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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT
ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM:
PART I: THE INDEPENDENCE OF JUDGES

On the basis of comments by:
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INTRODUCTION

1. By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the Venice Commission to give an opinion on "European standards as regards the independence of the judicial system". The Committee is "interested both in a presentation of the existing acquis and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe".

2. The Commission entrusted the preparation of this report to its Sub-Commission on the Judiciary, which held two meetings on the subject in Venice on 16 October 2008 and 11 December 2008.

3. The Sub-Commission decided to prepare two reports on the independence of the Judiciary, one dealing with prosecution (rapporteurs Mr Hamilton - CDL-JD(2008)004, Mr Sorensen - CDL-JD(2008)005 and Ms Suchocka - CDL-JD(2008)004), and the present report on judges, prepared on the basis of comments by Mr Neppi Modona (CDL-JD(2009)002), Ms Nussberger (CDL-JD(2008)006) and Mr Zorkin (CDL-JD(2008)008).

I. PRELIMINARY REMARKS

4. The independence of the judges and – as a consequence – the reputation of the judiciary in a given society depends on many factors. In addition to the institutional rules guaranteeing independence, the personal character and the professional quality of the individual judge deciding a case are of major importance. The legal culture as a whole is equally decisive. It is formed over long periods of time and is often difficult to change.

5. Institutional rules have to be designed in such a way as to guarantee the selection of highly qualified and personally reliable judges and to define settings in which judges can work without being unduly influenced from outside.

6. 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 organisations and official bodies or by independent scientific groups, offer 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.

7. But, as experience shows in many countries, the best institutional rules cannot work without the good will of those responsible for their application and implementation. The implementation of existing standards is therefore at least as important as the identification of new standards needed. Nonetheless, the present report endeavours not only to present an overview of existing standards but to identify areas where further standards would be required in order to change practices which can be an obstacle to judicial independence.

II. EXISTING STANDARDS

8. At the European and international level there exist already a large number of texts on the independence of the judiciary. It would not be useful to start from scratch with a new attempt to define the standards of judicial independence but the Venice Commission will base itself in this report on the already existing texts.

9. At European level, the right to an independent and impartial tribunal is first of all guaranteed by Article 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.

10. Apart from the European Convention on Human Rights, the most authoritative text 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. This text is currently under review and the Venice Commission hopes that the present report will be useful in the context of this review.

11. Since this text does not go into much detail, a number of attempts were made for a more advanced text on the independence of the Judiciary. Probably, 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. Other Opinions of the CCJE are also relevant in this context, e.g. CCJE Opinions no. 6 on Fair Trial within a Reasonable Time, no. 10 on the "Council for the Judiciary in the Service of Society" and no. 11 on the Quality of Judicial Decisions.

12. 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.

13. The Venice Commission's 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.

14. 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 Council of Europe standards but usually do not go beyond them.

15. The present report tries to present the contents of the European standards in a coherent way. It largely follows the structure of Opinion No. 1 of the CCJE.

16. It should be noted that some principles are applicable only to the ordinary judiciary at the national level but not to constitutional courts or international judges, which are out of the scope of the present report.

III. SPECIFIC ASPECTS OF JUDICIAL INDEPENDENCE

1. The level at which judicial independence is guaranteed

17. Recommendation (94)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."*

18. Opinion No. 1 of the CCJE recommends (at 16[1]), 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."*

[1] Unless otherwise indicated references to the CCJE relate to its Opinion No. 1.

19. The Venice Commission strongly supports this approach. **The basic principles relevant for the independence of the judiciary should be set forth in the constitution**.

2. Basis of appointment or promotion

20. Recommendation (94)12 provides that *"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."*

21. 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".*

22. **The principle that all decisions concerning the professional career of judges should be based on merit only seems indisputable.**

4. The appointing and consultative bodies

23. 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".*

24. 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."*

25. Opinion No. 10 of the CCJE on "the Council of the Judiciary in the service of society" further develops the position of the CCJE. It provides (at 16): *"The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided."* and (at 19) "*In the CCJE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice".*

26. The position of the Venice Commission (CDL-AD(2007)28) is more nuanced:

"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."*

27. To sum up, **it is the view of the Venice Commission** that at least in the new democracies **it is an indispensable guarantee for the independence of the judiciary that decisions on the appointment and career of judges are taken by an independent judicial council**. The Venice Commission strongly recommends this also for old democracies and urges the traditional democracies not yet having done so to consider the establishment of an independent judicial council. In all cases **the council should have a pluralistic composition, with a substantial part if not the majority of the members being judges elected by their peers**.

5. Tenure - period of appointment

28. 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."*

29. 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."*

30. 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.

31. 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."

32. The Venice Commission has dealt extensively with this issue in its Report on Judicial Appointments (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."

33. To sum up, **the Venice Commission strongly recommends to appoint ordinary judges permanently until retirement. Probationary periods for judges are problematic from the point of view of independence and systems of candidate judges without full judicial powers are preferable.**

6. Tenure - irremovability and discipline - transfers

34. The principle of irremovability is implicitly guaranteed by Principle I.3 of the Council of Minister's Recommendation (94)12 (see above).

35. 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."

36. 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."*

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

38. **The Venice Commission has consistently supported including the principle of irremovability in Constitutions**. **Transfers against the will of the judge can be permissible only in exceptional cases**. 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.**

7. Remuneration of judges and the budget of the judiciary

39. 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.

40. 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."*

41. The Venice Commission shares the opinion that **the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference.** The example of the Polish Constitution, which guarantees to judges remuneration consistent with the dignity of their office and the scope of their duties seems positive. The level of remuneration will have to be determined in the light of the social conditions in each country to the level of remuneration of higher civil servants in other fields.

42. In a number of mainly post-socialist countries judges receive also **non-financial benefits** such as apartments, cars, etc. Such non-monetary remuneration of judges has two main origins: the first lies in the previous socialist system of distribution of goods, which depended on central planning. Some groups, including judges, were privileged in obtaining specific goods, including dwellings. This was a considerable advantage of being a judge.

43. The second origin of this practice lies in the post-socialist period of transition to a market economy. The prices for real property increased exponentially and this made it impossible for State officials, including judges, to purchase adequate housing. Again, one of the advantages of being a judge was the attribution of apartments. Especially for young judges, it is still difficult to purchase real estate and consequently, the system of allocation of housing persists.

44. While the allocation of such apartments is a source of concern it is not an easy task to resolve the problem of providing the judiciary with an appropriate living standard, including housing. An argument advanced in favour of such non-financial allocations is that they can be attributed according to individual need whereas salaries are set at the same level for all judges in a given category without the possibility to distinguish and to support those in special need. However, this assessment of social need and the differentiation between judges is the possible entry point for abuse and the application of subjective criteria.

45. **Even if such benefits are defined by law, there will always be scope for discretion when distributing them. They are therefore a potential threat to judicial independence.** While it may be difficult to immediately abolish such non-financial benefits in some countries since they correspond to a perceived need of social justice, **the Venice Commission recommends to phase out such benefits and replace them by an adequate level of financial remuneration.**

46. As regards the budget of the judiciary, **it is the duty of the state to provide adequate financial resources for the proper functioning of the judicial system.** Courts should not be financed on the basis of discretionary decisions of official bodies such as higher courts but **on the basis of objective and transparent criteria.**

47. International texts also do not provide for a budgetary autonomy of the judiciary but there is a strong case in favour of taking judicial views into account when preparing the budget. Opinion No. 2 of the CCJE on the funding and management of courts provides:

> *"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[1] – 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."*

48. To sum up, **the Venice Commission is of the opinion that a level of remuneration should be guaranteed to judges which corresponds to the dignity of their office and the scope of their duties and that non-financial benefits, the distribution of which involves a discretionary element, should be abolished. As regards the budget of the judiciary, decision on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and judges should have an opportunity to express their views about the proposed budget to parliament, possibly through the judicial council**.

8. Freedom from undue external influence

49. 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."*

50. 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."***

51. The issue of criminal and civil liability and immunity of judges should 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."*

52. 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).

53. To sum up, it is indisputable that **judges** have to be protected against undue external influence. To this end they **should enjoy functional – but only functional - immunity.**

9. Final character of judicial decisions

54. 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*".

55. 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.

56. The Venice Commission underlines the principle that **judicial decisions should not be subject of any revision outside the appeals process, in particular not through a protest of the prosecutor outside the time limit for an appeal**.

10. Independence within the judiciary

57. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that "judges are subject only to the law". This principle protects judges first of all against undue *external* influence. It is, however, also applicable *within* the judiciary. A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial activity would be a clear violation of this principle. Judges exercise different functions but there is no hierarchy among them.

58. The basic considerations are 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)."*

59. 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.

60. 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)

61. To sum up, **the Venice Commission underlines that the principle of judicial independence means independence of each individual judge and that a hierarchical organisation of the judiciary is incompatible with judicial independence. Higher courts must not influence lower courts by adopting recommendations or guidelines but only through their case-law, when deciding on legal remedies against decisions of the lower courts.**

11. The allocation of cases and the right to a lawful judge

62. The issue of internal independence arises not only between judges of the lower and of the higher courts but also between the presidents of courts and the judges of this court. Internal and external independence are indeed closely linked in this respect, since court presidents may be under particular pressure from the executive authorities.

63. In many countries court presidents exercise a strong influence by allocating cases to individual judges. 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."

64. 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)

65. The European Convention of Human Rights provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal "established by law" (Article 6 ECHR). According to the Court's case-law, the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament".[2] Nor, in countries where the law is codified, can the organisation 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.[3]

66. That means that the guarantee given by the ECHR is weaker than a subjective right to a lawful judge inscribed in many of the European constitutions. As a rule, the guarantee is worded in a negative way, such as in the Constitution of Belgium: *"No one can be separated, unwillingly, from the judge that the law has assigned to him."* (Article 13) or Italy *"No one may be removed from the normal judge predetermined by law"*.[4] Other constitutions state the "right to the lawful judge" in a positive way such as the Constitution of Slovenia: *"Everyone has the right to have any decision regarding his rights, duties and any changes brought against him made without undue delay by an independent, impartial court constituted by law. Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual*."[5]

67. The guarantee can be understood in two different ways. Either it is related only to the court as a whole or it is related also to the individual judge dealing with the case. Experience shows that the latter understanding of the "right to the lawful judge" should be promoted. It is not

[2] See *Zand v. Austria*, application no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.

[3] See *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII.

[4] See also § 24 of the Constitution of Estonia: "No one shall be transferred, against his or her free will, from the jurisdiction of the court specified by law to the jurisdiction of another court."; Article 8 of the Constitution of Greece: "No person shall be deprived of the judge assigned to him by law against his will."; Article 33 of the Constitution of Liechtenstein: "Nobody may be deprived of his proper judge; special tribunals may not be instituted."; Article 13 of the Constitution of Luxemburg: "No one may be deprived, against his will, of the Judge assigned to him by the law."; Article 17 of the Constitution of the Netherlands: "No one my be prevented against his will form being heard by the courts to which he is entitled to apply under the law.", Article 83 of the Constitution of Austria: "No one may be deprived of his lawful judge."; Article 32 para. 9 of the Constitution of Portugal: "No case shall be withdrawn from a court that already had jurisdiction under an earlier law.", Article 48 of the Constitution of Slovakia: "No one must be removed from the jurisdiction of his law-assigned judge. The jurisdiction of the court is established by law.", Article 101 of the German Grundgesetz: "No one may be removed from the jurisdiction of his lawful judge."

[5] See also Article 30 of the Constitution of Switzerland: „ Every person whose case is to be judged in judicial proceedings has the right to a court established by law, with jurisdiction, independence, and impartiality."; Article 24 of the Constitution of Spain "Likewise, all have the right to the ordinary judge predetermined by law …".

enough if only the court (or the judicial branch) competent for a certain case is fixed in advance. In these cases, as a rule, the chair-person of the court has the power to assign the case to the individual judge. This power involves an element of arbitrariness. It can be misused as a means of pressure on judges as they can be overcharged with cases or be assigned only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid giving them to others. This can be a very effective way of influencing the outcome of the process.

68. In order to enhance impartiality and independence of the judiciary it is highly recommendable to fix the order in which judges deal with the cases in advance. That can be done for example on the basis of the alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including the exceptions) should be fixed by law, whereas the details of the system can be fixed by special regulations on the basis of the law, e.g. in court regulations. Due to objective reasons it may not always possible to establish a fully comprehensive abstract system, leaving no room at all to decisions in individual cases, and there may be a need to take into account the workload or the specialisation of judges. The criteria for taking such decisions should, however, be clearly defined in advance. Ideally, this allocation should be subject to review.

69. To sum up, **the Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the extent possible on objective and transparent criteria and not left to the discretion of court presidents. If decisions by court presidents are required, these have to be based on objective and transparent criteria established in advance.**

IV. Conclusions

69. According to the Venice Commission, the following standards should be respected by states in order to ensure judicial independence:

1. The basic principles relevant to the independence of the judiciary should be set out in the Constitution. These principles include the judiciary 's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principle of irremovability of the natural or lawful judge pre-established by law.
2. All decisions concerning the professional career of judges should be based on merit only.
3. The essential premise for the external independence of the judiciary from other state powers entails that decisions on the appointment and career of judges be taken by an independent judicial council, which should have a pluralistic composition, with a substantial part - if not the majority of its members - as judges elected by their peers. Ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence and systems of candidate judges without full judicial powers are preferable.
4. Judicial councils, or disciplinary bodies with a similar composition, should have a decisive influence in disciplinary proceedings. The possibility of an appeal to a court against decisions of disciplinary bodies should be provided for.
5. A level of remuneration should be guaranteed to judges that corresponds to the dignity of their office and the scope of their duties.
6. Non-financial benefits for judges, the distribution of which involves a discretionary element, should be abolished.
7. As regards the budget of the judiciary, decisions on the allocation of funds to courts should be taken with the strictest respect for the principle of judicial independence. Judges should have an opportunity to express their views about the proposed budget to Parliament, possibly through the judicial council.

8. Judges should only enjoy functional immunity.
9. Judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor outside the time limit for an appeal.
10. The principle of internal judicial independence means the independence of each individual judge within the judiciary. Consequently, a hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial activity is incompatible with internal judicial independence. Higher courts should not influence lower courts by adopting recommendations or guidelines, but should only exercise their influence through their case-law, when deciding on legal remedies against decisions of the lower courts.
11. As an expression of the constitutional principle of the natural or lawful judge pre-established by law, the allocation of cases to individual judges should be based, where possible, on objective criteria and not left to the discretion of court presidents. If decisions by court presidents are required, these have to be based on objective, transparent and pre-determined criteria.