

HUMAN RIGHTS COMPLIANT CRIMINAL  
JUSTICE SYSTEM IN UKRAINE

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*Criminal Responsibility of Judges for Unjust Judgments*

*Comparative Paper*

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## 1. Executive summary

The key findings of this study can be summarised as following:

1. There is no one uniform approach to responsibility of judges. These approaches range from the most favourable to judges (in England and Wales) where judges can only be punished through a disciplinary process and the judgment can only be amended through appeals, to the least favourable to judges (in Moldova and Spain) where deliberately unlawful judgments are criminally punishable.
2. Although criminal punishment for deliberately unlawful judgments are not strictly speaking against the European standards, the minority of states covered in this comparative paper rely on this form of responsibility.
3. There are many forms of specific criminal liability that can cover deliberately unlawful judgments without creating a specific criminal offence including criminalisation of consequences such as illegal arrest or illegal deprivation of property. Other forms of criminal liability can criminalise illegal motives such as taking bribes or having stakes in the case. These ways of criminalisation seem more appropriate as they are less vague and include clearly identifiable *mens rea* and *actus reus*. They are less open to broad interpretation and are less likely to be abused.
4. It is important to regard the responsibility of Judges as a holistic system which does not only include criminal responsibility but some of its aims can be achieved through civil or disciplinary responsibility.
5. When examining the liability of judges two competing considerations should be taken into account: first, this liability should not be used to put pressure on independence of judiciary; second, deliberately unlawful judgments need to be prevented. One should bear in mind that the right to appeal is perhaps the most effective way of fixing judicial mistakes even the deliberate ones.
6. The legislator should also bear in mind that Judges should not only be aware of possible responsibility in case of deliberately unlawful judgments but they need to be protected from persecution for delivering of lawful judgments. In many of states under review, judges can be only brought to criminal or other forms of liability through a special procedure. Their immunity is usually functional and does not protect them from liability.

## 2. Introduction

The purpose of this study was to determine how different European states reconcile the dilemma between judicial immunities and the ideals of judicial independence on the one hand and the desire to ensure that deliberately unlawful judgments are not left unpunished and judicial accountability is promoted on the other hand. There are three types of personal responsibility of judges for the deliberately unlawful judgments: civil (tortious) claims, disciplinary punishment and criminal responsibility. In some way, quashing judgments on appeal can also be considered as a type of accountability. It seems that criminalisation of deliberately unlawful judgments on the points of interpretation of law and/or facts made by judges should be the matter of last resort. The legislator should be clear that no other form of responsibility is sufficient and that the special criminal sanction adds some deterrent effect on potential perpetrators without creating an unnecessary instrument of pressure and influence on judges. Moreover, these sanctions should not prevent qualified candidates from entering the profession. It needs to be stated at the outset that unintentional mistakes or plausible legal interpretations should not be criminally punished.

The discussion of accountability of judges has been going on for a considerable period of time. There are many who oppose the idea of specific liability of judges for their actions. For instance, Lord Cooke of Thorndon opined:

In what sense are they [judges] or should they be accountable for their decisions? So far as appellate tiers extend there is accountability within the judicial system; but a fashionable line of argument might suggest that somehow there should be more ... Judicial accountability has to be mainly a matter of self-policing; otherwise, the very purpose of entrusting some decisions to judges is jeopardised.<sup>1</sup>

This report looks at six European jurisdictions with the view of considering how effectively their legislation criminalises deliberately unlawful judgments. These jurisdictions include England and Wales, France, Italy, Moldova, Poland, and Spain. This report's method was limited to desk research. The experts compiled the data from open but reliable sources and the information presented in this report is accurate to the best of their knowledge.

Although there are many possible ways to describe the key term of this report – intentional judicial mistake, intentionally unfair judgment or deliberately unlawful judgments, we use the latter term in the majority of cases. It is necessary to show that the judgment is not unfair in general terms but rather contradicts legal provisions. Moreover, mistake is a suboptimal term as it connotes some elements of negligence.

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<sup>1</sup> R Cooke 'Empowerment and Accountability: the Quest for Administrative Justice' (1992) 18 Commonwealth Law Bulletin 1326, see also, Le Sueur A, 'Developing mechanisms for judicial accountability in the UK' (2004) 24 *Legal Studies* 73.

### 3. Substantive Issues of Criminal Liability of Judges.

#### 3.1. Can Judges Be Criminally Liable for Deliberately Unlawful Judgments?

##### *England and Wales*

In England and Wales, the answer is ‘no’ unless a judge commits a general criminal offence which is covered by criminal law such as taking bribes etc. For instance, Section 2 of Bribery Act 2010 provides:

Offences relating to being bribed

- (1) A person (“R”) is guilty of an offence if any of the following cases applies.
- (2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
- (3) Case 4 is where—
  - (a) R requests, agrees to receive or accepts a financial or other advantage, and
  - (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
- (4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
- (5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—
  - (a) by R, or
  - (b) by another person at R's request or with R's assent or acquiescence.
- (6) In cases 3 to 6 it does not matter—
  - (a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
  - (b) whether the advantage is (or is to be) for the benefit of R or another person.
- (7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.
- (8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.<sup>2</sup>

Another relevant offence is the common law offence of misconduct in public office. “The offence is committed when: a public officer acting as such; wilfully neglects to perform his duty and/or wilfully misconducts himself; to such a degree as to amount to an abuse of the public's trust in the

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<sup>2</sup> See, <https://www.legislation.gov.uk/ukpga/2010/23/section/2>.

office holder; without reasonable excuse or justification.”<sup>3</sup> According to the case law, judges are considered to hold public offices.<sup>4</sup> Effectively, this offence covers cases which cannot be covered by the offence of bribery or any other relevant statutory offences.

### *France*

Judges that commit ordinary crimes are subject to criminal liability like all other citizens and public officials.

There is no criminal responsibility per se for deliberately unlawful decision, unless the misconduct falls within one of the following categories:

- a) as public officials:
  - a. abuse of authority (article 432-4 of the Penal Code)
  - b. embezzlement and misappropriation of property (article 432-15 of the Penal Code);
- b) as magistrate:
  - a. corruption, active or passive (Penal Code, art. 434-9),
  - b. denial of justice<sup>5</sup> (Penal Code, article 434-7-1).  
For this offense, the magistrate faces a sanction of 7,500 euros in fine and 5 to 20 years of prohibition from exercising his functions (Penal Code, art. 434-7-1).

### *Italy*

The criminal liability of judges for deliberately unlawful judgments is relevant only if the unjust decision is taken:

- a) within a procedure, through a bribery and in order to benefit or damage a party (see corruption in judicial affairs, per article 319-ter criminal code). In this case, the protected values are the impartiality of the judges and the correct performance of the judicial functions. The sanctions are particularly harsh.
- b) to provide an undue advantage to the judge himself or a party (see abuse of office, per article 323 criminal Code).<sup>6</sup>

Magistrates<sup>7</sup> that commit ordinary crimes are subject to criminal liability like all other citizens and public officials.

### *Moldova*

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<sup>3</sup> See, <https://www.cps.gov.uk/legal-guidance/misconduct-public-office>.

<sup>4</sup> See, (1791) Sainsbury 4 T.R 451, (1968) Llewellyn-Jones 1 Q.B.429.

<sup>5</sup> See further definition in relevant sections of the report or the annexes

<sup>6</sup> “If the facts (...) are committed as to favor or damage a party in a civil, criminal or administrative process, the penalty of imprisonment is between 6 and 12 years”. “If the unjust decision issued an imprisonment below 5 years, the penalty of imprisonment is between 6 and 14 years; if the unjust sentence issued an imprisonment of more than 5 years or life imprisonment arises, the penalty is imprisonment of 8 to 12 years.

<sup>7</sup> In Italy, prosecutors and judges belong to the same category of “magistrates”. They perform investigative (prosecutors) and decisional (judges) judiciary functions.

The criminal liability of judges is provided in Article 307 of the Criminal Code of Moldova: “Deliberate ruling of a sentence, decision, conclusion or judgment contrary to the law:

(1) The wilful rendering by the judge of a judgment, sentence, decision or conclusion contrary to the law shall be punished by a fine from 650 to 1150 conventional units or by imprisonment for up to 5 years, in both cases with the deprivation of the right to hold certain positions or exercise a specific activity for a period of up to 5 years.

(2) The same action: related to the accusation of committing a serious, extremely serious or exceptionally serious offence, resulting in serious consequences is punishable by imprisonment from 3 to 7 years with the deprivation of the right to hold certain positions or exercise a specific activity for a period of up to 5 years”.<sup>8</sup>

### *Poland*

There is no provision that would criminally penalise judges for deliberately unlawful judgments in Polish criminal law but judges can be liable for general crimes such as taking bribes. For instance, Article 228 of the Penal Code of Poland provides:

Article 228. § 1. Whoever, in connection with the performance of a public function accepts a material or personal benefit or a promise thereof, or demands such a benefit shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

### *Spain*

According to the Constitution, judges are responsible before the law for their acts.<sup>9</sup> Judges deliberately issuing unlawful judgments (willingly<sup>10</sup> or negligently<sup>11</sup>) can be held criminally liable. The law on public administration<sup>12</sup> says that public officials, such as judges, have a criminal responsibility, like any other citizen.

The criminal code<sup>13</sup> establishes criminal liability for judges that:

a) knowingly dictate an unjust sentence or resolution (as per Article 446 of criminal code);<sup>14</sup>

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<sup>8</sup> Criminal Code of Moldova.

<sup>9</sup> “Of the judiciary” Article 117. “1. Justice emanates from the people and is administered in the name of the King by Judges and Magistrates who are members of the judicial power, independent, immovable, *responsible* and subject only to the rule of law. (...)”.

<sup>10</sup> Ex article 446 of criminal code

<sup>11</sup> Ex article 447 of criminal code

<sup>12</sup> Law 39/2015, *Ley de Procedimiento Administrativo Común, LPAC*, at Article 146 (Criminal responsibility) reads: “1. The criminal responsibility of the personnel at the service of the Public Administrations, as well as the civil responsibility derived from the crime, will be demanded in accordance with the provisions of the corresponding legislation. 2. The requirement of criminal responsibility of the personnel at the service of the Public Administrations will not suspend the procedures for the recognition of patrimonial responsibility that are instructed, unless the determination of the facts in the criminal jurisdictional order is necessary for the establishment of patrimonial responsibility”.

<sup>13</sup> Title 20 (Crimes against the Administration of Justice), chapter 1 (Prevarication) from crime of prevarication against the Administration of Justice and its penalties.

<sup>14</sup> “The judge or magistrate who knowingly dictates an unjust sentence or resolution will be punished: 1.º With the prison sentence of one to four years if it is an unjust sentence against the defendant in a criminal case for a serious or less serious crime and the sentence had not been executed, and with the same penalty in its upper half and fine of twelve to twenty-four months if it has been executed. In both cases, the penalty of absolute disqualification for a period of ten to twenty years shall also be imposed. 2.º With the penalty of a fine of six to twelve months and special disqualification for employment or public office for a period of six to ten years, in the case of an unjust sentence against the defendant issued in the process for a minor offense. 3. With the penalty of a fine of twelve to twenty-four

- b) due to serious imprudence or inexcusable ignorance, dictate a manifestly unjust sentence or resolution (as per article 447 of criminal code);<sup>15</sup>
- c) refuse to judge (ex article 448 of criminal code),<sup>16</sup> or
- d) guilty of malicious delay in the administration of Justice (ex article 449 of the criminal code).<sup>17</sup>

Additionally, the criminal code of Spain<sup>18</sup> indicates crimes for

- a) public officials, such as:
  - a. (Article 404) for knowingly taking a wrong or arbitrary decision, the sanction is disqualification;
  - b. (Article 439) for taking advantage of any kind of contract or business activity in which the civil servant participated by reason of his/her official position, the sanction is imprisonment (from six months to two years) and a fine (of twelve to twenty-four monthly salaries) and disqualification from public office.
- b) judges and prosecutors:
  - a. (article 529) for a judge who gives a case to a non-competent jurisdiction, sanction is special disqualification;
  - b. (article 530) a judge that decides or prolongs deprivation of liberty, with violation of deadlines or constitutional right, is specially disqualified from employment;
  - c. (article 531) a judge that decides or prolongs solitary confinement of a detainee, prisoner or sentenced person, with violation of the terms or other constitutional or legal guarantees, is specially disqualified from employment from 6 months to 2 years;
  - d. (article 532) in case the crimes above are committed with gross negligence, the judge is suspended for a period of six months to two years.

### 3.2 Special Procedures for Holding Judges Criminally Responsible

#### *England and Wales*

Judges do not have any formal immunity against prosecution for any criminal offences that they commit. They can be arrested for taking bribes or any other crimes against public office.

#### *France*

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months and special disqualification for employment or public office for a period of ten to twenty years, when any other unjust sentence or resolution is issued.” (see at <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>, in Spanish).

<sup>15</sup> “The Judge or Magistrate who, due to serious imprudence or inexcusable ignorance, dictates a manifestly unjust sentence or resolution, will incur the penalty of special disqualification for employment or public office for a period of two to six years.”

<sup>16</sup> “The Judge or Magistrate who refuses to judge, without alleging legal cause, or under the pretext of darkness, insufficiency or silence of the Law, will be punished with the penalty of special disqualification for employment or public office for a period of six months to four years.”

<sup>17</sup> “1. The Judge, Magistrate or Judicial Secretary guilty of malicious delay in the Administration of Justice shall incur the same penalty indicated in the preceding article. Malicious is understood as the delay caused to achieve any illegitimate purpose. 2. When the delay is attributable to an official other than those mentioned in the previous section, the indicated penalty will be imposed, in its lower half.”

<sup>18</sup> See, in Spanish, at <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>



Judges that commit ordinary crimes are subject to criminal liability like all other citizens and public officials.

### *Italy*

Magistrates, as any other citizen and public official, is bound by the criminal code. However, in order to remove any (actual, potential or perceived) conflict of interests for a magistrate judged by his/her district colleagues, the proceeding must take place in a judicial district<sup>19</sup> different from the one the incriminated judge usually operates.

### *Moldova*

According to Article 19 of the Law on the Status of Judge, a judge should not be held liable for his/her opinions expressed in justice making and for judgments s/he passed unless s/he is found guilty of criminal abuse by a final sentence. A judge may be subjected to criminal prosecution only by the Prosecutor General with the consent of the Superior Council of Magistracy (SCM), under the Criminal Procedure Code. If the judge commits passive corruption (Article 324) or influence peddling (Article 326), the SCM consent to initiate a criminal investigation is not necessary. A judge should not be detained, brought by force, arrested, searched without the consent of the SCM. The SCM consent is not required in case of flagrant offenses and in case of accusation of passive corruption (Article 324) or influence peddling (Article 326).

### *Poland*

All judges in Poland have immunity. According to Article 80 of the Act on Common Courts, a judge may not be arrested or held criminally responsible without the permission of the competent disciplinary court. This does not apply to detention when a judge is caught red-handed, if the detention is necessary to ensure the proper course of the proceedings. Until a permission is issued, allowing a judge to be held criminally responsible, only urgent actions may be taken. The president of the Court of Appeal is immediately notified about the arrest of a judge. He may order the immediate release of the detained judge. The president of the Court of Appeal then immediately notifies the National Council of the Judiciary, the Minister of Justice and the First President of the Supreme Court about the fact of detaining a judge.

The disciplinary court issues a resolution authorising the prosecution of a judge if there is a sufficiently justified suspicion that he has committed a crime. The resolution contains a decision on the permission to bring the judge to criminal liability, together with the justification. Before issuing a permission, the disciplinary court hears the disciplinary officer, judge, representative of the authority or the person who applied for the permission.

It needs to be clearly stated here that the disciplinary panel in Poland has a role in the criminal prosecution of judges and therefore it does not only apply disciplinary sanctions but also facilitates criminal process. Poland has undergone a significant reform of disciplinary responsibility of judges in recent years. Now the disciplinary responsibility can be summarised as following: “In the first instance, the cases are heard by disciplinary courts at appellate courts or by the newly created

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<sup>19</sup> The Italian territory is divided into 26 judicial districts, each one with a court of appeal.

Disciplinary Chamber of the Supreme Court (the latter being proper, in particular, when the disciplinary misconduct constitutes an intentional crime prosecuted by public indictment or when the defendant is a judge of the Supreme Court). In the second instance, all cases are adjudicated by the Disciplinary Chamber of the Supreme Court.

The case is examined, in general, at a hearing and the proceedings are open to the public. The defendant may use a defence counsel. A judgement delivered by the disciplinary court of the first instance may be appealed against by the defendant, the disciplinary officer, the National Council of the Judiciary and by the Minister of Justice. The appeal should be heard by the Supreme Court's Disciplinary Chamber within the two-month period. The ruling of the court of the second instance is final and cannot be subject to cassation.”<sup>20</sup>

The Supreme Court's Disciplinary Chamber was introduced by the recent judicial reform and has already been a subject of the decision of the Court of Justice of the European Union. “Taking the view that, by adopting the new disciplinary regime for judges, Poland had failed to fulfil its obligations under EU law, on 25 October 2019 the [European] Commission brought an action before the Court of Justice. The Commission claims, inter alia, that the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber, composed exclusively of judges selected by the National Council of the Judiciary, the fifteen judges who are members of which were elected by the Sejm (the lower chamber of the Polish Parliament).”<sup>21</sup> The Court of Justice has granted interim measures in this case which effectively prevent the Disciplinary Chamber from operating. The case is still pending before the Court.

### *Spain*

In Spain there is no special procedure for criminal responsibility of judges.

Criminal liability proceedings against a judge may be filed either by an order issued by the competent court or following a complaint lodged by the prosecutor, the aggrieved or injured party, or by exercising popular action in public interest. Criminal proceedings against a judge must be instituted, either before the competent higher court of justice or before the Supreme Court, depending on the hierarchical position of the judge in question. In all cases of judicial abuse concerning judges, the General Council of the Judiciary (*Consejo General del Poder Judicial - CGPJ*) decided to suspend temporarily the involved judges from office, once the indictment had been filed and the opening of trial had been ordered by the competent court.

Articles 398-400 LOPJ (*Ley organica del poder judicial*) provide that serving judges may only be arrested by order of the competent court or in case of *flagrante delicto*.

### 3.3 Is There Any Available Record of How the Need of Specific Criminal Liability of Judges Is Justified?

### *England and Wales*

In England and Wales there is no specific liability, all unlawful judgments even intentional are dealt with on appeal. Disciplinary sanctions can be invoked for judges' behaviour, language or conduct.

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<sup>20</sup> M Szuleka and M Kalisz, *Disciplinary Proceedings Against Judges and Prosecutors* (Warsaw, 2019)

<sup>21</sup> <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf>

### *France*

No evidence was found to this end.

### *Italy*

The High Council of Magistrates<sup>22</sup> (*Consiglio superior della Magistratura*, or CSM) clarifies that in order to have criminal and administrative liability for judges, 3 elements must be in place, notably: 1) the judge has acted wilfully or with gross negligence; 2) a person has suffered an unjust damage and 3) the link between element 1 and 2.

The goals of having liability for judges are:

- i. guarantee correctness, respect and reliability of the judiciary function, by avoiding that it is damaged by the conduct of those who are called to exercise it, and
- ii. guarantee citizenry against possible deterioration of the administration of justice.

### *Moldova*

There is no information available in open sources of the rationale behind inclusion of Article 307 (Deliberate ruling of a sentence, decision, conclusion or judgment contrary to the law) into the Criminal Code but this provision was under review of the Constitutional Court of Moldova which considered it and declared it constitutional. The Constitutional Court mentioned that “the duty performed by a judge in interpreting the law, examining evidence and assessing facts when solving cases, shall not give rise to civil, criminal or disciplinary liability of the judge, save for cases involving bad faith, intentional guilt or proved gross negligence”.<sup>23</sup> The Court also emphasised that ‘the Superior Council of Magistrates, when authorising the launch of criminal prosecution under Article 307 of the Criminal Code, is under the duty to consider the fact that criminal liability shall always be a measure which is to be applied as a last resort. Subsequently, an analysis must be undertaken each time on whether other measures than that of criminal nature, for instance disciplinary sanctions, may be more appropriate’.<sup>24</sup>

### *Poland*

There is no specific criminal liability of judges.

### *Spain*

“In a democratic system such as that regulated in the Spanish Constitution, the judiciary is legitimized by the application of the law to which it is subject, and not by the simple imposition

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<sup>22</sup> See website of the High Judicial Council (visited on July 30, 2020), at [https://www.csm.it/web/csm-internet/magistratura/ordinaria/percorso-professionale?show=true&title=responsabilit%C3%A0&show\\_bcrumb=responsabilit%C3%A0#:~:text=I%20magistrati%20sono%20sottoposti%20alla,figure%20di%20reato%20\(ad%20es.&text=L'unica%20deroga%20al%20regime,%C3%A8%20quella%20prevista%20dall'art.](https://www.csm.it/web/csm-internet/magistratura/ordinaria/percorso-professionale?show=true&title=responsabilit%C3%A0&show_bcrumb=responsabilit%C3%A0#:~:text=I%20magistrati%20sono%20sottoposti%20alla,figure%20di%20reato%20(ad%20es.&text=L'unica%20deroga%20al%20regime,%C3%A8%20quella%20prevista%20dall'art.)

<sup>23</sup> [http://www.constcourt.md/libview.php?l=en&id=985&idc=7&t=%2FMedia%2FNews%2FCriminal-Liability-of-Judges-Arising-from-a-Wilful-Rendering-of-an-Illegal-Decision-Constitutional%2F&fbclid=IwAR0t96LW-yCOpfhueg-gDqo\\_dtGREo\\_Vyz-P7qtAhr4dnQimjyvV-WPkIq4.](http://www.constcourt.md/libview.php?l=en&id=985&idc=7&t=%2FMedia%2FNews%2FCriminal-Liability-of-Judges-Arising-from-a-Wilful-Rendering-of-an-Illegal-Decision-Constitutional%2F&fbclid=IwAR0t96LW-yCOpfhueg-gDqo_dtGREo_Vyz-P7qtAhr4dnQimjyvV-WPkIq4.)

<sup>24</sup> *Ibid.*

of its powers. Thus, the rule of law is violated when the judge, under the pretext of applying the law, acts only on his own subjectivity specified in a particular way of understanding the question to be resolved, and dispensing with all the interpretation methods admissible in law (...) From this perspective, the legal provision of the crime of judicial prevarication cannot be understood in any case as an attack on the independence of the Judge, but rather as a democratic requirement imposed by the need to criminally reprove a conduct carried out in the exercise of the judicial power that, under the pretext of the application of the law, is directly violating the rule of law".<sup>25</sup>

The protection of the Administration of Justice justifies the existence of criminal regulations that punish the most serious attacks on its proper functioning. The regulation of these crimes is found in Title 20 of Book 2 of the Penal Code (articles 446 to 471 bis CP). The protected legal value is the Administration of Justice as a public service provided by independent Judges and Magistrates, exclusively subject to the rule of law.

### 3.4 If There Is a Provision for Criminal Liability How Is This Offence Formulated? What Are Mens Rea and Actus Reus of This Offence? What are the sanctions?

#### *England and Wales*

This particular issue is not applicable to England and Wales.

#### *France*

There is no crime of a deliberately unlawful judgments committed by a judge. However, if a judge wilfully takes a wrongful decision, motivated by a bribery, then s/he is responsible of corruption. Similarly, in case the judge (wilfully or not) denies justice, s/he is criminally liable ex art. 434-7-1 of criminal code (see here below).

On top of crimes committed by public officials, judges are subject to additional liability, for judiciary specific crimes, such as:

1) denial of justice (Penal Code, article 434-7-1). In this case, the magistrate faces a sanction of 7,500 euros in fine and 5 to 20 years of prohibition from exercising his functions (Penal Code, art. 434-7-1) and

2) corruption, active or passive (Penal Code, art. 434-9)

Public official corruption (active or passive) applies to:

- the following subjects:
  - a) a judge or prosecutor, a juror or any other member of court of law;
  - b) an official of the Court Registrar;
  - c) an expert appointed either by a court or by the parties;

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<sup>25</sup> Judicial Power, Supreme Court, February 9, 2012 "Supreme Court. Judgment of the case "Peláez, Crespo and Correa v. Garzón" for judicial prevarication in violation of constitutional guarantees"  
(<http://www.poderjudicial.es/portal/site/cgpj/menuitem.0cb0942ae6fbd1c1ef62232dc432ea0/?vgnextoid=75e19efd54265310VgnVCM1000006f48ac0aRCRD&vgnnextchannel=6d70f20408619210VgnVCM100000cb34e20aRCRD&vgnnextfmt=default>)

- d) a person appointed by a judicial authority to carry out conciliation or mediation;
- e) an arbitrator carrying out his mission under the national law on arbitration
- o who, directly or indirectly, at any time, unlawfully requests or accepts any offers, promises, donations, gifts or advantages, for himself or another, in return for performing or abstaining from performing an act of his office or facilitated by this office. Yielding to the solicitations of a person described in 1 to 5, or unlawful proposing, directly or indirectly, at any time, any offer, promise, donation, gift or reward, for such person or another, with a view to obtaining from such a person the performance or non-performance of an act pertaining to his office at any time, is subject to the same penalties.

The sanction is ten years' imprisonment and a fine of €150,000. Where the offence is committed by a judge or prosecutor in favour or against a person who is being criminally prosecuted, the penalty is increased to 15 years' imprisonment and a fine of €225,000.

Additional sanctions are:

- o forfeiture of civic, civil and family rights
- o Prohibition either to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, for a maximum period of ten years, or, for offences set out in articles 433-1, 433-2 and 433-4, to undertake a commercial or industrial profession, to direct, administer, manage or control, in whatever title, directly or indirectly, for their own or another's account, a commercial or industrial enterprise or a commercial company. These prohibitions may be given cumulatively.
- o the public display or dissemination of the decision

The penalties incurred are of a professional nature and are established, according to Article 45 of the statutory order of 22 December 1958, on the following scale:

- 1) Reprimand, with note on file
- 2) Change of office
- 3) Withdrawal of certain tasks
- 4) Prohibition from being appointed or promoted to be a single judge (maximum five years)
- 5) Demotion
- 6) Temporary suspension from duties (maximum one year), with total or partial deprivation of salary
- 7) Downgrading
- 8) Ex officio retirement or separation from office
- 9) Dismissal

### *Italy*

In the case of corruption in judicial acts (as per art. 319-ter of the criminal code) the *mens rea* (mind of the criminal) is not the mere intentional unjust decision, but the purpose, to favour or damage a party in a criminal, civil or administrative procedure. In addition, there must have been the promise or exchange of bribe (either through money or other benefit, good or favour). This type

of corruption is not only for judges and prosecutors. It is also for public officials that, through their corrupted action (for example a fake report or declaration), do influence the outcome of a (criminal, civil or administrative) procedure.

Even the promise of a bribe, regardless the occurrence of the positive or negative outcome for a party, constitutes a crime.

Sanctions for criminal liability depends on the type of crime. For example, for corruption in judicial acts (as per art. 319-ter of the criminal code) the “regular” sanction goes from 6 to 12 years imprisonment, elevated to 8 to 12 years, for more serious consequences.

### *Moldova*

When considering Article 307 of the Criminal Code, the Constitutional Court of Moldova reviewed the *mens rea* of this crime. The Court stated that “by inserting into Article 307 of the Criminal Code the phrase “wilful rendering,” the lawmaker has expressly provided for the judges to be held criminally liable for this criminal component, exclusively in case there is proved his intention to deliver the judgment, sentence, decision of the ruling in breach of the law.” The Constitutional Court continued by stating that ‘the criminal liability of the judge under Article 307 of the Criminal Code may be compatible with the principle of independence of the judge only following a strict interpretation and only on the basis of indisputable evidence that would prove the intention of the judge in issuing a judicial act in breach of the law’.<sup>26</sup>

Sanctions:

Section 1 of Article 307 provides for two types of punishment: fine (from 650 to 1150 conventional units) and prison term (up to 5 years). In both cases this sentence can be accompanied with the deprivation of the right to hold certain positions or exercise a specific activity for a period of up to 5 years. The aggravated form of this crime can be punished by imprisonment between 3 and 7 years and accompanied by the deprivation of the right to hold certain positions or exercise a specific activity for a period of up to 5 years.

The aggravated crime is committed when the wilful rendering by the judge of a judgment, sentence, decision or conclusion contrary to the law related to the accusation of committing a serious, extremely serious or exceptionally serious offence; resulting in serious consequences

No open source information was found as to how these sanctions are applied in real cases.

### *Poland*

No specific criminal liability is envisaged.

### *Spain*

The elements of the criminal responsibility for judges deliberately issuing unlawful judgments are:  
1) Material element: Unjust or unfair decision

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<sup>26</sup> Ibid.

The term “unjust” or “unfair”, for either judicial and administrative decisions, means a decision blatantly contrary to the law, and therefore legally unjustifiable.

2) Subjective element: will or gross negligence.

The adjudicating judge must act with full awareness of the unfair nature of the resolution it dictates. This means s/he acts “willingly” or deliberately (ex article 446 of the criminal code), or “with gross negligence” (ex article 447 of the criminal code). The *mens rea* is the absolute notoriety of the injustice.

The type, amount or length of penalties are the following:

a) in case of knowingly dictate an unjust sentence or resolution (article 446 criminal code):

a1) For unjust sentence (non-implemented) in a serious criminal case: imprisonment (for 1 to 4 years. If the sentence is implemented, imprisonment (for 2 to 4 years), plus a fine (of 12 to 24 months). In both cases, an absolute disqualification from public office (for 10 to 20 years).

a2) For unjust sentence in a minor criminal case: a fine (of 6 to 12 months) and a special disqualification from public office (for 6 to 10 years)

a3) For all other unjust decisions: a fine (of 12 to 24 months) and special disqualification from public office (for 10 to 20 years).

b) in case of wrongfully dictate a manifestly unjust sentence: a special disqualification from public office (for 2 to 6 years)

c) in case of refuse to judge (ex article 448 of criminal code<sup>27</sup>): a special disqualification from public office (for months to 4 years)

d) in cases of guilty delay of justice administration: a special disqualification from public office (for months to 4 years; cut in half if “the delay is attributable to an official other” than the judge or magistrate)

### 3.5 What Particular Aspects of Liability Are Taken into Account? Gravity of Consequences? Any Particular Circumstances or Forms of Mens Rea?

#### *England and Wales*

Since there is no specific criminal liability for judges this question is not applicable.

#### *France*

No useful evidence was found to this end.

#### *Italy*

As said, in Italy there is no criminal liability for judges for delivering deliberately unjust judgments, unless it is done in order to facilitate or damage a party to the (criminal, civil or administrative)

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<sup>27</sup> “The Judge or Magistrate who refuses to judge, without alleging legal cause, or under the pretext of darkness, insufficiency or silence of the Law, will be punished with the penalty of special disqualification for employment or public office for a period of six months to four years.”

procedure (ex art.319-ter criminal code), or for the undue advantage of the judge or a party (abuse of office, ex article 323 criminal Code).

Only in this second case, the sanction is much higher if under the “corruptive” sentence a suspect was unjustly imprisoned. In this case, the sanctions for the magistrate are the following:

- For unjust imprisonment of up-to 5 years: imprisonment between 6 and 12 years
- For unjust imprisonment above 5 years: imprisonment between 8 and 12 years

### *Moldova*

Section 2 of Article 307 provides for aggravated responsibility in cases related to the accusation of committing a serious, extremely serious or exceptionally serious offence; resulting in serious consequences.

The Criminal Code explains the meaning of serious and exceptionally serious offence (Article 16): Serious crimes are considered acts for which criminal law provides for a maximum punishment by imprisonment for a term of up to 12 years inclusively. Extremely serious crimes are considered crimes committed with intent for which criminal law provides for a maximum punishment by imprisonment for a term of more than 12 years. Exceptionally serious crimes are considered crimes committed with intent for which criminal law provides for life imprisonment.

### *Poland*

No criminal liability is envisaged.

### *Spain*

The type of liability and sanctions applied depend on the following factors:

a) Mens rea

a1) knowingly issuing an unfair decision (ex article 446 of criminal code)

a2) wrongfully (with gross negligence) issuing an unfair decision (ex article 447 of criminal code)

a3) refuse to judge (ex article 448 of criminal code)

b) the type of victim

b1) the accused/sentenced for a serious crime (ex art.446.1) or minor crime (ex article 446.2)

b2) other victims (articles 446.3, 447 or 448)

c) the type of procedure:

c1) criminal process

c2) other types of procedure

d) the intrusiveness of the decision:

d1) implemented criminal sentence (ex article 446.1/B)

d2) non-implemented sentence (ex article 446.1/A)

3.6 Are There Any Other Forms of Accountability for Judges?



Judicial responsibility is a holistic matter. It does not start or end with criminal liability. It is important to consider the system as a whole.<sup>28</sup> This section briefly explains how criminal liability is integrated within the general system of liability of judges.

#### *England and Wales*

In England and Wales, there are plenty of forms of accountability. Although there is no specific criminal liability for deliberately unlawful judgments, it does not mean that judges are not subject to any sort of accountability. For instance, all hearings are done orally, the judgments should be clearly reasoned and they are written and done by judges themselves, etc.

It was argued that:

“Removal from office is by no means that only way in which judges are held accountable, and should not be the first demand of those dissatisfied with a judicial decision... judges are accountable to the Constitution and to the law. The principal way in which judges are expected to account for the performance of their legal and constitutional duties is by giving reasoned judgements and ruling in open court. Appeal mechanisms serve as a further check in many cases. A judge acting in good faith should incur no personal sanction if his or her decision is overturned on appeal. Indeed, the rule of law would suffer if judge were deterred from applying the law as they saw it, and such a situation would be particularly detrimental to the independence of the judiciary, of which the decision-making autonomy of individual judges is a vital part”.<sup>29</sup>

#### *France*

Judges have civil responsibility for their mistakes. However, similar to the situation in Italy, they respond to the State only. This is a reparation claim, in case the State (that has indirect responsibility for the damage caused by judges in the exercise of their functions) was forced to pay for an unjust damage suffered by a citizen. As of June 2019, this action by the State seems not been used.<sup>30</sup> Magistrates, as any other public official, are subject to disciplinary liability, in the event of a breach of their duties, honor or dignity. There is no list of types of misconduct, but guidelines explain the code of ethics and the case law of the High Judicial Council (*Conseil Supérieur de la Magistrature*, or CSM).

#### *Italy*

Yes. A judge that contravenes his/her duties (i.e. act with impartiality, correctness, diligence, productiveness, privacy and balance and respects, inside and outside office) can be disciplined. Also, there are other types of liabilities for the judge:

- criminal liability: for a crime, as any other individual, plus corruption in judicial affairs;
- civil liability: for unjust damage suffered by a third-party (outside the process);

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<sup>28</sup> See more details in Annex 2 and 3.

<sup>29</sup> Aldo Zammit Borda, ‘The appointment, tenure and removal of judges under Commonwealth principles: a compendium and analysis of best practice’ (2015) 41 Commonwealth Law Bulletin 501, 524

<sup>30</sup> The responsibility of magistrates (by Magistrate Nicolas Braconnay, last modified Jun 2019, at <https://www.vie-publique.fr/parole-dexpert/38544-justice-la-responsabilite-des-magistrats-et-de-letat>)

- administrative liability: for damage to the State or other public entity

### *Moldova*

Apart from usual forms of accountability such as appeal procedures and giving reasons in the judgments, Article 13 of the Law on the Status of Judge provides that judges' performance is evaluated. Judges' performance is evaluated in order to assess the level of professional qualification and skills of judges. Acting judges are subject to periodic performance evaluation once in 3 years. Under the law, the acting judges are subject to performance evaluation also in case of:

- a) appointment until age limit;
- b) promotion to a higher court;
- c) appointment as court chair or deputy chair;
- d) transfer to a court of the same level or a lower court.

Judges may be subject also to extraordinary performance evaluation if judicial decisions taken by them raise doubts about their qualification level and professional skills. The performance of judges is evaluated by the Border for performance evaluation of judges.

### *Poland*

Judge in Poland are accountable through appeals. The higher court is expected to detect the unlawful judgments on the points of law or facts. The judges have to present their reasons in writing and the court hearings are normally open. Other forms of disciplinary responsibility are also possible.<sup>31</sup>

### *Spain*

There is both civil and disciplinary responsibility for judges. Public institutions and officers (including judges) have civil<sup>32</sup> and disciplinary<sup>33</sup> responsibility. For civil liability, victims of unjust damage (like litigants for a wrongful decision), must file a claim against the public administration the officer belong to. Similar to what happens in France, the public administration that has compensated the victim for unjust damage derived by an act or decision of its personnel<sup>34</sup>, can then act against for reparation against the wrongful officer that has acted with a) fraud, b) gross

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<sup>31</sup> See Annex 2.

<sup>32</sup> See articles 145 and 146 of the Law on Common Administrative Procedure (*Ley 39/2015, Ley de Procedimiento Administrativo Común, LPAC*), and in articles 19 to 21 of the Regulation of the Procedures of the Public Administrations in matters of Patrimonial Responsibility (*Reglamento de los Procedimientos de las Administraciones Públicas en materia de Responsabilidad Patrimonial, RPRP*), as well as the organic Law 6 of 1985 (on the Judicial Power) has a specific section (title 5) on the patrimonial responsibility of the State for the operation of the administration of justice (see articles 292 to 296).

<sup>33</sup> The provisions in relation to disciplinary liability of Spanish Judges are included in articles 414 to 427 of the Spanish Organic Law n.6 of 1985 (*Ley Orgánica del Poder Judicial, Law on the Judiciary*<sup>33</sup>). These provisions are complemented by the case-law of the discipline panel within the Council for the Judiciary, as well as the administrative division of the Supreme Court. The provisions apply to all judges, including justices of the peace (lay judges).

<sup>34</sup> In order to assess the responsibility, the following criteria will be weighed, among others: the harmful result produced; intentionality; the professional responsibility of the personnel at the service of the Public Administrations and their relationship (closeness or interest) with the production of the harmful result.

fault or c) negligence. Damages and losses caused by the judges and prosecutors in the exercise of their functions will give rise to the responsibility of the State due to judicial error or miscarriage of justice. Disciplinary proceedings for judges<sup>35</sup> are adjudicated by the Disciplinary Committee of the General Council for the Judiciary (*Consejo General del Poder Judicial*).

### 3.7 Have There Been Cases of Bringing Judges to Criminal Liability?

#### *England and Wales*

In England and Wales, there is no specific criminal liability for deliberately unjust judgments however, as has been pointed out above, judges are criminally liable for general criminal offences. In practice such cases are almost absent. For instance, in England and Wales in a case dated back to 1975 the judge stated that “[t]here is no case in our books where a judge of a superior court has ever been held liable in damages.”<sup>36</sup> No new reported cases of criminal misconduct of judges were found either. There are some reports of prosecution of lawyers linked to courts. For example, in 2009 a barrister acting on behalf of the prosecution service was accused of taking a bribe of £20,000 for dropping a case.<sup>37</sup> In 2012 a court clerk was jailed under the Bribery act for taking bribes.<sup>38</sup>

#### *France*

For members of the judiciary, there have been 1 case in 2004 and 1 in 2008 for active bribery, and 1 in 2007 for passive bribery.<sup>39</sup>

#### *Italy*

Yes, both for civil responsibility (against a victim or the State) and criminal liability (for example corruption in judiciary acts and decisions).<sup>40</sup> For criminal liability, in addition to past cases also involving judges and politicians, very recently there have been news on media reporting a possibly large case of alleged corruption involving judges members of the CSM. However, the case is still pending at the prosecution office, and as such it cannot be described without the risk of damaging the rights and reputation of the suspects. Nevertheless, the experience shows that judges are brought to justice for criminal liability.

#### *Moldova*

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<sup>35</sup> Judges must perform, in general terms, following ten principles: Independence; Impartiality; Submission to the law; Integrity and honesty; Spirit of service and proper treatment of colleagues, practitioners and citizens; Respect for the parties involved in the process; Submission to due process; Resolution of the lawsuit in a reasonable time, according to the circumstances of each case; Motivation of judicial decisions; Obligation to keep professional secrecy.

<sup>36</sup> *Sirros v Moore* [1975] AC 118; [1975] QB 118; [1974] 3 WLR 459; [1974] 3 All ER 776; (1974) 118 SJ 661.

<sup>37</sup> See, <https://www.theguardian.com/uk/2010/jun/29/crown-prosecution-service-officer-bribe>.

<sup>38</sup> See, <https://www.theguardian.com/law/2012/may/24/court-clerk-bribery-act-sentence>.

<sup>39</sup> <https://uncaccoalition.org/files/official-documents/country-review-report-france.pdf>.

<sup>40</sup> See relevant sections above

There were a number of cases in which judges were brought to criminal responsibility under Article 307 of the Criminal Code. However, they have not been yet successful. For example, Judge Dorin Munteanu was acquitted when the prosecutor decided to drop the charges. The Supreme Council of Magistracy have lifted his immunity. The case originated from the fact that Judge Munteanu decided not to extend pre-trial detention of a high-profile suspect.<sup>41</sup>

Another prominent case is the case of the current president of the Constitutional Court of Moldova, Judge Dominika Manole. It has been reported that “Judge Dominica Manole faced criminal proceedings after ruling ... that the Central Election Commission’s refusal to organize a constitutional referendum as petitioned by ‘Dignity and Truth’ had been illegal.”<sup>42</sup> Evidently, this case also has not resulted in successful prosecution.

### *Poland*

While there is no criminal liability in Poland for exercising judicial power, there are other crimes for which judges can potentially be held criminally liable in relation to the court proceedings they handle. The case of Judge Tuleya is relevant here. He faced prosecution for having allowed the presence of media in a sensitive case concerning the investigations on the 2017 budget vote in the Polish House of Representatives (Sejm) that took place without the presence of the opposition. He had been charged with ‘failing to comply with his official duties and overstepping his powers’ for having allegedly disclosed a secret of the investigation to ‘unauthorized parties’. The accusations stem from the initiative of the judge to allow media and the public in the courtroom while issuing his ruling.<sup>43</sup> It was reported that his immunity was not lifted in this case.<sup>44</sup>

### *Spain*

There are a number of cases in which judges were brought to criminal responsibility under Articles 446 and 447 of the Criminal Code. Evidence was found of a decision of the Supreme court (*Tribunal Supremo, or STS*), in judgment of the case “Peláez, Crespo and Correa v. Garzón” for judicial prevarication in violation of constitutional guarantees (STS 79/2012, of February 9).<sup>45</sup> The Second Chamber of the Supreme Court has issued judgment 79/2012 in the case 20716/2009 initiated by the complaint filed by a lawyer against the magistrate.<sup>46</sup> The said procedure was opened for a continuous crime of judicial prevarication and a crime committed by a public official for using tapping and recording devices in violation of constitutional guarantees, regarding the conversations held between preventive prisoners and lawyers in the prison booths. Later, the private accusations of Pablo Crespo and Francisco Correa, investigated by the magistrate, were

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<sup>41</sup> See, <https://newsmaker.md/rus/novosti/sudyu-muntyanu-opravnali-ego-obvinyali-v-otkaze-prodlit-arest-odnogo-iz-advokatov-platona/>

<sup>42</sup> See, [https://www.ssoar.info/ssoar/bitstream/handle/document/60925/ssoar-jlibertyintaff-2018-2-scourfield\\_mclauchlan-The\\_impact\\_of\\_the\\_European.pdf?sequence=1&isAllowed=y&lnkname=ssoar-jlibertyintaff-2018-2-scourfield\\_mclauchlan-The\\_impact\\_of\\_the\\_European.pdf](https://www.ssoar.info/ssoar/bitstream/handle/document/60925/ssoar-jlibertyintaff-2018-2-scourfield_mclauchlan-The_impact_of_the_European.pdf?sequence=1&isAllowed=y&lnkname=ssoar-jlibertyintaff-2018-2-scourfield_mclauchlan-The_impact_of_the_European.pdf)

<sup>43</sup> <https://www.ici.org/poland-stop-arbitrary-proceedings-against-judge-igor-tuleya/>.

<sup>44</sup> <https://balkaninsight.com/2020/06/11/polish-courts-independent-judiciary-wins-battle-not-war/>.

<sup>45</sup>

[http://www.poderjudicial.es/stfls/TRIBUNAL%20SUPREMO/NOTAS%20DE%20PRENSA/Pelaez%20et%20a1%20vs%20B%20Garzon,%20STS%2079\\_2012.pdf](http://www.poderjudicial.es/stfls/TRIBUNAL%20SUPREMO/NOTAS%20DE%20PRENSA/Pelaez%20et%20a1%20vs%20B%20Garzon,%20STS%2079_2012.pdf)

<sup>46</sup> The process has received media attention (BBC, [https://www.bbc.com/mundo/noticias/2012/02/120209\\_garzon\\_caida\\_perfil\\_sentencia](https://www.bbc.com/mundo/noticias/2012/02/120209_garzon_caida_perfil_sentencia)) and critics from INGOs (Spain: Judge Baltasar Garzón's trial, "a blow to human rights", Amnesty International, <https://www.amnesty.org/es/latest/news/2012/01/spain-trial-judge-baltasar-garzon-blow-human-rights/>)

added to the procedure. The magistrate was sentenced as the perpetrator responsible for a crime of prevarication of article 446.3 in apparent competition of norms (article 8.3) with a crime of article 536, first paragraph, all of the Penal Code, to the penalty of a fine of 14 months with a daily fee of 6 euros, with subsidiary personal responsibility in accordance with article 53 of the Penal Code, as well as 11 years of special disqualification from the position of judge or magistrate<sup>47</sup>.

Other available cases:

- 1) (2019) The Supreme Court denies a judge his rehabilitation to the judicial career after serving a sentence of disqualification for a crime of prevarication (ex article 446 of penal code)<sup>48</sup>
- 2) (2017) The Supreme Court rehabilitates a magistrate after serving his sentence for prevarication<sup>49</sup> (ex article 447 of criminal code);
- 3) (2017) The Supreme Court confirms the ten-year penalty of disqualification of a Judge for prevarication<sup>50</sup> (ex article 446.3 of criminal code).

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<http://www.poderjudicial.es/portal/site/cgpj/menuitem.0cb0942ae6fbd1c1ef62232dc432ea0/?vgnnextoid=75e19efd54265310VgnVCM1000006f48ac0aRCRD&vgnnextchannel=6d70f20408619210VgnVCM100000cb34e20aRCRD&vgnnextfmt=default#:~:text=Art%C3%ADculo%20446,-El%20Juez%20o&text=1.%C2%BA%20Con%20la%20pena,meses%20si%20se%20ha%20ejecutado.>

<sup>48</sup> <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-Tribunal-Supremo-deniega-a-un-juez-su-rehabilitacion-a-la-carrera-judicial-tras-cumplir-una-pena-de-inhabilitacion-por-un-delito-de-prevaricacion>

<sup>49</sup> <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Sala-de-Prensa/Notas-de-prensa/El-Tribunal-Supremo-rehabilita-como-magistrado-a-Francisco-de-Asis-Serrano-tras-cumplir-su-condena-por-prevaricacion>

<sup>50</sup> <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-Tribunal-Supremo-confirma-la-pena-de-diez-anos-de-inhabilitacion-al-juez-Fernando-Presencia-por-prevaricacion>

#### 4. Conclusion. Summary Table.<sup>51</sup>

	Question	England	France	Italy	Moldova	Poland	Spain
1	Can judges be criminally liable for deliberately unlawful judgments?	No specific crime	No specific crime	Not exactly	Yes	No specific crime	Yes
2	Is there a special procedure of criminal responsibility of judges?	No	No	Yes	Yes	Yes	No
3	What guarantees against undue influence on judges are established?	Broad immunity against criminal and civil responsibility . Special procedure for disciplinary actions	Special procedure for disciplinary actions. Only retrospective civil liability	Special procedures for all forms of liability.	Special procedures for disciplinary and criminal liability. Immunity from civil liability.	Special procedures for disciplinary and criminal liability. Only retrospective civil liability.	Specific provisions on initiating a criminal procedure, or arrest a judge. Special procedure for disciplinary actions.
4	Are there any other forms of accountability for judges?	Yes	Yes	Yes	Yes	Yes	Yes
5	Have there been cases of bringing judges to criminal liability?	No	(no evidence)	Yes	Yes	Yes	Yes
6	Who is entrusted with judging judges for their deliberately unlawful judgments?	No specific provision	No specific provision	No specific provision	After their immunity is lifted – normal process	Special process	No specific provision
7	Are there reported cases in which judges used their immunity against prosecution or other claims?	No	No	No	No evidence	Yes	No

<sup>51</sup> This table includes only questions for which simple answers could be summarised for convenience.

## Annex 1: Overview of the Judiciary

### England and Wales

The system of judges in England and Wales comprises of professional judges and volunteers. Magistrates Court deal with the majority of criminal cases and some family issues. Justices of the Peace, or JPs, are adult volunteers from the local community who decide cases that do not involve complex questions of law. They need not have formal legal qualification, but receive advice on matters of law and practice by a legally qualified justices' clerk. In order to become a magistrate, one needs to be:

- Age. Magistrates have to be over 18 and under 65. They must retire at 70 and are normally expected to serve for at least 5 years.
- Health. Magistrates need to be able to hear clearly, with or without a hearing aid, to listen to a case. They also need to be able to sit and concentrate for long periods of time.
- Personal qualities. Magistrates need to show they have got the right personal qualities, for example that they are: aware of social issues; mature, understand people and have a sense of fairness; reliable and committed to serving the community. They also need to be able to: understand documents, follow evidence and communicate effectively; think logically, weigh up arguments and reach a fair decision
- Exclusive criteria: found guilty of a serious crime; found guilty of a number of minor offences; banned from driving in the past 5 to 10 years; declared bankrupt

All other cases are dealt with by the professional judges. Professional judges need to have at least 5 or 7 years of post-qualification experience (PQE) for legally qualified posts. These activities include:

- (a) the carrying-out of judicial functions of any court or tribunal
- (b) acting as an arbitrator
- (c) practice or employment as a lawyer
- (d) advising on the application of the law
- (e) assisting persons involved in proceedings for the resolution of issues arising under the law
- (f) acting as mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of proceedings
- (g) drafting documents intended to affect persons' rights or obligations
- (h) teaching or researching law
- (i) any activity that, in the relevant decision-maker's opinion, is of a broadly similar nature to those listed above.

Professional judges also required to have relevant legal qualification that means that you have to be eligible to be either a barrister, solicitor, chartered legal executive, government lawyer, legal academic or patent and trade mark attorney. The judges should be a citizen of the UK, the Commonwealth, or of the Republic of Ireland.

Judges in England and Wales are selected by the Judicial Appointment Commission (JAC). The JAC is an independent body that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals with UK-wide jurisdiction. The JAC runs selection

exercises for all judicial roles in courts and tribunals up to and including High Court Judge and Upper Tribunal Judge and convenes panels to make appointments for senior roles such as the Lord Chief Justice. The Commission comprises 15 Commissioners who are responsible for ensuring that the JAC fulfils its role, achieves its aims and objectives, and promotes the efficient and effective use of staff and other resources. The Chairman of the Commission is a lay member. Of the 14 other Commissioners: 6 must be judicial members (including 2 tribunal judges); 2 must be professional members (Barrister, Solicitor or fellow of the Chartered Institute of Legal Executives), 5 must be lay members, 1 must be a non-legally qualified judicial member. Twelve commissioners, including the Chairman, are appointed through open competition. The other 3 are selected by the Judges' Council (2 senior members of the courts judiciary) or the Tribunal Judges' Council (1 senior member of the tribunals judiciary).

As of 1 April 2019, there were 3,210 judges (on a headcount basis) with a primary appointment as a court judge.<sup>52</sup>

### France

The magistrates are officials of the Ministry of Justice, divided into judges and prosecutors. In order to become a magistrate, one must graduate from the National School of Magistrates. Seats at the school are accessible by exam:

1. (most of the seats) for holders of a master degree in law or political science (max age 31yo).
2. for civil servant having completed 4 years of public service (max age 48yo),
3. for practitioners with 8 years of experience in a company or holding an electoral mandate (max age 40yo).

After a 31 months training (in class and in court) graduates choose their assignment, according to their ranking and the available positions.

In France there are approximately 6,995 professional judges (i.e. 10.4 per 100,000 inhabitant) and 1,955<sup>53</sup> prosecutors (i.e. 2.9 per 100,000 inhabitant).

### Italy

A magistrate is a public official with judicial powers. The magistrate can be a prosecutor (investigative magistrate) or a judge (deciding magistrate) for different procedures:

- Ordinary: civil or criminal jurisdiction
- Administrative: for the protection of legitimate interests towards the Public Administration;
- Audit and tax: over compensation for tax damage;
- Military: with competences related to military crimes.

According to Italian law, the judiciary constitutes an autonomous and independent order from any other power (art. 104 of the Constitution). The self-governing body of the judiciary is the Superior Council of the judiciary (*Consiglio Superiore della Magistratura*, or CSM), a constitutional body, chaired by the President of the Republic.

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<sup>52</sup> See, <https://www.judiciary.uk/wp-content/uploads/2019/07/Judicial-Diversity-Statistics-2019-1.pdf>.

<sup>53</sup> See, CEPEJ-STAT (2016) <https://www.coe.int/en/web/cepej/dynamic-database-of-european-judicial-systems>.



The CSM is composed of:

- the President of the Republic (who is a member by right, by reason of the function performed, and chairs it)
- the First President of the Court of Cassation (who is a member by right, due to the function performed)
- the Attorney General at the Court of Cassation (who is a member by right, due to the function performed)
- 16 magistrates, of which 2 exercising functions of legitimacy, 10 exercising judicial functions on merit, 4 exercising prosecutor functions
- 8 full professors in law or lawyers with at least 15 years of practice.

In order to access the public competition and to become a magistrate, the candidate must:

1. Be an Italian citizen;
2. Have full civil rights;
3. Clean criminal background;
4. Have a degree in law
5. Have completed a specialisation through:
  - a) an internship at the judicial offices,
  - b) a preparation school for legal professions,
  - c) be a qualified lawyer,
  - d) have a PhD in law.

The public exam has both written and oral tests, on different subjects of law<sup>54</sup> and one foreign language.

There are approximately 6,395 professional judges (i.e. 10.6 per 100,000 inhabitant) and 2,138<sup>55</sup> prosecutors (i.e. 3.5 per 100,000 inhabitant).

## Moldova

The system of courts includes the Supreme Court, Court of Appeal and ordinary courts.<sup>56</sup> The Supreme Court of Justice is the highest court of law. The Court of Appeal is the supreme instance concerning ordinary ways of appeal. The Court of Appeal considers the appeals against the decisions pronounced in first instance, as well as in other cases provided by law.<sup>57</sup>

The Constitutional Court is the sole and highest authority of constitutional judicature in Moldova. It is a unique constitutional judicial body, independent from the executive, legislature and judiciary branches; it decides constitutional cases and deals exclusively with constitutional issues of the law. It consists of six judges nominated for six-year terms. Two judges are appointed by Parliament,

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<sup>54</sup> Civil law and fundamental elements of Roman law; Civil law and procedure; Criminal law and procedure; Commercial and bankruptcy law; Labor and social security law; Administrative, constitutional and tax law; EU law; International public and private law; Elements of legal informatics and judicial systems.

<sup>55</sup> See, CEPEJ-STAT (2016) <https://www.coe.int/en/web/cepej/dynamic-database-of-european-judicial-systems>.

<sup>56</sup> See, <https://instante.justice.md/?fbclid=IwAR1inGL8CZwFQYXgBLL3f-0h4tsOjk23kMC0nuHfPUVbBfuTQ4kDvWEx6Is>.

<sup>57</sup> <https://www.nyulawglobal.org/globalex/Moldova.html>.

two by the Government and two by the Superior Council of Magistrates.<sup>58</sup> The Moldovan Law on the status of judge provides the key regulations regarding the role of a judge.<sup>59</sup> Pursuant to Article 6 of this law Individuals who may run for the office of judge are the ones who have an impeccable reputation, are citizens of the Republic of Moldova, have domicile in this country and meet the following requirements:

- a) s/he has legal capacity;
- b) s/he has Bachelor Degree (university diploma) in Law or its equivalent;
- c) s/he has graduated from the National Institute of Justice and has a required length of experience. The length of experience offering the right to an individual to run for judge office is considered his/her work over the past five years as judge or assistant judge of the Constitutional Court, judge in international courts, prosecutor, law professor in higher accredited education institutions, advocate, judicial assistant or clerk.;
- d) s/he does not have criminal records; e) s/he knows the state language;
- f) s/he meets the medical requirements to hold the office.

Article 8 of the same law provides restrictions of the activities of a judge. A judge may not:

- a) hold any other public or private positions, except for didactic and scientific activity;
- b) be MP or counsellor in local public authority;
- c) be member of any parties or carry out activities of political nature, including the period of detachment from office;
- d) carry out entrepreneurial activities;
- e) provide legal consultancy either in written or oral forms on litigation-related matters;
- f) conduct any activity related to performing his/her office duties in cases involving a conflict between his/her interests and the public interest in justice making, except where the conflict of interest was brought in writing to the knowledge of the court chair or, where appropriate, communicated to the Superior Council of Magistracy.

Court judges and judges of the courts of appeal are appointed, from among the candidates selected by competition, by the President of the Republic of Moldova upon the proposal of Superior Council of Magistracy. Selected candidates are appointed as judges initially for 5 year. After the 5-year term, the judges are appointed till age-limit of 65-years old.

Judges of the Supreme Court of Justice are appointed by Parliament upon the proposal of the Supreme Council of Magistracy.

All judges in Moldova are professionals. There are approximately 418 judges in the Republic of Moldova.<sup>60</sup>

## Poland

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<sup>58</sup> Ibid.

<sup>59</sup> [https://www.ecoi.net/en/file/local/1290603/1226\\_1404470326\\_moldova-law-status-of-judges-am2013-en.pdf](https://www.ecoi.net/en/file/local/1290603/1226_1404470326_moldova-law-status-of-judges-am2013-en.pdf).

<sup>60</sup> <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>, 2018, p. 103.

In Poland a reform of judiciary has taken place over the last couple of years. Disciplinary responsibility of judges was one of the key issues in this reform. Moreover, this reform actually led to the case of the Court of Justice of the European Union which is currently pending.<sup>61</sup>

According to Article 173 of the Polish Constitution, the Polish judiciary comprises of courts and tribunals. The courts include:

- the Supreme Court
- common courts
- administrative courts, including the Supreme Administrative Court
- military courts.

The Constitution also lists the Constitutional Tribunal and the Tribunal of the State.

Currently, there are 376 common courts in Poland – 11 appeal courts, 45 district courts and 321 regional courts.<sup>62</sup>

Judges of common courts are appointed by the President of the Republic of Poland at the motion of the National Judiciary Council for an indefinite period of time. Judges in Poland are independent, they are governed solely by the Constitutions and Laws. They hold an immunity and may not be dismissed from their positions, which means that the employment relationship is dissolved only in cases established by law when a judge either resigns, disciplinary dismissed or retires.

The Minister of Justice exercises only administrative supervision of common courts. This supervision covers issues connected with financial and administrative activity of courts, as well as any other issues concerning efficient consideration of cases and proper execution of judgements. This means that the supervisory power of the Minister of Justice may not interfere with independence of judges, i.e. the wording of judgements and decisions, whose correctness may be examined only according to the procedure stipulated by law.

The National Judiciary Council is a constitutional collegiate body guarding the independence of courts and of judges. The most important tasks of the Council include:

- providing an opinion regarding normative acts concerning the judiciary and judges, as well as adoption of resolutions concerning matters referred to the Constitutional Tribunal for an examination of their consistency with the Constitution of the Republic of Poland with regard to independence of courts and judges,
- consideration and evaluation of candidates to serve offices of judges and submission to the President of the Republic of Poland of motions for appointment or promotion of judges of the Supreme Court, the Supreme Administrative Court, common courts, provincial administrative courts and military courts,
- adoption of a catalogue of professional ethical rules of judges and monitoring of their observation.<sup>63</sup>

The Council is composed of 25 members. The Council is composed of: the First President of the Supreme Court, the President of the Supreme Administrative Court, a person appointed by

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<sup>61</sup> See, the decision as to the Interim Measures. Press release: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf>.

<sup>62</sup> <https://www.arch.ms.gov.pl/en/the-judiciary-in-poland/>.

<sup>63</sup> See, <https://www.arch.ms.gov.pl/en/the-judiciary-in-poland/>.

the President of the Republic of Poland, the Minister of Justice, four MPs, two senators, ten judges representing common courts, two judges of the Supreme Court, two judges of administrative courts and a judge of a military court.

In 2016 there were 9980 professional judges and 12977 lay judges in Poland.<sup>64</sup> However, this number could have changed as the judicial reform introduced lay judges in the Supreme Court.

## Spain

Access to the Judicial Career in Spain is regulated in articles 301 and following of Organic Law 6 of 1985 on the Judicial Power and is based on the principles of merit and capacity to exercise the judicial function.

Entry into the Judicial Career is done through the selection course carried out in the Judicial School or the Center for Legal Studies of the Ministry of Justice.

The requirements to attend the exams are:

- Have Spanish nationality
- Be of age (but not retirement age).
- Have a law degree or master
- Absence of cause of disability for:
  - o physical or mental impediments to the exercise of judicial functions,
  - o have been the subject of a conviction for an intentional crime, until rehabilitation is obtained,
  - o have been subject to prosecution or indictment for a fraudulent offense until acquittal is obtained or an order of dismissal is issued,
  - o not being in the full exercise of civil rights.

The procedure for entering the category of Judge, which has a total duration of approximately three years, is as follows:

- 1) Passing the exam, in 3 phases:
  - a) First exercise: questions on constitutional law, civil law, criminal law and procedural law.
  - b) Second exercise: oral presentation in a public hearing of 5 topics (one on constitutional law, two on civil law and two on criminal law).
  - c) Third exercise: oral presentation in a public hearing of 5 topics (two on civil procedural law, one on criminal procedural law, one on commercial law and one on administrative or labor law).
- 2) Judicial School:
  - a) First period (twelve months approx.): Passing a theoretical and practical course.
  - b) Second period (six months approx.): Internship phase performing functions of assistance and collaboration with the heads of the judicial bodies.
  - c) Third period (five months approx.): Replacement and support phase in judicial bodies.

There are approximately 5,367 professional judges (i.e. 11.5 per 100,000 inhabitant) and 2,473<sup>65</sup> prosecutors (i.e. 5.3 per 100,000 inhabitant).

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<sup>64</sup> Data from 2016. <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>.

<sup>65</sup> See, CEPEJ-STAT (2016) <https://www.coe.int/en/web/cepej/dynamic-database-of-european-judicial-systems>.