



Strasbourg, 27 November 2009

**CDL-JU(2009)040**  
Engl. only

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

**in co-operation with**  
**the Judicial Training Centre of Tajikistan**  
**the Tajik Branch of the Open Society Institute**  
**- Assistance Foundation**  
**with the support of the German Government**

**SEMINAR**  
**ON**

**“INTERNATIONAL EXPERIENCES AND  
STANDARDS IN THE FIELD OF THE  
INDEPENDENCE OF THE JUDICIARY”**

**Dushanbe, Tajikistan**  
**12-13 November 2009**

**REPORT**

**“CONSTITUTIONAL GUARANTEES  
FOR JUDICIAL INDEPENDENCE”**

**by**  
**Mr Marco OLIVETTI**  
**Professor of Constitutional Law**  
**University of Foggia, Italy**

---

# CONSTITUTIONAL GUARANTEES FOR JUDICIAL INDEPENDENCE

Dushanbé, Tagikistan,  
November 12, 2009  
Prof. Marco Olivetti  
University of Foggia, Italy



# Judicial independence is a central value in liberal democracies.

---

- General statements in international law:

art. 10 of UDHR

- Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

art. 6, par. 1 of ECHR

- In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

# General statements on judicial independence in some European Constitutions

---

- Art. 97 of the German Fundamental Law: “judges are independent and subject only to the law”
- Art. 87 of the Austrian Const.: “judges are independent in the exercise of their judicial office”
- Art. 117, par. 1 of the Spanish Const.: “Justice emanates from the people and is administered in the name of the King by Judges and Magistrates who are members of the judicial power and are independent, irremovable, responsible, and subject only to the rule of the law”
- art. 30, par. 1 of the Const. of Switzerland of 1999: “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. Exceptional tribunals are prohibited”
- Art. 101 of the Italian Const. of 1947: “Judges are subject only to the law”
- Art. 104 of the Italian Const. of 1947: “The judiciary is an autonomous and independent branch of government not subject to any other”.
- Art. 64 of the French Const.: the President of the French Republic shall be the guarantor of the independence of the Judiciary.
- Art. 151 of the Belgian Const.: “Judges are independent in the exercise of their jurisdictional power (...)”
- Art. 173 of the Polish Const. of 1997: “The courts and tribunals shall constitute a separate power and shall be independent of other branches of power ”.

# Approaches to judicial independence

---

## A) “objective approach”

- independence is usually mentioned as a necessary character
  - of the judge
  - or of the judicial power

## B) “subjective approach”

- Judicial independence as an aspect of a fundamental right: the right to judicial protection (art. 6 ECHR; art. 10 UDHR; art. 30 of Swiss Const.)

The first profile (A) is instrumental to the second (B)

## Independence as a necessary element of the concept of judge and of jurisdictional power, as distinguished from the administrative power

---

- “Jurisdictional power is the function of the State consisting in the protection and in the implementation of the law (el derecho objetivo), in a form that is potentially irrevocable and through organs that operate without interest in the controversy, with independence and being submitted exclusively to the law”

(I. Díez Picazo Giménez, *Art. 117*, in M.E. de las Casas, M. Rodríguez Piñero (eds.), *Comentarios a la Constitución española*, Kluwer, Madrid, 2008, p. 1830)

# Independence

---

- Judicial independence is a requirement that serves the judicial function, not the free development of the personality of the judge

(C.D.Classen, Art. 97, in H.v. Mangoldt, F. Klein, C. Starck (eds.), *Bonner Grundgesetz Kommentar*, vol. III, Vahlen, München, 2001, p. 1190)

# Concepts of judicial independence

---

- Impartiality in front of the case and independence
  - Functional independence and personal independence
  - Internal independence and external independence
  - Independence of the single judge (or Court) and Independence of the judiciary
- 
- The independence of the judiciary leads to the basic principles of the separation of powers and of the checks and balances between them

# Impartiality and independence

---

- The impartiality of the judge in front of the case is essential in order to legitimize the judge, who can be defined as an authority entrusted with the power to decide a case in last instance, being a “third” (i.e. “neutral”) in relation to the parts of the case.
  - \* Subjective impartiality: personal behaviour of the judge (e.g.: statements)
  - \* Objective impartiality: facts and situations that make the judge appear or be not impartial (“Justice must not only be done, it must also be seen to be done”)
- \* Examples of procedural remedies in concrete situations:
  - Impossibility for the government and for the parties of a judgment to choose the judge (establishment of judges before the case and practical system to ensure it)
  - Obligations to abstain
  - Power to ask for abstention
  - Incompatibilities (e.g. presence in the judging body of persons belonging to the public administration, or of judges having previously taken part to another phase of the judgment)

# Functional independence

---

- Functional independence is referred to the activity of judging:
  - Independence means absence of hierarchy and of instructions
  - Independence from instructions coming from the executive power: this is the basic requirement of independence
  - Independence from instructions coming from the legislative power. From the functional point of view, judicial independence is the other side of the subordination to the law
  - Independence from instructions coming from the same judicial power: superior judges cannot instruct inferior judges; they can intervene on the cases decided by them only hearing the same case in appeal

# Personal independence

---

“Personal independence means specially impossibility to remove and to substitute the judge. It serves the functional independence of the judge, that is in danger not only when the Judge receives instructions, but also when he must fear disadvantages for his personal legal position because of his decisions”

(K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, XVIII ed., C.F. Müller, Heidelberg, 1991p. 224)

# Personal independence

---

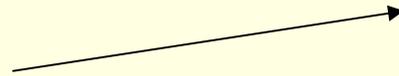
The source of the legal regulation of the judiciary:

- this regulation is reserved to the law of Parliament, in the form of a “organic law” (e.g. art. 122, par. 1 of Spanish Const.; art. 64, par. 3, of French Const.) or of an ordinary law (art. 108 of Italian Const.; art. 146 and 151 of Belgian Constitution)
- Parliament finds sufficiently clear guidelines in the Constitution
- A Constitutional Court can strike down parliamentary laws not respecting the constitutional standards

# Personal independence

---

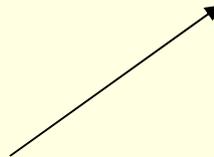
- selection of judges
- who selects;



The formal power to select judges can be conferred to different types of authorities:

- Executive power (Britain, Belgium till 1991)
- Legislative power (in the Swiss Cantons and for some superior judges in Switzerland at the federal level)
- The same judiciary (cooptation)
- An Independent authority (Judiciary Council)

- how the judge is selected:  
which criteria



alternative between

- a system of public examinations and
- selection on the base of previous activity in legal professions
- In the first case the judge is a civil servant

# Judicial salary

---

- Salary as the first material guarantee of judicial independence
- Determination by the law of Parliament
- Impossibility for the government to reduce the salary of judges in general
- Impossibility for the government to reduce the salary of judges in specific cases
- Automatic increase (“revalorisation”) of the salary of judges (inflation, pay increases for other civil servants): the reserve to the legislator of the fixation of the salary is a guarantee in front of the executive (art. 154 Belgium Const.), but it is a disadvantage because the reevaluation (“revalorisation”) procedure is more flexible and rapid

# Judicial career

---

- Security of tenure (Act of Settlement, 1700: tenure “during good behaviour” and not “during pleasure”)
- Possibility to remove the judge only on the base of a judicial decision (art. 152 of Belgian Const.; art. 97, par. 2, of German fundamental law)
- Tenure as judge and tenure in a specific judicial position
- Conditions for removing or transferring a judge
- Appointments to specific judicial positions
- Promotions

# Jurisdiction on judicial discipline

---

- This is the first area that has been removed from the sphere of action of the executive power: see the Judiciary Council under the III French Republic (law of 1883)
- How to define the rules: short general clauses (France) or a code of conduct (U.S., Italy after 2005)

# Incompatibilities and prohibitions

---

- Incompatibility is a technique aimed to avoid conflict of interests between functions that correspond objectively to different rationales:
  - - with other public positions
  - - with other legal professions
- Prohibitions of membership in political parties and trade Unions: in this case the reason of the rule could be to impose not only the independence of the judge, but also the appearance of it

# Court organization

---

- districts
- staffing
- structures

This area usually remains within the competences of the Ministry of Justice

France: recent proposals to alter the judicial map

Italy: services relating to justice

# Systems of governance of the Judiciary

---

- A. the Ministry of Justice model and its variations
- Variation 1. The German model: Judicial selection Committee and federal/member-state Justice ministers
- Variation 2. Britain: from the Lord Chancellor to the Judicial Appointing Commissions
- B. the Judiciary Council model

# A. The Ministry of Justice

---

- Judges are civil servants. Their career is governed by a department of the Executive, directed by a Minister, member of the Cabinet and responsible before Parliament
- The Minister acts under the law, as an administrative authority (its authority is often restricted by rules that limit the removal of judges to the cases mentioned by the law and with the proceedings established by it)
- In some countries that adopt this model, the jurisdiction on disciplinary matters is devolved to another authority (in Germany to a section of the Federal Supreme Court)

# Variation 1: the English model

---

- Historically: centrality of the Executive power in the process of appointing judges
- Appointment on the base of merit, selection between successful barristers
- Security of tenure dating back to the *Act of Settlement* (1700)
- In the governance of the Judiciary central role of the Lord Chancellor
- Up to 2005. Lord Chancellor as President of the House of Lords, Member of the Government and of the Cabinet and judge (in the Law Lords) → criticism of the ECHR in *T. vs. United Kingdom*, 16.12.1999
- After 2005: Lord Chancellor not anymore member of the House of Lords, nor judge. Appoints judges on the base of proposals formulated by Judicial Appointment Commissions (influence of art. 6 of ECHR)

# Variation 2: the German model

---

- The selection of lower judges is governed by the law faculties and the member-States Justice ministers, through a system of two highly selective state examinations
- The appointment of lower judges is competence of the member-States Justice ministers
- Promotion to higher member States judicial position is decided by their Justice ministers, but in some cases they are supported by selection Committees similar to the federal one. Promotion is usually based on merit and also on political orientation

# Variation 2: the German model

---

- The appointment of federal judges (less than 500 judges out of a total of 21.000): they are the last-instance judges) is competence of a Committee for the selection of Judges (*Richterwahlkommission*).
- *Richterwahlkommission*. This Committee is composed by the 16 ministers of Justice of the 16 German member States and by 16 members of parliament (distributed proportionally between the different parliamentary groups): it nominates the judges, who are appointed by the minister of judges.
- The removal of a judge is possible only in the cases established by the law and respecting the procedures established by the law
- Disciplinary Jurisdiction is devolved to a section of the Federal Supreme Court.

## B. The Judiciary Council model

---

- Conseil superieur de la magistrature (France 1883, then 1946, 1958, reformed many times)
- Consiglio superiore della magistratura (Italy, 1908, then 1947 Const. and law 158/1958)
- Conselho Superior da Magistratura (Portugal, 1976)
- Consejo general del Poder Judicial (Const. 1978; L.O. 1/1980, 6/1985, 2/2001)
- Conseil superieur de la Justice (Belgium 1999)
- Judiciary Councils in Eastern Europe:
  - - Rumania: art. 132-133 of 1991 Const.
  - - Poland: art. 187 of 1997 Const.
  - - Lithuania: art. 112, par. 5 Const. 1991
  - - Bulgaria (art. 129-130 Const. 1991)

## B. The Judiciary Council model

---

- The general end that is pursued with the institution of an authority like the Judiciary Council is to deprive the Executive of (all or some of) the competences concerning the legal status of the Judges
- In some cases the Council is created to foster the independence of the Judiciary after a long period of authoritarian rule (Italy, Spain, Portugal and Eastern Europe)
- In some cases the Council is created to legitimize the Judiciary after a major scandal (Affaire Dutroux, Belgium)

# What's a Judiciary Council?

---

- Its constitutional position can be compared to that of an Independent administrative authority (in France or Italy) or of a “quango” (in UK)
- Its functions can be very different but are usually administrative in their character
- Administration of the Judicial System (“amministrazione della giurisdizione”: A. Pizzorusso)
- Number of members: great variations:
  - 44 Belgium
  - 27 Italy
  - 25 Poland
  - 20 Spain
  - 5 Netherlands

## *Ex officio* members

---

- In some Councils there are ex officio members:
- The Head of the State (Italy, France 1946)
- The Minister of Justice (France 1946, Poland, Bulgaria, Romania for appointing functions)
- The President of the Supreme Court (Spain), or Courts (Poland, Bulgaria)
- The General Prosecutor (Italy, Bulgaria)

# Presidency

---

- In some cases the President is elected by the Council (Poland)
- In other cases there is an ex officio President (Bulgaria: Minister of Justice; Rumania, only in appointing functions; in disciplinary functions the President is the President of the Supreme Court)
- In other cases there is a ex officio formal President, with an elected vice president (Italy)

# Membership and election/appointment of members of a Judiciary Council

---

## I. Self-government of the judiciary:

In this case, the Judiciary Council should be appointed by the judges themselves, through elections;

Another possibility is to give this function to the Supreme Court (France 1883, but with competences limited to the disciplinary jurisdiction)

# Membership and election/appointment of members of a Judiciary Council

---

## II. Mixed composition

- with majority of judges and a minority of non judges : Italy (non judicial members are law professors or barristers), Poland (the non judicial members are MPs), France 1993
- with minority of judges: France 1946
- with equal composition of judges and non-judges: Belgium (Conseil Superieur de la Justice: art. 151 of the Const., introduced in 1998)
- It is also relevant the majority for the adoption of decisions of the Judiciary Council: in Belgium 2/3

# Membership and election/appointment of members

---

III.

Internal membership but external appointment:  
Spain (Ley orgánica 6/1985)

- election by Parliament;
- only judges can be elected;
- Election with qualified majority (3/5)

# Membership and election/appointment of members of a Judiciary Council

---

IV.

Political composition:

- parliamentary election (simple or qualified majority)
- appointment by the Government

# The Italian Judiciary Council

## 27 members

### ■ 3 ex officio members

- \* President of the Republic, who is the President of the Council
- \* First President of the Supreme Court
- \* General Prosecutor of the Supreme Court

## 24 elective members

16 elected by the judges between the different categories of judges

8 elected by Parliament (the two Chambers in joint session) with a 3/5 majority: they are usually shared between the majority (5) and opposition (3)

One of the members elected by Parliament is elected by judges as Deputy President of the Council, and he is the actual, day-by-day President, because the Head of the State takes part to the meetings only in some important circumstances.



# Powers of the Judiciary Councils

---

- advisory powers (France - CSM section for prosecutors; Lithuania)
- decision powers (Italy, Spain, France - section for judges)
- Final decision (France 1883, because the Judiciary Council was the Supreme Court) or appeal to the judiciary (if the Council is an Administrative authority, Italy)

# Functions of Judiciary Council

---

- Selection of Judges
- Appointment of Judges
- Training of Judges (initial and continual)
- Promotions
- Transfer from one judicial position to another
- Disciplinary responsibility
- Removal
- Self-regulation?
- Power to bring a constitutional question before the Constitutional Court
- Control of the Judiciary
- Preparing a Draft budget for the Judiciary
- No Judicial Council possesses ALL these functions
- The Functions depend from the historical circumstances of the institution of the Council

# Whose independence? (1)

---

- The judiciary Council guarantees the independence and governs the career of ordinary judges.
- Which independence for “special judicial authorities”? In many European Countries there is not a unitary Judiciary, but beside the jurisdictional power is divided between “ordinary judges” and “special judges”, who are instituted to deal with specific – albeit sometimes broad - matters: it is usually the case of Administrative judges and Fiscal judges, but sometimes also of other corps of judges, separated from the ordinary.
- In some Countries (Italy, France) the Judiciary Council is empowered only with the task of granting the independence of the ordinary judiciary.

# Whose independence? (2)

---

- Some more recent Constitutions provide for Judiciary Councils with the responsibility to guarantee the independence of all judges, included administrative judges: Bulgaria (art. 130 Const.), Poland (art. 187 Const.)
- Only in a recent phase mechanisms to guarantee the independence of “special judges” have been created, usually not at the constitutional level (this is the case of Portugal, where we find three Judiciary Council: for judges, for public prosecutors and for administrative or tax judges), but by the ordinary legislation (the Council of Presidency of the Administrative Judiciary created in Italy in 1982 and the similar authorities created for the other special judges in the following decades).

# Judiciary Council and public prosecutors

---

1. A single Judiciary Council both for judges and public prosecutors, who enjoy the same guarantees enjoyed by judges (Italy)
2. A single Judiciary Council with two “sections” one responsible for judges, the other for public prosecutor (France)
3. Two Judiciary Councils, one responsible for judges, the other for public prosecutor (Portugal, Spain)

# Relations of the Judiciary Council with other Constitutional powers or authorities:

---

- Minister of Justice, usually still responsible for some services related to justice, mainly of organizational character (e.g. buildings, prisons, inspections, non judicial personnel of the Courts, etc.: Italy)
- Supreme Court
- Regional governments (decentralization of services at the regional level: Spain; decentralization of some functions of the Judiciary Council to the “district judiciary council”: Italy)
- In Belgium the Council is composed of two section, one french-speaking and the other dutch-speaking
- Constitutional Court

# The Judiciary: a power without control?

---

- This set of measures – or some of them – should ensure the independence of the judiciary and of the judge.
- Is there a limit to independence?
- Does independence require that the judge should be free from every responsibility for his acts?

## Forms of responsibility:

- Disciplinary → actions or omissions corresponding to judicial duties
- Civil → responsibility for damages in exercising judicial duties (limitations?)
- Criminal → crimes committed by the judge in the exercise of his duty
- Political → only in the form of subjection to criticism

# Accountability

---

- Evaluating judicial performances
- Fostering continual (life-long) judicial training
- Checking the efficiency of the judiciary system, promoting internal self control (controls of the quality of the judicial service does not infringe upon independence)
- This profile has been strongly developed by the Belgian Judiciary Council, that is competent also on hearing complaints concerning the functioning of the Judicial system (the judiciary can examine complaints itself or transmit complaints to competent authorities). The Belgian Council can also organize inquiries on the working of the Judicial System. Doing this, the Council must respect the independence of the Judiciary and cannot intervene in specific judicial cases

# Legal rules and culture

---

- Independence is not only a matter of legal regulation
- Importance of “culture of judicial independence”, both in the judiciary, in the political power and in the public opinion
- England till 2005 is a case of a country with a very imperfect system of guarantee of the independence of judges, but with a high respect for it in the practice
- Strict legal rules are sometimes necessary in countries where the political power has the tendency to try to influence judicial decisions (this can be said e.g. of some European Latin countries)