

## VOLKOV VS. UKRAINE AND THE VENICE COMMISSION'S APPROACH TO STRUCTURAL INDEPENDENCE OF THE JUDICIARY <sup>1</sup>

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- 1 *Structural judicial independence as an individual human right*
- 2 *Development of the Venice Commission's doctrine on judicial independence*
  - 2.1 *A doctrine first developed in country-related opinions*
  - 2.2 *General reports – judicial appointments*
- 3 *Elements of structural judicial independence*
  - 3.1 *Level of regulation*
  - 3.2 *Appointment system*
  - 3.3 *Judicial councils*
    - 3.3.1 *Mixed composition , involving a non-judicial component*
    - 3.3.2 *Membership of the Minister of Justice*
    - 3.3.3 *Membership of the Prosecutor General*
    - 3.3.4 *Independence of the members of the Judicial Council – full time occupation*
  - 3.4 *Probationary periods*
  - 3.5 *Discipline*
  - 3.6 *Budget and remuneration*
  - 3.7 *Judicial Immunity*
  - 3.8 *Case allocation*
- 4 *Conclusion*

### STRUCTURAL JUDICIAL INDEPENDENCE AS AN INDIVIDUAL HUMAN RIGHT

The organization of the judiciary – the appointment of judges, their promotion, their remuneration, judicial discipline – is usually seen as an implementation of the principle of the rule of law, which is one of the three pillars of the Statute of the Council of Europe together with democracy and human rights protection.

Democracy, the protection of human rights and the rule of law are of course closely intertwined: real democracy is unthinkable without the protection of human rights and the rule of law. Substantial rule of law includes elements of the democratic creation of the law and at least the right to a fair trial. Human rights, as set out in the European Convention on Human Rights include of course the right to a fair trial and the democratic right to vote under Article 3 the First Protocol to the Convention.

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<sup>1</sup> This article reflects the views of the authors only and does in no way engage the Council of Europe or the Venice Commission.

While there are also monitoring mechanisms for the other two pillars, the mechanism for the protection of human rights is developed most thoroughly by the European Convention on Human Rights and the case-law of the Strasbourg Court.

The Court's recent judgment *Volkov vs. Ukraine*<sup>2</sup> has highlighted that structural judicial independence is a key element of the right to a fair trial under Article 6 of the European Convention on Human Rights. Due to the nature of the Convention system, Article 6 is usually interpreted on a case by case basis, when the Court looks into the issue of the independence of the individual judge who decided a case that was brought before the Strasbourg Court.

In the *Volkov* case, the Court identified "structural deficiencies"<sup>3</sup> in the proceedings before the High Judicial Council of Ukraine in a case relating to disciplinary proceedings against a judge of the Supreme Court:

"112. ... Given the importance of reducing the influence of the political organs of the government on the composition of the HJC and the necessity to ensure the requisite level of judicial independence, the manner in which judges are appointed to the disciplinary body is also relevant in terms of judicial self-governance..."

The *Volkov* case thus underlines that the whole judicial system surrounding individual judges is of direct relevance to the determination of the case at hand. In fact, *Volkov vs. Ukraine* is not a novelty, but *Volkov* gave the Court the opportunity to set out the principles to be applied in a clear manner. Even if the chamber case will be appealed to the Grand Chamber, the issue of structural independence will certainly remain an important topic for the Article 6 examination by the European Court of Human Rights.

What is structural independence of the judiciary and how can it – or rather how can its absence – influence the outcome of an individual case before a judge in any of the Council of Europe member states and what has the Venice Commission to say on that issue?<sup>4</sup>

This article examines the position of the Venice Commission in respect of the necessary 'ingredients' for structural judicial independence. In doing so, the authors rely both on elements drawn from opinions relating to the judiciary of individual countries and on general reports on judicial independence. When appropriate, the authors also make reference to Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities<sup>5</sup>, which provides important guidelines on the structural independence of the judiciary.

<sup>2</sup> Application no. 21722/11.

<sup>3</sup> Para. 117.

<sup>4</sup> The present article further develops ideas presented in an earlier text of the authors: Buquicchio, Gianni / Dürr, Schnutz Rudolf, *European Standards for an Independent Judiciary in a Democratic State – Contribution of the Venice Commission*, in Csehi, Zoltán / Schanda, Balázs / Sonnevend, Pál, *Viva VoxIurisCivilis, Tanulmányok-SólyomLászlóTiszteletére 70. SzületésnapjaAlkalmából (Mélanges LászlóSólyom)*, Xenia-LibriAmicorum, UniversitasCatholicae de Petro PazmanyNominatae, Budapest (2012), pp. 105-118.

<sup>5</sup> Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Minister's Deputies.

## DEVELOPMENT OF THE VENICE COMMISSION'S DOCTRINE ON JUDICIAL INDEPENDENCE

Since its establishment in 1990, the Venice Commission<sup>6</sup> has always insisted in its opinions and recommendations on the elements of structural independence of the judiciary. In its work, the judiciary – constitutional justice, but also the ordinary judiciary – always played a key role. No democratic system is conceivable without an independent judiciary and the judiciary is the starting point for any attempt to define the rule of law.<sup>7</sup>

### A DOCTRINE FIRST DEVELOPED IN COUNTRY-RELATED OPINIONS

The Venice Commission built the key elements of its doctrine on structural independence of the judiciary through opinions on draft constitutions<sup>8</sup> and in opinions on laws on the judiciary.<sup>9</sup>

To name but a few of the major topics which the Commission covered in opinions on individual countries, the authors refer to the status of prosecutors and especially their relations with courts<sup>10</sup>, judicial councils<sup>11</sup>, the status of judges<sup>12</sup>, their disciplin-

6 The Venice Commission, its real name being the European Commission for Democracy through Law, is an advisory body of the Council of Europe, composed of “independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science” (Resolution(2002)3, Revised Statute of the European Commission for Democracy through Law, adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers’ Deputies).

As a result of an Italian initiative within the Council of Europe, the Commission has its seat in Venice, Italy, which explains why it is referred to as the Venice Commission. It advises its 59 member States in Europe and beyond in matters of constitutional and international law (non-European full members are: Algeria, Brazil, Chile, Israel, the Republic of Korea, Mexico, Morocco, Peru, Tunisia and the United States. Belarus is associate member, while Argentina, Canada, the Holy See, Japan, Kazakhstan and Uruguay are observers. South Africa and the Palestinian National Authority have a special co-operation status similar to that of the observers). Upon request by its member states, the organs of the Council of Europe and other international organizations, the Venice Commission provides opinions on (draft) constitutions and legislation in the field of constitutional law in the wide sense, including legislation on the judiciary. Its opinions relate to specific countries, whereas reports are of a general nature. In the field of the judiciary, the Venice Commission also acts as a “service provider” to the constitutional courts and equivalent bodies (constitutional councils, supreme courts with constitutional jurisdiction). The Commission’s Joint Council on Constitutional Justice provides the means for a mutual exchange of information between courts through the on-line Venice Forum and information on case-law in its publications - the Bulletin on Constitutional Case-Law and the CODICES database ([www.CODICES.coe.int](http://www.CODICES.coe.int)). The purpose of these services is to promote “cross-fertilization” between the courts, which is conducive to the basic principles of the Council of Europe, democracy the protection of human rights and the rule of law.

7 CDL-AD(2011)003rev, Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011).

8 E.g. CDL(1995)044, Opinion on the provisions concerning the organization of the judiciary contained in the Transitional Constitution of the Republic of Albania and on related provisions (G. Malinverni).

9 E.g. Opinion on the reform of the judiciary in Bulgaria, adopted by the Commission at its 38<sup>th</sup> Plenary Meeting (Venice, 22-23 March 1999, CDL-INF(1999)005).

10 CDL-AD(2008)019, Opinion on the draft Law on the Public Prosecutors’ service of Moldova adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008); CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

11 CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

12 CDL-AD(2008)007, Opinion on the Draft laws on Judges and the Organization of Courts of the Republic of Serbia adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008); CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

ary liability<sup>13</sup> and even aspects criminal procedure<sup>14</sup>.

In preparation for its general report on the independence of the judiciary, the Commission systematized its opinions in the draft *Vademecum* on the Judiciary.<sup>15</sup> This *Vademecum*<sup>16</sup> provided a first overview of the opinions adopted in the field of ordinary justice (as opposed to constitutional justice) by presenting citations from the opinions in a systematic manner. On the basis of the *Vademecum*, the Commission examined various topics linked to judicial independence.

#### GENERAL REPORTS – JUDICIAL APPOINTMENTS

While the Venice Commission always saw the independence of the judges as the central element of the rule of law in a democratic state, the opinions on individual countries did not provide the Commission with an opportunity to express its views in an abstract and comprehensive manner. The Commission was given an opportunity to do so when in 2007, the Committee of Ministers of the Council of Europe gave a mandate to the Consultative Council of European Judges (CCJE)<sup>17</sup> to prepare an opinion on judicial appointments and to consult the Venice Commission on this issue.<sup>18</sup>

As an input to the preparation of the CCJE's "Opinion No. 10 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society"<sup>19</sup>, the Venice Commission prepared its own Report on Judicial Appointments<sup>20</sup>, which took up ideas and principles already expressed in previous country opinions. The more abstract approach allowed the Commission to prepare a coherent text on a key element of judicial independence - judicial appointments.

The next opportunity to develop the Venice Commission's position came soon thereafter, in 2008. It was the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, which requested an opinion on "European standards as regards the independence of the judicial system". The most challenging aspect of this request was to present not only the existing *acquis*, but also proposals for future development.

13 CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

14 CDL(2000)013, Revised comments on the amendments to the Bulgarian Penal Procedure Code (J. Hamilton).

15 CDL-JD(2008)001.

16 Since 2011, the Venice Commission calls its overviews of opinions and reports "Compilations" (e.g. on Constitutional Justice – CDL(2011)048 or on Minorities - CDL(2011)018).

17 As opposed to expert committees composed of government representatives from the respective ministries, which usually prepare draft recommendations and conventions for the Committee of (foreign) Ministers of the Council of Europe, the Consultative Council of European Judges is an advisory body to the Council of Europe, composed exclusively of judges.

18 Terms of reference of the Consultative Council of European Judges (CCJE) for 2010 and 2011, Decisions adopted at the 1075<sup>th</sup> meeting of the Ministers' Deputies, 20 January 2010, Appendix 3, (Item 10.1).

19 Adopted by the CCJE at its 8<sup>th</sup> meeting (Strasbourg, 21-23 November 2007).

20 CDL-AD(2008)028, adopted by the Commission at its 70<sup>th</sup> Plenary Session (Venice, 16-17 March 2007).

Within the framework of its Sub-Commission on the Judiciary, the Commission prepared two partial reports, the first on the independence of judges<sup>21</sup> and the second on the prosecution service<sup>22</sup>. In the present article, the authors cannot deal with the second report on the prosecution service, even if it contains many aspects, which – in the light of the close relationship between judges and prosecutors - are of relevance for judicial independence as a whole (the variety of models of organization of the prosecution service, the incidence of mandatory or discretionary prosecution, appointments, discipline, external and internal independence, including the possibility for an effective appeal against illegal instructions, public accountability and finally a warning against excessive powers of the prosecutor outside the criminal law field).<sup>23</sup>

The Report was prepared taking into account Recommendation (94)12 of the Committee of Ministers, then still in force. In addition to providing an overview of European Standards to the Parliamentary Assembly, the Venice Commission's Report was also designed to provide input to the work of the Committee of Ministers of the Council of Europe in revising this recommendation, which resulted in the adoption of Recommendation CM/Rec(2010)12<sup>24</sup>. When appropriate, we will therefore also refer to that Recommendation, without trying to be exhaustive.

#### ELEMENTS OF STRUCTURAL JUDICIAL INDEPENDENCE

Judges do not operate in a vacuum, but are part of a complex system of courts on various levels, from first instance courts and appeal courts to supreme courts<sup>25</sup>. In addition to civil and criminal courts, in many countries there are specialized courts dealing for example with commercial, labour or administrative issues and some of them have their own hierarchic system of judicial instances. While there is no decision making hierarchy and no judge can give another judge instructions on how to decide cases<sup>26</sup>, judges are dependent on others in a number of ways – as concerns their appointment, training, promotion, discipline and salaries, to name but a few. The procedures

<sup>21</sup> CDL-AD(2010)004, adopted by the Venice Commission at its 82<sup>nd</sup> plenary session (Venice, 12-13 March 2010).

<sup>22</sup> CDL-AD(2010)040, adopted by the Venice Commission at its 85<sup>th</sup> plenary session (Venice, 17-18 December 2010).

<sup>23</sup> We also cannot refer here to the OSCE/ODIHR's Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, which were a point of reference for the Venice Commission in its Joint Opinion with ODIHR on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session (Venice, 17-18 June 2011, CDL-AD(2011)012).

<sup>24</sup> Adopted by the Committee of Ministers on 17 November 2010 at the 1098<sup>th</sup> meeting of the Minister's Deputies.

<sup>25</sup> The present article does not refer to Constitutional Courts, which are specialized in dealing constitutional aspects only. Often, constitutional courts remain outside of the judicial power, as set out in the various Constitutions. This does not mean, however, that many aspects of judicial independence would not relate to Constitutional Courts as well (see for example Recommendation CM/Rec(2010)12, para. 1). Often, constitutional courts differ however in the system of appointment and status of judges (see Venice Commission, *The composition of constitutional court- Science and Technique of Democracy*, no. 20 (1997), CDL-STD(1997)020).

<sup>26</sup> On this topic see Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by the Venice Commission at its 90<sup>th</sup> Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001), para. 69.

regulating these issues are highly relevant for determining, in a case at hand, whether a judge is really free to make a judgment in an independent and unbiased manner.

#### LEVEL OF REGULATION

The Venice Commission's Report, like Recommendation CM/Rec(2010)12<sup>27</sup>, insists that the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts. This logic was applied in the Hungarian case:

“While some principles, as well as the general structure, composition and main powers of the National Council of Judges and National Judicial Office, should have been developed in the Constitution itself, most of the details could have been left to ordinary laws that do not require a qualified majority in Parliament.”<sup>28</sup>

Regulations on a lower level lack appropriate guarantees, whereas regulations on a too high level are difficult to amend and can obstruct the necessary development of the judicial system.

#### APPOINTMENT SYSTEM

In its Report on Judicial Appointments, the Commission distinguished two major types of appointments – elective systems and direct appointment systems and warned against the dangers of the former. In particular, the Venice Commission was of the opinion that ordinary judges should not be elected by Parliament, because there was a great danger that “political consideration prevail over objective merits of a candidate”<sup>29</sup>.

In its series of opinions on the judiciary of Bulgaria,<sup>30</sup> the Venice Commission regretted the complete replacement of the “parliamentary component” of the Supreme Judicial Council (11 out of the 25 members) after each change of parliamentary majority by simple majority vote. The Commission consequently called for an election of the parliamentary component of the judicial council by a qualified majority. The composition of judicial councils thus became one of the Commission's recurrent topics in the field of judicial independence (see further below).

The Commission preferred that the appointment of judges be made by an indepen-

<sup>27</sup> Recommendation CM/Rec(2010)12, paragraph 7.

<sup>28</sup> CDL-AD(2010)004, paragraph 22.

<sup>29</sup> CDL-AD(2007)028, paragraphs 9-12.

<sup>30</sup> CDL-INF(1999)005, Opinion on the Reform of the Judiciary in Bulgaria; CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, adopted by the Commission at its 51st Plenary Session (Venice, 5-6 July 2002); CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria adopted by the Venice Commission at its 56th Plenary Session (Venice, 17-18 October 2003); CDL-AD(2008)009 Opinion on the Constitution of Bulgaria adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008); CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009); CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, adopted by the Venice Commission at its 85th Plenary Session, Venice (17-18 December 2010).



dent judicial council.<sup>31</sup> Appointments by the Head of State were however found to be acceptable, as long as he or she was bound by the decisions of an independent judicial council.<sup>32</sup> Such a Council should have a “decisive influence on the appointment and promotion of a judge and [...] on disciplinary measures brought against them”<sup>33</sup>.

#### JUDICIAL COUNCILS

A central point of the Report on Judicial Appointment dealt with the composition of judicial councils. While accepting that there is no standard model for such councils, the Commission recommended that they should have a mixed composition, with a “substantial element or a majority” of judges and other “members elected by Parliament among persons with appropriate legal qualification taking into account conflicts of interest.”<sup>34</sup> With this formula, the Commission tried to combine two conflicting principles. Judicial independence might be best served by a judicial council composed only of judges, but experience has shown that such councils tended to be lenient, especially in the field of judicial discipline, and when only judges appointed judges there was a danger of corporatism within a judicial caste, unaccountable to the public.

Referring only to the ordinary judiciary, the Venice Commission is of the opinion that an independent judicial council should have a “decisive influence on decisions on the appointment and the career of judges”<sup>35</sup>. Recommendation Rec(2010)12 accepts that decisions are made by the head of state, the government or the legislative power, but calls for input from an independent and competent authority.

The Commission goes further than that by recommending that “states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.”<sup>36</sup> The Commission wants these judicial councils to take the final decision in judicial appointments, not limit them to making recommendations.

#### MIXED COMPOSITION, INVOLVING A NON-JUDICIAL COMPONENT

The other principle pursued was that of the uninterrupted chain of democratic legitimacy, developed in the German constitutional doctrine. According to this doctrine, all state bodies should have a direct or indirect link to the will of the sovereign people. By recommending to have part of the judicial council elected by Parliament, the Venice

<sup>31</sup> However, the Commission was of the opinion that such a council should not be burdened with administrative organization of the judiciary.

<sup>32</sup> CDL-AD(2007)028, paragraph 14.

<sup>33</sup> CDL-AD(2007)028, paragraph 25.

<sup>34</sup> CDL-AD(2007)028, paragraph 29.

<sup>35</sup> CDL-AD(2010)004, paragraph 32.

<sup>36</sup> *Idem*.

Commission sought to achieve a compromise between full judicial independence and democratic legitimacy of judicial appointments. The Commission limited the scope of Parliament's influence right away by insisting that active members of Parliament are not eligible. Moreover, a qualified majority vote should oblige the parliamentary majority to seek a compromise with the opposition. Ideally, they could settle on neutral candidates, but they would have to accept, at least, a balanced composition of the parliamentary component of the judicial council, which would include members close to the majority and others close to the opposition. On this point, ideas that were developed over the years in country opinions found their way into the general report on judicial appointments.

In the Venice Commission's Comments on the Draft Opinion of the Consultative Council of European Judges on Judicial Councils,<sup>37</sup> the Venice Commission had opted for the formula of "a substantial element or a majority" of judges as members a judicial council. The substantial element clause was intended to accept even slightly less than half of the members as judges. The CCJE however envisaged 75 per cent of judges as a minimum and admitted even judicial councils composed only of judges. In her comments pointing out this difference, Ms Suchocka explicitly referred to democratic legitimacy as the argument supporting a lower number of judges.

#### MEMBERSHIP OF THE MINISTER OF JUSTICE

Another issue that had come up in the Commission's opinions was the participation of the minister of justice in the judicial council and whether he or she should preside it *ex officio*. Not least because of the responsibility of the minister for the judiciary towards parliament, the Commission did not exclude the minister's participation in the council. Often, as a member he or she might be an instigator of reform, which would have to be implemented by the judicial council. However, because of his or her political mandate, the minister of justice should not participate in certain decisions, especially on judicial discipline.

The CCJE also had ruled out the participation of the Minister of Justice in the Council, admitted by the Venice Commission. For the CCJE, the president of the judicial council should be elected by its members from among the judicial members, whereas the Commission had preferred a non-judicial member as the council's president.<sup>38</sup> In expressing this view, the Venice Commission explicitly referred to the need to avoid "corporatist tendencies within the council".<sup>39</sup>

#### MEMBERSHIP OF THE PROSECUTOR GENERAL

When the European Court of Human Rights held, in the Volkov case, that the role of the Prosecutor General in the disciplinary body was problematic, it specifically referred to the Venice Commission:

<sup>37</sup> CDL-AD(2007)032.

<sup>38</sup> CDL-AD(2007)032, paragraphs 11 and 13.

<sup>39</sup> CDL-AD(2007)028, paragraph 35.



“114. The Court refers to the opinion of the Venice Commission that the inclusion of the Prosecutor General as an ex officio member of the HCJ raises further concerns, as it may have a deterrent effect on judges and be perceived as a potential threat. In particular, the Prosecutor General is placed at the top of the hierarchy of the prosecutorial system and supervises all prosecutors. In view of their functional role, prosecutors participate in many cases which judges have to decide. The presence of the Prosecutor General on a body concerned with the appointment, disciplining and removal of judges creates a risk that judges will not act impartially in such cases or that the Prosecutor General will not act impartially towards judges of whose decisions he disapproves (see paragraph 30 of the Venice Commission’s Opinion cited in paragraph 79 above). The same is true with respect to the other members of the HCJ appointed by quota of the All-Ukrainian Conference of Prosecutors.”

In general, the Venice Commission is of the opinion that a separation of judges and prosecutors in judicial councils is required. When there is a single judicial council for both corps, chambers need to be introduced within the council to allow for such a separation.<sup>40</sup>

#### INDEPENDENCE OF THE MEMBERS OF THE JUDICIAL COUNCIL – FULL TIME OCCUPATION

In its *Volkov* judgment, the European Court of Human Rights also criticized another aspect of the composition of the High Judicial Council (HJC), in particular that its members are dependent on their other occupation – including as judges:

“113. The Court further notes that in accordance with section 19 of the HCJ Act 1998, only four members of the HCJ work there on a full-time basis. The other members continue to work and receive a salary outside the HCJ, which inevitably involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality.”

This means that the members of a judicial council should work on a full-time basis in order to avoid possible pressures stemming from their other employment.

#### PROBATIONARY PERIODS

The report on judicial appointments takes a clear stance against probationary periods for judges, because the Commission found that probation can “undermine the independence of judges”. In its country related opinions, the Commission was often confronted with constitutional provisions setting out such probationary periods. The last such opinion relates to Ukraine and was adopted in October 2011, just at the moment when the former Prime Minister of Ukraine, Ms Tymoshenko, was condemned to a seven year

<sup>40</sup> CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), para. 21; CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), para. 66.

prison sentence by a judge during his probationary period. The Commission was of the opinion that “it should be ensured that judges in these temporary positions cannot be appointed to deal with major cases with strong political implications”<sup>41</sup>.

Some countries, unfortunately, go as far as to regulate probationary periods for judges on the level of the constitution. In order to overcome the problem that the laws, which the Commission assessed, could not contradict the constitution, the report recommended in such cases to quasi assimilate the non-confirmation of a judge in a probationary period to dismissal and called for the same guarantees as those against dismissal: citing its opinion on “the Former Yugoslav Republic of Macedonia”, the Report on Judicial Appointments states that a “refusal to confirm a judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is removed from office”<sup>42</sup>.

The Committee of Ministers’ Recommendation demands that decisions on probationary periods for judges “be based on objective criteria pre-established by law or by the competent authorities”<sup>43</sup>. The Venice Commission has a stronger view on this point and recommends that judges be appointed permanently because probationary periods are “problematic from the view of independence”<sup>44</sup>.

#### DISCIPLINE

In its Opinion no. 10, the CCJE had opted for disciplinary measures to be adopted by a judicial council reduced in its membership to judges only.<sup>45</sup> Here, the Venice Commission had a different approach. Because of the perceived leniency of ‘judges-only’ disciplinary boards, the Commission was of the opinion that disciplinary measures should be adopted in a mixed composition. The idea was that non-judicial members were more likely to hold a judge accountable than his or her peers. However, the judge sanctioned should have the possibility to appeal these measures to a court of law.<sup>46</sup>

As concerns disciplinary proceedings, the Commission’s Report on Judicial Independence confirms the position of the Venice Commission that decisions should be made

41 CDL-AD(2011)033, Joint Opinion on the Draft Law amending the Law on the Judiciary and the Status of Judges and other Legislative Acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), paragraph 49. See also ECtHR, case of Miroslaw Garlicki v. Poland (application no. 36921/07).

42 CDL-AD(2007)028, paragraph 41, referring to CDL-AD(2005)038, Opinion on Draft Constitutional Amendments concerning the reform of the Judicial System in ‘the Former Yugoslav Republic of Macedonia’, paragraph 23.

43 CM/Rec(2010)12, paragraphs 51 and 44.

44 CDL-AD(2010)004, paragraph 38.

45 CCJE, Opinion no. 10 on the Council for the Judiciary at the Service of Society, para. 20.

46 CDL-AD(2008)028, paragraph 14.

by an appeal to a court against decisions of disciplinary bodies.<sup>47</sup> Without explicitly referring to a court, the Committee of Ministers also recommends to “provide the judge with the right to challenge the decision and sanction”<sup>48</sup>. The Committee of Ministers also insists that such proceedings be conducted with all the guarantees of a fair trial and that sanctions be proportionate.

In the Volkov case, the European Court of Human Rights held that the judicial review of disciplinary cases is problematic if the review judges themselves are subject to the disciplinary body, the decisions of which they review:

*“The Court observes that the judicial review was performed by judges of the HAC [High Administrative Court] who were also under the disciplinary jurisdiction of the HCJ [High Judicial Council]. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ’s independence and impartiality (as examined above), the Court is not persuaded that the judges of the HAC considering the applicant’s case, where the HCJ was a party, were able to demonstrate ‘the independence and impartiality’ required by Article 6 of the Convention”.*<sup>49</sup>

This is an issue, which the Venice Commission has not yet examined. While this argument in the Volkov case is convincing, it is likely to be difficult to find a way to implement this requirement. Judges reviewing disciplinary cases would thus need a separate disciplinary system, which does not involve the disciplinary body, which is in charge of all other judges. This could finally result in a type of specialized group of “disciplinary judges”, with their own disciplinary system. It seems however too early to come to any conclusion on this complex issue.

#### BUDGET AND REMUNERATION

In its Recommendation Rec(2010)12, the Committee of Ministers calls upon member states to allocate adequate resources, facilities and equipment to the courts.<sup>50</sup> The Commission goes a step further by recommending that “the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council”.<sup>51</sup>

A major point of the Venice Commission’s Report on the Independence of the Judiciary deals with bonuses for judges. Based on the experience in some Eastern European coun-

47 CDL-AD(2010)004, paragraph 43.

48 CM/Rec(2010)12, paragraph 69.

49 Paragraph 130.

50 CM/Rec(2010)12, paragraph 33.

51 CDL-AD(2010)004, paragraph 55.

tries, the Venice Commission feared that bonuses and the allocation of housing could be abused in order to influence a judge. Therefore, the Commission recommends that bonuses and non-financial benefits, which involve a discretionary element, be phased out.<sup>52</sup> The Committee of Ministers recommends that “[s]ystems making judges’ core remuneration dependent on performance should be avoided as they could create difficulties for the independence of the judges”.<sup>53</sup> The reference to “core remuneration” seems to allow some performance based bonuses as long as they do not constitute a major part of the revenue.

Stable salaries for judges is an essential guarantee for their independence, not least to avoid the danger of corruption of judges. Recommendation Rec(2010)12 states that “Judges’ remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions.” The Recommendation is silent however on whether in exceptional cases of economic crisis, the salaries of judges could be reduced. The Venice Commission had to reply to this question in an amicus curiae opinion for the Constitutional Court of “the Former Yugoslav Republic of Macedonia”:

*“... in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges’ salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge’s profession and his or her burden of responsibility. If the reduction does not comply with the requirement of the adequacy of remuneration, the essence of the guarantee of the stability of conditions of judge’s remuneration is infringed to a degree that the basic aim, pursued by that guarantee, i.e. a proper, qualified and impartial administration of justice is threatened, even leading to a danger of corruption.”<sup>54</sup>*

#### JUDICIAL IMMUNITY

Another issue, which the Commission had to address in its series of Bulgarian opinions, was judicial immunity. The Bulgarian Judiciary was rattled by allegations of corruption in the three branches of its magistracy: judges, prosecutors and investigators. Their immunity, similar to that of the members of Parliament, was deemed to be too wide. The Commission affirmed its position that judges should benefit only from functional immunity for acts performed in their judicial activity. Immunity should not shield them against intentional crimes such as taking bribes for handing down a favourable

<sup>52</sup> CDL-AD(2010)004, paragraph 51.

<sup>53</sup> CM/Rec(2010)12, paragraph 55.

<sup>54</sup> CDL-AD(2010)038, Amicus Curiae Brief for the Constitutional Court of “The former Yugoslav Republic of Macedonia” on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), para. 20.

judgment. While pointing to the dangers of pressure on the judges, including from the prosecution, this position was further developed in the *amicus curiae* Brief for the Constitutional Court of Moldova on Judicial Immunity<sup>55</sup>.

Following its line of development in country opinions, the Commission held that judges “should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)”<sup>56</sup>. Without referring to immunity as such, the Committee of Ministers came to a similar result when it stated that the “interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice”<sup>57</sup>, read together with paragraph 71 of the Recommendation, which says: “[w]hen not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen”.

#### CASE ALLOCATION

On the basis of Article 6 of the European Convention on Human Rights and the right to a lawful judge found in many constitutions, the Commission came to the conclusion that the possible abuse of the allocation of sensitive cases to compliant judges by court presidents, which had been observed in some countries, should be avoided by introducing automatic case-allocation systems. The Commission discussed in detail whether such systems should be recommended to all states, how such systems could be established and under which conditions exceptions were permissible. As a result of these discussions, the Commission “strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations”<sup>58</sup>. While the term “to the maximum extent possible” admittedly weakens the recommendation, the Commission strengthened it by adding that: “Exceptions should be motivated”. In a similar vein, the Recommendation sets out that the “allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge”<sup>59</sup>.

Case allocation was a central issue in the Opinion on the Judiciary in Hungary<sup>60</sup>. The Commission stated:

55 CDL-AD(2013)008, *Amicus curiae* Brief on the Immunity of Judges for the Constitutional Court of Moldova Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013).

56 CDL-AD(2010)004, paragraph 61.

57 CM/Rec(2010)12, paragraph 68.

58 CDL-AD(2010)004, paragraph 81.

59 CM/Rec(2010)12, paragraph 24.

60 Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001).

*“The allocation of cases is one of the elements of crucial importance for the impartiality of the courts. With respect to the allocation of cases, the Venice Commission - in line with Council of Europe standards<sup>61</sup> - holds that “the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law.”<sup>62</sup> According to the ECtHR’s case-law, the object of the term “established by law” in Article 6 ECHR is to ensure “that the judicial organization in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament”.<sup>63</sup> Nor, in countries where the law is codified, can the organization of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.<sup>64</sup> Together with the express words of Article 6 ECHR, according to which „the medium” through which access to justice under fair hearing should be ensured must not only be a tribunal established by law, but also one which is both “independent” and “impartial” in general and specific terms [...], this implies that the judges or judicial panels entrusted with specific cases should not be selected ad hoc and/or ad personam, but according to objective and transparent criteria.”<sup>65</sup>*

*„The order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed. In national legislation, it is sometimes provided that the court presidents should have the power to assign cases among the individual judges. However, this power involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be a very effective way of influencing the outcome of the process.”<sup>66</sup>*

This means that an essential part of structural independence is a system which guarantees to the maximum extent possible that there is either no discretion at all in the allocation of cases or that court presidents or judges’ bodies allocating cases must follow stringent criteria. These criteria, in turn, could be subject to judicial review as part of an appeal against the decision made by the judge(s) to whom the case was assigned.

<sup>61</sup> Recommendation CM(2012)12, paragraph 24. [footnote numbering within this citation follows the order in this article].

<sup>62</sup> CDL-AD(2010)004, paragraph 81, 82.16.

<sup>63</sup> See Zand v. Austria, application no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.

<sup>64</sup> See Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paragraph 98, ECHR 2000-VII.

<sup>65</sup> CDL-AD (2010)004, paragraph 77.

<sup>66</sup> CDL-AD(2010)004, paragraph 79.

## CONCLUSION

The judgment of *Volkov vs. Ukraine* by the European Court of Human Rights confirms that the right to a fair trial under Article 6 of the Convention not only depends on the circumstances of the individual case, but also on whether there are sufficient guarantees for structural independence of the judiciary. Only when such guarantees are in place, a fair trial can take place in an individual case.

This article highlighted a few aspects of structural judicial independence and presented the Venice Commission's views on these standards, in particular those related to judicial appointments including the composition and work of judicial councils, permanent tenure and judicial discipline.

The doctrine of the Venice Commission in the field of judicial independence evolved from country-related opinions on specific topics, to a general approach, first on judicial appointments only and then covering a wider range of issues. This evolution was both gradual and coherent as from the outset it was based on the common constitutional heritage and applicable European standards.

The Venice Commission found that in the new democracies which it assists, the establishment of an independent judiciary often proved to be even more difficult than setting up other democratic institutions such as a pluralistic parliament or a functioning electoral system. The reasons for these persistent problems are complex, starting with a low esteem of the profession of judges in some countries, an overwhelmingly strong position of prosecutors, underfunding of the judicial system and problems of corruption as a consequence, to name but a few.

While the Venice Commission did not cover all aspects of the life of the judiciary, its opinions and reports were always geared towards assisting its member states, both in old and new democracies, in establishing and further developing a judiciary that is independent and provides an impartial service to all. Democracy is unthinkable without an independent judiciary. An independent judiciary is the core of the rule of law. *Volkov vs. Ukraine* has reminded us that an independent judicial system is also a directly applicable human right.



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