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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**EUROPEAN STANDARDS  
ON THE INDEPENDENCE OF THE JUDICIARY  
A SYSTEMATIC OVERVIEW**

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## I. INTRODUCTION

1. At European level the right to an independent and impartial tribunal is first of all guaranteed by Art. 6 ECHR. The case law of the Court sheds light on a number of important aspects of judicial independence but, by its very nature, does not approach the issue in a systematic way. Its content is summarised in Mr Naismith's article.
2. The most authoritative text (apart from the ECHR) on the independence of the judiciary at the European level is Recommendation (94)12 of the Committee of Ministers on the independence, efficiency and role of judges.
3. Since this text does not go into much detail, a number of attempts was made for a more advanced text on the independence of the Judiciary. The most comprehensive text is Opinion No. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges. Some other Opinions of the CCJE are also relevant in this context.
4. Another Council of Europe text is the European Charter on the Statute of Judges which was approved at a multilateral meeting organised by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998.
5. The Venice Commission Report on Judicial Appointments (CDL-AD(2007)028) covers issues of particular importance for judicial independence. Other aspects are dealt with in various Venice Commission opinions.
6. There are also a number of UN standards on the independence of the judiciary, in particular the Basic Principles on the Independence of the Judiciary endorsed by the UNGA in 1985 ([link to the Basic Principles](#)) and the Bangalore Principles of Judicial Conduct of 2002 ([link to the Bangalore Principles](#)). These standards often coincide with the CoE standards but do not go beyond them.
7. The following paper tries to present the contents of the European standards in a systematic way. It follows the approach – including the sub-titles – of Opinion No. 1 of the CCJE as the most systematic and comprehensive text. It should be noted that some principles are applicable only to the ordinary judiciary but not to constitutional court judges.

## II. SPECIFIC ASPECTS OF JUDICIAL INDEPENDENCE

### **The level at which judicial independence is guaranteed**

Recommendation (92)12 provides (Principle I.2.a): *“The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law.”*

Opinion No. 1 of the CCJE recommends (at 16<sup>1</sup>), following the recommendation of the European Charter, to go further: *“the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level.”*

This corresponds to the approach taken by the Venice Commission when examining individual constitutional texts (see CDL-JD(2008)001).

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<sup>1</sup> Unless otherwise indicated references to the CCJE relate to its Opinion No. 1.

## **Basis of appointment or promotion**

Recommendation (94)12 provides: “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.”

Opinion No. 1 of the CCJE recommends in addition (at 25) “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”.

## **The appointing and consultative bodies**

Recommendation (94)12 reflects a preference for a decisive role of a judicial council but accepts other systems:

*“The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority itself decides 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”.*

The CCJE also argues in favour of the involvement of an independent body (at 45): “**The CCJE considered that 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 - pointed in a general direction which the CCJE wished to commend. This is particularly important for countries which do not have other long-entrenched and democratically proved systems.**”

This is also the position of the Venice Commission (CDL-AD(2007)28):

*“44. 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.*

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

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

*47. **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.*

48. 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**.

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

50. 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.”

Opinion No. 10 of the CCJE on “the Council of the Judiciary in the service of society” further develops the position of the CCJE.

### **Tenure - period of appointment**

Principle I.3 of Recommendation (94)12 provides: “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of the term of office.”

Opinion No. 1 of the CCJE adds (at 48): “European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence.” and (at 53) “**The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance.**”

This corresponds also to the position of the Venice Commission which has, apart from special cases such as constitutional court judges, always favoured tenure until retirement.

A special problem in this context are probationary periods for judges. This issue is explicitly addressed in the European Charter at 3.3:

“3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.”

The Venice Commission has dealt extensively with this issue (CDL-AD(2007)028):

“40. 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. [...]

41. 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”.***

*42. 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.**”*

*43. 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.”*

### **Tenure - irremovability and discipline - transfers**

The principle of irremovability is implicitly guaranteed by Principle I.3 of Recommendation (94)12 (see above).

The CCJE concludes (at 60):

*“The CCJE considered*

*(a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (see paragraph 16 above);*

*(b) that the intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline; and*

*(c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area.”*

The Venice Commission has consistently supported including the principle of irremovability in Constitutions. As regards disciplinary proceedings, para. 49 of document CDL-AD(2007)028 favours the decisive influence of judicial councils in disciplinary proceedings. In addition, the Commission has consistently argued that there should be the possibility of an appeal to a court against decisions of disciplinary bodies.

The issue of transfers is more specifically addressed in the European Charter at 3.4:

*“3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.”*

This corresponds to the approach of the Venice Commission when examining national constitutions.

## Remuneration

Recommendation (94)12 provides that judges' remuneration should be guaranteed by law (Principle I.2b.ii) and "commensurate with the dignity of their profession and burden of responsibilities" (Principle III.1.b). The Charter, supported by the CCJE, extends this principle to guaranteed sickness pay and retirement pension.

The CCJE adds in Opinion No. 1:

*"62. While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living."*

An issue which is not addressed in the various texts are is the non-monetary remuneration of judges, e.g. systems where apartments are allocated to judges by national, regional or local authorities. These systems introduce a discretionary element into judicial remuneration which seems problematic from the point of view of judicial independence.

The texts also do not address the more wide-ranging issue of a (limited) budgetary autonomy for the judicial system as a guarantee for judicial independence. This issue is, however, addressed in CCJE Opinion No. 2 on the funding and management of courts.

**"5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.**

*10. Although the CCJE cannot ignore the economic disparities between countries, the development of appropriate funding for courts requires greater involvement by the courts themselves in the process of drawing up the budget. **The CCJE agreed that it was therefore important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.***

*11. One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists<sup>1</sup> – a co-ordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees."*

## Freedom from undue external influence

Recommendation (94)12 provides (Principle I.2.d):

*" In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or*

*interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.”*

The CCJE comments in its Opinion No. 1 (at 63):

*“..The difficulty lies rather in deciding what constitutes undue influence, and in striking an appropriate balance between for example the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press. Judges must accept that they are public figures and must not be too susceptible or of too fragile a constitution. **The CCJE agreed that no alteration of the existing principle seems required, but that judges in different States could benefit from discussing together and exchanging information about particular situations.**”*

The issue of criminal and civil liability and immunity of judges could be addressed in this context. In its Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, the CCJE concludes:

*“75. As regards criminal liability, the CCJE considers that:*

- i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;*
- ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.*

*76. As regards civil liability, the CCJE considers that, bearing in mind the principle of independence:*

- i) the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals (whether with or without permission of the court);*
- ii) any remedy for other failings in the administration of justice (including for example excessive delay) lies only against the state;*
- iii) it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.”*

The Venice Commission has argued in favour of a limited functional immunity of judges:

*“Magistrates (...)should not benefit from a general immunity as set out in the Bulgarian Constitution. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts.”(CDL-AD(2003)12, para. 15.a):*

Recommendation (94) 12, Principle I(2)(a)(i) provides that *“decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law”*.

While the CCJE concludes in its Opinion No. 1 (at 65), on the basis of the replies to its questionnaire, that this principle seems to be generally observed, the experience of the Venice Commission and the case law of the ECHR indicate that the supervisory powers of the Prokuratura in post-Soviet states often extend to being able to protest judicial decisions no longer subject to an appeal.

### **Independence within the judiciary**

The fundamental principle is clearly set forth by the CCJE:

*“64. The fundamental point is that a judge is in the performance of his functions no-one’s employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.*

*66. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. “Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law” (Recommendation No. R (94) 12, Principle I (2)(d). This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case).”*

The practice of guidelines adopted by the Supreme Court or another highest court and binding on lower courts which exists in certain post-Soviet countries appears problematic in this respect.

The Venice Commission has always upheld the principle of the independence of each individual judge:

*“Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgments of lower courts, it should not supervise them.” (CDL-INF(1997)6 at 6).*

*“Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art. 50.1) the possibility to address to the lower courts “recommendations/explanations” on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are*



*subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium.” (CDL-INF(2000)5 under the heading “Establishment of a strictly hierarchical system of courts”)*

*“Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an “internal” aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the “internal” independence of the judiciary. The best protection for judicial independence, both “internal” and “external”, can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence.” (CDL(2007)003 at 61)*

The authority of court presidents, who may be under particular pressure from executive authorities, should also be scrutinised in this context. As regards the distribution of cases, Recommendation (94)12 contains some important principles (Principle I.2.e) and f):

*“ The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order of some similar system.”*

*“ A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interests. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.”*

The Venice Commission has also stated *“The procedure of distribution of cases between judges should follow objective criteria.”(CDL-AD(2002)026 at 70.7)*

In the same sense but more comprehensively, some national Constitutions such as the Austrian, Czech, German, Italian and Slovak Constitution enshrine the principle of the “natural judge” or “lawful judge” requiring that case allocation has to be done on the basis of abstract principles, not leaving any discretion to the court president. This principle would probably merit to be more clearly reflected in international standards.

## **The judicial role**

Under this heading the CCJE examines the following issue:

*“72. An important topic touched on during the CCJE meeting concerns the inter-changeability in some systems of the posts of judge, public prosecutor and official of the Ministry of Justice. In spite of this inter-changeability, the CCJE decided that the consideration of the role, status and duties of public prosecutors in parallel with that of judges lay outside its terms of reference. However, there remains an important question whether such a system is consistent with judicial independence. This is a subject which is no doubt of considerable importance to the legal systems affected. **The CCJE considered that it could merit further consideration at a later stage, perhaps in***

**connection with the study of rules of conduct for judges, but that it would require further specialist input.**

A further study of this topic will be undertaken jointly by the CCJE and CCPE.

### **III. PRELIMINARY CONCLUSIONS**

There is a considerable number of largely converging standards on the independence of the judiciary. One may, however, regret that the more detailed standards were prepared by bodies composed of judges and were not approved at the intergovernmental level.

The existing standards focus on appointment, dismissal and tenure of judges, and the role of an independent judicial council in decisions concerning the career of judges. Some standards could be further developed, in particular on non-monetary remuneration of judges and the involvement of the judiciary in budgetary decisions and on independence within the judiciary where the establishment at the European level of the principle of the right to the “natural judge” or “lawful judge” could be useful.