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**SEMINAR
ON**

**"INTERNATIONAL EXPERIENCES AND
STANDARDS IN THE FIELD OF THE
INDEPENDENCE OF THE JUDICIARY"**

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REPORT

**"THE VENICE COMMISSION'S ACTIVITY
IN THE FIELD OF JUDICIAL INDEPENDENCE"**

**by
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Ladies and gentlemen,

Dear friends,

First of all allow me to express my deep gratitude to the organisers for the excellent arrangements made for this important event. As a representative of the Venice Commission, but also as a person coming from Azerbaijan, I would like to extend my warmest greetings to all present here and to the people of Tajikistan with which the Azerbaijanis certainly have very much in common, particularly as it relates to history, traditions and culture.

In my presentation I am going to give you a brief overview of the Venice Commission's activities in the field of judicial independence. I will mainly focus on issues of appointment, tenure, remuneration, budget of the judiciary, and external and internal independence of judges.

At the outset I would like to emphasise that the need to ensure the independence of the judiciary, as well as the functioning of the judicial system in the interest of society, plays an important role in the Venice Commissions' activities. It has been one of the central issues in all the opinions the Commission has provided on the constitutions and draft constitutions of Member States. This issue has also been elaborated in the Commission's opinions on relevant legislative texts of a wide range of countries. Extracts from these numerous opinions have been compiled in a comprehensive document which the Venice Commission is currently working on. The aim of this compilation, known as a *vademecum*, is to give an overview of past opinions of the Venice Commission in the judicial field. The document can be very useful when drafting constitutions and legislations on the judiciary. Furthermore, in March 2007 the Venice Commission adopted its report on judicial appointments which covers a number of issues of particular importance for judicial independence. Finally, upon request by the Parliamentary Assembly of the Council of Europe, the Venice Commission is currently preparing a report on the independence of the judicial system which is intended to present the existing standards in this field as well as proposals for their development.

The Venice Commission has repeatedly stressed that although the independence and impartiality of a judge depends primarily on his or her attitude, and his or her action and inaction, during the handling of the case, during the hearing and in drafting the judgment, there must also be objective guarantees for independence, and any grounds for suspecting a lack of judicial independence on the part of the parties in the case must be avoided. For both aspects, the appointment procedure of judges is of great importance.

In the Commission's view, 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.

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. 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. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore in these countries explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges. In particular, appointment of judges by the Executive – and possible involvement of Parliament – should be always based on a nomination procedure in the hands of an independent and apolitical body, that is a Judicial Council.

In the Venice Commission's view, a judicial council should have a decisive influence on the appointment and promotion of judges and on disciplinary measures against them. The

Commission has also emphasised that the direct appointment of judges by a judicial council is clearly a valid model provided that the independence and autonomy of this body is ensured.

Many European democracies have incorporated into their legal systems such councils. The main purpose of the existence of such a body is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions. The said bodies should be endowed with constitutional guarantees for its composition, powers and autonomy. It is important that they have substantial judicial representation chosen democratically by other judges. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications.

The Venice Commission is of the opinion that judges, whether appointed or elected, should have guaranteed tenure until a mandatory retirement age or the expiry of the term of office.

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.

A special problem in this context is probationary periods for judges. The Venice Commission has dealt extensively with this issue in its previously mentioned Report on Judicial Appointments. The 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.

However, 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.

The main idea is to exclude the factors that could challenge the impartiality of judges. 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 take judicial decisions.

When examining national constitutions, the Venice Commission has consistently supported the principle of irremovability. Transfers against the will of the judge can be permissible only in exceptional cases. As regards disciplinary proceedings, as I have already noted, the Commission favours the decisive influence of judicial councils in such 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.

Ensuring independence of a judge heavily depends on how he or she is remunerated. The main principle is that judges' remuneration should be guaranteed by law and commensurate with the dignity of their profession and burden of responsibilities. It is generally important, and especially so in relation to the new democracies, to specifically provide in law that the salaries of judges cannot be reduced during their term of office.

The Venice Commission has stated that adequate remuneration is indispensable to protect judges from undue outside interference. 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. The remuneration should be based on a general standard and not on an assessment of the individual performance of a judge. Bonuses should be excluded.

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. The second origin of this practice lies in the post-socialist period of transition to a market economy. The prices for real property increased considerably 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.

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.

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 has recommended phasing out such benefits and replacing them by an adequate level of financial remuneration.

Another important issue in the context of judicial independence is budget of the judiciary. It is the duty of the state to provide adequate financial resources for the judicial system. Even in times of crisis, the proper functioning and the independence of the judiciary must not be endangered. 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.

In its opinion on the Albanian law on the organisation of the judiciary (adopted in December 1995) the Venice Commission stated that "the practice according to which, contrary to the principle of budgetary autonomy of the magistracy, the Ministry of Justice in fact controls every detail of the courts' operational budgets, contains obvious dangers of undue interference in the independent exercise of their functions".

Decisions 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 freedom from undue external influence.

Two aspects of judicial independence complement each other. External independence shields the judge from influence by other state powers and is an essential element of the rule of law. Internal independence ensures that a judge takes decisions only on the basis of the Constitution and laws and not on the basis of instructions given by higher ranking judges.

It is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes).

Moreover, judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions or restrictions on political activities of judges.

Decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law. The experience of the Venice Commission and the case law of the European Court of Human Rights 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.

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.

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.

Thus, potential threat to judicial independence may also arise from an internal judicial hierarchy. In other words, 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.

In this respect, 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.

The Venice Commission has always upheld the principle of the independence of each individual judge. In one of its opinions the Commission stated that granting the Supreme Court the power to supervise the activities of the general courts 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.

In its opinion on the Ukrainian law on judiciary the Venice Commission emphasised that the power of the Plenum of the Supreme Court to address to the lower courts “recommendations/explanations” on matters of application of legislation is not likely to foster the emergence of a truly independent judiciary in the country, but entails the risk that judges behave like civil servants who are subject to orders from their superiors.

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 the pertinent court as well as among its judges. Internal and external independence are indeed closely linked in this respect, since the courts and their presidents may be at times under particular pressure from the executive and/or legislating power.

In many countries court presidents exercise a strong influence by allocating cases to individual judges. 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. The Venice Commission has stated that the procedure of distribution of cases between judges should follow objective and transparent criteria established in advance. 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. In other words, judges or judicial panels entrusted with specific cases should not be selected *ad hoc* and/or *ad personam*. This requirement derives from the well-known maxim that “justice must not only be done, but also seen to be done”.

Many European constitutions contain a subjective right to a lawful judge. Most frequently, the guarantee to this effect 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 Austria: “No one may be deprived of his lawful judge” (Article 83). 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 charges 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”.

Now let me sum up what I have described. It is the view of the Venice Commission that following standards should be respected by states in order to ensure judicial independence:

The basic principles relevant to the independence of the judiciary should be set out in the Constitution.

All decisions concerning appointment should be based on objective criteria and the professional career of judges should be based on merit only.

An independent judicial council should have a decisive influence on the appointment and promotion of judges and on disciplinary measures against them. An appeal against disciplinary decisions to an independent court should be available.

Judicial councils should be endowed with constitutional guarantees for its composition, powers and autonomy.

Ordinary judges should be appointed permanently until retirement. Setting probationary periods can undermine the independence of judges.

A level of remuneration should be guaranteed to judges, which corresponds to the dignity of their office and the scope of their duties.

Non-financial benefits for judges, the distribution of which involves a discretionary element, should be phased out.

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.

Judges should only enjoy functional immunity.

States may provide for the incompatibility of judicial office with other functions and may restrict political activities of judges.

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.

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.

The allocation of cases to individual judges should be based to the extent possible on objective and transparent criteria established in advance and not left to the discretion of court presidents.

Thank you very much for your attention.