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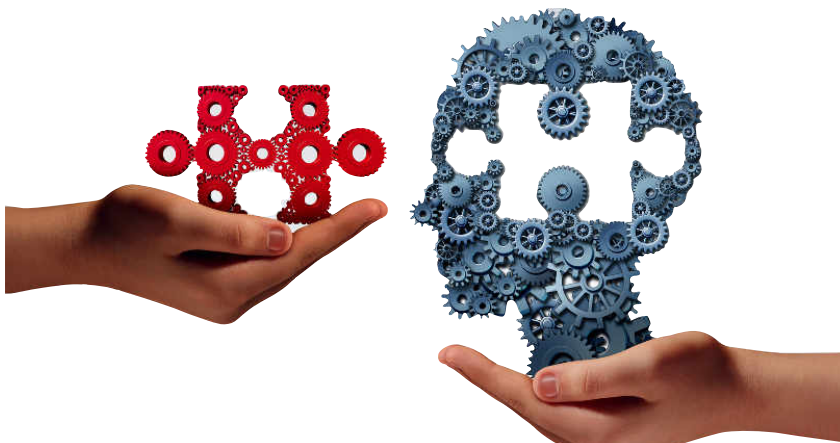
**THEMIS 2018: Semi-Final D Judicial Ethics and Professional Conduct**

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# Training towards a new era

*"Excellence is an art won by training and habituation. We do not act rightly because we have virtue or excellence, but we rather have those because we have acted rightly. We are what we repeatedly do. Excellence, then, is not an act but a habit."*

Aristotle



## **TEAM ITALY 1**

**Team members:**  
Massimiliano Sturiale  
Giulia Pulcina  
Maria Giulia D'Ettore

**Team coach:**  
Luca Agostini

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## INTRODUCTION

One of the core objectives of the EU is to build a **strong, independent and effective justice based on a common legal culture**; therefore, EU law has had a strong impact on the role of judges and prosecutors both in the national systems and at the Union level.

The **acquisition of some fundamental principles** (such as the primacy of EU law over national law, the right to a fair process, the safeguard of human and civil rights, the rule of law and the creation of a common area where goods, persons, services, capitals and judicial decisions are free to circulate) created a very complex legal environment, in which European judges and prosecutors have to work daily.

The role of judges and prosecutors is thus shifting to a new era and it is therefore necessary to wonder if European magistrates (we use this term to include both judges and prosecutors) are actually able to deal with all the issues presented by modern disputes.

An important challenge is certainly that of human rights. The ambition to create a common space where everyone is guaranteed full respect for their fundamental rights is certainly a goal for the modern European judge/prosecutor. However, this is not just a legal issue. The European judicial experience shows that juridical knowledge is no more sufficient to handle modern disputes, but it is, in fact, necessary to develop wider capabilities and skills, that go beyond legal studies; the so called “judicial

craft”.

Therefore, it is of striking evidence how important it is for a modern European magistrate to be adequately trained: “*training*” is a **key tool**, in order to ensure that the rights granted by EU legislation become a reality, that the effectiveness of the justice systems in the Member States increases and, mostly, that legal practitioners trust each other’s justice systems.

Moreover, it is the mean through which legal systems can ensure the **full independence of its judges and prosecutors**. The independence of the judiciary, in particular, constitutes a precondition for the impartiality of the judges and, therefore, it is a fundamental ingredient for an effective protection of citizens’ rights in judicial proceedings.

In this view, our paper focuses on the relevance of judicial training.

In particular, in chapter one, we will give a recognition of the legal principles concerning the judicial training, as an instrument to safeguard the independence and impartiality of judges; in chapter two, we will compare a few judicial training systems, in order to see if they are adequate for the education of a “modern European judge/prosecutors”; in chapter three, we will try to explain what a modern “good” judge or prosecutor should do and we will analyze the positive consequences of a well-trained judge/prosecutors on independence and effectiveness of justice.

Finally, we will try to give a personal contribution to the improvement of the European judicial training system as a whole, by presenting a few ideas, which will be hopefully implemented in the near future.

## CHAPTER 1

### **The role of judges and prosecutors: shifting to a new era**

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#### **§1.1. Training is a right and a duty for judges and prosecutors.**

Training is, at the same time, “*a right and a duty for judges*”<sup>1</sup>.

Since it is a right, the Committee of Ministers of the Council of Europe on the 17<sup>th</sup> of November 2010<sup>2</sup> stated that “*judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state*”.

But training is also a duty, because -according to the Committee of Ministers of the Council of Europe- it is necessary in order to guarantee the independence of the judge, as an individual, and consequently of the judiciary, as a whole<sup>3</sup>, which, as laid down in Article 6 of the European Convention on Human

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<sup>1</sup> The Recommendation (2000)19 of the Committee of Ministers (Council of Europe: Committee of Ministers, Recommendation Rec(2000)19 of the Committee of Ministers to Member States on *the Role of Public Prosecution in the Criminal Justice System*, 6.11.2000) states that “*training is both a duty and a right for all public prosecutors*” and also the Magna Carta of Judges (CCJE (2010)3 Final, 17.10.2010, *Magna Carta of Judges*) affirms that training is, at the same time, “*a right and a duty for judges*”.

<sup>2</sup> *Amplius*, Council of Europe: Committee of Ministers, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on *Judges: independence, efficiency and responsibilities*, 17.11.2010.

<sup>3</sup> The Recommendation (2000)19 (see footnote 1) states that “*the independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law*”.

Rights, “*is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence*”.

The same kind of idea is developed in article 9 of the **UN Basic Principles** on the Independence of the Judiciary (1985): “*Judges shall be free to form (...), to promote their professional training and to protect their judicial independence*”<sup>4</sup>.

And also in the **nine fundamental principles on judicial training** coded by European Judicial Training Network (EJTN), on the 10th of June 2016. This document states that “*all judges and prosecutors should receive initial training before or on their appointment*”. But the right to training is not limited to initial formation: “*all judges and prosecutors should have the right to regular continuous training*” as a “*part of the normal working life of a judge and a prosecutor*”.

Training is therefore necessary to guarantee the independence of the judiciary, which “*shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary*”<sup>5</sup>.

In fact, a solid professional competence should protect the judge from undue influences in many cases (for instance when an unfair pressure is made by a suggestive persuasion). Moreover, the independence of the judiciary is a principle enshrined in the first place by art. 8 of the UDHR, then by art. 6 ECHR, as well as a common principle of all the Constitutions of the Western world<sup>6</sup>.

At this point it is necessary to analyze, on the one hand, how to make this judges/prosecutors' right to training effective and, on the other hand, what the content of the right to judicial training is and how it should be carried out.

### **§1.2. How to make the right to training effective, looking especially at EU Law.**

Paragraph 56 of CM/Rec(2010)12 states that the “*theoretical and practical initial and in-service training*” is “*entirely funded by the state*”<sup>7</sup>.

The institutions of the European Union dealt with judicial training for the first time in 1999, with the Treaty of Amsterdam.

Article 61 has, in fact, enabled the European Union to take measures to “*progressively establish an area of freedom, security and justice*”.

The European Council meeting in Tampere in 1999, then, established that “*the enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member*

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<sup>4</sup> *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>5</sup> *Basic Principles on the Independence of the Judiciary*, Article 9; see footnote 4.

<sup>6</sup> For instance, the article 104 of Italian Constitution states that “*The judiciary is an autonomous order and independent of any other power*”.

<sup>7</sup> Council of Europe: Committee of Ministers, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on *Judges: independence, efficiency and responsibilities*, 17.11.2010.

*State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgements and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved”<sup>8</sup>.*

To do that *“the European Council asks the Council and the Commission to adopt,(…), a programme of measures to implement the principle of mutual recognition”<sup>9</sup>.*

In 2001, also, the European Council meeting in Leaken called *“for a European network to encourage the training of magistrates to be set up swiftly; this will help develop trust between those involved in judicial cooperation”<sup>10</sup>.*

In 2006, the European Commission<sup>11</sup> affirmed that *“the adoption of the Amsterdam Treaty with its reference to the new objective of creating an “area of freedom, security and justice” means that judicial training is a new task for the Union”*. Along with paragraph 11, which states that *“the European Union has no grounds for interfering in the organization of national training systems, which reflect the Member States’ legal and judicial traditions. But strengthening mutual confidence entails developing training sufficiently and devoting sufficient resources to it.”*

Judicial training became *“a vital issue for the establishment of the European judicial area”*.

Consequently in 2008 the Council of the European Union and the Representatives of the Governments of the member states adopted a Resolution on the judiciary training<sup>12</sup>, stating (paragraph 7) that *“the Commission and the Member States are invited to consider the possibility of revising the administrative procedures for allocating Community funds to training projects for judges, prosecutors and judicial staff, notably those organized by bodies with which the Commission has concluded framework partnerships, in particular ERA, EIPA and EJTN, with a view to further simplifying these procedures and allowing available funds to be allocated within shorter timeframes”*.

All of this converged into two key moments: 1) the Treaty of Lisbon (TFEU) in 2008 and 2) the Stockholm program in 2009.

In article 67 TFEU it is affirmed that a common area where fundamental rights are respected must be guaranteed to all persons; therefore, judicial cooperation in civil, commercial and criminal matters is needed and must be strengthened (articles 81 and 82) even with support for judicial training programs. This is the only professional training mentioned in the Treaty, because it is necessary to guarantee and ensure a common space for fundamental rights, that also requires trust in a common justice system.

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<sup>8</sup> Presidency Conclusions- Tampere European Council (15 and 16 October 1999), Article 5.

<sup>9</sup> Presidency Conclusions- Tampere European Council (15 and 16 October 1999), Article 37.

<sup>10</sup> Presidency Conclusions- Leaken European Council (14 and 15 December 2001), Article 43.

<sup>11</sup> Com (2006) 356 final, Communication from the Commission to the European Parliament and the Council on judicial training in the European Union, 29.06.2006.

<sup>12</sup> Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union, OJ C 299, 22.11.2008, p. 1.

The Stockholm program of 2009<sup>13</sup> pursues this goal in two ways.

Firstly, a study visits plan and joint judicial training have been set up with the active support of the European Judicial Training Network (EJTN) and the Academy of European Law.

Secondly, the inclusion in national training programs of the law of the European Union and of the other Member States has been foreseen<sup>14</sup>.

To achieve these results, the Commission in 2011 developed an action plan with the aim of offering training on European law to half of all European legal practitioners (around 700,000) by 2020<sup>15</sup>.

In 2012, the European Parliament proposed a pilot project<sup>16</sup> on European judicial training, to identify the best practices in training of judges, prosecutors and justice professionals on national legal systems and traditions as well as on Union law, the most effective ways of delivering training in EU law and national legal systems to judges, prosecutors and justice professionals at local level, to promote the dialogue and coordination between EU judges and prosecutors, encouraging EU judicial training providers to share ideas on best practices and disseminate them across the EU and improving cooperation between the EJTN and national judicial training institutions.

Lately, the fourth justice program (2015-2020)<sup>17</sup> stated, on the one hand, that judicial training is considered a central tool to build mutual trust and to improve cooperation between judicial authorities and legal operators in the Member States (recital n. 5), on the other hand, that the European Union should facilitate judicial training on the law of the European Union, contributing to support its cost.

### **§1.3. What is the right to judicial training? And how should it be carried out?**

It is now necessary to analyze the principles governing judicial training. The theme can be broken down into two parts: the first one concerns the characteristics that the trainer should possess, while the second one concerns the content of the training programs.

Paragraph 57 of CM/Rec(2010)12<sup>18</sup> states that training is provided by “*an independent authority*”, not only in the Montesquieu’s perspective, in relation to the other powers of the State, but also and above all to the internal one, with the Council for the Judiciary<sup>19</sup>.

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<sup>13</sup> Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, 02.12.2009, 17024/09.

<sup>14</sup> In Italy, the National Judicial Council (Consiglio Superiore della Magistratura-CSM), in 2001, implemented *The Stockholm Programme* with the project called “*European Gaius*”.

<sup>15</sup> Com (2011) 551 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Building trust in Eu-wide justice. A new dimension to European Judicial training*, OJ C 335, 16.11.2011, p. 18.

<sup>16</sup> European Parliament resolution of 14 March 2012 on judicial training, (2012/2575(RSP)).

<sup>17</sup> Regulation (EU) 1382/2013 of The European Parliament and of The Council, 17.12.2013, establishing a Justice Programme for the period 2014 to 2020, OJ L 354, 28.12.2013, p. 73.

<sup>18</sup> Council of Europe: Committee of Ministers, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on *Judges: independence, efficiency and responsibilities*, 17.11.2010.

<sup>19</sup> “*In order to ensure a proper separation of roles, the same authority should not be directly responsible for both training and disciplining judges. The CCJE therefore recommends that, under the authority of the judiciary or other independent body, training should be entrusted to a special autonomous establishment with its own budget, which is thus able, in*

This autonomous body must therefore be independent both economically and under the definition of training programs.

In fact, the “modern” judge or prosecutor should not only be technically prepared, but he/she should also know how to use the legal tools in a proper way<sup>20</sup>.

But above all, according to paragraph 57 of CM/Rec(2010)12<sup>21</sup>, training “*should include economic, social and cultural issues related to the exercise of judicial functions*”.

A new role of the judge emerges as a deputy not only to be the “*bouche de la loi*”, i.e. to “*apply the law or resolve conflicts by the implementation of the law*”, but also “*to a certain extent, a creator of law*”, which requires responsibility, knowledge of other sciences and ethical rules consistent with this evolution<sup>22</sup>.

Training today is in fact essentially aimed at making the judge/prosecutor able to give a fast answer to the demand for justice and able to satisfy the interests of Court users, not only those of the national State of the judge/prosecutor, but those of the entire EU.

The judge's decision must not only be able to circulate within the common European space and protect the rights of the parties in all the member countries of the EU, but it must also be able to understand the changes in society and to satisfy the need for protection of citizens.

If the judge/prosecutor fulfills in this way his/her ethical duties and is formed adequately, then he/she obtains the expected results: increase public confidence in justice and, at the same time, guarantee a common space where full respect for fundamental rights is recognized to all people.

So, the training of judges/prosecutors today must necessarily include other skills and this topic will be discussed more specifically in the following paragraphs of this work.

## CHAPTER 2

### Judicial training in Europe: lights and shadows

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As far as initial and continuous judicial training is concerned, every Member State has its own system. A comparative and critical analysis of those systems<sup>23</sup> is interesting in order to see in which manner European magistrates are “guided” towards the significant changes that their role is going through.

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*consultation with judges, to devise training programmes and ensure their implementation*”- CCJE (2003), Op. N° 4, 27.11.2003, *On appropriate initial and in-service training for judges at national and European levels*.

<sup>20</sup> “*The judge improves his training in order to avoid any delay in the proceedings caused by a non-professional approach. maintains throughout his life the highest level of professional competence uses all the legal tools that he learns*”- In European Network of Councils for the Judiciary (ENCJ), *Quality and access to justice. Report for the years 2009-2010*, With the support of the European Union, 2010.

<sup>21</sup> See footnote 18.

<sup>22</sup> *Amplius* in European Network of Councils for the Judiciary (ENCJ), *Quality and access to justice. Report for the years 2009-2010*, With the support of the European Union, 2010.

<sup>23</sup>F. CONTINI (Ed.), “*Handle with care*”, *Assessing and designing methods or evaluation and development of the quality of justice*, Bologna, 2017.

Eventually, it might be useful in order to improve the European training level, by shaping new methods or activities, common to all Member States.

In order to catch the positive and negative aspects of the European training system, both with regard to national and transnational training programs, we will start with the description of the Italian system, to highlight similarities and differences with other States' systems.

Then, we will look at the integrated training methods, like those developed by the European Judicial Training Network.

### **§2.1. Judicial training systems at a National level.**

In **Italy**, the **access to the judiciary** is based on a **public competition**, structured on a written part and an oral examination. Law graduates are enabled to participate and no previous professional experience is necessary, although more recently it has become one of the possible prerequisites and it is taken into consideration as an extra point in the final ranking. The selection is thus focused on the knowledge of substantial and procedural law, but no relevance is given to practical skills: the Italian judge/prosecutor, at the beginning of his/her career, knows the law but ignores how to apply it in real cases. This is the reason why, after the public competition, the winners undergo a period of **initial training** (from 12 to 18 months), during which they cooperate in Courts with senior judges/prosecutors, thus acquiring practical skills; at the same time, they attend the National School for Magistrates (Scuola Superiore della Magistratura), where they study specific legal issues more deeply. It is noteworthy that both in the initial selection and in the following training, the magistrates' evaluation depends on commissions composed by legal practitioners -many of them: judges or prosecutors. The SSM is a body that provides for the initial and continuous training of judges and, according to the fundamental principles mentioned above, it is independent both from the Government and from the National Judicial Council.

The positive features of the Italian system are to be found in the **meritocratic criteria** of selection: the public competition, where examinations are held by independent committees, ensures that the selected competitors have a strong legal knowledge and, above all, that they are **independent** from political bodies - e.g. the Government -, so to guarantee their impartiality in the exercise of the judicial functions.

The main limit, instead, is that judicial trainees have **no practical experience** when they are selected; the initial internship is short, and it gives only the basic tools to an autonomous exercise of the judicial functions, whilst only natural skills or experience teach how to deal with people, to manage hearings, to decide legal cases, just to name a few.

A more important role for practical skills in the initial training of judges is to be found in other Member States' recruitment system.

In **France**, for instance, judges are recruited for a **training program** in the National School for Judges, an independent training body (École Nationale de la Magistrature), after being selected **by competition**



**or previous professional experiences** and the criteria may vary on the basis of the background of the applicants. The training program is divided into two different phases: a period of study in the École Nationale, which provides an *in loco* accommodation for trainees, who are therefore able to study together and to create a good professional network; and a period of internship in Courts, law firms and public administration offices. During their training, the French judges/prosecutors are taught to deal with concrete judicial situations, not only from a legal point of view, but also under an ethical and social perspective, and they practice in the decision making process. Their training, moreover, includes a period abroad, according to the European training standards. The French system allows judges to be confident with the practice of law way before they are appointed; the multiple ways through which it is possible to have access to the judiciary, moreover, makes it possible to bring into the judicial culture **different skills and points of view**, according to the previous experiences of the applicants.

Further evidence of the fact that a practical legal experience is an essential requirement for those who apply as judges, is shown in the **Dutch system**, which pays great attention to **judicial skills and craft**. Indeed, candidates must have a minimum of two years of **previous legal experience** in order to become judges. The selection is based on various tests and interviews and, after being selected, the candidates take part to a judicial training program, under the supervision of a senior judge; the duration of the training period differs according to the entity of the previous experience of each candidate; at the same time, **judicial trainees** are obliged to attend a Judicial Training Institute, where they **study** about specific aspects of law.

In chapter one, we saw that continuous training for judges/prosecutors is as important as initial training and that it constitutes a right and a duty for all judges/prosecutors, as it is a key tool for the independence of the judiciary and to ensure the impartiality and a high quality in the exercise of the judicial functions.

The **continuous training** of **Italian** magistrates is managed mainly by the Scuola Superiore della Magistratura, an independent body - as seen above- that organizes learning activities of various type, such as seminars, classes and exchange programs, both at a national and at a local level; some of those activities are compulsory, others are on a voluntary basis. Beside that, the National Judicial Council (Consiglio Superiore della Magistratura-CSM) provides periodical evaluations of judges/prosecutors<sup>24</sup>, which involve the increase of judges' salary, eventually, and some of the criteria taken into account are related to skills and knowledge, but also to impartiality and independence. This system allows a continuous control on judges/prosecutors' abilities and therefore it is necessary in order to maintain high legal standards; moreover, it is to be considered that evaluations are made by an independent body

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<sup>24</sup> D. lgs. 05.04.2006, n. 160, *Nuova disciplina dell'accesso in magistratura, nonché in materia di progressione economica e di funzioni dei magistrati a norma dell'art 1, comma 1, lett. a), della l. 25.07.2005 n. 150*, GU n. 99 29.04.2006, Suppl. Ord. N. 106, modified by L. 30.07.2007 n. 111, *Modifica alle norme sull'ordinamento giudiziario*, G.U. serie generale n. 175 30.07.2007, Suppl. ord. n. 171.

(CSM) with the intervention of the local branches of the National Judicial Councils and have a positive outcome in almost the totality of the cases. Judges/prosecutors' capacity sometimes seems to be more related to the number of the decisions rather than to the quality of those. In our opinion, this kind of approach is wrong, because it leads to forgetting that independence relies on the goodness of the decisions and timing is just a part of it.

A major limit is to be found in the **French system**, where the evaluation of judges has a hierarchical character and it is done by judges' supervisors; this feature, in our opinion, clashes with a fully independent judiciary. Beside that, though, it is to be said that the continuous training of French judges is separated from their career, since the ENM, that is responsible for their training, develops educational programs that are not directly linked to judges' evaluation.

More focused on the quality of justice at a global level is the **Dutch system** of evaluation, which is based on a model called "Rechtspraak". The system implies a variety of criteria on the basis of which judges and Courts are evaluated. The individual evaluation, though, is not intended to affect the single career but it rather becomes part of a global evaluation concerning the Court where those judges work in, thus allowing a continuous control on the system of justice as a whole. In particular, the evaluation regards the impartiality, independence and expertise of the single judge, providing analytical criteria of evaluation, such as, for instance, the amount of hours that each magistrate should dedicate to personal study.

After this brief comparison, we found that the **French training model** is characterized by a good balance between a theoretical approach and a peculiar attention to practical skills, thus allowing the acquisition of a complete "judicial craft" (see chapter 3 § 3.3.); in particular, French judges are taught to relate with other people in their work, to deal with various situations, to manage judicial procedures and to make decisions. In other words, it is not only a matter of "knowing" the law, but also of "being able to apply" law and to handle disputes. Moreover, the independence of the ESN - i.e. the French training body - avoids any external influence of judges' training and the fact that the school provides its students with local accommodation allows the consolidation of a professional network, that is a precious ground for future cooperation among judges on the national territory.

From this point of view, the features of the French system should be a guideline for other Member States and for the European Union itself, because it seems to be the most adequate in order to ensure a complete and polyhedral judicial training and to foster judicial cooperation in Europe<sup>25</sup>.

In other words: to shape a real "European modern judge/prosecutor".

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<sup>25</sup> With regard to a proper judicial training, see: *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, that reads "10. Persons selected for judicial office shall be **individuals of integrity and ability** with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives".

## §2.2. The European perspective.

The cooperation between EU judicial training institutions is the main aim of the **European Judicial Training Network (EJTN)**, since the goal of the association is to foster a **common legal and judicial European culture**, by enhancing European judges' skills and knowledge in both EU law and Member States' national law, and to promote **mutual trust and cooperation** among European judges<sup>26</sup>.

The EJTN's action should lead to a significant improvement in the quality of justice throughout the European territory<sup>27</sup>, with evident benefices in terms of protection of citizens' fundamental rights and good functioning of the European internal market<sup>28</sup>.

The key tools to achieve these goals are various; they include seminars, in-class courses, e-learning activities and exchange programs, study visits. In the European perspective, issues like the actual capability of handling the disputes and the relevance of practical skills are fundamental.

Unfortunately, the EJTN comes across some serious issues, such as language barriers, lack of adequate information about the associations' projects and significant workload that prevents Member States' judges/prosecutors from participating to training activities, as we will see.

The fact that judges/prosecutors' training is a fundamental value to be promoted and safeguarded is a common opinion of all Member States. However, when it comes to promoting concrete actions aimed at obtaining concrete results, many obstacles emerge.

According to a study of the European Parliament<sup>29</sup>, the major **limits of the European training system**, intended as a whole, are:

- a) the study of substantial EU and comparative law is an important part of all training programs, but, apart from few exceptions, a very scarce relevance is given to cooperation instruments, that are the tools through which EU law should be applied and international legal cooperation should be sought;
- b) even when practical abilities are taken into consideration, there is still a lack in the consolidation of a wider "judicial craft", that includes not only a proper use of judicial and cooperation tools, but also making decisions, interacting with lawyers and parties, being able to deal with ethical issues, working in a team...

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<sup>26</sup> [www.ejtn.eu](http://www.ejtn.eu).

<sup>27</sup> European Parliament- Directorate General for the internal policies. Policy Department for citizens's rights and constitutional affairs, *The Training of Judges and Legal Practitioners - Ensuring the Full Application of EU Law*, Workshop 12.04.2017.

<sup>28</sup> These same objectives are pursued by ERA, the Academy of European Law in Trier. The task of the Academy of European Law Trier is to enable individuals and authorities involved in the application and implementation of European law in Member States and in other European States interested in close co-operation with the European Union to gain a wider knowledge of European law, in particular European Union law and its application and to make possible a mutual and comprehensive exchange of experiences. The Academy pursues this objective by organizing courses, conferences, seminars and specialist symposia, particularly for the purposes of continuing vocational training, by issuing publications and by providing a forum for discussions (article 2 of ERA Statute); [www.era.int](http://www.era.int).

<sup>29</sup> European Parliament-Directorate General for internal policies. Policy Department for citizens's rights and constitutional affairs, *Judicial training in the EU member States*, Brussels, 2011.

- c) a common language, that is necessary in order to obtain any form of cooperation, is not adequately taught, neither during the initial training, nor during continuous training;
- d) participation to “European” training (i.e. the participation to the EJTN programs) is usually considered as an “extra” activity that judges/prosecutors have to render compatible with their job in Courts. If we consider the entity of workload that lies on every single judge/prosecutor, it is clear how difficult it is to take part to non compulsory training programs;
- e) none or very little information is provided within national judiciaries about the mentioned training programs;
- f) very few of the training projects concerning EU and comparative law are actually common. We reckon that the possibility of studying and practicing in the same place, thus being in contact with foreign colleagues, is a fundamental key for an efficient training and a well functioning network.

At present, the aforementioned limits can be overcome only, on the one hand, on a voluntary basis, because it is a personal choice of the judge/prosecutor to improve its own knowledge and skills, on the other hand, by introducing new modern methodologies when organizing training events.

Therefore, it can be said that taking care of self legal culture is an **ethical duty**.

Even if continuous training could be imposed by the States, any sort of control on the personal effort made by judges/prosecutors into their own training would be extremely discretionary and, therefore, it could undermine the independence of the judiciary. Even if some forms of permanent training are compulsory and have an influence on the positive outcome of the periodical evaluation which magistrates are subject to, we reckon that those seminars and courses are not enough in order to keep up with the continuous development of the national and international legal systems. The increasing attention paid to the protection of human rights, as well as the development of new methods of international cooperation in judicial matters – for instance – make it impossible for the magistrate to maintain an adequate standard of knowledge or judicial ability, without a personal and voluntary commitment.

In other words, in order to reach a high standard in the quality of justice, the present institutional training is not sufficient and it becomes a duty for the single magistrate to take care of her/his own personal education (by studying the applicable law case by case and by self-improving the required skills), out of the working hours.

It is essential, then, to build a “training culture” among judges, by letting them catch the importance of a continuous training and the incidence that it has on the quality of the job they do. At the same time, it is fundamental to give magistrates tools and programs to take care of their training and, (why not?) an “*European forum*” where to further develop the acquired crafts.

## CHAPTER 3

### Ethical principles governing judges and prosecutors' professional conduct as a guaranty of independence and effectiveness of justice

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As it was outlined in the previous two chapters, **professional awareness** is considered to be both a **right** and an **individual duty** for judges and prosecutors: not only the Member States and the EU must assure that training is consistent with the objective of independence and quality of justice, but also judges and prosecutors' professional conduct should be governed by ethical principles and rules, among whom continuous training plays a key role.

In chapter 3 we will analyze the duties of a “good” judge/prosecutor, which, in our opinion, are strictly related to initial and continuous training and we will try to suggest best practices to be followed in order to improve not only professional, but also personal skills (the so called “judge craft”).

#### §3.1. European Union and the rule of law.

Nowadays, citizens are increasingly losing faith in their respective systems of government for reasons which vary from inequality to persistent unemployment.

Within this “rule of law crisis”<sup>30</sup>, the judiciary is seen as the ultimate guarantor of the democratic functioning of institutions at national<sup>31</sup> and international level: so, what is a “good” judge or prosecutor asked to do?

The ECJ notes that the factors to be taken into account in assessing whether a body is a ‘court or tribunal’ include, *inter alia*, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, **whether it applies rules of law and whether it is independent**<sup>32</sup>.

At the same time, the ECtHR stated that the “independence” of Court for the purposes of Article 6 par. 1 of the Convention is related to the following criteria: **the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and whether the tribunal presents an appearance of independence**<sup>33</sup>.

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<sup>30</sup> It is the so called “rule of law backsliding” or “democratic backsliding, defined as “*the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party and the progressive weakening of the system of check and balances.*” (K.L. SCHEPPELE, L. PECH, *What is Rule of Law Backsliding?*, *VerfBlog*, 2018/3/02, <https://verfassungsblog.de/what-is-rule-of-law-backsliding/>).

<sup>31</sup> CCJE (2003) Op. N° 4, 27.11.2003, *On appropriate initial and in-service training for judges at national and european levels.*

<sup>32</sup> ECJ, Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, Case C-64/16, §38.

<sup>33</sup> ECtHR, *Agrokompleks v. Ukraine*, 6 October 2011, §125.

See also ECtHR, *Angelo Majorana v. Italy*, 26 May 2005, in which the ECtHR specified, that, with regard to the “appearance of independence” criteria, the sole appointment of some judges by the Region can not jeopardize the independence of judges if it is clear from their statutes that, once appointed, they are not subject to pressure or instructions

As it was outlined in the previous two chapters, only those who are well advanced and prepared in their respective field and opened to social issues are protected against external interventions or pressure liable to impair the independent judgment and to influence their decisions and are also able to apply the law in a consistent way<sup>34</sup>; moreover, their decision externally appears to be more independent.

And, ultimately, the independence of the individual members of the judiciary is a guaranty of effectiveness of the entire judicial system, which is crucial for upholding the values upon which the EU is founded, for the implementation of the EU law, for the strengthening of mutual trust and for safeguarding the rule of law.

For all these reasons, a “good” judge or prosecutor should be aware that the **legitimation of the judicial system** and its **effectiveness** is based on his/her **independence**, which is, in turn, deeply linked to the **individual skills**.

Therefore, a “good” judge or prosecutor needs to be aware that **continuous training and professional awareness are a prerequisite if the judiciary is to be respected and worthy of respect: training is essential** to improve the **various skills** that those in the judicial public service are required to have, in order to be more independent and, consequently, to improve the very functioning of that service<sup>35</sup>.

### §3.2. European Union and law enforcement.

When we talk about “effectiveness of the judicial system”, guaranteed by independence and professional awareness of its members, we do not only refer to the national level, but also to the European judicial system.

In fact, the further development of a European area of justice based on mutual recognition and mutual trust, where individual parties have the right to challenge before the Courts the legality of any decision or other national measure, depends on the effective role of our national Courts as “**the common Courts**”.

The European Commission stated that “*the national judge has become the front-line judge of Union law*”<sup>36</sup>, as the EU law permeates a wide number and diverse range of activities at national level, matters to European citizens and affects their daily lives<sup>37</sup>: the problem is not the lack of EU legislation, but the fact that the EU law is not applied effectively<sup>38</sup>.

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from the Region and carry out their duties in a completely independent manner.

<sup>34</sup> F. CONTINI (Ed.), “*Handle with care*”, *Assessing and designing methods or evaluation and development of the quality of justice*, Bologna, 2017.

<sup>35</sup> CCJE (2003) Op. N° 4, 27.11.2003, *On appropriate initial and in-service training for judges at national and european levels*.

<sup>36</sup> Com (2011) 551 final, Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Building trust in Eu-wide justice. A new dimension to European Judicial training*, OJ C 335, 16.11.2011, p. 18.

<sup>37</sup> Communication from the Commission, *EU Law: Better results through better application*, OJ C 18, 19.1.2017, p. 10.

<sup>38</sup> Communication from the Commission, *EU Law: Better results through better application*, OJ C 18, 19.1.2017, p. 10.

Moreover, nowadays, Europe is facing a wide range of human rights challenges and has established itself as a key player in human rights protection on a global level, by developing institutions and mechanisms to protect and promote human rights.

Hence, we strongly believe that it is up to “good” judges or prosecutors **to feel part of a common judiciary culture**, as this is also a **guaranty of uniform application of the law** and it ultimately **serves the general interest**: the creation of a European judicial culture that fully respects subsidiarity and judicial independence is central to the efficient functioning of a European judicial area<sup>39</sup>.

In our opinion, it is an ethical duty to foster the development of a **judge’s and prosecutor’s European profile**.

First of all, when a judge or prosecutor is dealing with a case, he/she should take EU law into account just as much as (or even more than) his/her national law, by **giving EU law more relevance** in the final decision, especially in the motivational part.

Second, a **good understanding of the different national legal systems** is necessary to ensure recognition and swift execution of judicial decisions as well as cooperation between judicial authorities

And, furthermore, a “good” judge or prosecutor **cannot ignore the recent emerging issues**, that have a great impact on our society, such as fundamental freedoms and human rights, anti discrimination, asylum, but also trafficking in human beings, terrorism, immigration, family law (especially domestic violence against women) and Child-friendly justice, hate crimes, community sanctions and alternative measures to detention, crimes against public health, pollution, transport safety and security and so on<sup>40</sup>.

So, even if it is not imposed by the State through compulsory activities, it is up to the “good” judge or prosecutor to widen his/her knowledge of European and international law, especially in the fields of human rights promotion and protection, as well as the knowledge of other countries’ judicial systems, since mutual confidence and trust among the Member States can only be enlarged if we create a common law enforcement system and if we know our respective judicial systems.

To reach these goals, **training is obviously a crucial step**, as it can provide judges and prosecutors with the useful tools to increase their knowledge and it enhances mutual confidence between Member States, practitioners and citizens.

Nevertheless, these issues, particularly related to fundamental human rights, require not only a good knowledge of law and juridical tools, but also broader abilities, which might be summarized by the expression “judgecraft”.

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<sup>39</sup> Com (2011) 551 final, Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Building trust in Eu-wide justice. A new dimension to European Judicial training*, OJ C 335, 16.11.2011, p. 18.

<sup>40</sup> CCJE (2003) Op. N° 4, 27.11.2003, *On appropriate initial and in-service training for judges at national and European levels*; Communication from the Commission, *EU Law: Better results through better application*, OJ C 18, 19.1.2017, p. 10.

### §3.3. “Judgecraft”, when knowing the law is not enough.

“Judgecraft” or “the art of judging” refers not only to the knowledge of the legislation, but also to those different and multidisciplinary types of knowledge and skills a “good” judge or prosecutor must have. All those skills are crucial to face the emerging issues, especially in the fields of human rights promotion and protection, and to respond efficiently to the requirements of our society, granting **fair treatment and equality** to citizens.

As the CCJE neatly stated (see chapter 1 §1.3.), *“the trust citizens place in the judicial system will be strengthened if judges have a depth and diversity of knowledge which extend beyond the technical field of law to areas of **important social concern**, as well as **courtroom and personal skills and understanding** enabling them to manage cases and deal with all persons involved appropriately and sensitively”*<sup>41</sup>.

First of all, the “good” judge or prosecutor should remember that the exercise of judicial functions is strictly related to **economic, social and cultural issues** and to other branches of knowledge, such as medicine and psychology, and these cannot be totally ignored, if we want to be up to the standards.

Secondly, it is essential to develop time management skills, to be confident in working in a very busy environment, and to handle the stress and the pressure by using an analytical approach.

Resilience and ability to resist to stressful situations, as well as the ability to use modern technologies are in fact skills that a modern judge or prosecutor should desire to develop, as they are fundamental to deliver good results under pressure and to respect the deadlines.

Moreover, a greater attention should be given to both written and oral communication, in order to deal with all the people involved in a trial (lawyers, clerks, experts, citizens and so on) appropriately and sensitively.

Once again, training is a key tool: judges or prosecutors should be aware that continuous training can provide them with **all the above cited new modern skills**, that can help them to overcome the breakdowns, the excessive amount of work and the heavy time pressure, while assuring a more efficient answer to the demand for justice.

### §3.4. Train to be a “good” judge or prosecutor!

If we aim at being independent, if we want to foster mutual trust between judges and prosecutors from different European legal systems and to strengthen the trust citizens place in the judicial system, if we believe that it is essential to increase the level of knowledge of EU law among the European judiciary, and, ultimately, if we want to improve those skills that can help us to respond efficiently to the demand

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<sup>41</sup> CCJE (2003) Op. N° 4, 27.11.2003, *On appropriate initial and in-service training for judges at national and European levels*.



for justice, we should recognize that **training is essential to be a “good” judge or a prosecutor and should be part of our work.**

A judge / prosecutor, who is investing time in its formation and aims at being professionally aware, is not reducing the time for his/her “ordinary job”.

Hence, it is a moral duty to **set aside a minimum number of hours per week/day per year for continuous training.**

Despite any external imposition or compulsory activity, “continuous training” consists of always taking into account a high degree of professional awareness, when doing our job<sup>42</sup>, and of recognizing that a **“good” judge or prosecutor is not isolated.**

How could this be done?

Even though we should of course take advantage of the activities and events of training carried out by national schools for the judiciary or by national universities and professional bodies<sup>43</sup>, it is also necessary to create networks between judges of different cultures: we need to see the relations with our foreign colleague as a way to enlarge and implement our opportunities of knowledge.

Therefore, “good” judges or prosecutors should try to organize their job in such a way that they can also **take part in internationals training events or exchanges**, since people usually learn more through interaction and participation than through mere didactic lecturing<sup>44</sup>.

In fact, these events promote a constructive approach: dialogues or interventions, followed by debates, allow the participants to exchange points of views and experiences, conduct in-depth comparisons on how the Member States’ judicial systems work in practice, reflect on their own practice, and - mostly - get useful contacts. All of these activities are crucial to foster mutual trust, to understand the respective national legal systems develop those skills a modern judge or prosecutor should have<sup>45</sup>.

In our opinion, indeed, sharing professional experiences and being part of an international professional network, is the way through which European judges and prosecutors can grow and train together, thus inevitably becoming actual “European magistrates”.

However, it was also outlined that the amount of work, the heavy time pressure imposed on legal professionals and also the objectives they are required to reach are all problems that need to be taken into account when organizing training events.

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<sup>42</sup> European Judicial Training Network (EJTN), *Handbook on Judicial Training Methodology in Europe*, With the support of the European Union, 2016.

<sup>43</sup> European Parliament resolution of 14 March 2012 on judicial training, (2012/2575(RSP)).

<sup>44</sup> European Commission – Directorate General for Justice, *European judicial Training 2017*, Belgium, 2017.

<sup>45</sup> European Parliament-Directorate General for internal policies. Policy Department for citizens’ rights and constitutional affairs, *Judicial training in the EU member States*, Brussels, 2011; Com (2011) 551 final, Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Building trust in Eu-wide justice. A new dimension to European Judicial training*, OJ C 335, 16.11.2011, p. 18.

So, if it is true that the best way to improve the cooperation are *vis-a-vis* contacts, it also true that it is necessary to find other possible ways to promote the dialogue with our colleagues and to enlarge our professional contacts.

**Electronic communication** is therefore a strong advantage.

More or less all Italian judges participate to juridical mailing lists and forums with other Italian colleagues.

It could be useful to start **building such mailing lists** with European colleagues or enlarging the existing ones or to **hold a forum** at which European judges of all levels of seniority can hold discussions in areas of law where domestic and cross-border issues frequently arise, in order to encourage discussion, create contacts, create channels of communication and build mutual confidence and understanding<sup>46</sup>.

While doing this, it is also necessary to consider European Law an across-the-board subject, that involves different fields of law: we could create different mailing lists or forums concerning different issues or areas of the law, so that we could also benefit from the different points of view and the cultural interaction when deciding upon a specific case.

Moreover, **self-training resources** are accessible to any user by creating an account and all types of distance learning and self-learning resources available should be used when deciding upon a case.

Last but not least, **language training** can also contribute to allow judges, prosecutors and judicial staff to participate in exchange programs, as well as in training activities which are held in other Member States<sup>47</sup>: a “good” judge or prosecutor should work to eliminate or reduce any type of linguistic barrier that can prevent himself/herself from taking part to international training events and from benefiting of the contacts with foreign colleagues.

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## CONCLUSIONS

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In this paper we explored the important role played by the judicial training in the national and European systems.

In particular, we tried to give evidence of the relationship existing between a complete and independent training, on the one hand, and an impartial exercise of the judicial function, on the other hand. Impartiality, in turn, proved to be an essential ingredient to ensure the fundamental right to a fair process, while a high, uniform standard in the training of European judges and prosecutors proved to be, eventually, one of the fundamental features of a common economic and judicial area.

Through the analysis of three European training systems, together with the EJTN’s programs, we were able to come across the main pros and cons of the present *status* of training in Europe.

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<sup>46</sup> European Parliament resolution of 14 March 2012 on judicial training, (2012/2575(RSP)).

<sup>47</sup> European Parliament resolution of 14 March 2012 on judicial training, (2012/2575(RSP)).

From that study, we inferred that training systems are more often focused on substantial knowledge than on practical skills and abilities, while a modern magistrate is required to “be able to do” and not only “to know”.

The integration between the EU and the Member States’ judicial systems, just like the drawing attention to the safeguard of fundamental human rights, are creating new challenges for the modern magistrates; therefore, their training should be shaped in such a way to make them capable of keeping up with those continuous changes.

We found that a European, modern judge or prosecutor should have a wide knowledge of national and EU law, but should also be able to handle disputes, to be confident with judicial writings and the handling of proceedings, as well as to have effective interactions with lawyers, court users and other practitioners. Training should thus concern not only law, but also, informatics, foreign languages, social and psychological issues, to name a few. This is what is generally referred to as “judicial craft”.

In order to implement the acquisition of the above mentioned judicial craft, we reckon that magistrates should have a common and shared training, not only as far as EU law is concerned, but also with regard to other matters.

In this view, the creation of mailing lists, just like the implementation of new international training programs could help to build a widespread professional network.

In our opinion, indeed, the quality of justice will take significant benefits from a common judicial culture.

Judges/prosecutors who are well integrated in a professional network and who train and work together, thus become part of a common judicial environment.

The final result of such a cooperation could go far beyond the mutual recognition of judicial decisions; let us think for a moment about the possibility of creating, in some subjects, European virtual Courts, composed by exponents of all Member States, competent in giving judgments in civil and commercial disputes. That would make it much easier for citizens to obtain some judicial acts, such as the European Order for Payment. The main benefit coming from this virtual model consists of a uniform application of EU law tools, with a clear positive influence on the certainty of law.

But there is more.

Through a real shared experience, judges and prosecutors will in fact keep alive and maybe strengthen the principles of independency and impartiality and, therefore, the rule of law.

Knowing that there is a wide network of colleagues that believe and share those same fundamental values, indeed, could be a strong help for European judges/prosecutors whenever their role is threatened, as well as in the event of a generalized loss of faith in justice by the people.

For all these reasons, improving judicial training is essential to build a European judicial area to the benefit of people and businesses, and participation in training should be recognized as normal work and reward it accordingly.

In conclusion, **training is an investment in better justice** and it should be developed in order to make effective and visible the progress achieved in establishing the area of freedom, security and justice, as it can help in the cross-border cooperation for legal professions<sup>48</sup>.

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