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THE VARIOUS ASPECTS OF EXTERNAL AND INTERNAL INDEPENDENCE OF THE JUDICIARY

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Strengthening democratic reform in the Southern Neighbourhood/ Renforcer la réforme démocratique dans les pays du voisinage méridional

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1. The sources of European standards.

At the European and international level there exist a very large number of texts on the independence of the judiciary, starting with Article 6 of the European Convention of Human Rights, which guarantees the right to an independent and impartial tribunal established by law. Probably the most comprehensive text is Opinion No. 1 (and other subsequent opinions) of the Consultative Council of European Judges (CCJE), but today I have been asked to make a presentation of two specific documents.

One is the most authoritative text at the European level, the Recommendation CM/Rec (2010)12 of the Committee of Ministers on "Judges: independence, efficiency and responsibilities", adopted on 17 November 2010. The second is the last report "On the independence of the judicial system: the independence of judges", adopted by the Venice Commission on 13 March 2010, which takes into account the most important documents on the matter of the last ten years, starting with the opinions of the CCJE and its own reports and opinions. Both of them deal with the principles that are considered to be essential for guaranteeing the independence of the judiciary as a whole and the independence of single judges when they exercise judicial functions. Very often the difference between the content of the two documents rests only on the order the principles are dealt with.

2. General principles.

First of all it is important to underline that the independence of the judiciary is neither an end in itself, nor a personal privilege of the judges. The main function of the independence is to guarantee the right of an individual to have his/her rights and freedoms determined, protected and implemented by an independent and impartial judge. We could say that the independence of the judiciary as a whole is the essential condition of the judicial independence, which enables judges to fulfill their role of guardians of the rights and freedoms of the people. By this point of view the independence of judges is an indispensable premise of the rule of law.

It is worth mentioning that the close relation between the judiciary's independence and the rule of law suggests that the basic principles ensuring the independence of the judges should be set up in the Constitution or equivalent texts, that is to say at the highest level of national legislative system. So, the fundamental principles cannot be repealed or modified by an ordinary law, and perform a role of binding guidance of the ordinary laws in the matter.

All that said about the close relationship between the independence of the judiciary, the safeguard of rights and freedoms of the people, and the rule of law, the independence of the judges can 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, the political parties, the economic power centers, etc. When we deal with this kind of problems, we refer to the so-called external independence.

- that of the relations of each judge with other judges – the president of the court and higher judges – that is, the independence and autonomy in carrying out the judicial functions in respect to the structure to which the judge belongs: the so-called internal independence.

3. External independence.

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

Yesterday I realized that there was a large agreement on a system whereby the judges are appointed through an independent body composed largely – I say the majority or at least half of the members - by judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary, but not all of you agree with this proportion. Since such a body – normally called High Judicial Council or High Council of the Judiciary – must also be competent to take all measures concerning the legal status of judges (promotions, transfers, disciplinary measures, dismissals, etc.), and to promote the efficient functioning of the judicial system, it is normally composed by full time members. The main objective of the Judicial Council is to avoid undue influence and pressures of the political power on the judges, removing from the government all the decisions concerning the legal status and the career aspirations of the judges.

In authoritarian regimes, as well as in systems that don't implement the principles of the separation of powers, the minister of justice is always entrusted with the power of governing the judiciary, which is in such a way submitted to the control of the executive; in democratic systems, based on the division of powers, the Judicial Council performs the role of a self-governing body, excluding any direct interference of the political power on the judges.

As for the role, composition and functions of the judicial council it suffices to mention the standards contained in the CM/Rec (2010)12 (points 26 to 29), the Opinion 1 (2001) of CCJE, the European Charter on the Statute for Judges in Europe, the numerous opinions of the Venice Commission, in particular the Report adopted in 2007 on Judicial Appointments (CDL-AD(2007)028).

The large participation of judges in the Judicial Council has a decisive influence in safeguarding the autonomy and independence from political power, but it does imply that judges may be quite self governing. It is necessary to provide a proper balance between self administration and the necessary accountability of the judiciary, in order to avoid negative effects of corporatist management within the judiciary. One way to achieve this goal is to establish a balanced composition among the Judicial Council members.

In order to provide democratic legitimacy of the Judicial Council it seems reasonable that the council should be linked to the representation of the will of the people, as expressed by the Parliament. Non judicial members should be elected by the Parliament among persons with appropriate legal qualification, as lawyers, law professors, civil society exponents. The need to insulate the judicial council from politics suggests that non judicial members should not be current members of the Parliament. The depoliticization of such a body should be favored by the election of non judicial members with qualified majority of the Parliament, for instance two thirds. Following this method, a compromise has to be sought with the opposition, which is more likely to bring about a balanced and high professional composition.

The presence of the minister of justice in the Judicial Council is quite common, but it raises some concern, above all in matters relating to transfers and disciplinary measures. So, it is advisable that the minister of justice, if ex officio member, be not involved in decisions concerning the transfer of judges and disciplinary measures, as this could lead to inappropriate interference by the Government.

As for the President of the Judicial Council, the best solution in order to avoid possible corporatist tendencies within the judiciary should be to appoint the President by the Council itself from among non judicial members, with the qualified majority of two thirds. The system guarantees a right link between the judiciary and the political power expressed in a pluralistic way by the Parliament. Some countries entrust the president of the highest court of the judiciary, who normally is ex officio member of the body, with the presidency of the Judicial Council, but the solution could have negative effects of judicial corporatism within the council.

All the decisions of the Judicial Council on the legal status of judges might be submitted to judicial review by a judicial body, such as the Court of Cassation, an administrative court, or the Constitutional Court as in Croatia.

4. Internal independence.

While great attention has been devoted to the standards of the external independence of the judiciary, the internal independence has received less attention, at least from a quantitative point of view. The fundamental principles of independence within the organization of the judiciary are contained in the already mentioned Recommendation of the Committee of Ministers and in numerous opinions of the Venice Commission, in particular they are set out in Document CDL-JU(2008)002, under the subtitle “Independence within the judiciary”.

The first constitutional basis to ensure internal independence is the implementation of the principle of the natural judge established by law, that is to say the right of everybody to a lawful judge. Such a right means that the judge who rules 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 judiciary.

It has been noted that in the frequent cases of a court with more than one section or more judges, the allocation of the work to the specific section or judge is often left to the subjective and discretionary choices of the president of the court. It would then be possible to influence the outcome of the case by choosing a judge with certain ideological or political inclinations.

In order to overcome the risks of discretionary choices, which were supposed to be inherent in the power of the head of the office, the rule has been adopted that the natural judge is identified - which specific exceptions which are also provided for by law or by special regulations - on the basis of objective and general criteria, as for instance the alphabetical or chronological order of the cases, the categories of cases, a computerized system. The exceptions should take into account the workload, the specialization of the judges, the complexity of legal issues, etc.

The principle of the natural or lawful judge, established in art. 6 of the European Convention of Human Rights, is also present in numerous Constitutions, such as 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” (see for instance Article 25.1 of the Italian Constitution). As a consequence, a case could be withdrawn from the natural judge only on the basis of objective criteria provided for by the law and following a transparent procedure before a pre-established authority within the judiciary.

The right to a lawful judge is an essential but non sufficient guarantee. The internal independence can be jeopardized by a hierarchical organization of the judiciary. In such a system the decisions taken by a given judge are subjected to the control of the president of the court over the subordinated judges and, more in general, through preliminary instructions and directives or subsequent checks by higher judges, be they appeal, court of cassation, supreme court 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. These are the main reasons why a hierarchical structure of the judiciary has been unanimously criticized as incompatible with the independence of the single judges.

The constitutional principle that more directly 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” (see for instance Article 101.2 of he Italian Constitution). The principle guarantees at the same time the independence of the judiciary from undue influences, instructions and recommendations coming from within the judiciary, and from external pressures coming from the political power.

From another viewpoint, the principle sets out the rule that the control over the decisions of the single judge can be exercised only through procedural remedies, that is an appeal to a higher judge, and not through preventive recommendations, explanatory directives or legal interpretations addressed to the lower courts.

The subordination of the judge only to the law is closely linked to the constitutional principle of equality between judges. This principle means, on the one hand, the refusal of a hierarchical power of control of upper judges on lower judges, on the other hand, that judges can be distinguished only by their different functions, such as first instance, appeal, legitimacy, investigative, adjudication. Both meanings of the principle are incompatible with any form of hierarchical organization or supremacy within the judiciary.

5. Corollaries of the judges independence.

Some necessary corollaries of the external and internal independence of the judges can be summarized as follows:

- The tenure until the mandatory retirement age or the expiry of the term of office is a fundamental guarantee of the external independence. Indeed, when the recruitment procedures provide for a trial period before confirmation on a permanent basis or the appointment is made for a limited period that can be renewed, the independence of judges is undermined, since they may feel under pressure to decide cases in a particular way which can favor the renewal or the reappointment.

In order to reconcile the need of probation and evaluation with the independence of judges some systems provide probationary periods during which candidate judges can assist in the preparation of adjudication without taking judicial decisions which are reserved to permanent judges.

- **The guarantee of irremovability**, normally established at the constitutional level, is strictly linked to external and internal independence. The transfer of a judge to another court or to another judicial office, even by the way of promotion, should be possible only with his/her consent, or in case of disciplinary sanctions, lawful alteration of the court system, temporary assignment to reinforce a neighbouring court. In fact, the fear to be transferred without consent to another court or office could undermine the freedom of judgment, influence the decision and interfere more generally with judicial independence.

- The remuneration of judges, corresponding to the dignity of the profession and adequate for protecting judges from undue outside interference, should be established and guaranteed by law. Non monetary remunerations, such as apartments, cars, etc., even if defined by law, always involve scope for discretion and are a potential threat to judicial independence.

- The independence of the judiciary requires that **Courts should be financed on the basis of objective and transparent criteria established by law**, and not on the basis of discretionary decision of the executive or legislative power. In particular, the judiciary should be given the opportunity to express its views about the proposed budget through the Judicial Council.

- External independence needs to be protected from civil liability in case of judicial errors or other failings done in good faith in the administration of justice. In these cases civil liability should lie only against the State. On the contrary, when not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.