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

Revised following discussions
at the Sub-Commission on the Judiciary (Venice, 10 December 2010),
by the Plenary Session (Venice, 11-12 December 2009)
and including further proposals made by members

on the basis of comments by

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Table of contents

Introduction 3
I. Preliminary remarks 3
II. Existing Standards 4
III. Specific Aspects of Judicial Independence 5
1. The level at which judicial independence is guaranteed 5
2. Basis of appointment or promotion 6
3. The appointing and consultative bodies 7
4. Tenure - period of appointment 8
5. Tenure - irremovability and discipline - transfers 9
6. Remuneration of judges 10
7. Budget of the Judiciary 11
8. Freedom from undue external influence 12
9. Final character of judicial decisions 13
10. Independence within the judiciary 13
11. The allocation of cases and the right to a lawful judge 15
IV. Conclusions 17

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. At the latter meeting participated Mr Desch, representing the European Committee on Legal Co-operation (CDCJ) and Ms Laffranque, President of the Consultative Council of European Judges (CCJE). Ms Laffranque also made comments on the secretariat note on existing standards (CDL-JD(2008)002).

3. The Sub-Commission decided to prepare two reports on the independence of the Judiciary, one dealing with prosecution 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), Mr Zorkin (CDL-JD(2008)008) and Mr Torfason.

4. The present draft report was adopted by the Sub-Commission on the Judiciary (Venice, 12 March 2009). This report was discussed at the Plenary Sessions of the Commission (12-13 June and 9-10 October), the Sub-Commission on the Judiciary (10 December 2009) and the Plenary Session on 11-12 December 2009). The present text has been prepared by the Secretariat on the basis of the text presented to this Plenary (CDL(2009)055rev5) and further remarks made by some members (see appendix). [The proposals for further amendments are underlined.]

5. The present report was adopted by the Venice Commission at its … Plenary Session (Venice, …).

I. PRELIMINARY REMARKS

6. The independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people.

7. 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 also important.

8. 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.

9. The problem of establishing a comprehensive set of standards of judicial independence has been addressed in a considerable number of documents of differing detail, aimed at establishing reference points. These documents whether or not issued by international

organisations, official bodies or by independent groups, offer a comprehensive view of what the elements of judicial independence should be: the role and significance of judicial independence in ensuring the rule of law and the kind of challenges it may meet from the executive, the legislature or others.

10. As experience shows in many countries, however, 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 might be required in order to change practices which can be an obstacle to judicial independence.

11. 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 outside the scope of the present report.

II. EXISTING STANDARDS

12. At the European and international level there exist 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 and therefore the Venice Commission will base itself in this report on the existing texts.

13. At European level, the right to an independent and impartial tribunal is first of all guaranteed by Article 6 of the European Convention on Human Rights *("1. 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. …").* 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. Based on Article 10 of the Universal Declaration of Human Rights *("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"),* 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 United Nations General Assembly in 1985 and the Bangalore Principles of Judicial Conduct of 2002. These standards often coincide with the Council of Europe standards but usually do not go beyond them.

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

III. SPECIFIC ASPECTS OF JUDICIAL INDEPENDENCE

1. The level at which judicial independence is guaranteed

20. 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."*

21. 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."*

22. The Venice Commission strongly supports this approach. **The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts**.[2]

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[1] Unless otherwise indicated references to the CCJE relate to its Opinion No. 1.
[2] Examples for constitutional provisions are:
Albania - Article 145 of the Constitution
1. Judges are independent and subject only to the Constitution and the laws. …
Andorra - Article 85 of the Constitution
1. In the name of the Andorran people, justice is solely administered by independent judges, with security of tenure, and while in the performance of their judicial functions, bound only to the Constitution and the laws. …
Austria - Article 87 of the Constitution
(1) Judges are independent in the exercise of their judicial office. …
Czech Republic - Article 81 of the Constitution
The judicial power shall be exercised in the name of the Republic by independent courts.
Georgia – Article 84 of the Constitution
1. A judge shall be independent in his/her activity and shall be subject only to the Constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law.
Germany - Article 97 of the Basic Law - Independence of judges
(1) Judges shall be independent and subject only to the law. …
Greece - Article 87 of the Constitution
1. Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence. …
Iceland - Article 70 of the Constitution
Everyone is entitled to obtain a determination of his rights and obligations or of any charge against him for criminal conduct by a fair trial within a reasonable time before an independent and impartial court of law. A court hearing shall be held in public unless the judge otherwise decides pursuant to law in order to protect morals, public order, national security or the interests of the parties.
Latvia – Article 83 of the Constitution
Judges shall be independent and subject only to the law.
Italy – Article 101.2 of the Constitution "Judges are subject only to the law" and Article 104.1 of the Constitution "The judiciary is an order that is autonomous and independent of all other powers."
Lithuania – Article 109 of the Constitution
In the Republic of Lithuania, the courts shall have the exclusive right to administer justice.
While administering justice, judges and courts shall be independent.
While investigating cases, judges shall obey only the law.
The court shall adopt decisions on behalf of the Republic of Lithuania.
Portugal - Article 203 of the Constitution - Independence
The courts are independent and subject only to the law.

2. Basis of appointment or promotion

23. 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."*

24. 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*". Merit is not solely a matter of legal knowledge analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgements, etc.

25. It is essential that a judge have a sense of justice and a sense of fairness. However, in practice, it can be difficult to assess these criteria. Transparent procedures and a coherent practice are required when it is applied.

26. Finally, merit being the primary criterion, diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society.[3] ~~no sector of society should be excluded from access to judicial office~~.[4]

Article 216 of the Constitution - Guarantees and disqualifications

1. Judges have security of tenure and may be transferred, suspended, retired or removed from office only as provided by law.
2. Judges may not be held liable for their decisions, except in the circumstances provided for by law.
3. Judges in office may not perform any other functions, whether public or private, other than in unpaid teaching or legal research, as provided by law.
4. Judges in office may not be assigned to perform other functions unrelated to the work of the courts unless authorised by the appropriate superior council.
5. The law may establish other circumstances that are incompatible with performance of the functions of a judge.

Romania – Article 123 of the Constitution - Administration of Justice
(1)Justice shall be rendered in the name of the law.
(2)Judges shall be independent and subject only to the law.
Russian Federation - Article 10 of the Constitution
The state power in the Russian Federation shall be exercised through separation of the legislative, executive and judicial powers. The bodies of the legislative, executive and judicial powers shall be independent.
Article 120 of the Constitution
1. Judges shall be independent and be responsible only to the Constitution of the Russian Federation and the federal law. …
Slovenia - Article 125 of the Constitution - The Independence of the Judges
The Judges shall independently exercise their duties and functions in accordance with this Constitution and with the law.
Turkey - Article 138 of the Constitution
Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law, and their personal conviction conforming with the law.
No organ, authority, office, or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, make recommendations or suggestions.
No question shall be asked, debated held, or statement made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.
As an example on the level of law, in the United Kingdom, s. 3 of the Constitutional Reform Act 2005 provides that all government ministers with responsibility for matters relating to the judiciary or the administration of justice "must uphold the continued independence of the judiciary". [proposal by Mr. Jowell].

[3] [proposal by Mr. Jowell].

[4] See also a similar conclusion relating to judges of constitutional courts, Report on the Composition of Constitutional Courts, Science and Technique of Democracy no. 20, p. 30.

27. **The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable. Subject to this principle, diversity within the judiciary should be taken into account..**

3. The appointing and consultative bodies

28. Recommendation (94)12 reflects a preference for 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".*

29. 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."*

30. 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".*

31. The position of the Venice Commission (CDL-AD(2007)028) 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."*

32. To sum up, it is the Venice Commission's view that at least in new democracies it is an indispensable guarantee for the independence of the judiciary that **an independent judicial council have decisive influence on decisions on** the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. **While respecting this variety of legal systems, the Venice Commission recommends that old democracies which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges.[5] With the exception of ex-officio members these judges should be elected <u>or appointed</u>[6] by their peers.**

4. Tenure - period of appointment

33. 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."*

34. 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."*

35. This corresponds to the position of the Venice Commission which has, apart from special cases such as constitutional court judges, always favoured tenure until retirement.

36. 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."*

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[5] See CDL-AD(2009)028 para. 50.
[6] [proposal by Mr. Jowell].

37. 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."*

38. To sum up, **the Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence.**

5. Tenure - irremovability and discipline - transfers

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

40. 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."*

41. 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."*

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

43. **The Venice Commission has consistently supported the principle of irremovability in constitutions**. **Transfers against the will of the judge may be permissible only in exceptional cases**. As regards disciplinary proceedings, the Commission's Report on Judicial Appointments[7] **favours the power of judicial councils or disciplinary courts to carry out 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.**

6. Remuneration of judges

44. 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.

45. 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."*

46. 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 is a commendable approach. The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Bonuses which include an element of discretion should be excluded.

47. 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.

48. 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. Young judges in particular may not easily be able to purchase real estate and, consequently, the system of allocation of housing persists.

49. While the allocation of property is a source of concern, it is not easy 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 of supporting those in special need. However, this assessment of social need and the differentiation between judges could too easily permit abuse and the application of subjective criteria.

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[7] CDL-AD(2007)028, para. 49.

50. 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 immediately abolish such non-financial benefits in some countries since they correspond to a perceived need to achieve social justice, the Venice Commission recommends the phasing out of such benefits and replacing them by an adequate level of financial remuneration.

51. To sum up, **the Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties. Non-financial benefits, the distribution of which involves a discretionary element, should be phased out.**

7. Budget of the Judiciary

52. 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 but in a stable way on the basis of objective and transparent criteria.

53. International texts do not provide for a budgetary autonomy of the judiciary but there is a strong case in favour of taking views of the judiciary 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."*

54. **Decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council**.

8. Freedom from undue external influence

55. 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 (see below, chapter 10) ensures that a judges takes decisions only on the basis of the Constitution and laws and not on the basis of instructions given by higher ranking judges.

56. 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."*

57. 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."*

58. 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."*

59. 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).

60. 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** (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes).

61. 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 and is also a reason why many states restrict political activities of judges.

62. Impartiality is also a requirement of Article 6 ECHR and has a similar but distinct connotation from independence. Judges have to recuse themselves when their participation in a case raises a reasonable perception of bias or conflict of interest, irrespective of whether the judge is in practice biased.[8]

9. Final character of judicial decisions

63. 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*". It should be understood that this principle does not preclude the re-opening of procedures in exceptional cases on the basis of new facts or on other grounds as provided for by law.

64. 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.

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

10. Independence within the judiciary

66. 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.

67. 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*

[8] [Proposal by Mr. Jowell].

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)."

68. 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 is problematic in this respect.

69. 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)

70. To sum up, **the Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges.**

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

71. As already noted, the issue of internal independence arises not only between judges of the lower and of the higher courts but also between the president or presidium[9] of a court and the other judges of the same 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.[10]~~

72. 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 principles (Principle I.2.e and f), which may be seen as essential to the notion of judicial independence:

> *"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."*

73. In similar vein, the Venice Commission has stated that *"the procedure of distribution of cases between judges should follow objective criteria"* (CDL-AD(2002)026 at 70.7).

74. The European Convention on 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 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".[11] 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.[12]

75. The main point to be noted, however, is that according to the express words of Article 6, the medium through which access to justice under fair hearing should be ensured must not only be a tribunal established by law, but also one which is both "independent" and "impartial" in general and specific terms. And in its evaluation of these requirements for a fair hearing, the Strasbourg Court has applied the maxim that "justice must not only be done, but also be seen to be done." All of this implies that the judges or judicial panels entrusted with specific cases should not be selected *ad hoc* and/or *ad personam*, but according to objective and transparent criteria.

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[9] [The amendments in paragraphs 70 and 76-79 were made by Mr. Vermeulen. The appendix presents Mr. van Dijk's and his arguments for these changes.]

[10] [Proposal by Mr. Vermeulen – explanation: the argument that internal and external independence are closely linked, because courts and presidents may be at times under pressure of executive or legislative power is not adequate. IF external independence is sufficiently guaranteed, pressure on court presidents etc. will be excluded]

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

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

76. Many European constitutions contain a subjective right to a lawful judge (in doctrine often referred to as "natural judge pre-established by law"). 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 Italy *"No one may be removed from the natural judge predetermined by law"*.[13] 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.*"[14]

77. The guarantee can be understood as having two dimensions. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. In terms of principle, it is clear that both dimensions of the "right to the lawful judge" should be promoted. It is not enough if only the court (or the judicial branch) competent for a certain case is fixed in advance. That the order in which the individual judge (or panel of judges) is fixed in advance, meaning that it is based on general objective principles[15], is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed**.** In national legislation, it is sometimes provided that the chairperson of a collegiate court should have the power to assign cases among the individual judges. However, this power involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be an very effective way of influencing the outcome of the process.

78. In order to enhance impartiality and independence of the judiciary it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria ~~fixed in advance~~. This can be done for example on the basis of 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 exceptions) should be formulated by the law or ~~be fixed by law, with the details of the system fixed~~ by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges will sit on that case. The criteria for taking such decisions

[13] Article 25.1 of the Constitution of Italy. 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."

[14] 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 …".

[15] [Proposal by Mr. Vermeulen].

by the court president or presidium should, however, be ~~clearly~~[16] defined in advance. Ideally, this allocation should be subject to review.

79. To sum up, **the Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations.** ~~**and not left to the discretion of court presidents.**~~[17]

IV. Conclusions

80. The following standards should be respected by states in order to ensure internal and external judicial independence:

1. The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. 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 principles of the natural or lawful judge pre-established by law and that of his or her irremovability.
2. All decisions concerning appointment and the professional career of judges should be based on merit and the diversity of the judiciary as a whole should be taken into account.
3. Rules of incompatibility and for the challenging of judges are an essential element of judicial independence.
4. It is an indispensable guarantee for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. While respecting the variety of legal systems existing, the Venice Commission recommends that old democracies not yet having done so 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. With the exception of ex-officio members these judges should be elected by their peers.
5. Ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence..
6. Judicial councils, or disciplinary courts, 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.
7. A level of remuneration should be guaranteed to judges, which corresponds to the dignity of their office and the scope of their duties.
8. Non-financial benefits for judges, the distribution of which involves a discretionary element, should be phased out.
9. 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. The judiciary should have the opportunity to express its views about the proposed budget to Parliament, possibly through the judicial council.
10. Judges should enjoy functional – but only functional – immunity.
11. States may provide for the incompatibility of the judicial office with other functions. Judges shall not exercise executive functions. Political activity that could interfere with impartiality of judicial powers shall not be authorised.
12. 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.

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[16] [Proposals in this paragraph by Mr. Vermeulen].
[17] [Proposals in this paragraph by Mr. Vermeulen].

13. Judicial decisions should not be subject to of any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal.
14. The principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges.
15. As an expression of the principle of the natural or lawful judge pre-established by law, the allocation of cases to individual judges should be based **on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations.** ~~to the maximum extent possible on objective and transparent criteria established in advance and not left to the discretion of court presidents.~~[18]

[18] [Proposal by Mr. Vermeulen].

Appendix

Explanation by Mr. van Dijk and Mr. Vermeulen of amendment proposals in paragraphs 70 and 76-79 by Mr. Vermeulen (5 March 2010)

…

1.As promised at the Venice Commission meeting in December 2009, we hereby send you some additional comments on the abovementioned draft report. These comments are in line with earlier remarks made by Pieter van Dijk at the October 2009 meeting and by Ben Vermeulen at the December 2009 meeting.

2.While we fully endorse most of the excellent draft report, we feel uneasy about the unqualified emphasis it lays on the (internal) independence of the individual judge in paras 76 ff., leading to the statement that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance and not left to the discretion of court presidents (para. 78).

3. Our uneasiness in part stems from our experience within the Administrative Judicial Division of the Dutch Council of State. The Division is the highest administrative court with general jurisdiction, decides on some 10.000 cases per year, and is only able to do so through a system of formal and informal coordination between some 55 judges, based on experience and specialization. With such a workload it simply is impossible to guarantee a minimum of quality and comply with the time limits of Article 6 ECHR if the presidium of the Judicial Division were not allowed to allocate cases on the basis of an efficient system that takes into account legal knowledge and experience, experience as a judge and as a presiding judge, specialized competences in particular legal areas, as well as 'matters of character, judgment, accessibility, communication skills, efficiency to produce judgments etc. (rightly mentioned in para. 24). It seems evident, for instance, that judges who decide on whether or not to refer the case for a preliminary ruling should be able to reach such a decisions on the basis of a combination of broad knowledge of community law and sufficient insight in questions which have already been decided by the Court of Justice or are pending. Or – to take an example outside the field of administrative law – it is rather plausible that family law judges who have to decide on sensitive and intimate issues should have communicative talents and be able to demonstrate empathy, sympathy etc. – without loosing the attitude of independence and objectivity. And finally, it is reasonable that when a court has to decide on a 'big' case, concerning important economic, political or moral-symbolical interests, the most senior and respected judges are selected to deal with the case.

4.In sum, allocation of cases in part may – or even must – be based on criteria that are not fully objective, and that demand a certain amount of reasonable discretion. This also implies that there is a person or group of persons – the President, or Presidium – within the court who applies these criteria. It is our feeling that the Draft report does not leave enough room for these aspects. We submit that these aspects should be mentioned explicitly, and that paras. 76-78 are rephrased, in that the suggestion that allocation of cases entirely should in principle take place on the basis of purely objective criteria formulated in advance in legal prescriptions ('rules') is avoided.. Furthermore, broad statements suggesting that leaving room for some discretion in individual cases is probably an unavoidable, but unfortunate exception should be omitted. According to our experience, quite often such discretion is not only unavoidable, but even desirable in terms of quality and efficiency.

5.One aspect that is not explicitly addressed in the Draft report is the value of a coherent and consistent case law, which value also qualifies the emphasis on the internal independence of individual judges. In particular higher and supreme courts, that have to guard the uniformity of the interpretation and application of the law by the judiciary, cannot function adequately if there is no internal coordination, which demands that as a rule standing case law is followed. The

Draft report gives the impression that the independence of the individual judge may not be restricted (by formal rules and informal arrangements) directed at guarding consistency of the court's case law. A few remarks on this aspect, taking away that impression, might be useful.
…

Proposals by Mr. Jowell (29 December 2010)

…
On the document on judicial independence I have the following further points to make:

First, in footnote 2 we have examples from various countries of judicial independence enshrined in constitutions, but nothing about that happening through statutes. Could you add as an example of the latter the following:

In the United Kingdom, s.3 of the Constitutional Reform Act 2005 provides that all government ministers with responsibility for matters relating to the judiciary or the administration of justice "must uphold the continued independence of the judiciary".

This provision is reinforced by the need for the responsible minister to take an oath to uphold the rule of law, respect the independence of the judiciary and to discharge his duty to ensure the provision of adequate resources for the administration of justice.

(The notion of a ministerial oath to that effect could perhaps be dealt with somewhere else in the document.
as another technique to ensure judicial independence).

Secondly, In the amended paragraph 26 where we now provide for access to the judiciary for all sectors of society, I think we should say that access should be provided to all qualified persons in all sectors of society.

Thirdly, in para.32: I think we should allow for the judiciary to elect or appoint their own members.

Fourthly, I wonder whether we should stress both independence and impartiality of the judiciary. Impartiality is also a requirement of Article 6 ECHR and has a similar but distinct connotation from independence. Do we need to say anything about judges recusing themselves in cases where their participation in a case raises a reasonable perception of bias or conflict of interest (irrespective of whether the judge is in practice biased?)
…