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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

"JUDICIAL APPOINTMENTS"

Discussion paper prepared by the Secretariat for the meeting of the Sub-commission on the Judiciary

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I. Introduction

Choosing the appropriate rule of judicial appointments is one of the primary challenges faced by the newly established democracies, where concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is considered to be endangering the neutrality of the judiciary in these States, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

International standards in this respect are more in favour of the extensive depolitisation of the process. However it is difficult to identify an exclusively non-political "model" of appointment system which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.

II. Appointment system

The UN Basic Principles on the Independence of the Judiciary (adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) underline that *"any method of judicial selection shall safeguard against judicial appointments for improper motives".*

Methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed.[1] Notwithstanding their particularities appointment rules can be grouped under two main categories.[2]

I. The e*lective system*, where judges can be elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament (the method is used to elect judges at the Swiss federal level and in Slovenia; in Ukraine, the Verkhovna Rada of Ukraine is entitled to elect all other judges than professional ones). This system is sometimes conceived as tending towards greater democratic legitimacy, but it could also lead to involving judges in the political campaign and to the overall politisation of the process. [3]

II. In the *direct appointment system* the appointing body can be the Head of State (this is the case in Albania, upon the proposal of the High Council of Justice; in Armenia, based on the recommendation of the Judicial Council; in the Czech Republic; in Georgia, upon the proposal of the High Council of Justice; in Greece, after prior decision of the Supreme Judicial Council; in Ireland; in Italy upon the proposal of the High Council of the Judiciary; in Lithuania, upon the recommendations submitted by the "special institution of judges provided by law"; in Malta, upon the recommendation of the Prime Minister; in Moldova, upon proposal submitted by the Superior Council of Magistrates; in Netherlands; in Poland on the motion of the National Council of the Judiciary; in Romania based on the proposals of the Superior Council of Magistracy; in the Russian Federation judges of ordinary federal courts are appointed by the president upon the presentation correspondingly of the Chairman of the Supreme Court of the Russian Federation and of the Chairman of the Higher Arbitration Court of the Russian Federation; in Slovakia on the basis of a proposal of the Judiciary Council; in Ukraine, upon the

[1] For example procedure of appointment of judges of a constitutional court can be different from the rule of appointment of judges of ordinary courts, on which the present paper will mainly focus.

[2] The present paper is mainly based on the constitutional provisions in respect of the organisation of the judiciary.

[3] The elective system is however often applied for appointing judges of the constitutional courts, for example the German Federal Constitutional Court.

proposal of the High Council of Justice) or the government (in Sweden "appointments to posts in courts of law … shall be made by the Government or by a public authority designated by the Government"). This method often raises concerns related to the independence of judges appointed by other branches of power.

Another option is appointment made by a specially designated body - high judicial council. (For example in Portugal the Superior Council for the Judiciary has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them. In Bulgaria judges, prosecutors and investigating magistrates are appointed by the Supreme Judicial Council. In Croatia judges are appointed and relieved of duty by the State Judicial Council. In Cyprus the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers are exclusively within the competence of the Supreme Council of Judicature. In "the Former Yugoslav Republic of Macedonia" judges and court presidents shall be elected and dismissed by the Judicial Council. The Hungarian Act on the Organisation and Administration of Courts. (Act LXVI of 1997) set up the National Judicial Council exercising the power of court administration including the appointment of judges).

A third - *hybrid system* consisting of both an elective and an appointment component exists as well, however it seems to be mainly applied for the composition of the Constitutional and Supreme Courts.

The Venice Commission has already had the opportunities of assessing the features of the elective system. The involvement of parliament in the process may result in the politicisation of judicial appointments. In the light of European standards the selection and career of judges should be *"based on merit, having regard to qualifications, integrity, ability and efficiency".*[4] Elections by parliament are discretionary acts, therefore even if the proposals are made by the Judicial Council, it cannot be excluded that an elected parliament will not self-restrain from rejecting candidates. Consequently political considerations may prevail over the objective criteria.

The Venice Commission found that *"the parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of Parliament coming from one district or another will want to have his or her own judge. The right of appointment ought to remain linked with the head of state. Of course, the president also represents a given political tendency but in most cases he/she will demonstrate greater political reserve and neutrality. It therefore seems that entrusting the head of state with the power to nominate judges is a solution that depoliticizes the entire process of nominating a judge to a much greater degree,"* [5]

At the same time it should be ensured that the main role in the process is given to an objective body – the judicial council. The proposals from this body may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. [6]

III. The role of a high judicial council in the appointment procedure

[4] Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges.

[5] Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia adopted by the Venice Commission at its 52nd Plenary session on 18-19 October 2002, CDL-AD (2002) 26, § 22.

[6] Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, adopted by the Venice Commission at its 64th plenary session on 21-22 October 2005, CDL-AD(2005)023, § 17.

The involvement of an independent authority in the process has been regarded to be particularly important to ensure that the appointment rules will not affect the independence of judges and will protect the judiciary from political interferences.

According to opinion No 1 (2001) of the CCEJ, *"every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria."*

Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges provides as follows: *"The authority taking the decision on 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 decides itself 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."*

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: "*In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."* According to the Explanatory Memorandum of the European Charter, the term "intervention" of an independent authority means an opinion, recommendation or proposal as well as an actual decision.

The CCEJ commends the standards set by 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*".

Regardless of the appointment system used, most European States have introduced a special body (high judicial council) with an exclusive or lesser role in respect of judicial appointments.[7]

"Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State." [8]

The mere existence of a high judicial council can not automatically exclude political considerations in the appointment process. For example *"in Croatia, a High Judiciary Council of 11 members (seven judges, two attorneys and two professors) has responsibility for such appointments, but the Minister of Justice may propose the 11 members to be elected by the*

[7] Albania, Andorra, Belgium, Bulgaria, Cyprus, Georgia, Greece, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, "the Former Yugoslav Republic of Macedonia", Ukraine, Turkey.

[8] Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, § 5.

House of Representatives of the Croatian Parliament and the High Judiciary Council has to consult with the judiciary committee of the Croatian Parliament, controlled by the party forming the Government for the time being, with regard to any such appointments. Although Article 4 of the amended Croatian Constitution refers to the principle of separation of powers, it also goes on to state that this includes "all forms of mutual co-operation and reciprocal control of power holders", which certainly does not exclude political influence on judicial appointments or promotion. In Ireland, although there is a judicial appointments commission, political considerations may still determine which of rival candidates, all approved by the commission, is or are actually appointed by the Minister of Justice (and the commission has no role in relation to promotions)."[9]

The role of the high judicial council can vary to a large extent. For example, the role of such Councils in Germany may be different depending on the level of courts. There are councils for judicial appointments which are purely advisory. In Hungary the Act on the Organisation and Administration of Courts (Act LXVI of 1997) set up the National Judicial Council exercising the power of court administration including the appointment of judges. In Portugal the Superior Council for the Judiciary has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them.

IV. Composition of a high judicial council

According to the Venice Commission, *"there is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary 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 (….)."*[10]

As regards the existing practice related to the composition of high judicial councils, *"a basic rule appears to be that a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members."* [11]

In general, high judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such composition is justified by the fact that *"the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause*

[9] CCEJ opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, §20.

[10] Opinion on the Reform of the Judiciary in Bulgaria, adopted by the Venice Commission at its 38th Plenary Meeting on 22-23 March 1999, CDL-INF(1999)005e, § 28.

[11] Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF (1998)09, § 12.

citizens' confidence in the administration of justice to be raised." [12] Moreover, the supremacy of the judicial component may raise concerns related to the risks of "corporatist management". *"An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges."* [13] Therefore in order to maintain the balance of interests it seems advisable to encourage proportionate participation of the representatives from academic or other professional sectors, for instance lawyers, who also have interests in the proper administration of justice.

The participation of the legislative branch in the composition of such an authority is characteristic for almost all legal systems. *"In a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament."* [14] In general the legislative bodies are entitled to elect the members of the high judicial councils among judges and lawyers,[15] however according to some systems the MPs themselves are entitled to be members of this high judicial council.[16] The Venice Commission is in favour of the depolitisation of such bodies by providing for a qualified majority for the election of its parliamentary component. [17]

As regards the involvement of the prosecution authorities in the work of judicial councils, it is also quite frequent, for example in Greece the Prosecutor of the Supreme Civil and Criminal Court participates in the Supreme Judicial Council on civil and criminal justice, in Bulgaria the Chief Prosecutor is sitting ex officio on the Supreme Judicial Council.

Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, in particular in the newly established democracies, such practice is quite common. It is the case in France (the President of the Republic is the President of the Council, furthermore, in France the Minister of Justice is the *ex officio* Vice President of the Council as well as its President in the absence of the President of the Republic, in Bulgaria (where the meetings of the Supreme Judicial Council are chaired by the Minister of Justice without a right to vote), in Romania (the proceedings for nomination of candidacies for appointment shall be presided over by the Minister of Justice, who shall have no right to vote). Such presence does not seem, in itself, to impair the independence of the council, according to the opinions of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures.

"*The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal stage and prosecutors. The nomination of these judges and prosecutors has been exclusively entrusted to the High Council of Justice, thereby removing these decisions from undue political influence. However, it is advisable that the Minister of Justice should not be*

[12] *Idem.,* § 9.

[13] *Ibidem.*

[14] *Ibidem.*

[15] For example in Bulgaria, Slovenia.

[16] For example in Georgia, Hungary.

[17] Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, adopted by the Venice Commission at its 51st Plenary Session on 5-6 July 2002, CDL-AD (2002) 015,§ 5.

involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government."[18]

V. Appointment basis

Due consideration should also be given to the basis of judicial appointments and promotions.

The UN basic principles state: *"Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience".*

In a number of countries judges are appointed based on the results of a competitive examination,[19] in others they are selected from the experienced practitioners.[20] Both categories of selection can raise questions. It could be argued whether the examination should be the sole grounds for appointment or regard should be given to the candidate's personal qualities and experience as well. As for the selection of judges from a pool of experienced practitioners, it could raise concerns as regards to the objectivity of the selection procedure.

In its opinion No 1 (2001), the Consultative Council of European Judges (CCEJ) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges suggests 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". Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect."*

VI. Appointment for a probationary period

The European Charter on the statute for judges states as follows *"Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".*

The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: *"The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually".*

The Venice Commission also considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.

"A decision of the Appeal Court of the High Court of Justiciary of Scotland (Starr v Ruxton, [2000] H.R.L.R 191; see also Millar v Dickson [2001] H.R.L.R 1401) illustrates the sort of

[18] Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF (1998)09, § 16.

[19] For example in Italy.

[20] For example in Cyprus, Malta the UK.

difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent." [21]

This tendency should not be interpreted as necessarily excluding the possibility for a temporary judge to be regarded an independent tribunal within the meaning of the ECHR. The main idea behind it is to exclude the factors that could challenge the impartiality of judges, therefore *"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."*[22]

At the same time in the 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 appointing him. If probationary appointments may therefore be considered indispensable, they need to be followed by appropriate safeguards, including procedural safeguards established by legislation in order to ensure that all decisions on appointment of these judges are based on objective criteria and are largely dependant on the judicial council. [23]

VII. Conclusions

To be discussed

[21] Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", adopted by the Venice Commission at its 64th plenary session, on 21-22 October 2005, CDL-AD(2005)038, § 23.

[22] *Idem.* § 29.

[23] Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, adopted by the Venice Commission at its 64th plenary session on 21-22 October 2005, CDL-AD(2005)023, §§ 13-15.