Judicial independence In the context of the organization of the judiciary Part I

Recruitment, remuneration and retirement

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1. INTRODUCTION

The essentiality of judicial independence for the rule of law and the foundations of liberal democracies is indisputable. There is no doubt that the judges, when dealing with their essential tasks, should be free from outside pressures. This aspect is known as individual or substantial independence.[2] It is generally associated with individual judges, whose decision-making on judicial matters needs to be free, 'in accordance with their own assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.[3]

The doctrine of individual judicial independence is broadly accepted, even in the systems which otherwise prioritize collectivist ideas and adhere to the system of unity of state power. But this very fact also confirms the assessment that judicial independence remains a 'fuzzy concept' that is not equally implemented across the world.[4]

While personal independence (sometimes also called substantial or individual independence) is an established part of the doctrine of judicial independence, a less uncontroversial aspect of judicial independence is the collective or corporate independence. Within the doctrine of the separation of powers, broadly accepted in Western democracies, the judicial branch of government is conceived as a collective entity that should, in principle, be independent from the executive and legislative. Under this concept, the organization of the judiciary should also mirror this separateness and independence from the other branches of the state power.

Yet, from the very inception of the doctrine of the separation of powers, doubts arose regarding the extent to which the organization of the judiciary should be separate and independent from the other branches of government and the society as a whole. For Montesquieu, the inventor of the separation of powers doctrine, the judicial branch was not a 'branch of power' (*puissance*), but rather an 'authority' (*autorité*)[5], as the judiciary was seen to be strictly bound to adhere to the mechanical application of the laws enacted by the legislature.[6] While the view that judges are nothing but *la bouche qui prononce les paroles de la loi*[7] has largely been abandoned, another aspect of modern constitutionalism has become relevant: the aspect of checks and balances.

Montesquieu argued that '…in order for power not to be abused, power must, by the arrangement of things, control the power'.[8] A hundred years later, Lord Acton provided us with the famous quote, 'power tends to corrupt and absolute power corrupts absolutely'.[9] But, it is still debatable to which extent does this quote apply to the judiciary as the 'third power'. For some, there is no essential harm from entirely separate and independent judiciary; in the words of Alexander Hamilton, courts are the 'least dangerous branch' as they neither possess the brute force nor the money to enforce their decisions.

But already in the 1960s, it became clear that the 'least dangerous branch' consists of some 'most extraordinarily powerful courts of law the world has ever known'.[10] Insofar, the courts – especially the highest ones – play an incredibly important and eminently political role.[11] Courts sometimes decide on matters that determine the fate of nations or even the world. Indeed, political control and undue interference may prove fatal for the ability to issue independent, impartial, and – above all – wise judgments. However, a branch of government entirely separate from the rest of society and dependent only on its own discretion becomes 'the least accountable branch'[12]. Such power inevitably steers us into trouble.

Therefore, organizational issues, such as who, when and how one becomes a judge, and what the relationship of the judiciary's organization is with the rest of state authorities and civil society, are much more than technical matters. Notwithstanding that they are rarely taught in law schools, even less so within the classes of civil and criminal procedure, these are the issues essential for judicial legitimacy, judicial accountability, and judicial responsibility – and these issues should go hand in hand with judicial independence.

At the 1982 congress of International Academy of Comparative Law in Caracas, the importance of a balanced approach was raised in the general report on judicial responsibility of Mauro Cappelletti, later published under title 'Who Watches the Watchmen'.[13] Contemplating Juvenal's question[14], Cappelletti finishes his exploration of judicial responsibility by developing three abstract models of judicial responsibility. The first two are the model opposites: in the *repressive (or dependency) model*, the judiciary is subservient and politically accountable to the holders of political power, especially to the executive, while in the second, in the *corporative-autonomous (or separateness model)* the judicial independence is absolutized, 'to the point of making of the judiciary a *corps séparé,* totally insulated from government and society'.[15] Cappelletti did not have much sympathy for either of these two extremes. The first is, in its most radical form, exemplified by the judiciary of Nazi Germany, while the second is found at its worst in France, when, during the *ancient régime,* the judiciary 'has become so deaf to societal needs as to turn into one of the most hated targets' of the French revolution.[16] In his times, Cappelletti found new forms of judicial isolationism in the countries such as Italy and Spain, with the high judicial councils as emerging bodies of judicial self-government. These new forms, according to Cappelletti, might be 'less fearful than one of dependency from the political power' but 'not necessarily less damaging'. Trying to form a beneficial middle ground, Cappelletti developed the third model, *the 'responsive (or consumer-oriented) model'* – a model of social responsiveness. In this model, the judiciary is oriented towards the needs of its users, but without 'either subordinating the judges to the political branches, to political parties, and to other societal organizations, or exposing them to the vexatious suits of irritated litigants.'[17]

Forty years later, in this general report, we strive to establish the current state of affairs regarding the organizational independence (and accountability) of the judiciary. Has the world moved closer to the dependency model, or to the corporative/isolationist model? What has been done to achieve the fair balance between judicial independence and accountability that corresponds to Cappelletti's user-oriented model of social responsiveness? What sort of checks and balances have been found to work as the proper answer to Juvenal's question? What sorts of personal guarantees – but also incentives for good work – have been developed in the national judicial systems? In this general report, two reporters assigned by the IAPL, Professor Daniela Cavallini and myself, address various issues essential for the development of judicial career, including the diverse means of recruitment, remuneration, liability, and removal of judges. The issues given to us for consideration were:

1. Access to the judiciary and independence: career appointment v popular election
2. Judicial independence and adequate remuneration
3. (Mandatory) retirement of judges
4. Sanctioning judges: judicial independence in the context of disciplinary liability, and
5. The renewal of confidence in judges: the ratification.

In our reports, we endeavor to make the text less tiresome and more engaging for readers by presenting these issues in a narrative form, focusing on the matters we find most interesting and pressing. In my part of this general report, I address issues 1 to 3, while Professor Cavallini deals with issues 4 to 5 in her part. However, in the conclusions of our papers, we provide some broader comments that may extend beyond our self-assigned division of labor.

We are deeply grateful to a great number of our colleagues who have provided us with valuable material and submitted their views in the form of national or regional reports, as well as with their reflections and comments. I would in particular like to thank the following colleagues (in alphabetic order): Marco de Benito, Patricia Bermejo, Andres Bordall, Pablo Bravo Hurtado, Antonio Cabral, Scot Dodson, Kinga Flaga, Yulin Fu, Ramón Garcia Odgers, Emmanuel Jeuland, Danie van Loggerenberg, Rick Marcus, Raúl Núñez Ojeda, Álvaro Pérez Ragone, Claudia Sbdar, Abraham Siles, Elisabetta Silvestri, John Sorabji, Magne Strandberg, Marit Tjemeland, Edilson Vitorelli, Stefaan Voet and Hermes Zaneti. Special thanks also go to Renzo Cavani, our devoted and proactive panel coordinator.

2. BECOMING A JUDGE IN CONTEMPORARY SOCIETIES: JUDICIAL CAREER AND JUDICIAL INDEPENDENCE

2.1. Access to the Judiciary: General Remarks and the Explored Issues

The judicial job is generally considered a desirable occupation in most countries, though its level of prestige and popularity vastly differs across various jurisdictions and court levels. Nevertheless, it is fair to state that it holds significant importance in all circumstances, as evidenced by the fact that almost everywhere a relatively complex and regulated process is provided for becoming a judge.

The recruitment and selection process for prospective judges has always reflected the societal, political, and cultural perception of the role of the judiciary. In the past, within ancient tribal societies, judicial authority was bestowed upon the wisest and oldest members of the tribe. In the feudal system, the judicial authority went hand-in-hand with the power held by landlords or the clergy. In absolutist states, the power to adjudicate legal disputes and enforce the law was exercised on behalf of the royal authority to reinforce the central power of the crown.[18] Only with the *emergence of the modern nation-states* did the *judicial power become a distinct branch of government*, leading to the creation of a professional corpus of adjudicators, assisted by supporting staff, who needed to possess appropriate, generally recognized qualifications. It is also during this time that the idea of judicial independence in both the discharge of their functions and organizational matters emerged.

However, while all contemporary states recognize judicial profession as a separate and distinct profession, the perception of what constitutes *appropriate qualification* still varies among different national jurisdictions. Furthermore, the positions on *whether and to what extent* the *process of recruitment* should *reflect the ideal of judicial independence* differ significantly.

In this part of the general report, I will address the issues related to the qualifications of prospective candidates for judicial functions and the process of their selection and appointment. In particular, the following questions, which also formed the basis of the questionnaire for the national reporters, will be explored:

- How are judges selected and recruited? At what point in a legal (or other) career do the candidates become judges? Are they appointed or elected?
- What kind of influence in the election process can be attributed to political, professional and corporate elements? What is the decisive element in the process of selection?

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The special focus of this report will be on the trends and developments in the past decades, along with the reasons behind them.[19] Given the assessment that the 'tension between judicial independence and accountability has become stronger'[20] in the recent period, not only in Europe but also globally, I will assess how these developments have influenced the methods of selecting and recruiting judges.

2.2. Selection and Recruitment of Judges: Career and Non-Career Systems

The first necessary distinction to be made is between the system of a *career judiciary* (in which judges are selected shortly after completing their legal studies and remain committed to a judicial career throughout their working life) and a system where judges are recruited among a diverse body of well-established professionals who assume judicial roles later in their lives (*non-career judiciary*). This distinction is not identical to the dichotomy between *professional* and *non-professional judges*, or between *legally trained* and *lay judges*. For a non-career judiciary, the essential element in the recruitment of judges is their non-judicial experience, which may be linked to their proven expertise in advocacy, prosecution, government, business, teaching, or even their non-juridical expertise and profile in public life (including political credentials).[21]

While the career judiciary is generally associated with the *civil law tradition*, and the non-career judiciary with the *common law tradition,* variations exist within both traditions as to how both models operate. Some convergence can also be noted, resulting from longer judicial careers in some common law judiciaries (e.g., due to the trend of selection of younger candidates)[22] and from the trend of encouraging collateral appointments in some civil law countries (e.g., the *quinto constitucional* rule in Brazil[23], or the reserved quotas in the ENM in France[24]).

The career and non-career systems of selecting judges imply a cluster of features that determine the methods of judicial recruitment.[25]

The career judiciary is characterized by the following features:

- Judicial careers usually begin shortly after completing formal legal education.
- Normally, a competitive exam determines entry into the career path.
- A period of specialized training combined with internship and education for judicial or prosecutorial tasks ('judicial school' or 'judicial academy' for 'magistrates' – judges and public prosecutors) is a precondition for appointment.
- The selection is often based on (tentatively) 'objective' criteria, typically depending on results from some form of examination of knowledge based on objectivized assessment.
- Selection is based on the success and scores achieved in testing candidates for judges, often involving written tests and essays that are graded to achieve refined results.
- An important part of the appointment process is entrusted to members of the judiciary i.e., the 'insiders' providing their views and evaluation of the professional abilities of the candidates based on predominantly technical criteria.
- Upon first appointment to judicial office, the new judge becomes part of a hierarchically organized judiciary, usually at the lowest ladder of this hierarchy, which is associated with a lower level of prestige, harsher working conditions, and more modest income, at least in comparison with colleagues at superior courts and tribunals who work less but earn more.

On the other hand, the non-career system – while more diverse than the career system – also exhibits some typical features:

- Appointment to a judicial position follows independent work in another branch of the legal profession, either in the private or public sector.
- Formal legal education and academic success are less important elements, and may not even be relevant for recruitment into the judiciary.
- Normally, no special additional period of education or training is required for the appointment, and any socialization into the new position occurs, if at all, during the exercise of judicial functions.
- Selection criteria are more subjective than objective, dependent on individual assessments of the 'appropriateness' of the candidate rather than the strict application of prescribed methods of evaluation.
- Selection is based on 'soft' criteria, comparing the professional reputation and achievements of the candidates and predicting their future professional behavior in respect to various (including controversial) social issues.
- The process of selection provides some form of democratic legitimacy or at least democratic participation, either through the popular election of candidates or, more frequently, through the active participation of democratically elected officials in the appointment process.
- Upon being vested with judicial powers, judges immediately join a corpus of highly paid and prestigious judicial professionals, with limited options for further improvement of their status, as eventual transfers to 'higher' courts do not bring significant increases in income or prestige. Moreover, as lateral entry into the judicial profession is not limited to the lowest courts, the first appointment to judicial office may occur at the highest courts and tribunals in a particular jurisdiction.

The old critique of both career and non-career systems is well-known. The career system in civil law countries has been described by Merryman as a system in which the judge is 'a civil servant, a functionary' who belongs 'to an organization of judges that has improvement of judicial salaries, working conditions, and tenure as a principal objective'[26]. Or, in even harsher terms, the civil law career judge tends to be 'uncreative', with a function that is 'mechanical', acting as 'a kind of expert clerk' who exercises 'a fairly routine activity', resembling 'an operator of a machine designed and built by legislators': in a word, a faceless bureaucrat who 'plays a substantially more modest role that the judge in the common law tradition'.[27]

On the other hand, the common law non-career judiciary – particularly in the USA, which brought the most specific and colorful variant of such a mode of selection – has not only received praise but also faced criticisms for its arbitrariness, tendency towards populism (especially in state courts where judges are elected through popular elections) and, above all, the politicization of their judicial function. Numerous examples of 'court-packing' from President Roosevelt to President Trump serve as corroboration of these criticisms. As Scott Dodson puts it, the appointment process for US judges is highly political, especially for seats on the highest federal courts.[28] This political influence also extends to the US state courts, which, according to Marcus, have seen an even greater level of politicization in recent years, particularly in elections for higher state courts.[29]

On the other side of the spectrum, some non-career judiciaries – most prominently England and Wales – attempt to avoid politicization by emphasizing the sole criterion of 'merit' in the appointment process. Although defining such 'merit' can be challenging due to a wide range of factors that are difficult to objectify, it is asserted that 'political considerations do not form any part of the appointment process for any judicial office in the UK.'[30]

2.3. Selecting Judges at Popular Elections: Democratic Accountability?

The current landscape regarding the process of judicial selection still largely depends on the divide between career and non-career systems. However, significant developments are occurring, especially regarding the methods of selection within the career judiciary. Let us begin by addressing the issue of democratic legitimacy in the process of selecting judges. One might argue that contemporary judicial systems have become less 'democratic' – or at least less dependent on popular support and subject to external 'checks and balances'. Such an assessment may arise from several trends.

The ultimate example of a 'democratic' selection process is the system in which holders of judicial posts are decided through popular elections. However, nowadays, *popular elections* for judicial posts are *relatively rare*. In the career judiciary system, they are virtually non-existent[31], while in the non-career system they are also a rarity and primarily occur *in the United States*, as an element of American judicial exceptionalism. Even there, popular elections for judges are confined to elections of state judge, unlike the federal court system where judges are appointed for life by the President.

However, it is incorrect to think that popular elections for judges are an exception in the U.S. or that they are insignificant. State courts in the U.S. play a crucial role as they handle 95% of all civil cases in the country[32]. It is essential to note that while not every federal state employs the system of popular elections, *judges in the majority of U.S. federal states* (39 out of 50) *are subject to popular elections* at some level of court.[33] In 38 states, elections are used to select judges to the high court, but with different varieties of methods: In 16 states, judges are appointed by the governor and reselected in unopposed retention elections; in 14 states, judges are selected in contested nonpartisan elections; In 8 states, judges are selected in contested partisan elections, including New Mexico, which uses a hybrid system that includes partisan elections.[34] This system of selection has led to some judges receiving millions of dollars for their campaigns from interested parties, and local law firms making substantive monetary contributions for the (re)election of local judges.[35]

The U.S. federal states that use the system of popular elections to select judges include some of the largest states like Texas and California. In California, judicial elections are considered to be 'nonpartisan', but even in such a setting, there have been situations where judges were not reelected at 'retention' elections due to vigorous propaganda campaigns largely financed by insurance companies dissatisfied with certain court's rulings.[36] In this context, Rick Marcus observes that "'accountability' is to some extent contrary to the system of judicial independence", and that it can come at a significant cost to the latter.[37]

Some instances of popular election of judges also exist in civil law countries, but they are limited to special fields where lay judges are integrated into the career judiciary. For instance, the justices of the peace in Peru are considered to be a 'sui generis' category that is also recruited through popular elections.[38] The prevalence and implications of popular elections in the selection of judges are crucial considerations in evaluating the balance between democratic accountability and judicial independence within different legal systems.

2.4. Review by Periodic Reappointment: Indirect Democratic Accountability?

Another organizational approach to establishing accountability – albeit at a cost to independence – is subjecting judges to *mandatory periodical checks of their suitability* for office. There are various ways this periodic review can be conducted, but the typical approach involves appointing (or electing) judges for a limited but renewable term. The 'renewal' (or 'retention') of their mandate is not automatic and requires an assessment of how well the incumbent judges have performed their judicial duties. Disapproval during this evaluation can lead to the discontinuation of the judicial office and the selection of another candidate dee-

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med more suitable for the position. A milder variant of this system involves limited initial (or 'test') appointments, which need to be renewed before permanent appointment.[39]

As indicated in the national reports collected for the IAPL Congress, the practice of appointing judges to a timely limited term is more commonly utilized in contemporary judicial systems as a means of democratic control over the judiciary than popular elections.

In Europe, various bodies, including professional associations representing the interests of judges, generally take a critical stance towards periodical reviews, limited terms of office, and probationary periods. For example, the Venice Commission 'strongly recommends that ordinary judges be appointed permanently until retirement' and evaluates probationary periods for judges in office as 'problematic from the point of view of independence'.[40] The negative assessment of fixed and non-permanent terms of office in the European context is partly due to the fact that, before the 1990s, Socialist countries of Eastern Europe used to elect judges for relatively short terms of office. After the fall of the Iron Curtain, the systematic policy towards transition countries includes advocating for the broadest possible concept of judicial independence, including permanent appointments by independent self-governed bodies, as a critical criterion of the rule of law.

However, there are quite different examples. In the U.S. state courts, despite the variety of systems, appointments to fixed but limited terms dominate, irrespective of the system of selection. According to Scot Dodson, 'although at the time of the country's founding most states provided for lifetime judicial appointments on their state supreme courts, today only three states (Rhode Island, Massachusetts, and New Hampshire) grant the governor the power to appoint judges to life terms.'[41] The length of judicial terms of office varies between 6 and 14 years.[42] It is concluded that 'state judges, as a general matter, owe the selection and retention of their jobs to either the electorate or the political branches'.[43]

It should be noted that the European aversion to reappointments and less-than-permanent judicial terms of office generally applies only to *ordinary* judges. Appointments to constitutional courts in many European countries are not for life or until reaching retirement age, but for a fixed mandate, which is generally longer. For example, in Germany, constitutional court judges are appointed for a term of 12 years, and in France for 9 years. The highest European courts also do not have permanently appointed judges. The European Court of Human Rights, after the enactment of Protocol XIV in 2010, consists of judges appointed for a non-renewable term of nine years. The term of office for judges of the Court of Justice of the EU is six years, renewable once.

There is a tendency in Europe to extend the duration of fixed terms of office for constitutional and transnational judges and make them non-renewable to avoid possible pressures on judges during the period before their reappointment[44] (examples are the German Constitutional Court and the ECtHR since 2010). Appointments to constitutional courts outside of Europe are also often limited in time. For example, in South Africa, Constitutional Court judges hold office for a non-renewable term of 12 years.[45] Even in the United States, there are voices advocating changes in the appointment of judges in state courts by introducing a single, lengthy term of office.[46]

Different trends can be observed in Latin America: moving away from permanent appointments and towards reintroducing fixed mandates. According to Antonio Cabral, there are debates in Brazil on constitutional amendments, where there is a plan to limit the judicial term of office to a fixed mandate of 8 years, renewable once, for the Supreme Court, which in this country also exercises functions similar to constitutional courts.[47] Another topical issue relates to the status of provisionally appointed judges, which is particularly relevant for Peru where, out of 3,516 career judges, only some 39 percent are formally appointed, while the rest are judges in a provisional status.[48] In the case law of the Inter-American Court of Human Rights, such situation is assessed as a 'serious risk for judicial independence'.[49]

Another trend in relation to permanent appointments (but also making judicial terms of office compatible with accountability and judicial independence) is the use of periodic evaluation of performance that may lead to dismissal in case of poor results, such as the Peruvian 'ratification' procedure. It is the practice of periodic renewal of the mandate of judges (in Peru: every seven years) after performance analysis of their judicial work (see more *infra,* the report of Daniela Cavallini).

2.5. Permanent or 'For Life' Appointment: Independence at the Expense of Accountability?

In most contemporary judicial systems worldwide, the core judicial area, which includes ordinary judges and regular courts of first, second and third instance, prefers some form of 'tenured' appointment, which at least assumes the security that the judge will remain in office for a certain, if possible, longer period of time.[50] However, this tenured appointment can take different forms and strike different balances between accountability and independence. Factors that need to be considered include the availability of instruments that secure accountability (i.e., the likelihood that bad behavior and poor performance will result in liability and possibly the loss of the judicial position) and the duration of the prospective term of office (i.e., the length of the judicial mandate).

The U.S. federal judiciary exemplifies the extreme level of independence and job security. Federal judges, also known as 'Article III judges,' are appointed with *life tenure* and enjoy strong guarantees of their status and job security. Involuntary removal from office is extremely rare and can generally only occur through impeachment.[51] This level of judicial independence has been criticized by some, including Marcus, who suggest that the lifetime tenure of American federal judges goes beyond what exists in most countries and may be too far-reaching.[52] Dodson adds that the federal judiciary is profoundly antidemocratic, exercising little accountability to the political branches and the citizenry.[53] The perception of unaccountability is reinforced by the literal interpretation of 'appointment for life' phrase. Few federal judges (especially those in the Supreme Court) voluntarily retired. The tendency to appoint ever younger candidates to the highest court leads to the factual increase of the average term of office. Already now it is approaching forty years, but it may further increase.[54] For the popular support and legitimacy of the US Supreme Court, a mitigating circumstance is that, at least until recently, the federal judges used to 'exercise significant self-restraint in their rulings to avoid pronouncements that might be so outside of public or political acceptability that the judiciary loses public support and confidence'.[55] The public approval of the federal judiciary in the U.S. used to be high – higher than the reputation of their state counterparts.[56] Nevertheless – partly due to controversial Dobbs decision, but also due to other developments – some reports warn that the confidence in the U.S. Supreme Court recently sank to its lowest point in at least 50 years.[57]

Career judiciaries also face the challenge of dealing with judges who remain in office for many decades without significant accountability. Since judges in a career judiciary start their judicial career track immediately after law school, they typically become judges in their late twenties or early thirties. Considering that judges in career judiciaries usually often retire at the age of 70 or even 75 years (see more *infra*), some judges may hold their positions for thirty or even forty years. This lengthy term of office can become problematic if individuals are not fit for the demanding requirements of a judicial job. The quality of the selection process and mechanisms for ensuring accountability during long judicial service become critical. Failure to address this issue can result in a group of uncontrolled and democratically unaccountable individuals with significant powers, leading to a decline in public confidence in the judiciary.

Polls on public trust in judges in Europe show varying levels of confidence, ranging from 80:20 to 20:80 (i.e., from almost complete trust to almost complete distrust, extremes being Finland and Croatia). This happens in the self-declared area of justice within the European Union, where all national judiciaries are supposed to enjoy mutual trust. It is evident that countries in South and East Europe, with strong institutional independence but difficulties in securing judicial accountability, have the lowest levels of trust in the judiciary and its independence among both the general public and the business community.[58]

In summary, while permanent or 'for life' appointments provide a high level of judicial independence, there is a need to carefully balance this with mechanisms for accountability to maintain public trust in the judiciary.[59] Provisions for regular evaluations, transparency, and clear accountability mechanisms can help strike this balance and ensure a judiciary that is both independent and accountable.

2.6. Objectivization of the Selection Criteria: 'Merits' Test as a Guarantee of the Appointment of the Very Best?

History teaches us that occasionally even judicial power may turn into arbitrary, corrupt and unaccountable power, which can irritate society sufficiently to trigger turmoil or revolutions. There is no need to go back to the times of the *ancien regime* judiciary and the French Revolution. More recent examples of Albania and Slovakia, among others, serve as proof of the importance of keeping checks and balances even on the 'least dangerous branch'. This is especially important in career judiciaries (and some segments of non-career judiciaries) where democratic controls of elections and periodic reappointment are not present.

As already noted, there are two ways to ensure that judicial independence does not get abused in a career model. The first is at the front door, consisting of forming an elaborate system to secure that only the very best candidates enter the judicial profession. The other is continual monitoring and evaluation of the performance of courts and judges, combined with an appropriate system of incentives and liabilities.

Two factors are crucial for the quality of the appointment process: *the criteria applied to the appointment* and the *composition and procedure of the body (or bodies) in charge of appointing members* of the judiciary.[60] Today, there is a growing consensus in career judiciaries[61] that all candidates for judicial office should be selected based on *objective evaluation of their abilities*. In the past, the UN Basic Principles only warned that any method of judicial selection shall safeguard against improper motives of appointment and prohibited discrimination;[62] the Montreal Declaration only mentioned objective assessment of the candidate's integrity and competence in the context of the promotion of judges.[63] However, in more recent documents endorsed by various international bodies and organizations, such as Venice Commission or the Council of Europe the notion of 'objective criteria' and 'merits' is in the forefront. The CoE Recommendations on the independence, efficiency and role of judges provide that 'all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit'[64]; the 2010 revision adds that such objective criteria should be pre-established by law or by the competent authorities.[65] Venice Commission argues in its report that 'the principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable.'[66]

But exactly what these 'objective criteria' and 'merits' test should imply is not precisely defined. The broad standards determining what should be regarded in such an objective test are:

- integrity and ability with appropriate training or qualifications in law (UN Basic Principles)
- proper professional qualification (European Charter on the Statute for Judges)
- suitability of a candidate by reason of integrity, appropriate training or learning and ability (African Principles and Guidelines on the Right to a Fair Trial)
- qualifications, integrity, ability and efficiency (CoE Recommendation 1994)

- qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity (CoE Recommendation 2010)
- integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law (Montreal Declaration)
- professional qualifications, integrity, ability and efficiency; merit, integrity and experience (Mt. Scopus International Standards).

The national reports collected for this paper give a bit more insight into the interpretation of these broad standards. The key issue, particularly in career judiciaries, is to what extent some of these standards can be expressed in an objective way. Objectivization assumes some kind of quantification or measuring, which is quite challenging. The balance of different factors (e.g., how much weight should be given to qualifications, skills, integrity, or efficiency) can also differ. Combined with different appointment procedures, diverse backgrounds, and varying interest in judicial positions, a tentatively 'objective' pursuit of 'merits' can lead to quite different results.

In a career system, for instance, it seems that at least qualifications, as one of the 'objective' elements, can be quantified. Academic success in legal education could and should be relevant, but a uniform denominator needed to compare candidates with same success (e.g., "A" students) among various law schools often lacks. Therefore, many countries use *complex and competitive entry testing and examination of candidates for judicial office* before they are accepted to a judicial career track. Good examples are countries of South Europe like France, Spain, and Italy, but also the countries of Latin America[67], as well as the People's Republic of China.[68]. For instance, in Italy, the national examination which should, in theory, take place every year consists of three written tests followed by extensive oral examinations.[69] Similarly, in Spain, the candidates sit in a rigorous public state examination (*oposición*) which is organized nationally for all existing judicial and prosecutorial vacancies.[70] In Brazil, the testing of candidates usually has three phases: a multiple-choice test, a long essay, and an oral examination.[71] The public competitions for open judicial posts may be very attractive: in Brazil, it is frequent that 10.000 candidates apply for 30 spots.[72] In Chile, the judicial school ('Academy') is also the only way to get into the judicial branch.[73] But, in some other countries, like Croatia, the judicial job is less attractive, which, combined with the length and vexation of the process, leads to a situation where even mediocre candidates with a lot of patience have fair chances to be selected.

It should also be noted that at least some of the elements in the national examinations are *not completely free from subjective assessment*. While written tests may be graded anonymously, oral interviews are also a part of the evaluation, and the general impression of the candidates' abilities, which can hardly be entirely objective, also has a bearing on the score achieved by the candidates. However, limiting the testing to anonymous scoring of multiple-choice tests – irrespective of how well they are composed – is hardly an appropriate method of selecting prospective judges. For all these reasons, it is essential to have appropriate solutions for enforcing the proclaimed selection criteria. The key question is who is in charge of the selection process – who defines the criteria, designs the selection process, steers, and monitors its course, making sure it proceeds competently and free from improper influence from whatever side, and, ultimately, who has the final word and decides on the fate of the candidates.

2.7. Who Should Control the Selection Process?

No matter how much weight is placed on the objective appointment criteria, it is ultimately illusory to fully objectivize the process of selecting and recruiting judges. Only in mathematics is it irrelevant who does the calculus, and in matters of selecting the best human material for any job, the most important factor is the selecting person or persons. Of course, the existence of *clear and transparent criteria* and the *design of the process* may limit the discretionary power of the selectors, but such power can never be entirely removed or replaced.

If we leave aside popular elections as a method of selecting judges (see *supra*), the remaining options are that judges are either *appointed by the executive* (or, much more rarely, the *legislature*) or by some kind of *special body* composed of various segments, including members of the judiciary, but also other branches of government, as well as non-governmental members appointed among legal professionals or non-legal representatives of various groups in the society.[74]

Nevertheless, the formal authority to make appointments should be distinguished from the actual power to select the candidates of one's choice. A *pure discretionary system of appointment* is at present rarely in use. Rather, it is preferable to use some forms of balancing and reducing this discretion. The discretion of the appointing body may be modified in various ways. Some of the options are, for instance:

- To require, by law or established customs, mandatory consultations of the selecting authority with some other authority or organization;
- To limit the right to select the judge to the candidates who are approved by another body (e.g. by a professional organization);
- To require that the selector chooses among the candidates who are proposed (listed) by another body (with or without the requirement that the list contains certain number of candidates per vacancy);
- To limit the right to appoint to the specifically proposed candidate, but with the option to refuse the appointment and request another proposal;
- To request that the appointment is jointly made by several authorities or organizations; and
- To make a decision on the appointment by a qualified majority of votes (e.g., by two-thirds of members of a collegiate body).

The system in which administrative discretion of the appointing authority is balanced by the need to cooperate with others can be labeled as *cooperative system of administrative appointment*. All the above-mentioned appointment procedures can be found in various jurisdictions[75], both in the career and non-career judiciaries. A prominent example of cooperation of different branches of power is, for instance, the system of appointment of U.S. federal judges. The U.S. Constitution empowers the President to nominate judges to federal courts, but also requires that the Senate 'confirm' nominees before they can take office.[76] Another example is the process of selecting judges in Argentina which also requires 'formal and informal interaction between the various political powers of the the State'.[77] There, the justices of the Supreme Court are appointed with the consent of the Senate (like in the U.S.), and for lower federal courts, a Council of the Magistracy prepares a binding proposal of three candidates per open position, which are then appointed by the President with the consent of the Senate.[78]

Indeed, the system of appointing judges in which the key role is played by the executive or the legislature (or the combination of the two) is not in line with the absolute requirements of judicial independence. Nevertheless, it is safe to say that such methods of appointment work fairly well, and that they dominate the global judicial landscape.

Assessing whether such a method of appointment is compatible with the human right to an impartial and independent tribunal, the European Court of Human Rights (ECtHR) in a 1984 case came to the conclusion that the *appointment of judges by the executive* is not only in line with Article 6 ECHR, but also that it *is perfectly normal and usual*.[79]

However, in its more recent case law, the ECtHR, while repeating that 'appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role'[80], placed the weight on the concept of *a 'tribunal established by law'*, finding that such a requirement needs to be interpreted as clearly encompassing the process of the initial appointment of a judge to office. This process seeks to secure 'independence' *inter alia* by providing 'a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that *ensures their independence and selection criteria based on merit* – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.'[81] Consequently, the case in which the Minister of Justice, while not observing the procedure, removed four candidates from the list proposed by the Evaluation Committee (and appointer four other candidates) was assessed as a breach of the fair trial guarantee of a 'court established by law'.

The background of this ECtHR decision lies in a number of predominantly European soft law instruments issued by various organizations, most prominently by those which work under the auspices of the same organization, the Council of Europe. They argue that the optimal system of appointment of judges is the one which, to a maximum extent, corresponds to the model of organizational and institutional autonomy and independence of the judiciary. Such would be *the one in which the key role in the appointments would be played by the judiciary itself*. In the words of a Venice Commission report: 'it is [our] view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. […] In all cases *the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges*. With the exception of ex-officio members these judges should be elected or appointed by their peers.'[82] This view reflects the stance already taken by the CoE in 1994, when the recommendation (94)12 clearly preferred judicial councils, however recognizing that other systems are also in place – in particular in the established democracies of Western Europe like Germany, France or England and Wales.

It is a bit *paradoxical* that the ideal system of judicial appointments from the Council of Europe's perspective – the one in which appointments are made directly by the council which is composed of a majority of judges – exists in its *purest form* in the country which otherwise *has little to offer in terms of good judicial practices*. In Italy, judges are appointed by the *Consiglio Superiore de la Magistratura,* the High Council of the Judiciary, composed of thirty-three members: twenty members elected by the judges and ten members appointed by Parliament in a joint session, plus three members who hold office as of right (President of the Republic, the first president of the Court of Cassation and the General Prosecutor).[83] It is hard to evaluate the contribution of such organizational setting, but the fact remains that less than half of Italians have confidence in the national judiciary.[84] At the same time, Italy has the largest number of Article 6 violations among the CoE member states, and its High Council of the Judiciary is facing criticism that it has 'become a center of power distributing favors', acting 'under criteria that are not objective' and 'influenced by the political affiliation of its members, meaning most of all the ones elected by the judges'.[85] Another example of the *discrepancy between the extreme institutional guarantees of independence*[86] *and the lowest public trust* in judiciary among general public in Europe is Croatia.[87]

Again, the roots of the European position vis-à-vis judicial councils is in the recent history. One may say that this position is slightly schizophrenic (or hypocritical), with a touch of colonial consciousness. The belief was that uncritically embracing the largest possible institutional independence is good for the democratic transition of former Socialist countries. Since 1990's,[88] European rule of law documents started to

develop double standards, with different criteria applicable to 'well-established' or 'old democracies' and 'new democracies' or 'countries in transition'. The underlying narrative is that the 'old democracies' have long constitutional and legal traditions and customs that guarantee that judicial appointments by the government are in line with the principles of judicial independence, while the 'new Europe' is unconditionally invited to put judicial appointments in the hands of the judiciary through the establishment of judicial councils or similar bodies.[89]

This double-standards policy has been ongoing for about three decades and has *not resulted in any substantial improvement or harmonization* of approaches. While the Venice Commission now gently recommends introduction of judicial councils for appointment of judges to 'all states which have not yet done so'[90], few of the 'old democracies' have listened and changed their 'culture' and systems of judicial appointments, with some notable exceptions like Belgium[91] or Portugal[92]. Many existing national judicial councils in developed European countries do not take part in the initial judicial appointments.[93] Instead, the practice favors cooperative executive appointments in which the key parts of the selection process are entrusted to mixed judicial appointment committees that, however, do not have the final appointment prerogatives. In such a way, the collaborative procedure and participatory nature of the process serve as the guarantee of the quality – but also as the guarantee of the responsiveness to social needs and legitimate public policies.

In some of the key EU member states, like Germany, there is still a feeling that *self-recruitment* of judiciary may be *wrong and unconstitutional*. In the words of a reputable German lawyer, 'the system of co-optation, in other words the system whereby the judges refill their ranks by choosing their own peers and leaving to the executive power the purely ceremonial act of appointment… would clearly be anti-constitutional in Germany' as 'there is an obvious danger that the judiciary could develop outside such popular control'.[94] Despite the retention of judicial appointments by the executive, the popular satisfaction and confidence in the independence of judiciary are strongest in the EU countries in which judges are appointed in such a way. For instance, among the EU countries in which the general public has the highest trust in judicial independence, the top scorers are Finland, Denmark, Austria, Germany, Luxembourg, Sweden, Ireland, and the Netherlands - and in none of them are judges appointed by an independent body composed of the majority of judges elected by their peers.[95]

On the other side, the *policy of favoring judicial councils* as the guarantee of judicial independence has *not proved to be effective* for strengthening the rule of law and preventing violations of judicial independence in countries like Poland, Hungary and Slovakia. Conversely, as visible from Croatian experience, appointments by 'independent' and 'autonomous' judicial councils in 'new democracies' proved to be burdened by arbitrariness, political favors, and nepotism. Even in Chile, heavy involvement of superior courts in the process of appointing judges has been viewed as problematic from the perspective of internal independence.[96]

Indeed, it cannot be disputed that autocratic governments in the world are on the rise, and that judicial independence is under attack in many states where the executive seeks to gain control over the holders of judicial power. For example, the reform in Poland, which in 2017 changed the method of the appointment of judicial members of the National Council for Judiciary and transferred this power from judges to the Parliament, was held by the ECtHR in the specific circumstances of the case to be a violation of the right to an independent and impartial tribunal established by law.[97] Nevertheless, insisting on the corporative-autonomous model of appointment, which was critically described by Cappelletti, has not been successful for suppressing such tendencies. Instead, *the formation of a well-balanced system of judicial appointments* in which there is *true cooperation* – but also *a true system of checks and balances* – among all the key stakeholders (all three branches of power, the legal profession and the users of the justice system) seems to be a better way for fighting totalitarian and authoritarian tendencies.

3. APPROPRIATE REMUNERATION FOR JUDICIAL WORK

3.1. Judicial Income and Judicial Independence

The financial status of judges has always been important, though not decisive, for judicial independence. The judicial job is in almost all societies around the world a reputable and important career choice, but the principal motive for choosing it is rarely financial, as other segments of the legal professions like lawyers, notaries or bailiffs, usually have significantly higher incomes.[98] Still, for appropriate devotion to judicial duties, some sort of financial independence is needed. In this regard, the UN Basic Principles recommend that judges be *'adequately remunerated'* and that their remuneration be *'secured by law'*.[99]

Various regional acts on the independence of the judiciary add that professional judges are entitled to remuneration that is fixed, shielding them from pressures aimed at influencing their decisions. The remuneration may vary depending on the length of service, the nature of judicial duties, and the importance of the tasks assigned. It is also emphasized that the remuneration should not be diminished during the term of judicial office.[100] The Council of Europe's 1994 Recommendation adds that remuneration should be *'commensurate with the dignity of [judicial] profession and burden of responsibilities'*.[101] Building upon that, Venice Commission states that '[t]he level of [judicial] remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants'.[102]

Many national constitutions include *guarantees regarding fixed judicial income*. For example, in the USA, constitutional protection against salary diminishment is in Art. III § 1 of the US Constitution.[103] Similarly, the Constitution of South Africa provides that the salaries, allowances and benefits of judges may not be reduced.[104] Prohibition of the reduction of judicial salaries is also provided in the Argentinian Constitution.

It is also often constitutionally provided that judicial salaries must be regulated by law. Even if such constitutional provisions do not exist, most countries regulate judicial salaries at a high level, typically through statutes enacted by the parliament.

3.2. Adequate Remuneration: Judicial Salaries in Relation to Other National Salaries

The concept of "adequate remuneration" for judges depends on the specific circumstances. Generally, judges are paid from the budgetary means, and their main income consists of fixed salaries. In developed countries, these salaries are relatively high, but when compared to the average national salaries, they are often not significantly higher. For example, in Norway, the gross salary of judges at the beginning of their career is about 110,000 EUR, which is only around 2 times higher than the national average gross salary.[105] In Germany, judges at the beginning of their career earn even less compared to the national average, with an annual gross salary of about 53,000 EUR, which is approximately equal to the average national gross salary.[106] However, in some less affluent countries, judicial salaries at the beginning of their career are lower but are relatively high compared to other salaries. Examples include Albania (21,000 EUR annually, 4.1 times the national average), Azerbaijan (25,000 EUR annually, 6.3 times the national average), or Ukraine (30,000 EUR annually, 6.8 times the national average).

The earnings of judges *at the beginning of their career* differ between career and non-career judiciaries. In non-career judiciaries, fresh judges are already experienced lawyers, and their income should be considerably higher than that of young career judges. Another factor influencing judicial salaries is the number of judicial professionals. If a country has a high number of judges per capita, their salaries are expected to be lower compared to countries with fewer judges. For instance, Germany with 25 judges per 100.000 inhabitants has much lower initial judicial salaries (53.000 EUR) than Ireland with 3.3 judges per 100.000 inhabitants (130.000 EUR), or Norway with 11 judges per 100.000 inhabitants (110.000 EUR). Thus, judicial salaries are correlated with the overall expenditures for the justice system. Usually, approximately 70 percent or more of court budgets are being spent on salaries.[107]

The level of judicial income appears to be significantly higher in *common law* countries due to their non-career system and other factors. For instance, in the UK, 'judicial salaries tend to be high in comparison to other professions', starting at 93.000 GBP.[108] But some civil law countries, particularly in South America, also offer judges impressive salaries: 'if you take the minimum wage as a parameter for the comparison, a judge earns, in Brazil, approximately 23 times what a minimum wage worker would earn per year'.[109] In Chile, first instance judges also receive relatively high salaries, ranging between 6,539 USD and 8,366 USD per month.[110] In Peru, while reporters note that accurate figures on judicial salaries are not easy to obtain, it can be noted that especially the salaries of the supreme court judges can with bonuses range up to almost 10.000 USD per month, approximately 35 times more than the minimum wage for workers in the private sector.[111]

As judges gain seniority and move to higher courts, their salaries also increase, but the growth rate varies widely in different jurisdictions. In non-career systems of common law judiciaries, it is typical for there to be no significant *differences between the salaries at the lowest and highest levels of the judicial hierarchy*. For instance, in Malta this difference is practically inexistent; in Scotland, Ireland and Northern Ireland the highest judicial salary is only about 53, 61 and 91 percent higher than the lowest salary.[112] Normally, in European countries, highest judicial salary is between 1,5 and 2,5 times higher than the beginner judicial salary. However, in some common law countries like England and Wales, there is still a significant difference between the lowest and highest salaries.[113] Overall, the highest differences between highest and lowest judicial salaries in Europe are found in Italy (3.33 times) and Ukraine (3,2 times) according to the survey conducted by the CEPEJ. The highest judicial income in the same survey is found in the highest court of Switzerland, where a judge earns over 330,000 EUR annually.[114]

While assessing the adequacy of judicial remuneration can be challenging, it is important to note that challenges to judicial independence may arise not only from judges being remunerated too low but also from *excessive remuneration*. In some debates, it has been argued that even the fact that a judge legitimately owns *too much property may be an impediment* for the judge to engage with full intensity and devotion in dealing with his judicial mission.[115] The balance between the income of judges and their impartiality in socially sensitive cases is a topic of debate, as excessively high remuneration (a 'filthy rich' judge) may raise concerns about potential biases in decision-making. Thus, finding an appropriate level of remuneration that ensures the integrity and independence of judges remains an important consideration.

3.3. Performance Bonuses

The traditional approach to judicial remuneration involves judges receiving a fixed salary. However, some countries have explored the idea of introducing *performance bonuses as an additional variable component of judges' salaries*, considering the importance of judicial independence and the occasional challenges in achieving satisfactory levels of judicial productivity. So far, the practice of awarding performance bonuses to judges is relatively limited, but it has been adopted in certain jurisdictions.

Chile, for instance, has implemented performance bonuses since 1998. In this system, all judges and court personnel have the opportunity to earn additional bonuses, known as *bonos de gestión*, based on their efficiency and contribution to collective goals. The criteria for awarding these bonuses include factors such as reducing waiting time and participation in training programmes.[116] Despite occasional objections about

potential impact on judicial independence, the Supreme Court of Chile supports this system, viewing it as beneficial for achieving set objectives and efficiency targets.[117]

Spain also attempted to introduce similar economic incentives for judges in 2003. The General Council of the Judiciary issued a regulation that provided for variable remuneration based on the measured productivity of judges. However, the Supreme Court annulled this regulation in 2006, as it disregarded the need for an individualized assessment of judicial activity. In 2018, Spain revisited the idea and issued a new regulation with a more individualized approach to performance bonuses. However, the bonuses in this system are very modest, amounting to no more than 5 percent of the total salary.[118]

The 2010 Venice Commission Report is critical of bonuses, although not ruling out their use entirely. The general position is that judicial remuneration should be based on a standard with objective and transparent criteria, rather than on individual performance assessments. However, the report excludes only those bonuses that involve an element of discretion, and not all kinds of performance bonuses.[119]

It is important to distinguish performance bonuses from other types of regular bonuses that are sometimes generously awarded to judges automatically on an annual basis or other occasions. For example, the Peruvian national report noted a rather complex system of bonuses, including 'regional bonuses' and 'operating expenses' bonuses.[120] Italy is known for providing some of the highest bonuses to its magistrates since 1984, with retirement bonuses for magistrates being particularly substantial. A study from 2005 showed that retirement bonuses for magistrates had an average amount of 330,000 EUR, with the top six judicial positions receiving bonuses of over 400,000 EUR.[121] This situation may appear paradoxical, as the country is not particularly renowned for high judicial performance.

3.4. Additional Judicial Income

Judicial ethics typically demand that judges focus the majority of their time and efforts on their judicial duties. Engaging in *certain economic activities* is considered *incompatible with the judicial position*, and judges' ability to earn money through side activities is usually more limited compared to some other professions. The fundamental principle is that judges should avoid any activities or earnings that could compromise their appearance of independence and impartiality. However, the strictness of these incompatibility rules and the scope of permitted side jobs, both paid and unpaid, can vary significantly from one country to another.

In some countries, judges are strictly prohibited from earning any additional income beyond their judicial salary.[122] In other countries, some side activities are explicitly prohibited[123], while others are expressly or tacitly permitted. Common examples of permitted activities include *teaching and writing*. [124] But even these seemingly noble 'gigs' can be subject to controversy. For instance, in Chile, judges are only allowed to engage in paid activities outside their judicial role to a limit of 12 hours per week for teaching. Nevertheless, the actual engagements are not always closely monitored, and anecdotal information suggests that some Chilean judges may exceed the prescribed limits by assuming additional roles in faculty administration (e.g., LLM Director, Dean) in addition to teaching commitments.[125]

To prevent such issues from arising, some judicial systems impose a *duty on judges to report all their side activities*. In certain countries, like Norway, they even maintain openly accessible registers of external engagements of judges.[126] In some systems, judges are required to regularly report on their extrajudicial activities. For example, in Czechia, every judge must notify the president of the court about their extracurricular activities in the past twelve months before 30 June of the current year. This includes information on whether they earned more than one-fifth of their annual salary, along with details on the nature, place, and time of the side activities.

The amount earned from external activities can vary widely. In some cases, it may be negligible and hardly comparable to a judge's salary. For instance, in Brazil, some judges may hold professorships, but as university professors are relatively poorly compensated in Brazil, their earnings from such activities are typically only a fraction of their salary as a judge.[127]

However, there are instances where high-profile judges with numerous external engagements, such as lecturing, teaching, and writing, can earn more money than their annual salary, both in Brazil and other countries like Croatia. From the perspective of judicial independence, this can be problematic. Frequent external engagements may raise doubts about whether the judge is neglecting their primary responsibilities. Also, frequent engagements of judges at paid seminars organized by commercial legal information providers may be objectionable on various grounds: it can create negative public perception (e.g., supreme court judge abusing his position to get a highly paid lecturing position), contain prejudicial statements (e.g., responding to 'abstract' questions by lawyers whose cases are pending in a court of law), or violate internal independence (e.g., assessing how certain issues should be interpreted, hierarchically superior judge may impose his or her interpretation on the lower court judges).

The limits on earning from external activities are inconsistent even in the US Supreme Court. While justices are legally limited to earning not more than about 30,000 USD annually from outside teaching, there is no such limit for book publications, and some justices regularly report receiving hundreds of thousands (or even millions) of USD in book royalties.[128]

To ensure a strict appearance of independence in each individual case, many countries require a *prior assessment and approval* for judges' external activities, including unpaid ones. For example, in Italy, judges need approval from the High Judicial Council (CSM) for any lecturing activities, which should not exceed 80 hours per year. France permits lecturing based on individual exceptions, while in Malta, Ireland, and the UK, judges are prohibited from receiving any compensation outside their judicial salary. Even unpaid work, such as lecturing and teaching, needs to be authorized in advance by high authorities like the Supreme Court president.[129] Under the European Charter, '[t]he exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.'[130]

Engagement of *acting judges as arbitrators in commercial arbitrations* is a particularly sensitive topic. While their experience may be useful in individual arbitration proceedings, some argue that such engagement, especially in slow and inefficient judiciaries, may raise concerns. It may appear inappropriate as judges-arbitrators are spending time on lucrative private arbitration work instead of handling backlogs in the judiciary. As a result, many countries prohibit or significantly limit judicial participation in arbitrations. For example, Austria, Czechia, Slovakia, Hungary, Ireland, and Belgium do not allow judges to act as arbitrators.[131] In Germany, acting judges may serve as arbitrators, but only if appointed jointly by the parties or by an appointing authority.[132] In Croatia, judges may only act as sole arbitrators or presidents of the arbitral tribunal.[133] Some countries even without express statutory prohibitions interpret the rules of judicial ethics as prohibiting active magistrates from engaging in arbitration and out-of-court private mediation.[134]

External activities of *judges of the European courts* are subject to especially strict rules. The ECtHR prohibits any activity that is incompatible with judges' independence, impartiality, or full-time office. Judges are also obliged to declare any additional activity to the President of the Court. In case of disagreement, the plenary Court makes the final decision.[135] The EU Court of Justice requires that judges may not engage in any occupation, gainful or not, without an exceptional exemption granted by the Council, acting by a simple majority. Judges taking office must swear to respect the duty to behave with integrity and discretion regarding the acceptance of certain appointments or benefits after they cease to hold office.[136]

3.5. Non-Financial Benefits

Indirect methods of remunerating judges, such as providing *various privileges and non-financial benefits*, have been observed in some judicial systems. These benefits can include perks like cars, free housing, or favorable terms for obtaining immovable properties for housing purposes. This practice was more common in socialist judiciaries and has persisted in some post-socialist countries.

While such non-financial benefits may initially seem attractive, they can raise concerns about potential threats to judicial independence. The Venice Commission, in its analysis of this practice, acknowledged that it may temporarily benefit some judges, particularly young judges who might not otherwise afford real estate. However, in the long run, it can lead to issues of discretion in distributing these benefits, potentially undermining the appearance of independence. A transparent and sufficient financial compensation can help safeguard judicial independence and reduce the risk of improper influence or favoritism based on non-financial perks.

Since this can be a potential threat to judicial independence, the Commission recommends, in the long run, *to phase out* such benefits and replace them by adequate level of financial remuneration.[137] At the same time, it is noted that such benefits in some countries 'correspond to a perceived need to achieve social justice', which makes them *difficult to abolish* and replace.[138]

3.6. Judicial Income in Times of Economic Crisis

Perceived adequacy of remuneration may change over time, especially in times of economic and social crisis. Two situations that can occur are: 1.) a general drop in state revenues that requires austerity and a reduction in salaries in all segments of society, and 2.) high inflation, which depreciates the value of fixed salaries.

As already stated, the *diminishment of judicial salaries is often constitutionally prohibited*. However, in hard times for societies, it may be legitimately expected that all segments of society make sacrifices. But then, vindictive attacks on the judiciary may be disguised in the call for social solidarity. One of the rare international documents which recognizes the tension between judicial independence and justified need for joint collective actions is Beijing Statement of Principles, which provides that '[t]he remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, *except as part of a uniform public economic measure* to which the judges of a relevant court, or a majority of them, have agreed.'[139]

The second situation is more difficult. When money loses value, it is necessary *to increase salaries to maintain the standard of living*. However, while many systems have strong guarantees against the diminishment of salaries, it is rare to find express guarantees of salary increases. This problem was noted in CCJE Opinion No. 1, where it is not only suggested that judicial systems introduce 'specific legal provisions guaranteeing judicial salaries against reduction,' but also 'to ensure at least de facto provision for salary increases in line with the cost of living'.[140]

The calculus is, however, difficult. What constitutes a fair increase of salaries in the judiciary considering the situation in society is subject to interpretation. Eventually, the situation can escalate, as shown by the recent strike of judges in Croatia. The strike was symbolically announced by a judge in a small local court of Krk who issued a decision adjourning the hearing for seven months, with the explanation that his most recent paycheck brought him into a 'state of incompetence due to his bad mood'.[141]

3.7. Judicial Remuneration and Corruption

An often-used argument in favor of raising judicial salaries is that *only sufficient salaries can remove the temptation of corruption*. Indeed, in some societies, judicial posts are still viewed as feudal privileges connected with the right to receive money and gifts from *les justiciables.* In fact, only a few centuries ago, even in the heart of Western Europe, exploitation of public office for private gain used to be a fundamental feature of politics.[142] The buying and selling of judicial offices has not happened due to high salaries, but due to 'harvesting' of financial gains, as 'certain kinds of payments to legal officials by litigants and defendants were normal and necessary part of the judicial process', which included *épices* or 'tips' for the judges.[143] Some remnants of such mentality can still be found in various jurisdictions, such as in Central Asia, where judicial salaries are also quite low (excluding 'favors' and 'tips'). The UN Human Rights Committee noted in its observations regarding the situation in Kyrgyzstan[144] and Kongo[145] (but also applicable to a number of other jurisdictions) that the low level of salaries frequently results in corruption.

While it is true that 'inadequate resources may render the judiciary vulnerable to corruption'[146] there is, so far, *no empirical proof that raising judicial salaries beyond a certain level has, by itself, eliminated or even substantially reduced the level of judicial corruption.* Anecdotal evidence rather speaks to the contrary: in Ukraine or Albania the level of judicial corruption is still rather high, despite the fact that judicial salaries are 4-5 times (Albania) or 7-22 times (Ukraine) higher than the average national gross salaries.[147]

Some of the best paid judges in the world, with an annual salary of 285,000 USD, have not been immune from suspect practices, as seen in the recent case of Justice Clarence Thomas who 'secretly accepted luxury trips' from his billionaire 'friend', which included free trips around the world on a superyacht and regular free flights in a private jet.[148] These gifts can hardly be qualified as 'token gifts appropriate to the occasion' which 'cannot be reasonably perceived as intended to influence the judge'.[149]

Therefore, appropriate salaries are just one, important but not the most essential, prerequisite for the fight against corruption in the judiciary. The experience from post-Communist and other transition countries shows that further instruments for securing accountability, sometimes at the expense of reducing the extreme forms of judicial independence, are needed. The politics of pushing for 'judicial supremacy' in Central and Eastern Europe proved not to be working as planned. As some observers noted, in a social climate of corrupt, arbitrary and incompetent politicians 'to insulate and to autonomize the judiciary […] accomplishes nothing but to insulate and autonomize corruption.'[150]

A very unique case of dealing with the endemic corruption of the judiciary is the case of vetting of Albanian judges. While the remuneration of Albanian judges was decent but in no case excessive, after 10 years of the obligation to declare their assets, it was found that 'nearly 80 percent of Albania's appeals court judges have apparent financial discrepancies and cannot justify their wealth in one or more years during their judicial careers.'[151] In 2014, the level of widespread corruption among Albanian judges led the otherwise very diplomatic and rather differently oriented EU delegates to recognize that 'the whole judicial system in Albania is corrupt.'[152] Therefore, with the EU's blessing and with massive public support, an unprecedented process of judicial vetting began through constitutional amendments, which ordered a re-evaluation of all judges (including Constitutional Court judges) and all prosecutors, as well as all legal advisors and legal assistants in higher courts, 'in order to guarantee the proper functioning of the rule of law, the independence of the judicial system, as well as to re-establish the public trust and confidence in these institutions.'[153] The vetting was based on three pillars of assessment: an appraisal of assets, background checks, and proficiency testing. It was planned that the vetting process would be completed in five years (i.e. by 2022) in the first instance by the Independent Qualification Commission (IQC). Until now, over half of the 800 Albanian judges, prosecutors, and legal advisors have been vetted. The minority was confirmed, but over half were either dismissed from office or have voluntarily resigned, mainly because of inaccurate disclosure of assets, lack of legitimate financial sources to justify assets, and hiding of wealth. This radical accountability measure was the subject of various challenges, which have all failed. The Venice Commission found that judicial vetting 'would be ill-advised in normal conditions, as it could undermine judicial independence', but in the concrete case, it was held to be necessary and appropriate.'[154] The European Court of Human Rights established that the Albanian vetting process is a *sui generis* case in which a wide margin of appreciation must be awarded to the state. Consequently, in the leading case of Xhoxhaj v. Albania,[155] it found no violation of due process or other human rights of the dismissed judges.

3.8. The Remuneration of Quasi-Judicial Staff and Other Supporting Actors

One should not neglect that *appropriate judicial salaries are not the only element of fair remuneration* necessary for the proper functioning of the judiciary. Contemporary courts are complex organizations serviced by a diverse corps of professionals in various sectors, from cleaning and maintenance to assistants, secretaries, and IT services. Some jurisdictions empower non-judge legal professionals with the authority to undertake, more or less autonomously, certain adjudicational tasks. Deputy judges or young professionals on a judicial career track also occasionally contribute to the proper functioning of the judiciary. Without their assistance, contribution, and devotion, even the best-paid and highly motivated professional judges can hardly achieve satisfactory functioning of the judicial system as a whole. In national reports, concerns about the salaries of some segments of court staff are raised.Top of Form[156]

At the moment of writing this report, the strike of judicial staff in Croatia is entering its eighth week, becoming the longest ongoing strike in national history.[157] The strike was prompted by the raise of judicial salaries agreed after several weeks of judicial strike – but without any impact on the salaries of other employees in the judiciary. Reaching an agreement has so far proved difficult since the court administration is a part of the national public administration, and any raise in the salaries within the judicial administration is threatening to trigger a chain reaction. Again, the dispute is connected with differences in the understanding of judicial independence: as the judiciary has reached a critically high level of corporate independence, it has a spillover effect on the segments of public administration that service the judiciary, who also seek to decouple from the uniform national standards for remuneration of administrative jobs in the public sector.

4. RETIREMENT OF JUDGES

4.1. Relevance for Judicial Independence

From the perspective of judicial independence (but also judicial accountability), the regulation of judicial retirement may be of considerable importance. Retirement leads to the loss of judicial function, and in that sense, it is comparable in its effects to removal from office or the expiry of a time-limited mandate. In the past, the executive has used retirement as a method of interfering in judicial independence, either in individual cases[158] or systemically. A relatively recent case of systemic challenge to judicial independence occurred in Hungary in 2012. In that year, the government used constitutional amendments to change the retirement age of judges from seventy years to sixty-two, forcing about 274 judges into early retirement, including six out of 20 court presidents at the county level, four out of five appeals court presidents, and twenty out of seventy-four Supreme Court judges.[159] After critical judgments from the Constitutional Court[160] and the European Court of Justice[161] (the latter only on the account of age discrimination), some remedial actions were undertaken, but the main aim of the government – to get rid of most of the court presidents – was achieved.[162]

Therefore, some matters related to retirement have been the topic of various international documents on judicial independence. The UN Basic Principles, for instance, require that 'pensions and the age of retirement be adequately secured by law', and that their tenure lasts 'until a mandatory retirement age or the expiry of the judicial term of office'.[163] The *Beijing Principles* state that 'all judges exercising the same Jurisdiction be appointed for a period to expire upon the attainment of a particular age'.[164] However, the possibility of altering legislative retirement conditions is only tackled in a few international documents, mainly those adopted by judicial representatives. For instance, the Beijing Principles suggest that 'a judge's tenure must not be altered to the disadvantage of the judge during her or his term of office'.[165] The 1999 Universal Charter of the Judge (a document approved by the international association of judges) stipulates that '[a]ny change to the judicial obligatory retirement age must not have retroactive effect'.[166]

These standards may seem simple and more or less unified. However, when analyzing the concrete solutions in various national jurisdictions, a wide span of various options is revealed.

4.2. Life Tenure and Mandatory Retirement Age

The first difference regarding retirement systems is between those that provide *life tenure for judges* and those that stipulate *a mandatory retirement age*. The life tenure system, characteristic of US federal judges, originates from Article III of the US Constitution, which provides that federal judges 'hold their office during good behavior', interpreted to mean a lifetime appointment except under very limited circumstances (impeachment).[167] This means that US federal judges can retire voluntarily but do not have a mandatory retirement age.

However, life tenure for judges seems to be an exception that is fading away. Even in the United States, where lifetime appointments are a hallmark of Supreme Court justices, life tenure is only a privilege of 'Art III judges'. State judges, who were once mostly appointed for life, are now generally appointed for fixed terms (and in two states – Massachusetts and New Hampshire – judges are appointed until they reach the mandatory retirement age of 70).[168]

The majority of contemporary judiciaries, especially in ordinary career-based courts, embrace the system of appointment until judges reach the prescribed mandatory retirement age. But even within that system, there are significant variations.

On average, based on the submitted national reports, contemporary judiciaries may be accused of being prone towards gerontocracy, as the mandatory retirement age for judges in most states is significantly higher (sometimes considerably higher) than the usual national statutory retirement age.

For example, in the United Kingdom, judges, regardless of their judicial office, must retire at the age of 75.[169] The Chilean Constitution is a crossbreed of the US and the UK: judges have 'tenure' until reaching the age of 75, if they maintain good behavior.[170] Brazil also has a mandatory retirement age of 75 for judges, though the same age limit applies to every civil servant.[171] Argentina's limit is the same (75 years), but federal magistrates may be kept in office, with the agreement of the Senate, after the age of 75 through a new appointment.[172]

In Peru, the retirement age for judges is not a constitutional category, but it is also higher, statutorily limited to the age of 70 (though members of the National Board of Justice may serve until they reach 75 years of age). [173] The retirement age for permanent judges in Norway is also 70 years.[174] The same limit (70 years) is provided in the Judiciary Law in Spain, though judges are also eligible for voluntary retirement upon reaching the age of 65 (with at least 15 years of effective service).[175] Italy also sets the retirement age at 70 years (unlike the general retirement age, which is 66 years and 7 months for men and 65 years and 7 months for women). In Croatia, the retirement limit for judges is 70 years (provided by the Constitution), while the general retirement age is 65. In South Africa, the regime is more refined: while the mandatory

retirement age for judges is in principle 70, the Constitutional Court judges may have their mandate extended by an act of the Parliament. The Constitutional Court, Appeal and High Court judges must serve until they reach 75 if they have less than 15 years active service.[176] In Belgium, the mandatory retirement age depends on the level of the court: for the *Cour de cassation* (Supreme Court) it is 70 years, but the rest of the national judges retire at 67. However, retired judges may continue to work as substitute judges until they reach 70 (in come cases 74), or, for the Supreme Court, until they are 71 (or in some cases 75).[177]

Nevertheless, some countries have lower age limits for judicial retirements, consistent with the retirement age of regular citizens. In Germany, the compulsory retirement age for judges is 65 years (both for federal and state judiciary). The same retirement age applies to the Netherlands.[178] In France, the normal retirement age also applies to judges (62 years), but judges may be kept in office until they reach 65 or 66 (honorary and voluntary judges may be older than that).[179] In Poland, the judicial retirement age is 60 years for women and 65 for men, but judges may be called by the Minister of Justice to continue working until the age of 70.[180] In India, High Court judges retire at 62, and Supreme Court judges at 65. The lowest mandatory retirement age for judges is found in China – 60 years for men and 55 for women, which is consistent with the national statutory retirement age.[181]

The approach that sets a mandatory retirement age for judges at the higher side (70 or more) seems to be more compatible with the logic of non-career judiciaries. If judges are selected from the top legal professionals, there is more incentive to keep them in office longer. However, for judges who begin their career in their late twenties or early thirties, their judicial career may last for 30-40 years, and there may be little reasonable grounds for granting the privilege of staying in office considerably longer than other professionals in the same jurisdiction, especially for those who have not satisfied the criteria for promotion and remain at the lowest ladder of the judicial hierarchy.

The African Principles and Guidelines also recognize that it may not be discriminatory for states to set a maximum retirement age or duration of service for judicial officers and that such age or duration may vary with different levels of judges, magistrates, or other officers in the judiciary.[182] However, without good reasons and explanations, the privilege of some career judges to choose to retire at 70 or 75 years of age may be perceived as discriminatory, especially considering that not many professions have the privilege to choose whether to continue working in their late age or retire. There are so far no studies on relationship of public trust with the regulation of judicial tenure, but there is some evidence that 'gerontocratic' judiciaries enjoy less public confidence. The need to have agile judges able to use and embrace digital technology (and understand the tectonic shifts in the contemporary world) may also speak against the automatic 'late age retirement privilege', especially in the judiciaries which adhere to a bureaucratic model of judiciary.

Even some misguided attempts to reduce judicial retirement age, like the one in Hungary, may have had some acceptable intentions. The European Court of Justice, when deciding on Hungarian constitutional reforms, found that standardization of the compulsory retirement age 'can constitute a legitimate employment policy objective', just as the aim of establishing a more balanced age structure facilitating access for young lawyers to the professions of judge, prosecutor and notary.[183] In the concrete case, however, the reform failed the test of necessity, due to abrupt and unprepared change of the system and its dire consequences for the acting generation of Hungarian judges.

4.3. Judicial Work after Retirement

The retirement from an ordinary judicial position does not necessarily mean the end of judicial activity. Some judges may express a willingness to continue contributing after retirement, which can be beneficial in cases of high backlogs and low interest in entering judicial careers. In some countries, there are explicit provisions allowing retired judges to continue working as substitute judges, with certain age limitations.[184] For example, in Chile, this option is part of a policy to reduce the workload of the superior courts.[185] Probably with these considerations in mind, the International Association of Judges stipulated that 'after retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge.'[186] This allows retired judges to continue utilizing their expertise and experience in the legal field even after formally retiring from their judicial position. Yet, it can also prevent younger professionals from entering judicial career, and making such option dependent on the individual assessment could lead to favoritism.

4.4. Judicial Pensions

The willingness of judges to continue working after retirement may also depend on financial motives, as pensions received after retirement may significantly impact their income. In some systems, judges may experience a multiple reduction in revenues upon retirement,[187] which can influence their decision to stay in office or retire.

From the perspective of judicial independence, the regulation of judicial pensions is a relevant factor. In career judiciaries, judges often reach their highest position in the hierarchy and receive the highest revenues as they approach their retirement age. The executive branch is typically responsible for shaping the pension system, which can potentially put judges nearing retirement in a vulnerable position.

In international *acquis*, judicial pensions appear in several documents. In the older documents, such as the 1980 Singhvi's draft, an obvious element is highlighted, i.e., that 'during their terms of office, judges shall receive salaries and after retirement, they shall receive pensions'.[188] The main global and regional standards of judicial independence mention pensions among other terms that regulate judicial office, and emphasize that, among others, judicial pensions also should be 'prescribed and guaranteed by law'.[189]

Draft Universal Declaration also emphasize that not only salaries, but also pensions of judges should be 'adequate' and 'commensurate with the status, dignity and responsibility', and also periodically reviewed to overcome or minimize the effect of inflation.[190] The Universal Charter pleads that the 'annuity or pension' should be 'in accordance with [judges'] professional category'.[191] Burgh House Principles only require that 'conditions of service include adequate pension arrangements'.[192]

The European Charter adopted by the Consultative Council of European Judges (CCJE) goes even further, requiring guarantees for judges against social risks linked with illness, maternity, invalidity, old age, and death. It particularly emphasizes that judges should receive a retirement pension as close as possible to their final salary as a judge.[193]

Some countries have effectively provided guarantees for pensions being 'as close as salaries'. For example, in Argentina, the judicial pension is currently equivalent to 82 percent of the average judicial salary in the past 120 months.[194] In Germany, the limit of judicial retirement pension is 75 percent of the salary for active duty.[195] Again, Italy stands out with particularly privileged judicial pensions, as, according to 2015 data, retired judges receive an average pension of 103,000 EUR, which is about 90 percent more than what would be due based strictly on their contributions to the pension system.[196]

5. INTERIM CONCLUSIONS

In 1983, Mauro Cappelletti finished his general report on judicial responsibility with a wishful finding that the world is moving towards a model which 'combines a reasonable degree of political and societal responsibility with a reasonable degree of legal responsibility', the model which best balances independence and accountability.[197] Now, forty years later, revisiting the main organizational elements of the contemporary justice systems in the light of this plea shows that the world is still a long way from a perfect balance of independence and accountability. Revisiting the main elements of contemporary justice systems reveals that the concept of a judiciary that is free from undue influence, responsive to society's needs, and subject to appropriate checks and balances seems to be fading away amid adversarial discussions and interest-based conflicts.

The contemporary societies are saturated with conflicts. As societal and political problems increasingly find their way to the judicial domain,[198] the judiciary becomes more exposed, vulnerable, and subject to sharp criticisms. The overwhelmed judicial system emphasizes the separation of powers, but instead of gaining allies, it attracts more irritation and attacks from politicians and the media. This intensifies the tension between judicial independence and accountability.[199]

The conclusion which can be drawn from insightful contributions of national reporters is that, rather than fostering collaboration and responsiveness, the current global landscape is dominated by sharp divisions, contrasts, and extremes. Some of them are literally ongoing: the crises in Israel, Hungary or Poland are the most notorious examples, but many simmering conflicts and a large number of open issues come from almost all of surveyed jurisdictions, including Peru as the host jurisdiction of this congress.

Turning to institutional design, a large variety of different organizational regimes still prevails in judicial systems around the globe. The contrast between career and non-career systems of judiciary remains and shows no signs of fading away in the future. In the United States, elections of judges at popular elections and/or their executive appointment for a fixed term, subject to re-evaluation and reappointment, still characterizes the state judiciary. Bureaucratic judiciaries in civil law career systems have not lost their main features, and hierarchy still plays a very important role in terms of work, prestige, and social status of judges.

Among the trends in career judiciaries, especially in Europe, one can recognize further strengthening of corporate elements, including pleas for a system of corporate separateness in which the judicial branch would have the prevalent and decisive influence in all personal matters, from the selection of candidates to promotions of judges, as well as in matters of performance evaluation, disciplinary liability, and judicial remuneration, both during and after active service. So far, such trends have not brought much good in terms of the desired 'responsiveness' from Cappelletti's ideal judiciary.

Many judiciaries in the South and East of Europe, as well as many judiciaries in South America, display a high level of corporate privileges: the judiciary plays the most important role in (self)recruitment of future judicial professionals; judges enjoy a fixed tenure until a very old age; their remuneration is much higher than the average earning of teachers and academics, even without bonuses and additional engagements; their pensions are high and secured by law. Judges are protected from outside interference in their decision-making and cannot be called to responsibility for their work performance except before their own bodies and tribunals. But, the price of this noble isolation is high: as Cappelletti said, such a *'corps séparé,* totally insulated from government and society' gradually loses public confidence and scores low on the objective scales of quality, speed, and efficiency.

The wise self-restraint which once existed in the highest American courts, where judges 'avoid pronouncements that might be so outside of public or political acceptability that the judiciary loses public support and confidence',[200] is not universally embraced. While some parts of the world successfully convert judiciary to another subservient tool of the leading political and economical elites, in the other parts judiciary lacks modesty, empathy and solidarity with the rest of the society. This not only fuels legitimate criticisms, but can also be encouragement for forceful attempts of populist politicians to earn points by 'reforming' the

judiciary, while at the same time reinforcing their authoritarian rule. Nevertheless, history has taught us that judicial reforms designed by Berlusconi, Sarkozy, Orban, Bolsonaro, or Netanyahu can hardly bring us more freedom, more peace, and more justice.

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[2] See for instance the general reports of Nicola Picardi and Shimon Shetreet on the topics of judicial independence and judicial responsibility submitted at the *IX World Conference of the IAPL* in Coimbra and Lisbon in 1991.

[3] *Montreal Declaration* (Universal Declaration on the Independence of Justice), 1983, 2.02.

[4] Coman, Ramona and Dallara, Cristina (eds.), *Handbook on Judicial Politics*, Institutul European, Iasi, 2010, p. 32.

[5] See Montesquieu, *De l'esprit des lois*, Geneve, 1758, Part XI, Ch. 6 („*Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle*".) A similar distinction between the "power" and "an autonomous branch" is retained in the Italian constitution, see Silvestri NR, at 3.

[6] Some of that reasoning is still present in Italian doctrine, Silvestri, *ibid.*

[7] *Op. cit.*, Ch. VI.

[8] *Op. cit.*, Ch. IV.

[9] John Emerich Edward Dalberg-Acton, in Acton-Creighton correspondence, 1887.

[10] Bickel, Alexander M., *The Least Dangerous Branch. The Supreme Court at the Bar of Politics,* New York, 1962, at 1.

[11] For the USA, Scot Dodson reminds us that American courts have 'taken the lead on several core political and social goals', and that the 'have an ingrained *public* function'. Dodson (NR), at 2.

[12] Compare Kosar, David, 'The least accountable branch', *IJCL*, 11:1, 2013, pp. 234-260.

[13] Cappelletti, Mauro, 'Who Watches the Watchmen? A Comparative Study on Judicial Responsibility', *The American Journal of Comparative Law,* Winter, 1983, 31:1, pp. 1-62.

[14] Juvenal, *Satura,* VI 347: *quis custodiet Ipsos custodes?*

[15] Cappelletti, *op. cit.*, p. 60.

[16] *Ibid.*

[17] *Ibid.*, p. 61.

[18] This is, indeed, a simplification, as the processes were gradual, often perplexed and many mixed forms existed throughout centuries. For a nuanced presentation of the historical development of judicial profession, see van Caenegem, R. C., *Judges, Legislators and professors,* Cambridge, 1987, pp. 131-145; Berman, Harold J., *Law and Revolution,* Cambridge (Mass.)/London, 1983.

[19] Most systematical studies on selection and recruitment of judges at the global level are pretty old – see e.g., Clark, David S., 'The Organization of Lawyers and Judges' in: Cappelletti and Garth (eds.), *Civil Procedure. Vol XVI, International Encyclopedia of Comparative Law,* Tübingen, 1987; see also reports of Picardi and Shetreet of 1991, cit.

[20] Andenas, Mads, 'A European Perspective on Judicial Independence and Accountability', *The International Lawyer*, Vol. 41, No. 1 (SPRING 2007), pp. 1-20, at 2.

[21] See Clark, Dave S., *op. cit.*, pp. 81-85.

[22] Some judges in the UK are now appointed in early 30's or even late 20's (see: https://www.legalcheek.com/2023/01/civil-servant-who-finished-llb-in-2021-becomes-countrys-youngest-judge-at-29/); a trend of appointment of younger candidates – even for the highest courts – is noted by Rick Marcus in his national report, in the context of court-packing policies.

[23] This is a constitutional rule which reserves one fifth of appointments in higher courts for members of the legal profession who are not judges (for lawyers and *ministerios publicos*, Art. 94), see NR of Hermes Zaneti.

[24] A certain number of places for the retraining of public officials or for conversion of lawyers and other legal professionals to judiciary are offered by the National School for Magistrates - École nationale de la magistrature (ENM), see https://www.enm.justice.fr/fr/concours/les-concours/se-reperer.

[25] The following list of model features is derived from various sources, following the ideal-type method. See Damaška, Mirjan, *Faces of Justice and the State Authority,* Yale UP, 1986.

[26] Merryman, Henry, *The Civil Law Tradition,* Stanford, 1987, p. 35.

[27] *Ibid.*, at 36-37.

[28] Scot Dodson NR, at 3.1.

[29] Marcus NR, p. 7.

[30] See Chase, Hershkoff, Silberman, Sorabji, Stürner, Taniguchi, and Varano, *Civil Litigation in Comparative Context*, 2d., West Academic, 2017, p. 166.

[31] Even in the People's Republic of China, where judges used to be elected for a five-year term under the 1980's regulations, this is not the case anymore. Compare Fu Yulin, NR and diverse other materials.

[32] Dodson NR, at 3.2. Massachusetts and New Hampshire do not appoint judges for life, but have mandatory retirement ages of 70.

[33] Compare https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures (published May 2015).

[34] *Ibid.*

[35] Marcus NR, at 7; see also *Caperton v. Massey Coal Co., 556 U.S. 868 (2009),* deciding on whether judges who receive large financial contributions should recuse themselves from adjudicating cases involving their donors.

[36] See Grodin, Joseph, *In Pursuit of Justice: Reflections of a State Supreme Court Justice*, Univ. of Cal. Press, 1991.

[37] Marcus NR, at 8.

[38] Siles NR, p. 3.

[39] E.g., judicial candidates in Germany are subject to a probationary period of up to five years before their permanent appointment to judicial office (so-called *Richter auf Probe* or *Gerichtsassessor).* Seeking to enhance judicial accountability, a similar test appointment was introduced by Croatian Constitution in 2000, but has been abandoned in 2010.

[40] Venice Commission, *Report on the Independence of the Judicial System*, CDL-AD(2010)004, p. 9 at 38.

[41] Dodson NR, *ibid.*

[42] *See* Bannon, Alicia, *Rethinking Judicial Selection in State Courts*, Brennan Center for Justice, 2016, 1.

[43] Dodson NR, *ibid.*

[44] Already the Montreal Declaration in 2.19(b) pleads for 'guaranteed tenure until a mandatory retirement age or expiry of the term of office, where such exists'; compare also recommendation in Mt. Scopus Standards, 11.5.

[45] Section 3(1) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, see van Loggerenberg NR, at 6.

[46] See Brennan Center for Justice, *Choosing State Judges: A Plan for Reform*, 2018, https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform.

[47] Cabral NR, at 5.

[48] Siles NR, at 1.A.

[49] Corte IDH, Caso Álvarez Ramos vs. Venezuela, 30 de agosto de 2019, párrafo 148; STC 01460-2016-HC, Caso Fujimori Fujimori, 3 de mayo de 2016, FJ 10.

[50] See Mt. Scopus Standards, 12.1.

[51] All in all, fewer than ten federal judges have been successfully removed from office by impeachment, see https://www.fjc.gov/history/judges/impeachments-federal-judges.

[52] Marcus NR, p. 8.

[53] Dodson NR.

[54] The longest serving justice at the Supreme Court served for almost 37 years; chief justice John Marshall spent at the court 34 years; Clarence Thomas was appointed in October 1991 and is still incumbent. Average tenure in office increased from 15 years in 1970 to about 17 years in 2023.

[55] Dodson NR. Marcus believes that ' a central tenet of American judicial independence is that American judges aspire to rise above their biases and prejudices, and by and large they have succeeded'.

[56] Dodson argues that public confidence in state judges has waned in recent years – they are viewed as less competent and more biased than their federal counterparts. Dodson NR, see also https://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSc-2017-Survey-Analysis.ashx.

[57] General Social Survey of 2022 revealed that 'just 18% of Americans said they have a great deal of confidence in the court, down from 26% in 2021, and 36% said they had hardly any, up from 21%.' https://apnews.com/article/supreme-court-poll-abortion-confidence-declining-0ff738589bd7815bf0eab804baa5f3d1.

[58] Compare EU Justice Scoreboard, COM(2023) 309, pp. 41-42 at 3.3.1 (tables 49 and 51), https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en. The countries with the lowest score of public perception of independence (less than 40%) include Croatia, Poland, Bulgaria, Slovakia, Spain, Hungary and Italy. While in Poland and Hungary one may find some real challenges to judicial independence, Croatia, Spain and Italy have some of the strongest guarantees of corporate independence (see more *infra*).

[59] On public support as the ultimate limitation of judicial independence see Clark, Tom, *The Limits of Judicial Independence*, Cambridge, 2011.

[60] *ICJ International Principles* – Practitioners Guide, p. 41.

[61] A number of soft law instruments aspire to be the reflection of such consensus (at least when judicial professionals are concerned). For various collections see e.g., Gass, S., Kiener, R., Stadelmann, T. (eds.): *Standards on judicial independence*, Bern: Editions Weblaw, 2012; *ICJ International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. Practitioners Guide No. 1.*, Geneva (ICJ), 2007; for relevant human rights jurisprudence see *Factsheet – Independence of the justice system*, Strasbourg (Council of Europe), October 2022.

[62] *UN Basic Principles on the Independence of the Judiciary*, 1985, at 10.

[63] *Montreal Declaration*, 2.17.

[64] *CoE Recommendation No. R(94)12,* Principle I at 2(c).

[65] *CoE Recommendation, CM/Rec(2010)12* at 44.

[66] *Venice Commission*, CDL-AD(2010)004, p. 6 (at 27).

[67] See Regional Reports South America.

[68] See Chan, NR.

[69] Silvestri NR at 6.

[70] De Benito NR.

[71] Cabral NR, at 1.

[72] Ibid. Vitorelli in Regional Reports South America assesses that the usual competition rate is 166 candidates per one open position.

[73] Garcia Odgers et al., NR Chile.

[74] This is a simpler and more consistent version of the typology of methods of judicial appointments proposed by S. Shetreet who distinguishes executive appointments, judicial appointments, mixed model, collegial appointment and appointment by election. See Shetreet, Shimon, The rule of universality and particularity. Judicial independence, judicial appointments and other issues, in: Shetreet et al., *Challenged Justice: In Pursuit of Judicial Independence,* Brill, 2021, 68-120.

[75] For the examples from the U.S. state courts, see Dodson NR, 3.2.

[76] U.S. Const. art. II, § 2, cl. 2.

[77] Bermejo NR Argentina, p. 41.

[78] Art. 99 para 4 of the Argentinian Constitution.

[79] See Campbell and Fell v UK, 28 June 1984, 7819/77, 7878/77, § 79.

[80] Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18, § 207, 1 December 2020.

[81] Ibid., § 234.

[82] *Venice Commission Report*, *op. cit.*, para. 32.

[83] Silvestri NR, p. 7, referring to Art. 104 of the Italian Constitution.

[84] Only 43 percent of Italians are satisfied with the performance of the national judiciary, see See EURISPES, *34° Rapporto Italia-Percorsi di ricerca nella società italiana*, 2022, https://eurispes.eu/wp-content/uploads/2022/05/eurispes_sintesi-rapporto-italia-2022.pdf (cited in Silvestri NR, *ibid.*).

[85] Silvestri, *ibid.*

[86] Judges are appointed by the State Judicial Council in which 7 out of 11 members are elected by judges.

[87] According to EU Judicial Scoreboard, it was some 17% in 2021 – see *supra.*

[88] See 1994 CoE Recommendation, *op. cit.*

[89] See *Venice Commission Report (CDL-AD(2007)028):* '45. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time. 46. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse, and therefore, at least in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges.'

[90] *Venice Commission Report*, *op. cit.*, at 32.

[91] Since 2000 in Belgium a High Council of Justice composed of 44 members is established. It is composed of 22 magistrates and 22 others, i.e. 8 lawyers, 6 professors and 8 members of civil society. However, its function is nomination of the candidates for judges, and appointments as such are still in the hands of the Crown. While the HCJ organizes the national examinations of candidates, in the selection process for the appointment to a specific vacancy there are mandatory consultations with the chiefs of jurisdiction and the bar association. See Voet NR.

[92] The composition of the Conselho Superior da Magistratura in Portugal consists of 17 members (7 judges elected by their peers, 7 members appointed by the Parliament, 2 members appointed by the President and the President of the Supreme Court). However, the process of access to judicial profession consists of three stages, a public competition; a training course at the Centre for Judicial Studies and an apprenticeship. See https://www.encj.eu/images/stories/pdf/factsheets/csm_portugal.pdf.

[93] For instance in the Netherlands, see https://www.rechtspraak.nl/English/The-Council-for-the-Judiciary.

[94] See Heinz, Volker G., 'The Appointment of Judges in Germany', *Berliner Anwaltsblatt*, 4/1999, pp. 178-183.

[95] Compare EU Justice Scoreboard, *ibid.*, as well as the fact sheets published by the European Network of Councils for the Judiciary, https://www.encj.eu/members.

[96] Garcia Odgers et al., NR Chile: 'due to this power of the superior judges to select their future peers, lower courts judges have historically been given an informal choice: either follow the same criteria and behavior pattern of the superiors, or accept that your judicial career will end in the lower court'.

[97] See *Advance Pharma sp. z o.o v. Poland*, no. 1469/20. A similar violation as to the composition of the Constitutional Court was find in *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, judgment of 7 May 2021. Further violations of the right to a tribunal established by law due to fundamental irregularities in the appointment process and undue influence by the legislative and the executive were found in Reczkowicz v. Poland, no. 43447/19, judgment of 22 July 2021; *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, judgment of 8 November 2021 and *Juszczyszyn v. Poland*, no. 35599/20, judgment of 6 October 2022. See also Flaga-Gieruszynska and Klich NR Poland.

[98] Though there are exceptions: for instance, Vitorelli states for Brazil that 'when you compare judge`s salaries to private attorney's compensation, only lawyers at the top of the profession earn a yearly salary similar to what judges make'. Vitorelli, in Regional Report South America.

[99] UN Basic Principles, Conditions of service and tenure, at 11. See also African Principles and Guidelines, at 4(m); Beijing Statement of Principles 2001, at 31; Commonwealth Principles, 2003, IV.2(b).

[100] See European Charter on the statute for judges and Explanatory Memorandum (DAJ/DOC (98));

[101] CoE Recommendation 94(12), Principle III.1.b.

[102] *Venice Commission Report* CDL-AD(2010)004, para 46.

[103] See Dodson NR.

[104] Section 176(3) of the South African Constitution, see van Loggerenberg NR.

[105] See CEPEJ Evaluation Report 2022, at 80 (fig. 3.46). Compare Strandberg NR.

[106] CEPEJ, *ibid.*

[107] See CEPEJ, *op. cit.*, p. 27.

[108] See Sorabji NR.

[109] Vitorelli, in Regional Report South America, at 33.

[110] Garcia Odgers et al., Chile NR, at 5 (pointing to the transparency of judicial salaries which are publicly available on the web site of the Chilean judiciary).

[111] See Siles, Regional Report South America, p. 9-11.

[112] The data is derived from CEPEJ Evaluation Report, fig. 3.46 (2020 data).

[113] According to data provided by John Sorabji, the lowest salary is 93.000 GBP and the highest 257.000 GBP, which is about 2.7 times higher.

[114] *Ibid.* In 2020, the highest first instance salary in Europe was however in Scotland, about 160.000 EUR annually.

[115] Comments regarding the Czech Supreme Court case law on judicial assets, cited after Croatian SC President Report.

[116] Garcia Odgers et al., Chile NR, at 5.

[117] *Ibid.*

[118] De Benito NR, at 2.

[119] Venice Commission Report CDL-AD(2010)004, para 46.

[120] Siles, in Regional Report South America, p. 9-10.

[121] See di Federico, Recruitment, Professional Evaluation, Career and Discipline of Judges and
Prosecutors in Italy, in di Federico (ed.), *op. cit.*, p. 155.

[122] E.g., in the UK, see Sorabji NR, at 2.

[123] In Norway, pursuant to section 121 of the Courts of justice Act, judges may not receive any income or remuneration from previous or future employers. Strandberg NR, at 2.

[124] E.g., in China, judges 'may assist in practical teaching and research work in institutions of higher learning or research institutes' – see Chan NR; in Belgium the publishing of academic articles and participation in teaching in law schools are among the rare activities which are permitted and for which judges may receive remuneration. In contrast, Belgian judges may be members of the boards of up to two public bodies – but should not receive compensation for that if it exceeds more than one-tenth of judicial annual gross salary. For all other activities Belgian judges need to obtain permission by the King.

[125] Garcia Odgers et al., NR Chile.

[126] Strandberg NR. The register is called *sidegjøremålsregisteret* (side activities register).

[127] Vitorelli, in General Report South America, *ibid.*

[128] Time, 9 June 2022, https://time.com/6186294/supreme-court-salary-book-deals/.

[129] See Letter of the President, Croatian SC, 4 April 2022 (Su-IV-75/2022-21).

[130] *European Charter on the statute for judges and Explanatory Memorandum (DAJ/DOC (98)),* 4.2.

[131] *Ibid.*

[132] § 40(1) DRiG.

[133] Art 10(2) Law on Arbitration.

[134] See e.g., Opinion of the Slovenian Judges' Association of 7 January 2013, https://sodnisko-drustvo.si/mnenje-sodnik-mediator-arbiter/.

[135] Art. 4 of the Rules of Court (23 June 2023).

[136] Statute of the Court of Justice (consolidated, 1 May 2019).

[137] *Venice Commission Report*, *op. cit.*, 47-51.

[138] *Ibid.*, at 50.

[139] *Beijing Statement of Principles* 2001, at 31.

[140] *CCJE Opinion No. 1,* at 45.

[141] Decision P-281/2020-24 of 12 April 2023 broadly publicized in national news outlets. The full explanation was: '1. Having received the payroll - Salary calculation for the month of March 2023 - the acting judge was brought into a state of bad mood. The situation is particularly accentuated by the fact that the base for the judge's salary for March 2023 is lower than the base that was in force in 2009, despite the notorious increase in the cost of living not only over the past year, but over the entire past decade. 2. A judge who is burdened with his own existence cannot be expected to dedicate himself to deciding on other people's rights and obligations with appropriate attention and expertise.'

[142] Kettering, Sharon, *Patrons, Brokers, and Clients in Seventeenth-Century France,* New York/Oxford, 1986, pp. 192-206.

[143] Sawyer, Jeffrey K., Judicial Corruption and Legal Reformi n Early Seventeenth-Century France, *Law and History Review,* 6:1, 1988, p. 97.

[144] UN document CCPR/CO/69/KGZ, para. 15.

[145] UN document CCPR/C/COD/CO/3, para. 21.

[146] *ICJ International Principles*, *op. cit.*, p. 33.

[147] See CEPEJ Report 2022, *ibid.*

[148] Washington Post, 6 April 2023.

[149] See *Bangalore Principles of Judicial Conduct*, 4.16.

[150] Christina Parau (commenting on Romania and CEE) in Seibert-Forhr (ed.), Anja, *Judicial Independence in Transition*, Springer, 2012, p. 640.

[151] https://balkaninsight.com/2016/06/17/the-integrity-gap-albania-s-appeals-court-judges-asset-disclosures-raise-red-flags-06-16-2016/ (published 17 June 2016).

[152] Statement of Joaquin Urias, the chief of EURALIUS Mission (= EU Assistance Mission to the Albanian Justice Sysetm) in Albania in an interview for 'Voice of America', see https://www.infocip.org/en/?p=1199.

[153] See Art. 179(b) of the Albanian constitution, inserted by Law 76/2016 of 22 July 2016.

[154] See Venice Commission, Opinion No. 868 of 12 December 2016.

[155] Xhoxhaj v. Albania, ECtHR, 15227/19, judgment of 9 September 2021.

[156] See Strandberg NR, at 2 on the concerns expressed about the salaries of deputy judges in Norway who, on average earn about 20.000 EUR less than they did in their previous job.

[157] See e.g., https://www.jutarnji.hr/vijesti/hrvatska/strajk-u-pravosudu-premasio-rekord-danas-novi-sastanak-s-vladom-potpuno-cemo-obustaviti-rad-15354725 (12 July 2023).

[158] For instance, in 1992, after supporting independent views contary to the Government's position, the President of the Croatian Supreme Court Vjekoslav Vidović was retired 'due to reaching of retirement age', although he was appointed to the post only year before that when he was already past the retirement age. See Uzelac, Alan, 'Role and Status of Judges in Croatia', in: Oberhammer (ed.), *Richterbild und Rechtsreform in Mitteleuropa*, Wien, 2000, p. 27.

[159] See Halmai, Gábor, 'The Early Retirement Age of the Hungarian Judges', in: Nicola/Davies (eds.), *EU Law Stories,* Cambridge UP, 2017, p. 471.

[160] Decision 33/2012 (VII.17).

[161] ECJ, 6 November 2012, Case C—286/12.

[162] Halmai, *op. cit.*, p. 488.

[163] *UN Basic Principles on the Independence of the Judiciary*, Principle 11. See also *African Guidelines,* Principle A, paras. 4(l) and (m); Principle I.3 of the *Council of Europe's Recommendation Rec(94)12.* The ICJ commentators add that this formula should be read so as to include appointment for life which is also a safeguard for judicial independence – see ICJ International Principles – Practitioners Guide, p. 51.

[164] Beijing Principles, cit., paras. 18-20.

[165] *Ibid.*, para. 21.

[166] Universal Charter, cit. Art. 8(3).

[167] See https://www.uscourts.gov/judges-judgeships/about-federal-judges. See also Dodson NR.

[168] See more *supra*; see also Dodson, *ibid.*

[169] Sorabji NR, at 3.

[170] Odgers et al., Chilean NRs.

[171] Vitorelli, in Regional report, p. 34.

[172] Bermejo/Sbdar, in Regional report, p. 47.

[173] Siles, in Regional report, p. 11.

[174] Strandberg NR, at 3.

[175] De Benito, NR, at 3. But the mandatory retirement age for judges in Spain was fluctuating from 75 (before 1985), 65 (under the law of 1985) to 72 (a temporary measure in 2000). See Poblet/Casanovas, in di Federico (ed.), cit., pp. 185-186.

[176] Van Loggerenberg NR (see Section 3(1) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001).

[177] Voet NR.

[178] Langbroak, Philip, in: di Federico, *cit.*, p. 160.

[179] Jeuland NR, at 3.

[180] Polish NR, p. 21.

[181] Chan NR.

[182] African principles and Guidelines, Principle A, paras. 4 (i) and (k).

[183] ECJ, 6 November 2012, Case C—286/12, Commission v. Hungary, §§ 61–62 (ECLI:EU:C:2012:687). The ECJ cited its previous case of *Fuchs and Köhler*, C159/10 and C160/10, paragraph 50, where establishing a 'balanced age structure' between young and older officials was assessed as legitimate, in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service.

[184] E.g., in Belgium (see *supra*), Voet NR. In Chile, retired judges may continue to work as *abogado integrante,* external associates who exercise judicial duties.

[185] Odgers et al., Chile NR, p. 6.

[186] Universal Charter, Art. 13(3).

[187] In Chile, for instance, the judicial pension is less than half of judicial salary, see *ibid.* The same is true for Croatia, where pensions of judges amount to about 40 percent of judicial income before retirement.

[188] Draft Universal Declaration, at 18(a).

[189] UN Basic Principles, Principle 12; African Principles and Guidelines, Principle A, para. 4 (m).

[190] Draft Universal Declaration, at 18(b).

[191] *Universal Charter*, Art. 13(2).

[192] *Burgh House Principles*, 4.4.

[193] European Charter, 6.4. In the Explanatory memorandum, the Charter also demands that 'judges are not left out of the decision-making process' regarding such matters.

[194] Bermejo/Sbdar, in Regional Report South America, p. 46.

[195] Riedel, in di Federico (2005), *op. cit.*, p. 95. Admittedly, at least in the German case, the relatively high retention rate of judicial retirement pensions is not the privilege of only judiciary but applies to more or less all employees in the public sector. A more recent information from Germany (for all office holders) is that the average pension was a bit lower, 68 percent of their salaries, see https://www.bmi.bund.de/DE/themen/oeffentlicher-dienst/beamtinnen-und-beamte/versorgung/versorgung-artikel.html (info for 2022).

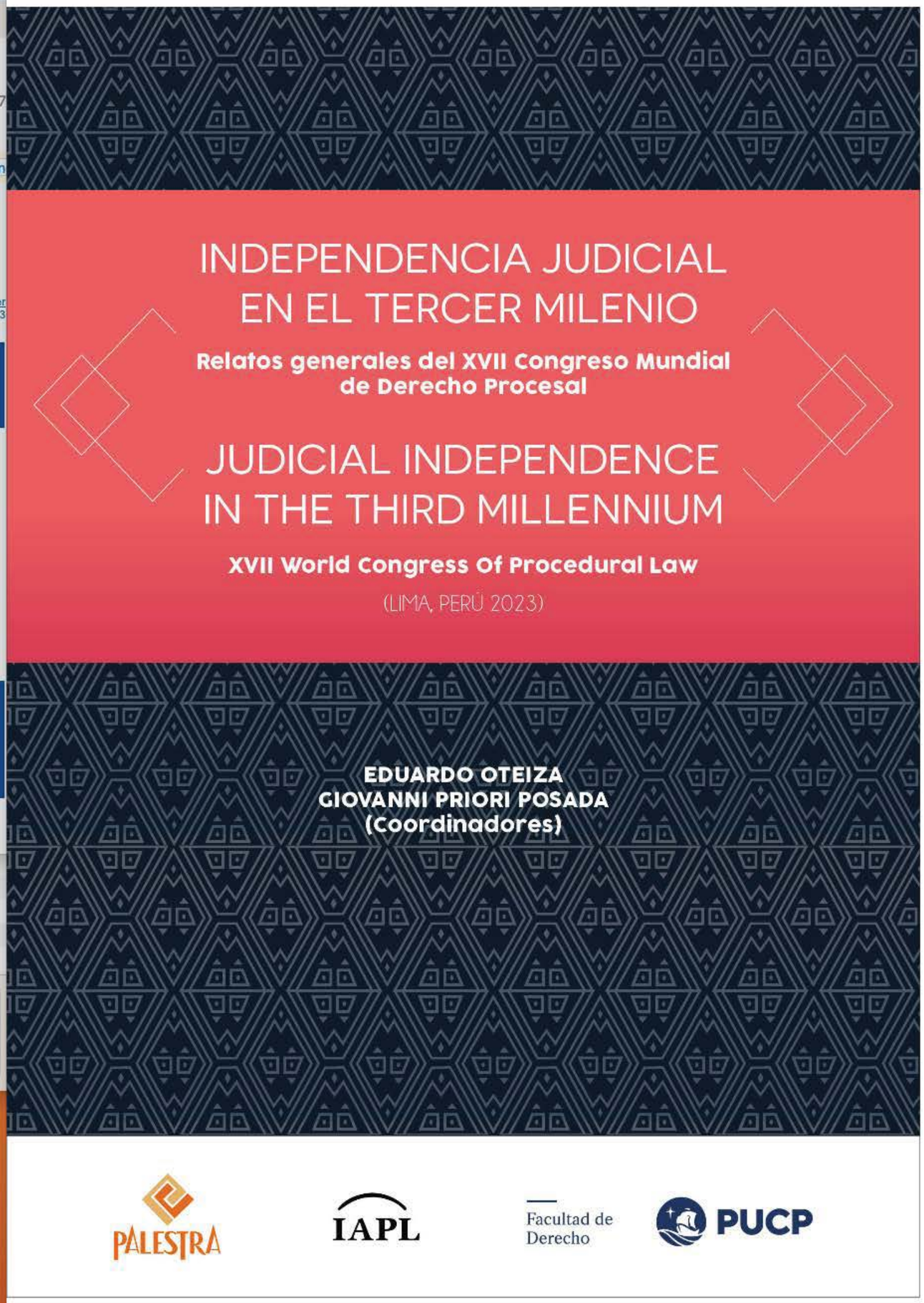
[196] https://www.ansa.it/english/news/2015/06/12/judges-pensions-90-higher-than-under-contribution-system_36f3751a-3bad-4b93-b08d-e2c1148bbb96.html (June 2015).

[197] Cappelletti, *op. cit.*, p. 61.

[198] Among others: prosecution of top politicians for corruption; sheltering human rights in the view of various anti-terrorist measures; dealing with ever bigger collective harm caused by most powerful enterprises; preserving free competition among growing global monopolies; moderating ever more aggressive tabloid press and social media; and even deciding on adequacy of response to climate change.

[199] *Cf.* Andenas, *op. cit.*, p. 2.

[200] Dodson NR, at 3.1.



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