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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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1. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly has requested the Venice Commission to give an opinion on “European standards as regards the independence of the judicial system”, and has expressed an interest “both in a presentation of the existing *acquis* and in proposals for its further development”. The following brief comments are presented as a contribution to the discussion on this subject within the Commission and its Sub-Commission on the Judiciary, and to the report being developed on the basis of that discussion.

2. I fully share the view that the preparation of the Commission report can be based on a reference to existing texts on the subject, which provide extensive coverage of the principles of judicial independence, together and on focusing on areas where new or extended standards might be identified or developed. - I also tend to support in general terms the several comments expressed by other Sub-Commission members, and the following will be limited accordingly.

3. Along with this view, I believe that the report must proceed from full recognition of the fact that in Article 6 of the ECHR, providing for the right of access to justice by fair hearing before an independent and impartial tribunal, the European nations have a compelling instrument capturing the essence of judicial independence and being broad enough to encompass all principles necessary to its subsistence in actual practice. In other words, I believe that Article 6 does not impose a minimum standard but a comprehensive demand, and thus is the appropriate point of departure for any consideration of the substance and the boundaries of judicial independence.

4. As a general remark in this vein, I believe it may be said that the first and most fundamental element of judicial independence is embodied in the principle that judges must be independent in maintaining justice. This is well expressed in Section I.2.d of Recommendation (94)12 of the Committee of Ministers, to the effect that “in the decision-making process, judges should be ... able to act without any restriction, improper influence, inducements, pressures, threats or interferences ... from any quarter or any reason”, and that judges should have “... 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”. In order to achieve this fundamental independence of action and to ensure that it is in fact being pursued on the basis of general public trust in the courts of law, it is necessary to rely on legal principles and guarantees aiming at securing judicial independence in the broader sense, namely, the existence of a judicial power substantially separate from the executive and legislative branches of power.

5. Concurrently with these principles relating to the so-called external independence of the judiciary, and as affirmed in the comments by other Sub-Commission members, it is necessary to maintain principles and guarantees aiming at ensuring that the judicial power is in fact functioning as a democratic phenomenon aiming at providing true access to justice, i.e. principles relating to the so-called internal independence of the judiciary and concerning the structural organisation of the courts of law and the relations of each individual judge to other judges within the system. In these respects, the underlying emphasis must be placed on the objectivity by which the access or approach to the courts should be governed and on the independence of each judge in carrying out his or her judicial functions. The significant demands of the former extend e.g. to such organisational matters as the allocation of cases among judges or panels within a specific court, and the call for independence of the specific judge will necessarily rest on a concomitant principle of equality among judges, both within each court or judicial instance and as between the various instances or functional divisions.

6. The specific aspects of judicial independence highlighted in the discussion within the Commission include the issue of the right of the individual to have his or her case brought before the lawful judge, i.e. a judge or judicial panel whose jurisdiction in the case lies naturally according to law and the court structure established by law, the principle involved being that judges cannot be selected *ad hoc* and *ad personam*. It seems to me that the existence of this right as a subjective right is an implicit premise of the concept of judicial independence as generally recognised among nations, and specifically as set out in Article 6 of the ECHR (cf. the comments in para. 3 above), which provides not only for a tribunal “established by law”, but also an “independent” tribunal permitting fair hearing. To my mind, therefore, the provisions of those European constitutions which address the issue more directly do not necessarily provide a stronger guarantee than that implicit in Article 6, but rather serve to reinforce its principles by way of more explicit statement.

7. It follows that I share the view that the right to a lawful judge should relate not only to the competent court as a whole, but also to the individual judge or panel dealing with the specific case within a pluralist court. In national legislation, it is frequently provided that the allocation of cases in such courts is to be determined by the court president. This is acceptable to the extent that it does serve to fix the responsibility for proper case allocation. At the same time, however, this makes it all the more important to have the allocation made on the basis of objective and transparent criteria substantially established in advance.

8. A further specific aspect to which attention has been drawn relates to the issue of remuneration of judges and the extent to which this may be provided in the form of non-financial benefits, such as the use of a family house or apartment. From the point of view of judicial independence, the overriding principle is that the remuneration of judges should be commensurate with the dignity of the profession and their burden of responsibilities, as stated in Recommendation (94)12, and that adequate remuneration is indispensable for protecting judges from undue outside influence. In countries where socio-economic conditions or specific circumstances may make it desirable to provide judges with housing rather than a corresponding salary allotment, the principle may perhaps be seen as more important than the form of remuneration. Given the discretionary element involved in such arrangements, however, they clearly should be avoided, and their elimination will be the proper aim.