid down in codes of judicial ethics, elaborated by commissions of specialists, among which judges should play a leading role.

Therefore, according to the IAJ's Universal Charter (Article 6-1), "In every circumstance, judges must be guided by ethical principles. Such principles, concerning at the same time their professional duties and their way of behaving, must guide judges and be part of their training."

Some of these principles are enumerated by the Charter in Articles 6-2, 6-3 and 6-4; they deal with:

(a) the duty to be impartial (and to be seen as such);
(b) the duty to perform judicial activities with restraint and attention to the dignity of the court and of all persons involved;
(c) the duty to refrain from any behaviour, action or expression of a kind effectively to affect confidence in his/her impartiality and independence;
(d) the duty to perform judicial tasks "diligently and efficiently (…) without any undue delays";
(e) the duty not to carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge;
(f) the duty to avoid any possible conflict of interest.

Among such ethical duties we should emphasize the duty of the judge to be efficient, in full accordance with the canons set by the Council of Europe both in the Recommendation No R. 2010/12, where efficiency is defined as "the delivery of quality decisions within a reasonable time following fair consideration of the issues" (Article 31), and in the multiple activities of the CEPEJ.

Disciplinary liability is dealt with by Article 7-1 of the new Universal Charter of the IAJ. The most important rule on this subject is enshrined in the first Paragraph, according to which "disciplinary action towards judges must be organized in such a way, that it does not compromise the judges' genuine independence, and that attention is only paid to considerations both objective and relevant." For this reason, disciplinary proceedings "should be carried out by independent bodies, that include a

majority of judges, or by an equivalent body" (Article 7-1, Para. 2). Also in order to protect judicial independence, no disciplinary action can be instituted against a judge as the consequence of an interpretation of the law or assessment of facts or weighing of evidence, carried out by him/her to determine cases, save in cases of malice or gross negligence, ascertained in a definitive judgement (Article 7-1, Para. 4).

This principle must be seen in relation to Article 70 of the Recommendation No. R 2010/12 of the Council of Europe, according to which judges "should not be personally accountable where their decision is overruled or modified on appeal."

As for the procedural rules, disciplinary proceedings shall take place under the principle of due process of law. The judge must be allowed to have access to the proceedings and benefit of the assistance of a lawyer or of a peer. Disciplinary judgments must be reasoned and can be challenged before an independent body (Article 7-2, Para. 3). Article 7-2 deals with the subject of civil and penal responsibility.

As far as civil liability is concerned, the IAJ's Charter substantially differs from the principles set in the Recommendation No. R 2010/12 of the Council of Europe. Actually, whilst the latter allows legislative solutions in which (like in France or in Italy) citizens can sue the State and, at a second stage, "the State may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation," (see Article 67 of the said Recommendation), the Universal Charter stipulates that "The remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the state. It is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default."

This solution is fully compliant with the UN Basic Principles on the independence of the judiciary, whose Article 16 provides that "judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."

To conclude on this matter I would like to cite here a good example on the subject of judicial ethics.

This example is taken from the Ethical Code for Judges and Prosecutors Approved by the French High Council for the Judiciary in 2019. At page 49 of the English version, we may find a reference to the IAJ's Universal Charter, approved by the Central Council of the International Association of Judges in Santiago de Chile in November 2017. Probably it s the very first time that an official document refers in an express way to one of the official papers of the IAJ (see http://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/gb_compendium.pdf).

This is the above-mentioned reference: "1. Internationally, the principle of non-concurrent activities whether paid or unpaid is established in the Universal Charter of the Judge adopted on 14 November 2017 by the Central Council of the International Association of Judges in Article 6-4, 1, under the heading 'Outside activities': 'The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge. He/she must

avoid any possible conflict of interest. The judge must not be subject to outside appointments without his or her consent'."

3. Recruitment, Training, Assessment and Promotion of Judges in the IAJ's Universal Charter.

Recruitment and appointment of judges are contemplated in two different Articles of the Charter (4-1 and 5-1, respectively), as in many legal systems they may be the effect of two different kinds of procedures, often made by different organs. What matters here is that both proceedings must be inspired by the same basic rules, which is to say they must be "based only on objective criteria, which may ensure professional skills" (Article 4-1), or "carried out according to objective and transparent criteria based on proper professional qualification" (Article 5-1). Both proceedings must be done by (or under the supervision of) the Council for the Judiciary, or another independent body described by Article 2-3.

A subject which is closely related to the issue of recruitment has raised interest in the last months in Italy: the use of psychological tests for the candidates to the posts of judges. The subject will be dealt with separately, later on (see below, Paragraphs 4-6).

As for training, Article 4-2 states that "Initial and in-service trainings, insofar they ensure judicial independence, as well as good quality and efficiency of the judicial system, constitute a right and a duty for the judge. It shall be organised under the supervision of the judiciary." The rule appears to be similar to Article 56 and 57 of the Recommendation No. R 2010/12 of the Council of Europe, according to which member States must ensure judges "theoretical and practical initial and in-service training, entirely funded by the State," whereas judicial training must be provided by an "independent authority," in charge of ensuring that "initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office."

As far as promotions are concerned, these must be "exclusively based on qualities and merits verified in the performance of judicial duties through objective and contradictory assessments" (Article 5-2, Para. 1).

Coming now to the issue of promotions, according to the Universal Charter, "Decisions on promotions must be pronounced in the framework of transparent procedures provided for by the law. They may occur only at the request of the judge or with his consent" (Article 5-2, Para. 2). When decisions on promotions are taken by the body referred to in Article 2-3 of the Charter (i.e. by the Council for the Judiciary or by an equivalent body) the judge, whose application for a promotion has been rejected, "should be allowed to challenge the decision" (Article 5-2, Para. 3).

In countries where judges are evaluated, "assessment must be primarily qualitative and be based on the merits, as well as on professional, personal and social skills of the judge; as for promotions to administrative functions, it must be based on

the judge's managerial competencies" (Article 5-3, Para. 1). According to Article 5-3, Para. 2, "Assessment must be based on objective criteria, which have been previously made public. Assessment procedure must get the involvement of the concerned judge, who should be allowed to challenge the decision before an independent body." Taking into account the wrong practice of several legal systems, particularly in Central and Eastern Europe, where judges are evaluated also on the basis of the number of judgments upheld or reversed in appeal, the Charter stipulates that "Under no circumstances can the judges be assessed on the base of judgments rendered by them" (Article 5-3, Para. 3).

4. Psychological Tests for Judges? The Position of the Italian Association.

Talking about the recruitment process of candidates to the posts of judges, a question has stirred a heated debate during the last months in Italy. Should candidates undergo psychological and attitude tests while being recruited?

Actually, the Italian Council of Ministers has recently approved a Legislative Decree (No. 44, dated 28th March 2024), which provides for supplementary and corrective provisions to the Legislative Decree No. 150, adopted on 10th October 2022 according to Law No. 134, dated 27th September 2021, which delegated the Government to enact provisions for the efficiency of criminal trials and in the field of restorative justice, as well as provisions aimed at the speedy conclusion of judicial proceedings. The No. 44/2024 Legislative Decree provides, among others, for the introduction of psycho-aptitude tests in order to evaluate the applicants who wish to be admitted into the ranks of ordinary Judiciary and to assess any reason of unsuitability to exercise the judicial function. The psycho-aptitude interview, which has been introduced by the above-mentioned Legislative Decree, will be applied to recruitment procedures as of 2026.

The Italian National Association of Judges and Prosecutors (ANM) expressed concern for the recent reform. It has been pointed out that not only do the new provisions of law reveal some faults as regards the procedure of approval (in fact, they were enacted by force of a legislative decree, adopted by the government on the basis of a delegation law previously enacted by the Parliament, which nonetheless had not provided, in any of its sections, for the introduction of psycho-aptitude tests), but the same provisions are also liable to cast discredit on the entire ordinary Judiciary, as they suggest, in front of the public opinion, the idea that it is urgent to assess the psychological fitness of magistrates. Plus, the introduction of psycho-aptitude tests will cause inevitable delays in recruitment procedures. The public statement released on 6th April 2024 can be found here: https://www.associazionemagistrati.it/allegati/anm-su-test-psicoattitudinali_2.pdf.

5. Psychological Tests for Judges? The Survey of the International Association of Judges.

On 11th March 2024, Prof. Marco Fabri of the Bologna branch of the Institute of Legal Informatics and Judicial Systems of the National Research Council of Italy (IGSG-CNR), has proposed to the Secretary-General of the International Association of Judges (IAJ), Mr. Giacomo Oberto, to circulate among IAJ National Associations a very short questionnaire on the use (or non-use) of psychometric/psycho aptitude/psychological tests in the recruitment/selection/assessment of judges: the first survey of this kind among national judicial associations.

The questionnaire consisted of three questions, with the possibility of adding comments. The first question concerned the existence of psychological, or psycho aptitude (or similar) tests, in the selection process of new judges. The second question asked for at least an estimate of the weight of the test on the candidate's overall evaluation. The third question asked whether psychological, or psycho-aptitude (or similar) tests are possibly foreseen during the judges' career, for example for a promotion to a superior court, or to a post of head of judicial office.

It is worth remembering that in many countries the judging and prosecuting functions are separate; therefore, the answers obtained mainly concern judges. The questionnaire was completed by 56 associations of judges from all over the world, out of the 92 composing the IAJ. Out of the total number of respondents, 32 belonged to the European Regional Group (European Association of Judges), 9 to the African Group, 10 to the Ibero-American Group and 7 to the ANAO Group (for more information on the survey and its results see https://www.iaj-uim.org/iuw/results-of-the-survey-on-the-use-of-psychological-tests-for-judges/; see as well OBERTO, *Questionario sull'utilizzo di test psicoattitudinali per Magistrati – Risultati dell'indagine svolta dall'IAJ-UIM*, available at the following web page: https://www.giacomooberto.com/Giacomo_OBERTO_RAPPORTO_FINALE_QUESTIONARIO_UIM_testpsic.pdf).

Following 30 associations responded by saying that in their Countries some kind of psychological, or psycho-aptitude (or similar) tests are in use for the initial selection of judges:

• Armenia • Austria • Benin • Brazil • Chile • Croatia • Czech Republic • Dominican Republic • Ecuador • Estonia • Finland • Georgia • Greece • Hungary • Italy	• Kazakhstan • Latvia • Lithuania • Luxembourg • Mexico • Moldova • Mozambique • Mongolia • Panama • Peru • Philippines • Portugal • Slovakia • The Netherlands • Tunisia

Following 26 associations responded by saying that in their Countries no psychological, or psycho-aptitude (or similar) tests at all are in use for the initial selection of judges:

• Azerbaijan • Australia • Bolivia • Bosnia and Herzegovina • Burkina Faso • Canada • Cyprus • Denmark • England and Wales • France • Gabon • Germany • Guinea (Conakry)	• Liechtenstein • Liberia • Norway • Sao Tomé and Principe • Scotland • Serbia • Slovenia • South Africa • Spain • Sweden • Switzerland • Taiwan • U.S.A.

In a nutshell, we can say that the international panorama is roughly divided in half, between systems in which the tests in question are used in the selection and career advancement process of judges and systems in which such tests are not applied. It may also be noted that, at least generally, the most relevant legal systems, both in terms of the importance of the respective countries and of the culture of respect for the independence of the judiciary, do not know this form of evaluation.

We must also consider that, from a comparative point of view, psycho-aptitude tests are in no way considered necessary in common law systems. The selection and appointment process of judges among the lawyers of these countries normally includes a series of references on the aptitudes and character of the candidates coming from different sources (other jurists, lawyers, judges, etc.), which may also appear suitable to highlight any possible psychological problems of aspiring judges.

Furthermore, hearings of the candidates by the commissions responsible for carrying out the selection processes also contribute to the evaluation of the psychological aptitudes of the candidates.

For civil law systems, on the other hand, the presence of periodic assessments of professionalism (as it happens, for example, in Italy) should already constitute the appropriate forum for considering and bringing out any psychological problems, although this reflection does not appear to have been made, in the determination to introduce the tests, by the Italian government.

Quite significant, in this regard, is the example of France, where psycho-aptitude tests were introduced in 2009 in the selection process for entry to the *Ecole Nationale de la Magistrature* in the wake of the fierce controversies that arose following the infamous "Outreau affair."

However, after a few years, in 2017 such tests were fully abolished. Actually, it was the unanimous assessment about the poor scientific rigor and very limited reliability of such tests that caused the decision to leave them aside.

6. Psychological Tests for Judges? A Bad Example from Uzbekistan.

A very bad example about the use of psychological tests for the recruitment of judges, combined with the use of AI, comes from Uzbekistan. It appears that in Countries which are former members of the Soviet Union the employ of such kind of tests is common (another bad example is given by Ukraine, upon we'll dwell later on, at the end of this paragraph).

Thus, a report on a very recent reform in Uzbekistan informs that "An electronic program has been developed and fully launched that helps assess the suitability of candidates for the judicial positions and judges based on their psychological profile." Therefore, "with the help of psychological tests and interviews, a professional psychologist gives recommendations about the worldview of judges, resistance to various situations in court, skills in assessing the situation, and even a tendency towards alcoholism and corruption."

Frankly speaking, we can only assess as alarming that important stakeholders, at high level in the judiciary of a given Country, show themselves so confident in the possibility to predict, via a psychological test, that a candidate will develop a tendency towards "alcoholism and corruption."

Such an Orwellian scenario becomes all the more worrying, if we think to the remarks made by a great expert of judicial systems (former President of the CCJE and of the IAJ), while assessing the Ukrainian reform introducing such tests: "the use of such instruments is very limited in Europe. If the purpose of such an exercise is not only to identify mental diseases or the likelihood of them, but also to test certain characteristics or attitudes, it is necessary to agree on such attitudes in advance. An agreement on a particular desired profile needs consensus in the society" (see REISSNER, *Assessment of the 2014-2018 judicial reform in Ukraine and its compliance with the standards and recommendations of the Council of Europe*, p. 25, https://rm.coe.int/doc-03-assessment-part-3/168097a77b).

Furthermore, an independent report on the Ukrainian system, such as that of the De Jure Foundation, highlights issues of such sensitivity as to raise the most serious doubts. Here we intend to refer in particular to the so-called "loyalty test," aimed at measuring the suitability rate of subjects to show an "attitude towards compliance with social and corporate standards." On the basis of this principle, indeed, the methodology followed serves to "measure (diagnose) the personal propensity to observe the social, moral, and organizational norms and rules. The methodology is an instrument for assessing the honesty, decency, and reliability (loyalty), both in the course of selection of candidates for employment and in further evaluations of employees in firms and organizations of any form of ownership" (see DE JURE FOUNDATION, *Establishment of the new Supreme Court: Key Lessons*, p. 12, https://dejure.foundation/en/establishment-of-the-new-supreme-court-key-lessons/).

The lessons we can draw from the experiences just mentioned (France, Uzbekistan and Ukraine) constitute as many caveats towards the supporters of the introduction of psycho-attitudinal tests in the recruitment of judges. In any case, where such systems are introduced, it would be necessary to provide suitable forms of appeal by the concerned applicants. Another delicate aspect is represented by the fact that the results of these tests, for evident privacy reasons, cannot be made public. Yet, precisely this conclusion makes it impossible to verify the concrete impact of the tests on the final evaluation of candidates, whereas, on the contrary, candidate evaluation sources should always be reliable and controllable, as required by the CCJE (see CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, *Opinion n°17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence*, § 39, https://rm.coe.int/16807481ea).