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

**COMMENTS ON**  
**EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE**  
**OF THE JUDICIAL SYSTEM:**  
**JUDGES**

**by**  
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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

## Introduction

The Parliamentary Assembly of the Council of Europe has asked the Venice Commission for an opinion/report on the European standards on the independence of the judicial system. The secretariat note discussed in Venice has identified two important elements relating to judges: the right to the lawful judge and the non-financial elements of the judges' remuneration. The present opinion is focused on these two problems.

## Preliminary remarks

The independence of the judges and – as a consequence – the reputation of the judiciary in a given society depends on many factors. What counts are the personal character and the professional quality of the individual judge deciding a case. The legal culture as a whole is equally decisive. It is formed over long periods of time and is therefore difficult to change.

Institutional rules are auxiliary means only. They 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. But, as experience shows in many countries, the best institutional rules cannot work without the good will of those responsible for their application and implementation.

Institutional rules for the judiciary have been developed over the centuries on the basis of trial and error. Regulations such as the appointment of judges by judicial councils or the exclusion of probationary periods have to be understood as counter-reactions to bad practice. As rules are shaped by experience caution is necessary if they are generalised or exported to other systems.

Nevertheless, certain basic principles can be defined that are often fixed on the constitutional level. Among those one of the most prominent ones is the right to a lawful judge.

## The right to the lawful judge

The right to the lawful judge is, as a rule, guaranteed in the Constitution in the form of a subjective right;<sup>1</sup> organisational principles do not have the same value as a protective means for the individual concerned.<sup>2</sup> Some constitutions only state that the court should be "competent"<sup>3</sup> or "have jurisdiction over the case"<sup>4</sup> without any further specification; others add that the competence should be based on the law.<sup>5</sup>

Similarly, the European Convention of Human Rights claims 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 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not

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<sup>1</sup> See e.g. Art. 10 of the Constitution of Andorra: "All persons shall have the right to jurisdiction and to have a ruling founded in the law, and to a due trial before an impartial tribunal established by law."

<sup>2</sup> See e.g. Article 59 of the Constitution of Iceland: "The organisation of the judiciary can only be established by law."; Article 126 of the Constitution of Romania: "The jurisdiction of the courts of law and the conduct of court proceedings shall only be stipulated by law."

<sup>3</sup> See e.g. Article 20 of the Constitution of Moldova, Article 45 of the Constitution of Poland

<sup>4</sup> See e.g. Article 42 of the Constitution of Georgia.

<sup>5</sup> See e.g. § 21 of the Constitution of Finland.

depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament".<sup>6</sup> 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.<sup>7</sup>

That means that the guarantee given by the ECHR is weaker than a subjective right to a lawful judge inscribed in many of the European constitutions.<sup>8</sup> As a rule, the guarantee 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).<sup>9</sup> 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 changes 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."<sup>10</sup>

The guarantee can be understood in two different ways. Either it is related only to the court as a whole or it is related also to the individual judge dealing with the case. Experience shows that the latter understanding 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. In these cases, as a rule, the chair-person of the court has the power to assign the case to the individual judge. This power involves an element of arbitrariness. It can be misused as a means of pressure on judges as they can be overcharged with cases or be assigned only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid giving them to others. This can be a very effective way of influencing the outcome of the process.

In order to enhance impartiality and independence of the judiciary it is highly recommendable to fix the order in which judges deal with the cases in advance. That can be done for example on the basis of the alphabetical order or on the basis of a computerized system. The general rules (including the exceptions) should be fixed by law, whereas the details of the system can be fixed by special regulations on the basis of the law, e.g. in court regulations.

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<sup>6</sup> See *Zand v. Austria*, application no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.

<sup>7</sup> See *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII.

<sup>8</sup> Cf. Christian Grabenwarter, *Europäische Menschenrechtskonvention*, 3. edition, Munich 2008, p. footnote 148.

<sup>9</sup> 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 may be prevented against his will from 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."

<sup>10</sup> 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 ...".

If the right to the lawful judge is granted as a human right violations might be brought before the Constitutional Court on the basis of constitutional complaints. That is a powerful means to enforce the rules on competences and to prevent arbitrariness in this regards.

### **Non-financial elements of judges' remuneration**

As a rule, the judges' remuneration is not fixed on the constitutional level. One rare example can be found in Article 178 of the Polish Constitution: "Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties."

It is generally accepted that very small salaries for judges, especially if they are not sufficient for a decent way of life make the judges liable for corruption and undermine their reputation in society. In some systems low salaries are complemented by non-financial remuneration such as housing, cars or other privileges. As somebody in the administration or the chair-person of the court has the power to distribute these non-financial benefits he or she has a great power that can easily be misused to influence the adjudication of cases.

Even if non-financial remuneration is fixed by law, there is always a scope for discretion for the one distributing it. And even if all the judges get exactly the same non-financial remuneration, it creates some sort of dependence. At the same time it might undermine the confidence of the ordinary people in the independence of the judiciary.

Contrary to non-financial remuneration there is no problem to provide the judges with the necessary means and support for fulfilling their work.

To sum up, it is highly recommendable to abolish all sorts of non-financial remuneration for the judges and to pay them decent salaries enabling them to live according to their societal status.