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COMMENTS ON

EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE OF THE JUDICIAL SYSTEM: JUDGES

by

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1. 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 developments".

2. It must be said at the outset that the independence of the judiciary may be viewed from two distinct but interlinked viewpoints:

- that of the relations of the judiciary as a whole (and of the single judges) with the political power – notably the government, the legislative power and the political parties : the so-called external independence;
- that of the relations of each judge with the other judges – the president of the court or the higher judges – that is, the independence and the autonomy in carrying out the judicial functions of each judge in respect of the structure to which he or she belongs: the so-called internal independence.

3. The external independence has been the object of numerous recommendations, opinions, directives, and sufficiently elaborated and detailed standards have been proposed or adopted at the European level, even though they are not always entirely followed by all States.

In particular, it may be said that is has been commonly accepted that the essential premise of the external independence is a system whereby the judges are recruited and appointed through an independent body composed largely or for the most part by judges, so as to exclude direct interference from the political power. Such a body – normally called Judicial Council or High Council of the Judiciary – is also competent to take any measure concerning the status of the judges (transferrals, disciplinary measures, dismissals etc.) which avoids undue influences and pressures from the political power through the career aspirations of the judges.

On the role, composition and functions of the judicial council suffices to mention the standards contained in Recommendation R(94)12 of the Committee of Ministers of the Council of Europe, Opinion 1 (2001) of the Consultative Council of European Judges, the European Charter on the Statute for Judges in Europe, adopted at the multilateral meeting on 8-10 July 1998, the numerous opinions of the Venice Commission on the independence of the judiciary, which are summarised in document CDL-JD(2008)001 – Draft Vademecum on the Judiciary and, in particular, the Report adopted at the Commission's 70th Plenary Session on Judicial Appointments (CDL-AD(2007)028).

As concerns the legal basis, it is implicit that the essential aim for both the external and the internal independence is that anyone has a right of access to "an independent and impartial tribunal established by law" (Article 6 ECHR).

4. While great attention has been devoted to the elaboration of standards in respect of the external independence of the judiciary, the internal independence has so far received less attention, at least from a quantitative point of view. The fundamental principles of independence at the level of the organisation of the judiciary are at any rate contained in the already mentioned Recommendation (94)12, in the Opinion 1 (2001) and in numerous opinions of the Venice Commission, set out in Document CDL-JU(2008)002 under the title of "Independence within the judiciary".

5. I must say at the outset that I fully share the approach taken my Ms Angelika Nussberger to the matter of the internal independence: the first constitutional basis to ensure such independence is the principle of the natural judge established by law, that is to say the right to a

lawful judge. Such right means that the judge who is to rule on a specific case must be identified on the basis of objective criteria predetermined by law, and not on the basis of discretionary choices of any individual, be he or she internal or external to the judicial structure. The principle of the natural judge cannot be based merely on the procedural rules which establish the competence ratione materiae or ratione loci of a given judicial body, for example the tribunal of Strasbourg or the Assizes Court of Bruxelles, the court of appeal of Paris. It has been correctly noted that, if this were the case, in the frequent cases of a court with more than one section or more judges, the allocation of the work to the specific judges would be left to the subjective and discretionary choices of the president of that court, assuming that it was his or her task to do so. It would then be possible to influence the outcome of a case by choosing a judge, for example, with certain ideological or political inclinations.

In order to overcome the risks of discretionary choices, if not arbitrariness, which are inherent in this power of the head of the office, the rule has been adopted that the natural judge is identified through objective and predetermined criteria established by law, with some specific exceptions which are also predetermined by law (see Rec (94)12 (principle 1.2 e) and f); VC CDL-AD(2002)026 at § 70.7).

The principle of the natural judge or lawful judge is present in some constitutions, such as in Austria, Germany, Greece, Portugal, Luxembourg, Estonia, Spain, Slovakia, Italy, mostly in a negative form such as “Nobody can be removed from the natural judge established by law” (article 25 § 1 of the Italian Constitution).

6. The right to a lawful judge is an indispensable premise but not a sufficient one to guarantee the internal independence which would be jeopardised by a hierarchically organised judicial system. In such a system, the control over the decisions taken by a given judge is exercised in the first place through the powers of the president of the court over the subordinated judges and, more in general, through preliminary instructions or subsequent checks by higher judges, be they the appeal judges, the court of cassation, the supreme court, on lower judges. It must be recalled in this context that the presidents of courts are the privileged channel for the executive power to exercise pressure on the whole judiciary.

A hierarchical structure of the judiciary has been unanimously criticised as incompatible in many respects with the independence of the single judges (Rec (94)12, principle 12 d); CCJE at 64, 66; Venice Commission CDL-INF(1997)006 at 6, CDL-INF(2000)005; CDL(2007)003 at 61).

The constitutional principle that more directly and immediately sets out the incompatibility between the hierarchical structure and the internal independence of the judges is formulated in some constitutions with the formula “judges are subject only to the law” (Article 101 § 2 of the Italian Constitution). This principle guarantees at the same time the independence of the judges from undue influences, instructions and recommendations coming from within the judiciary, and from real external pressures coming from the political power. From another viewpoint, this principle sets out the rule that the control over the decisions of the single judges can only be exercised through procedural remedies, that is, an appeal to a higher judge.

7. The subordination of the judge only to the law is closely linked to the principle of equality between judges, i.e. the refusal of a hierarchical judicial system based on the power of control of upper judges on lower judges. On the other hand, judges carry out different functions (first instance, appeal, merits, legitimacy, investigative, adjudication): the overcoming of any form of hierarchical subordination should therefore be expressed not merely through an abstract principle of equality, but through the principle that judges are distinguished only by their different functions (this principle is so codified in Article 107 § 3 of the Italian Constitution). The same principle was stated by the Venice Commission (CDL(2007)003 at 61: “Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication,

he or she shall 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) court.")

8. In conclusion, a system of European standards aiming to guarantee the independence of the judiciary could be based, insofar as the external independence is concerned, on the principle of entrusting the appointment and any measure concerning the status of the judges to a body independent from the executive and legislative powers, composed by a large part or the most part of judges, similarly to the Judicial Councils which exist in several States, bearing in mind the recommendations of the Venice Commission in its report on Judicial Appointments (CDL(2007)028).

As concerns the internal independence, the European standards could be summarised in the principles of the natural judge pre-established by law and of the judge being subject only to the law, as well as in the exclusively functional distinction among judges. These are principles which are incompatible with any form of hierarchical organisation or supremacy within the judiciary.