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<u>EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW</u>

(VENICE COMMISSION)

JUDICIAL APPOINTMENTS

Adopted by the Sub-Commission on the Judiciary

(Venice, 14 March 2007)

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Table of contents

Introduction

1. Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies, where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

2. International standards in this respect are more in favour of the extensive depolitisation of the process. However no single non-political "model" of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.

Appointment system

3. Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states *"All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules. However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above."*

4. In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

5. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, **at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges**.

6. In Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed.[1]

7. Notwithstanding their particularities appointment rules can be grouped under two main categories.[2]

The elective system

8. In elective systems, judges are directly elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament (the method is used to elect judges at the Swiss federal level and in Slovenia; in Ukraine, the Verkhovna Rada of Ukraine is entitled to elect all other judges than professional ones). This system is sometimes seen as providing greater democratic legitimacy, but it may also lead to involving judges in the political campaign and to the politisation of the process.

9. The involvement of parliament in the process may result in the politicisation of judicial appointments. In the light of European standards the selection and career of judges should be *"based on merit, having regard to qualifications, integrity, ability and efficiency".*[3] Elections by parliament are discretionary acts, therefore even if the proposals are made by a judicial council, it cannot be excluded that an elected parliament will not self-restrain from rejecting candidates. Consequently, political considerations may prevail over the objective criteria.

10. The Venice Commission found that *"the parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge".*[4]

11. **Appointments of ordinary judges are not** an **appropriate** subject **for a vote by Parliament** because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

Direct appointment system

12. In the *direct appointment system* the appointing body can be the Head of State. This is the case in Albania, upon the proposal of the High Council of Justice; in Armenia, based on the recommendation of the Judicial Council; in the Czech Republic; in Georgia, upon the proposal of the High Council of Justice; in Greece, after prior decision of the Supreme Judicial Council; in Ireland; in Italy upon the proposal of the High Council of the Judiciary[5]; in Lithuania, upon the recommendations submitted by the "special institution of judges provided by law"; in Malta, upon the recommendation of the Prime Minister; in Moldova, upon proposal submitted by the

[1] Due to the special functions of constitutional courts judges and their increased need for democratic legitimacy in order to annul acts of the Parliament, which represents the sovereign people, the procedure for their appointment is often different from the appointment of judges of ordinary courts, to which the present paper refers (see "The Composition of Constitutional Courts", Science and Technique of Democracy, no. 20).

[2] The examples given in the present paper exemplify the points made and do not intend to be exhaustive. The information provided is mainly based on constitutional provisions in respect of the organisation of the judiciary.

[3] Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges.

[4] Venice Commission, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, CDL-AD (2002) 26, § 22.

5 In Italy, the decree by the President of the Republic who is also the President of the judicial council is a mere formality.

Superior Council of Magistrates; in the Netherlands; in Poland on the motion of the National Council of the Judiciary; in Romania based on the proposals of the Superior Council of Magistracy; in the Russian Federation judges of ordinary federal courts are appointed by the President upon the presentation correspondingly of the Chairman of the Supreme Court and of the Chairman of the Higher Arbitration Court; in Slovakia on the basis of a proposal of the Judiciary Council; in Ukraine, upon the proposal of the High Council of Justice.

13. In assessing this traditional method, a distinction needs to be made between parliamentary systems where the president (or monarch) has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. **What matters most is the extent to which the head of state is free in deciding on the appointment**. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it.[6] **As long as the President is bound by a proposal made by an independent judicial council** (see below), the **appointment by the President does not appear to be problematic**.

14. In some countries judges are appointed by the government (in Sweden “appointments to posts in courts of law … shall be made by the Government or by a public authority designated by the Government”). As pointed out above, this method may function in a system of settled judicial traditions but its introduction in new democracies would clearly raise concern.

15. Another option is direct appointment (not only a proposal) made by a judicial council. For example in Italy and Portugal the judicial council has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them. In Bulgaria judges, prosecutors and investigating magistrates are appointed by the Supreme Judicial Council. In Croatia judges are appointed and relieved of duty by the State Judicial Council. In Cyprus the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers are exclusively within the competence of the Supreme Council of Judicature. In “the Former Yugoslav Republic of Macedonia” judges and court presidents shall be elected and dismissed by the Judicial Council. The Hungarian Act on the Organisation and Administration of Courts. (Act LXVI of 1997) set up the National Judicial Council exercising the power of court administration including the appointment of judges.

16. To the extent that the independence or autonomy of the judicial council is ensured, **the direct appointment of judges by the judicial council is clearly a valid model**.

The role of a judicial council in the appointment procedure

17. According to opinion No 1 (2001) of the CCEJ, *“every decision relating to a judge’s appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria.”*

18. The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: “*In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at*

6 Venice Commission, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, CDL-AD(2005)023, § 17.

least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary." According to the Explanatory Memorandum of the European Charter, the term "intervention" of an independent authority means an opinion, recommendation or proposal as well as an actual decision.

19. The CCEJ commends the standards set by the European Charter *"in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges*".

20. Regardless of the appointment system used, many European States have introduced a special body (high judicial council) with an exclusive or lesser role in respect of judicial appointments.[7]

21. "Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State." [8]

22. The mere existence of a high judicial council can not automatically exclude political considerations in the appointment process. For example *"in Croatia, a High Judiciary Council of 11 members (seven judges, two attorneys and two professors) has responsibility for such appointments, but the Minister of Justice may propose the 11 members to be elected by the House of Representatives of the Croatian Parliament and the High Judiciary Council has to consult with the judiciary committee of the Croatian Parliament, controlled by the party forming the Government for the time being, with regard to any such appointments. Although Article 4 of the amended Croatian Constitution refers to the principle of separation of powers, it also goes on to state that this includes "all forms of mutual co-operation and reciprocal control of power holders", which certainly does not exclude political influence on judicial appointments or promotion. In Ireland, although there is a judicial appointments commission, political considerations may still determine which of rival candidates, all approved by the commission, is or are actually appointed by the Minister of Justice (and the commission has no role in relation to promotions)."*[9]

23. The role of the high judicial council can vary to a large extent. For example, the role of such Councils in Germany may be different depending on the level of courts. There are councils for judicial appointments which are purely advisory. In Hungary the Act on the Organisation and Administration of Courts (Act LXVI of 1997) set up the National Judicial Council exercising the power of court administration including the appointment of judges. In Italy and in Portugal the judicial council has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them.

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[7] Albania, Andorra, Belgium, Bulgaria, Cyprus, Georgia, Greece, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, "the Former Yugoslav Republic of Macedonia", Ukraine, Turkey.

[8] Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, § 5.

[9] CCEJ opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, §20.

24. The Venice Commission is of the opinion that **a judicial council should have a decisive influence on the appointment and promotion of judges and** (maybe via a disciplinary board set up within the council) **on disciplinary measures against them**. **An appeal against disciplinary measures to an independent court should be available.**

25. While the participation of the judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice. *"An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The* ***management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges****."*[10]

Composition of a high judicial council

26. A **balance** needs to be struck **between judicial independence** and self-administration on the one side **and** the necessary **accountability** of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.

27. According to the Venice Commission, *"there is* ***no standard model*** *that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent judiciary within a democratic State. Though models exist where the* ***involvement of other branches of power*** *(the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and* ***is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State****. It is obvious that* ***the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated****. Nevertheless, it is generally assumed that the* ***main purpose*** *of the very existence of a Supreme Council of the Judiciary is the* ***protection of the independence of judges by insulating them from undue pressures from other powers of the State*** *in matters such as the selection and appointment of judges and the exercise of disciplinary functions (….)."*[11]

28. As regards the existing practice related to the composition of judicial councils, *"a basic rule appears to be that a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members."*[12] Thus, **a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself**. In order to provide for democratic legitimacy of the Judicial Council, **other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest**.

29. In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that *"the control of quality and impartiality of justice is a role*

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[10] Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF (1998)009, § 12.

[11] Venice Commission, Opinion on the Reform of the Judiciary in Bulgaria, CDL-INF(1999)005, § 28.

[12] Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, § 12.

that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised." [13] Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management".

30. The participation of the legislative branch in the composition of such an authority is characteristic. *"**In a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament**."* [14] In general, the legislative bodies are entitled to elect part of the members of the high judicial councils among legal professionals,[15] however in some systems members of parliament themselves are members of the judicial council.[16]

31. However, in order to insulate the **judicial council** from politics its **members should not be active members of parliament**. The Venice Commission is also strongly in favour of the **depolitisation** of such bodies **by providing for a qualified majority for the election of its parliamentary component**.[17] This should ensure that a governmental majority cannot fill vacant posts with its followers. A compromise has to be sought with the opposition, which is more likely to bring about a balanced and professional composition.

32. Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. This is the case for example in France (the President of the Republic is the President of the Council, the Minister of Justice is its *ex officio* Vice-President), in Bulgaria (where the meetings of the Supreme Judicial Council are chaired by the Minister of Justice without a right to vote), in Romania (the proceedings for nomination of candidacies for appointment shall be presided over by the Minister of Justice, who shall have no right to vote). Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, **the Minister of Justice should not participate in** all the council's **decisions**, for example, the ones **relating to disciplinary measures**.

33. "*The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal stage and prosecutors. The nomination of these judges and prosecutors has been exclusively entrusted to the High Council of Justice, thereby removing these decisions from undue political influence. However, it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government."*[18]

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[13] Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009*,* § 9*.*

[14] *ibid.*

[15] For example in Bulgaria ("practicing lawyers of high professional and moral integrity with at least 15 years of professional experience"), Italy ("among full university professors of law and lawyers after fifteen years of practice") and Slovenia ("Five members shall be elected by the vote of the National Assembly on the nomination of the President of the Republic form amongst practising lawyers, professors of law and other lawyers. Six members shall be elected from amongst judges holding permanent judicial office.).

[16] For example in Georgia, Hungary.

[17] Venice Commission, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, CDL-AD (2002) 015,§ 5.

[18] Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF (1998)09, § 16.

Chair of the Council

34. It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the **chair of the council could be elected by the Council itself from among the non judicial members of the council**. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council.

Appointment basis

35. Due consideration should also be given to the basis of judicial appointments and promotions. In a number of countries judges are appointed based on the results of a competitive examination,[19] in others they are selected from the experienced practitioners.[20] *A priori*, both categories of selection can raise questions. It could be argued whether the examination should be the sole grounds for appointment or regard should be given to the candidate's personal qualities and experience as well. As for the selection of judges from a pool of experienced practitioners, it could raise concerns as regards to the objectivity of the selection procedure.

36. In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that *"the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are 'based on merit, having regard to qualifications, integrity, ability and efficiency'. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect."*

Appointment for a probationary period

37. The European Charter on the statute for judges states as follows *"Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".*

38. The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: *"The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually".*

39. The Venice Commission considers that **setting probationary periods can undermine the independence of judges**, since they might feel under pressure to decide cases in a particular way: *"A decision of the Appeal Court of the High Court of Justiciary of Scotland (Starr v Ruxton, [2000] H.R.L.R 191; see also Millar v Dickson [2001] H.R.L.R 1401) illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial*

[19] For example in Italy, where this principle is established in the Constitution (Article 106).

[20] For example in Cyprus, Malta, the United Kingdom.

before an independent tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent."[21]

40. This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office".[22]

41. The main idea is to exclude the factors that could challenge the impartiality of judges: *"despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value."*[23]

42. In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges.

Conclusions

43. In Europe, a variety of different systems for judicial appointments exist and that there is **not a single model** that would apply to all countries.

44. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time.

45. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse, and therefore **explicit constitutional and legal provisions are needed as a safeguard** to prevent political abuse in the appointment of judges.

46. **Appointments of judges** of ordinary (non-constitutional) courts are **not** an **appropriate** subject **for a vote by Parliament** because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

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[21] Venice Commission, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", CDL-AD(2005)038, § 23.

[22] *Idem,* § 30.

[23] *Idem.* § 29.

47. An appropriate method for guaranteeing judicial independence is the establishment of a **judicial council**, which should be endowed **with constitutional guarantees for its composition, powers and autonomy.**

48. Such a Council should have a **decisive influence on the appointment and promotion of judges and disciplinary measures** against them.

49. A substantial element or a majority of the **members of the judicial council** should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications.

50. A **balance** needs to be struck **between judicial independence** and self-administration on the one side **and** the necessary **accountability** of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint.