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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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COMMENTS ON
EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE
OF THE JUDICIAL SYSTEM:
JUDGES

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GENERAL CONSIDERATIONS

The problem of establishing a comprehensive set of standards of judicial independence has been addressed in a considerable number of different documents dealing with these matters and aiming at working out some reference points, more or less detailed. These documents, independently of whether they have been issued either by international organizations and official bodies or by independent scientific groups, have offered a comprehensive view of what the elements of judicial independence should be, what is the role and significance of judicial independence in ensuring the rule of law, what kind of challenges it may meet from the part of either the executive or the legislature, etc. However, the fact should be recognized that hardly any document managed to make up a prescription of realistic implementation of these standards into a legal field, and to work out a method helping to overcome different non-established by law but still very powerful practices and customs impeding the independence of the judiciary from the moment of choosing candidates until dealing with the issues of dismissal of judges. Ordinarily, these obstacles are born by the practice itself and their origins lie in what we talked about earlier: lack of general respect for the rule of law and judiciary as an instrument securing it from the part of all the power branches and society in general; insufficient general political and social interest in the existence of the independent judiciary and will for creating fertile soil for it .

It would therefore be more useful during forthcoming discussion at the sub-commission meeting to focus mainly on the challenges that judicial independence faces in contemporary world, equally as the ways of coping with these challenges, rather than simply enumerating the elements and signs of this.

In the present paper we have attempted to stress some key points of judicial independence, focusing on those that are seen as most problematic from the point of view of domestic situation in Russia.

TO THE DRAFT OF THE EUROPEAN STANDARDS OF JUDICIAL INDEPENDENCE

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INTRODUCTION (The Significance of Judicial Independence)

These Standards are aimed at establishing uniform criteria of judicial independence and ways of achieving it.

Judicial independence, being a tool of achieving judicial impartiality as a fundamental procedural guarantee of parties, is a precondition of the rule of law and a basis of the real justice.

Independence of the judge has both institutional and individual levels. Institutional level relates to the separation of powers, individual level mostly refers to the procedures and practices concerning a particular judge in his/her appointment, career, fulfillment of professional duties and functions, and accountability.

Judicial independence is not a personal judge's privilege but a constitutional guarantee of a citizens' right to a fair trial and to a resolution of their case by an impartial tribunal. Impartiality of the judge is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society.

Judicial independence presupposes freedom from undue influences, both external and internal.

Factors impeding judicial independence are:

- improper influence of the Legislature and the Executive (external influences);
- improper influence of parties and the public, including media (external influences as well);
- improper influence of the judiciary itself (higher courts, senior judges (internal influences)).

The best ways of ensuring judicial independence and preventing undue interferences are the general respect for the rule of law, the dignity of judicial office, the proven interest of other branches of power in supporting independence.

Judicial independence and impartiality are closely related to the professional qualification of judges, thus crucial attention is to be paid to the proper organization of preparation and training of judicial candidates and to guarantees of maintenance and improving of their professional qualification level throughout their entire career.

The position of judges, principles and guarantees of their independence and impartiality, security of tenure and level of remuneration should be entrenched constitutionally or secured by law at the highest possible level.

As mostly legal systems establish well-developed standards of judicial independence, crucial point is to implement them into the real practice and to put principles already developed into full effect.

1. CAREER

1.1. RECRUITMENT OF CANDIDATES

The composition of the judiciary as a branch of power should be reasonable balanced. This balance presumes that the judiciary should reflect ideological, social, cultural and other diversities of society.

At the same time judicial candidates should not be political candidates in the traditional sense. That means that they are not expected to represent the interests of a geographically defined group of people, or to favor a political party or certain interests groups.

Potential candidates should possess not only professional skills but as well strong psychological qualities that would enable them to face stressful and conflict situations.

Candidates for judges are to be chosen and appointed on the basis of objective and transparent criteria, having regard to qualifications, integrity, ability and efficiency. Political considerations when appointing judges should be inadmissible. Highly desirable is to introduce, publish and give effect to objective criteria of selection, appointment and promotion of judges in provisions of domestic laws, which would not be not the mere recommendations but standards mandatory to follow in these processes.

1.2. APPOINTMENT

Whatever way of appointment of judges is chosen by a State, there should be an authority independent both from the executive and the legislature composed for a half at least of professional judges that should actively participate and have decisional powers concerning the evaluation of judicial candidates, recommending them for the office, deciding questions of promotion of judges and grounds for the termination of office.

1.3. TENURE IN OFFICE, PROMOTION AND TRAINING

As a general rule, judges are appointed for an extensive period of time, usually for their entire career. Appointments for a short term are admissible only when grant for refusal of continuation of office are the same that for the removal of a judge.

During their tenure in office judges are irremovable. Irremovability of judges should be enshrined as the constitutional principle or secured by law at the highest possible level.

Promotion of judges and higher judicial appointments should be based of the professional evaluation of judges made by a chair-person of a court where a judge works, or by an independent body responsible for deciding questions of appointment and career of judges.

1.4. REMUNERATION AND SOCIAL GUARANTEES

Judicial salaries and pensions shall be adequate to their status and responsibility, fixed by law, and should be reviewed in case of economic changes decreasing the real level of their income. Judicial councils or other judicial professional associations should participate and be consulted in the process of establishing standards of judges' salaries, pensions and other types of income.

All forms of judicial remuneration, including non-monetary ones, must be established by law; principles and mechanisms of the distribution of such benefits should be transparent and intelligible to the public as well as to members of the judiciary .

Commentary:

Non-monetary remuneration of judges has been very common especially in socialist and post-socialist countries. Most important element of this form of remuneration is providing for dwelling (habitation) at the account of the State budget.

Non-monetary remuneration of judges in post-socialist countries has two main origins: the first lies in a socialist system of goods distribution, when the right to dwelling could be realized not by way of an ordinary purchase of real estate on a free market, but only through the whole-State planning system of distribution, addressing the proved needs of different social groups in different kinds of benefits. Amongst these groups some were more privileged in obtaining these goods, and judges were included in the list of these priority categories, so it used to be one of the considerable advantages of a judge's profession.

Second origin of this practice lies in the post-socialist period with the establishment and fast development of market economy, one of the effects of which became the exponential growth of prices for all kinds of property, including real estate, which in its turn made it impossible for State officials, including judges, as being financed from the budget funds, to purchase any kind of real estate necessary for a decent living. And again, one of the incentives for judges became the opportunity to get the habitation from the State.

Although nowadays the income of judges in Russia comes near to the average European standards, nevertheless, due to the overestimated real estate prices it is still difficult, especially for young judges, being at the dawn of their career, to purchase dwelling on their own, thus the problem of non-monetary remuneration of judges remains acute. Although it is hard not to share doubts concerning transparency and adequacy of the distribution of these benefits among the judiciary, it is not an easy task to resolve the problem of providing the judiciary with the necessary decent level of living, including housing.

Besides, this kind of remuneration fulfills as well the function of social equation among the judiciary: generally, the right for obtaining housing an the account of the State is granted to those who prove their needs in this kind of benefits , whereas, in case of ordinary increase of salaries, it would be necessary to raise them for all members of the judiciary, on the equal basis.

Generally, non-monetary benefits may be of two types: common for all the judiciary, and destined for selected groups, namely for those proving the need to improve their habitation situation. Normally provisions stipulating the procedure of dwelling distribution are established by law, but of course a particular decision is always taken in any concrete case by a particular person (persons), often on the basis of discretion and, therefore, subjective criteria.

Summing up, in general perspective it would be desirable and recommended, with a view of increasing personal judicial independence, to eliminate all kinds non-monetary remuneration of judges, substituting them by an adequate level of monetary remuneration, enough to enable a judge to be provided with all the necessary elements of decent living.

2. RESOLUTION OF CASES

2.1. ALLOCATION OF CASES

Distribution of cases between judges should be done in accordance with the right of everyone to a lawful judge which presumes that judges cannot be allocated ad hoc and ad personam.

The right to a lawful judge implies that no one can be deprived of the opportunity of his or her case resolution by a judge whose jurisdiction over this person and this dispute is established by law.

The criteria of the allocation of cases should exclude the possibility that judges are chosen accordingly to subjective criteria rather than general objective criteria. Inadmissible is the allocation of cases on the basis of discretion of chairman of a court or other official. Such an allocation should be made either on the basis of the random sample (i.e., by means of a computer program or other technology) or using the objective criteria (i.e. category of cases, order of priority of resolution of cases, etc.), the use of which may prevent non-transparent or abusive distribution of cases. Even the mere possibility of manipulation infringes the constitutional right to a lawful judge.

Comment:

Historically, the right to a lawful judge aimed to prevent any influence from the outside especially from the executive. Nowadays, it is also seen as a safeguard against deprivation of the lawful judge through measures within the court administration. This principle, therefore, not only guarantees the subjective right of the citizen to his or her lawful judge from the citizen. In addition, it obliges the legislature to legislate the jurisdiction of a judge, as clearly as possible.

2.2. HEARING CASES

Judge decides cases according to the law and the facts of the dispute, following his or her conscience and conviction.

As a general rule, hearings should be public. Publicity ensures the independence of a judge in resolution of a case. Publicity should be ensured by a complete record of a hearing by technical means excluding the possibility of arbitrary fixation of the proceedings. The optimal way of fixation is video recording, but in case if economic situation does not afford the use of this type of record in all courts, there should be other record methods on condition that they may ensure objective and precise fixation of the hearing course.

The requirements above do not preclude the State from establishing written forms of proceedings when appropriate (summary proceedings, default judgements etc.), on condition that judicial acts delivered in such proceedings should be accessible to the public.

2.3. DELIVERING JUDGEMENTS

Decisions must be based upon an informed and good faith interpretation of the law and the Constitution, nor popular opinion or special interests.

2.4. ABSENCE OF INFLUENCES

Judges should show circumspection in their relations with media, maintain their independence and impartiality and refrain from any professional exploitation of any relations with the media and from making any unjustified comments on cases they are dealing with.

3. ACCOUNTABILITY

3.1. TYPES OF JUDICIAL RESPONSIBILITY

The independence of judges is not an absolute concept; it is limited by judicial accountability. Judicial independence and accountability should be balanced.

As a general rule, accountability does not imply individual civil liability of a judge for any damage caused by their decisions. The subject of such liability is the State itself. However, national law may provide for a possibility of recourse proceedings of this nature.

Judges should bear personal criminal and disciplinary liability.

As a general rule, criminal investigation or proceedings against a judge can not be started at the instigation of a private individual such an investigation or proceedings may be initiated by a public body having relative competence.

Ordinarily, judges should not have criminal liability for unintentional failings in the exercise of their functions.

3.2. JUDICIAL ETHICS AND THEIR VIOLATION

The judge should retain the dignity of judiciary both in professional activities and in private area of life.

The ethical rules related to the judiciary should be formulated, not merely implied, and they should be widely disseminated throughout the judiciary so that each of its members is fully aware of its contents: statutory rules, domestic and European case law, legal writings, Code of judicial ethics.

Standards governing behavior of judges in their private lives can not be set in a determined and exhaustive way. Therefore, a code of judicial ethics should refer to practices incompatible with the judicial status rather than establish a detailed list of standards of their conduct.

Document establishing standards of judicial conduct should not set out disciplinary or other liability for breaking these principles and standards.

3.3. DISCIPLINARY SANCTIONS

The list of disciplinary sanctions in relation of a judge committed a fault should provide for a range of sanctions which may be applied depending on the seriousness of misconduct, previous faults and sanctions applied, general professional and personal characteristics of a judge.

The catalogue must include different types of sanctions, including monetary ones. The most severe sanction – involuntary dismissal – as a general rule should not be applied for misbehavior having place for the first time, but only for repetitive violations on conditions that less severe sanctions were applied to a judge but have not lead to a desirable result. It may be applied only in cases when there exist reasonable grounds that there is no way to impact the behavior of a judge in the future so that to avoid committing similar violations.

Ordinarily the mere breach itself of professional standards should not be a ground for applying disciplinary sanctions. Professional standards represent best practice which all judges should aim to develop and towards which all judges should aspire. It would misunderstand their purpose to equate them with misconduct justifying disciplinary proceedings. In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which cannot be posited simply because there has been a failure to observe professional standards set out in different guidelines of judicial conduct. Neither can be a ground for disciplinary action the mere fact of criticism expressed by a judge related to senior judges or other officials of the judiciary.

Persons alleging that they have suffered by from judge's professional errors may challenge them only to the person or body responsible for initiating disciplinary action, but they can not initiate it directly.

Disciplinary proceedings against any judge should only be determined by an independent authority, operating procedures which guarantee full right of defense. It is highly desirable for this body to be a court specialized in resolution of disciplinary actions against judges. That does not imply an absolute bar for inclusion in a disciplinary tribunal of persons other than judges, provided that such other persons are not members of the legislature, government or administration.

The right to appeal a decision by a disciplinary court should be granted to a judge whose case has been determined as well as to a person or body having initiated the disciplinary action.

4. FINANCIAL SUPPORT OF COURTS

It is the duty of the State to provide for the adequate financial resources to allow for the due administration of justice.

The norms of financing courts should be ordinarily established by law; they must be elaborated by the Executive upon consultations and in cooperation with the representatives of the judiciary and should meet needs of its functioning calculated on the basis of the case load, number of staff, technical information and other dimensions of judicial activities.

Financing standards should not afford discretionary allocation of funds by any single official body, i.e. a higher court. Financing should be provided for directly from treasury or another similar body responsible for allocation of budget funds, on the basis of objective and transparent criteria. Financing standards established for a current year, can not be reduced for a following year, unless it is justified by a critical macroeconomic situation in the State.