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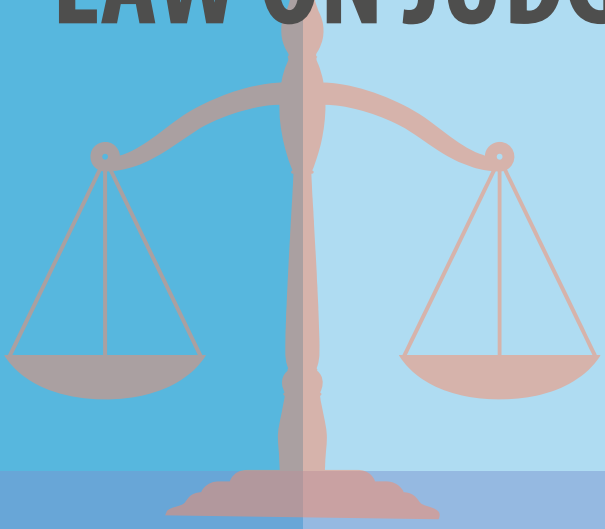
STANDING POINTS FOR ADOPTING THE LAW ON JUDGES



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STANDING POINTS FOR ADOPTING THE LAW ON JUDGES

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STANDING POINTS FOR ADOPTING THE LAW OF JUDGES

LAW ON JUDGES
(Neurlagic points)

We can classify the key neuralgic points of the *Law on Judges* as follows:

1. Basic principles (independence, tenure and irremovability, right to association, freedom of expression and public action, preservation of trust in independence and impartiality);
2. Dismissal, transfer, appointment of judges (irremovability - assignment and transfer, mutual independence of judges - change of annual tasks, schedule of cases, evaluation);
3. Appointment of a judge (procedure for the appointment of a judge);
4. Termination of a judge's office (dismissal of a judge);
5. President of the court (acting president of the court);
6. Lay judges (procedure and appointment of lay judges);
7. Disciplinary liability of judges (serious disciplinary offense - dismissal procedure).

In the Constitution of the Republic of Serbia, the status of the judiciary is not defined, nor is the relationship between the three branches of government defined and limited in accordance with the principle of the rule of law, which requires a special attention in the process of adopting the Law on Judges, to the basic principles that should safeguard the rule of law and justice.

Re. 1 Principles

1. Independence

The current legal solution proclaims the independence of judges only in acting and adjudicating and not in performing the judicial function, and it is necessary to harmonize it with Article 4 of the Magna Carta of Judges and guarantee independence in the activities of judges, but also in employment,

appointment up to the retirement age, advancement, immutability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

Moreover, the new legal solution, should correctly hierarchically distribute the existing sources of law and the case-law of international bodies that monitor the implementation of international human rights standards, and laws and other general acts, when provided for by law, should be added. This would eliminate the dilemma on the application of sources of international law, which is an expression and confirmation of accepted standards affirmed in the Constitution itself and in comparative law.

As a guarantee of the independence of judges, the Law should prohibit any influence on the judge in the exercise of the judicial function to ensure that the judge adjudicates only based on facts and law, without any external influence.[1]

This is necessary considering that international legal instruments differentiate between the so-called external influences on the work of judges and influences within the judiciary - from higher courts or court presidents. The external influence means the protection of the judge from the influence of state power and that the protection is a guarantee of the rule of law. Thus, in Study no. 494/2008 - European Commission for Democracy through Law (Venice Commission) - Report on the Independence of the Judicial System, Part I Independence of Judges, it is stated, with reference to Recommendation (94)12, (Principle 1.2.d), that "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".[2]

As a possible problem, the definition of impermissible influence is singled out with reference to the Consultative Council of European Judges (CCJE), which in Opinion no. 1 (63) notes: "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,

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1 It is also necessary to provide mechanisms to prevent the violation of the principle of independence, even when the permitted form of influence is exercised by legislative and executive authorities, through the arrangement and conditions for the work of the judiciary, in such a way that they indirectly affect its independence, for example, by not providing enough resources, sufficient staff or adequate working conditions. This reflects the necessity of prescribing an autonomous court budget, especially because the damages for exceeding a reasonable deadline are paid from the budget, and this is often a consequence of objective conditions, such as the workload of judges, but also their number.

2 Study no. 494/2008 - European Commission for Democracy through Law 93 (Venice Commission), Article 8.

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".[3]

In Recommendation CM/Rec(2010)12 and the Explanatory Memorandum, in paragraph 25, it is stated: "Revision of decisions outside legal framework, by the executive and legislative powers or the administration should not be permissible. 1. The concept of contempt of court (either civil – breach of a court order - or criminal, i.e. contempt in the face of court) is one derived from the common law. It is part of the machinery that enables the courts to ensure that there is no undue interference with the judicial process and to ensure that court orders are obeyed. 2. Revision proceedings are re-opening proceedings, aimed at enabling the revision of judicial decisions having authority of *res iudicata*. This does not remove the power of the Legislative to change existing or enact new laws which judges must then apply. The administration, executive or legislative powers should not invalidate, in individual cases, decisions of judges".

The impact within the judiciary is reflected in the same study in the finality of judgements with reference to Recommendation (94)12, in Principle I(2)(a)(i), which provides that „ decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law."[4] Subordination to presidents of courts or higher instances is stated as an example of strictly internal influence on judges, and related, it is explained that CCJE specifies a potential threat to the independence of the judiciary that may arise from the internal judicial hierarchy. The Council accepts that the independence of the judiciary depends not only on undue external influence, but also on the fact that it should be free from undue influence that in some situations may arise from the conduct 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 R(94)12, Principle I(2)(d)). This refers to individual judges. The way in which the principle is formulated does not exclude doctrines such as precedent in the Anglo-Saxon legal system (the obligation of a lower court judge to

3 Ibid.

4 As an example of "bad practice", the case of certain post-Soviet countries is mentioned, where there is a possibility that the prosecutor's office, based on its powers, can challenge court decisions against which it is no longer possible to file an appeal. Ibid, Article 9.

adjudicate in accordance with a previous decision of a higher court on a legal matter that immediately arises in the latter case).[5]

The Venice Commission advocates the principle of independence of each individual judge - it is also stated in the aforementioned Study no. 494/2008 with reference and citing a number of different opinions of the Venice Commission (see Opinions CDLINF(1997)6, paragraph 6 - refers to Azerbaijan[6], CDL-INF(2000)5 – refers to Ukraine [7], CDL(2007)003, para 61 – refers to Serbia[8]). The internal independence of judges is regulated in Chapter III of Recommendation CM/Rec(2010)12 of the Committee of Ministers, where in Chapter 23 it is stated: "Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings, or when deciding on legal remedies according to the law".[9]

2. Autonomy and irremovability

The new legal solution should regulate the issue of the permanent tenure of the judicial office in a more consistent way, so that the continuity of the judicial function is explicitly guaranteed from the moment of the election until the conditions for its termination are met.

In the new legal solution, the irremovability of the judge should be guaranteed by explicitly listing exceptions to assignments and transfers, by specifying the type of court to which the judge can be assigned, i.e. transferred, but with a guaranteed salary in the amount s/he had, if it is more favourable to him/her. Also, the judge should be able to appeal the decision on transfer or temporary assignment (made by the High Judicial Council - HJC) to the Constitutional Court. This way, a means of legal protection by another independent body shall be provided.

The necessity of the aforementioned changes stems from the need for harmonization with the Constitution, but also from the fact that the issue is regulated by the Charter on the Statute for Judges in Paragraph 3, entitled "Appointment and Irremovability". In point 4 of that paragraph the following is

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5 As an example of problematic practice, the principle that exists in the so-called post-Soviet countries, where the Supreme Court or another court adopts guidelines that are binding on lower courts. Ibid, Article 70.

6 https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1997)006-e

7 https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2000)005-e

8 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-srb

9 Recommendation CM/Rec(2010)12 of the Committee of Ministers.

stated on the transfer of a judge: "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".[10] The Appendix to Recommendation CM/Rec(2010)12 also regulates the issue of the status of a judge, which implies tenure and irremovability (paragraph 49), as well as in the Explanatory Memorandum, in paragraph 54 "Tenure and irremovability", where it is stated: "Security of tenure means judges cannot, except for disciplinary reasons, be removed from office, until they reach the mandatory retirement age. It also requires, in systems where judges must undergo a probation period before being confirmed in their posts, that the decision on or confirmation be taken by an independent authority. Irremovability implies that judges cannot receive new appointments or be moved to another post without their consent". In this sense, the already mentioned Study of the Venice Commission no. 494/2008 is important, Article 5 of which focuses on the immunity and irremovability.

3. Preservation of trust in independence and impartiality

It would be justified to consider prescribing sanctions for violating the trust in the independence and impartiality of judges in view of the actions of high-level state officials. See UN General Principles, paragraph 2, Recommendation no. R(94)12, Principle I(2)(d): "The law should provide for sanctions against persons seeking to influence judges in any such manner". In Opinion no. 1 (2001), in which the mentioned Recommendation is quoted, it is also stated that "the CCJE has no reason to think that they are not appropriately provided for as such in the laws of member States. On the other hand, their operation in practice requires care, scrutiny and in some contexts political restraint".[11]

10 Charter on the Statute for Judges in Paragraph 3.

11 CCJE Opinion no. 1 (2001) for the needs of the Committee of Ministers of the Council of Europe, on standards concerning the independence of judiciary and the irremovability of judges.

4. Financial independence

To fully affirm the judicial independence, it is necessary to prescribe the financial guarantees of each individual judge by law, i.e., in the sense of Amendment V, determine that:

- the salaries are regulated by law (exclude by-laws);
- the salaries cannot be reduced (it does not refer to situations when there is a general reduction of salaries in the public sector, so it is not in conflict with the decision of the CJEU *Associacao Sindical dos Juizes Portugueses*, in case No. C-64/16 of February 27, 2018);
- an increase in salary is ensured in line with the increase in the cost of living.

According to CCJE Opinion no. 1 (2001) and Recommendation no. R(94)12, salaries for the sick-leave and leave of absence should be regulated (in practice, they were reduced during annual vacations), as well as the issue of judges' pensions. The salary of judges is mentioned in Recommendation (94)12, the European Charter on the Statute for Judges with an explanation (remuneration and social welfare are guaranteed by Article 6 of the Charter), as well as in CCJE Opinion no. 1, where it is stated: "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".[12] In the Study of the Venice Commission no. 494/2008, the Constitution of the Republic of Poland is quoted as a good example of the regulation of judges' salaries, which stipulates that judges have the right to remuneration for their work, taking into account two parameters - the dignity of the office and the scope of duties.[13]

Establishing the financial independence of judges cannot be implemented without the financial independence of the courts and the HJC (the binding to sufficient funds in the budget renders any legal solution meaningless). That is why Amendment V stipulates that the courts and the HJC have their own budget. The Constitution, however, does not provide for this, which will open the question of the constitutionality of possible legal solutions in the context of the existing decision of the Constitutional Court of the Republic of Serbia (CC),

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12 CCJE Opinion no. 1 (2001) for the needs of the Committee of Ministers of the Council of Europe, on standards concerning the independence of judiciary and the irremovability of judges, para 61.

13 Study of the Venice Commission no. 494/2008, para 46.

which deemed the transfer of budgetary competences to the HJC as an unconstitutional provision.

5. Immunity

The provisions on immunity should be specified so that they do not only apply to judges only, but also to lay judges, because they, like professional judges, express their opinion and vote when a court decision is made. Also, they should be expanded so that judges and lay judges cannot be liable for opinions expressed in court proceedings and when voting for a court decision, and outside court proceedings for opinions given to protect judicial independence. This implies that "judges... 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)", it is stated in the Study No. 494/2008, in paragraph no. 59, 61.

Furthermore, the immunity for criminal and civil liability is also mentioned in CCJE Opinion No. 3, which expresses the principled position that such liability of judges (criminal liability) should not be encouraged by regulations and that it should not be a rule.[14]

6. Liability for damage

The provisions of the Law regulating the liability of judges for damage should be harmonized with international legal standards and Article 22 of the Magna Carta of Judges, which stipulates that it is not appropriate for a judge to be exposed to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.

The liability of judges is also mentioned in the European Charter on the Statute for Judges, Article 5 of which states: "Compensation for harm wrongfully suffered as a result of the decision or the conduct of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof".[15]

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14 CCJE Opinion No. 3, Article 4

15 European Charter on the Statute for Judges.

A special section on the liability of judges, both civil and criminal, can be found in Opinion no. 3 of the Consultative Council under point 4, which is entitled "Criminal, Civil and Disciplinary Liability of Judges". It is stated that the judge should be exempted from civil liability for damage and that in certain cases, the dissatisfied party can submit a reimbursement claim to the state only. However, in some cases, recourse can be requested from the judge if it is a matter of "gross and inexcusable negligence".[16]

7. Right to association

The provisions of the Law, which regulate the right to association must guarantee not only freedom of association but also of public action, and thus, also freedom of expression. They must guarantee the freedom of association in professional associations with the aim of improving the profession, protecting the autonomy and independence of courts and judges. This is said in the Report of the Venice Commission on the Freedom of Expression of Judges.[17]

8. Participation in making decisions of importance for the work of the courts

Harmonize with Art. 9 Magna Carta of Judges. The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation).

9. The right to professional development and training

Since the initial and in-service training are both the right and the duty of judges, and as they should be organized under the supervision of the judiciary[18], it is necessary to harmonize the solutions with the Law on the Judicial Academy, i.e., review certain solutions provided by that Law.

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16 Examples of Czech Republic and Italy are quoted: „The state may be held liable for damages caused by a judge's illegal decision or incorrect judicial action but may claim recourse from the judge if and after the judge's misconduct has been established in criminal or disciplinary proceedings. In Italy, the state may, under certain conditions, claim to be reimbursed by a judge who has rendered it liable by either wilful deceit or "gross negligence", subject in the latter case to a potential limitation of liability."

17 Opinion No. 806/215 of Venice Commission, Report on the Freedom of Expression of Judges

18 With reference to Article 8 of Magna Carta of Judges.

Training is provided, as mandatory and at the expense of the state, by the European Charter on the Statute for Judges, and in paragraph 2 it is stated that "the appropriateness of training programmes and of the organization which implements them" should be ensured. The right to training and the legal level which guarantees the right are regulated by CCJE Opinion No. 4, which refers to and quotes the European Charter and the Explanatory Memorandum as follows: "Any authority responsible for supervising the quality of the training programme should be independent of the Executive and the Legislature and at least half its members should be judges. The Explanatory Memorandum also indicates that the training of judges should not be limited to technical legal training, but should also take into account that the nature of the judicial office often requires the judge to intervene in complex and difficult situations". [19] A specific topic is the specialization of judges, which is stipulated in CCJE Opinion No. 15 (2012), and in this sense the advantages and disadvantages of the specialization of judges are highlighted - point A, paragraph 8.[20]

10. Election and termination of office and number of judges and lay judges

Must be harmonized with the amendments to the Constitution.

It is necessary to determine the legal framework that will ensure that the selection of candidates for the election of judges is positive. Apart from the conditions stipulated in the currently valid Law on Judges, in Articles 43 and 44, which are not sufficient because many candidates meet the stated criteria, the nomination, election and promotion procedures should be based on clear, objective and pre-determined criteria, which is also foreseen as one of the goals of the Judicial Development Strategy for the period 2020-2025. In this sense, it would be unacceptable to introduce the obligation of yet another exam and narrow the pool of candidates to those who attended the Judicial Academy.[21]

11. Employment rights of a judge

The employment relationship of judges is not precisely legally defined. Subsidiary application of the *Labour Law* in practice has set off many disputed

19 CCJE Opinion No. 4, citing the European Charter and the Explanatory Memorandum

20 CCJE Opinion No. 15 (2012) on the specialization of judges

21 To remind, the Venice Commission warned Serbia that if the Judicial Academy remains in the draft amendments to the Constitution, it must have guarantees of independence.

issues (such as the calculation of judges' salaries during annual vacations, allowances for separate living, etc.).

Re. 2 The status of judges and the tenure of the judicial office – removal, transfer, assignment

This chapter elaborates some previously mentioned principles, including their repetition. The tenure of the office implies that it lasts from the election as a judge until the conditions for the termination of the judicial office are met.

1. Removal from judicial office and reasons for removal

There is a dilemma whether, in addition to mandatory removal due to detention, there should also be an optional removal, which leads to unequal treatment, thus creating room for abuses and influence on judges. In any case, the Law must precisely define the cases when a judge could be removed from office (Recommendation No. R(94)12, in Principles VI (2) and (3) of the Committee of Ministers of the Council of Europe). Also, the decision on removal (Article 15), at least on optional removal, should not be made by the president of the court, of the immediately higher court, nor by the president of the Supreme Court, but by the HJC. That recommendation proposes a special independent competent body, and the European Charter also assigns that role to an independent body.[22] The duration of the removal should also be adjusted to the standards, and instead of the right to appeal, as with other decisions of the HJC, the possibility of appeal to the CC should be introduced.

Related to the above is the issue of disciplinary liability of the judge, which is regulated in Recommendation no. R(94)12, paragraph 57. The Recommendation states: "Principle VI(2) and (3), insists on the need for precise definition of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on Human Rights." Additionally, it says that "states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a

[22] It is also important to consider negative comparative legal experiences, such as Poland, where a new body was formed - the Disciplinary Commission at the Supreme Court, which dismissed a large number of judges. However, under pressure from the EU, Poland began to change that institutional framework. See: The disciplinary regime for judges in Poland is not compatible with EU law (europa.eu) Polish parliament approves abolition of judicial disciplinary chamber at heart of EU dispute | Notes From Poland.

superior judicial organ itself". The European Charter assigns that role to an independent body anNed suggests that it "intervenes" in all aspects of the appointment and promotion of all judges.

2. Irremovability of a judge (Articles 18–21 of the Law)

The legal solution for the irremovability of judges should have a precise norm to reduce the possibility of transfer as a punitive measure against judges and prevent abuse of that institute. Hence, it should be provided that the consent of the judge is necessary for both transfer and assignment, but also to specify the reasons and conditions for exceptional removability without consent, by specifying first the type of court to which the judge may be transferred or assigned, with a guaranteed salary which is more favourable to him/her. This is necessary in order to provide the judge with an appropriate or similar position and level of income. To provide legal protection to a judge who believes that his/her independence is jeopardized by the HJC's decision on the assignment or transfer, it is necessary to provide for the possibility of an appeal with the Administrative Court, which does not exclude the possibility of a constitutional appeal.

The existing legal solution envisages the possibility of assigning a judge to another state body, institution. That provision should be deleted because the constitutionality of such a decision is questionable, especially when it comes to assigning a judge to the Ministry of Justice as an institution of another branch of government. However, even then, it should be stipulated if and when the exemption from judicial function is mandatory, as well as the obligation of an independent body to decide on a possible conflict of interest.

That section represents the elaboration of Principle 2. Accordingly, the term defined in Article 18 should be harmonized with Amendment XI - transferred or assigned to another court with his/her consent, therefore, not to a state body or institution, and especially not to the Ministry responsible for judicial affairs. Article 19 "Transfer" should be harmonized with Amendment XI (of the same type and level or another level, guaranteeing the salary s/he had in the court from which s/he was transferred if it is more favourable).

It is necessary to envisage the right of appeal to the Administrative Court, which does not exclude the possibility of a constitutional appeal (separate, different procedures). Article 20 "Assignment to another court" should be harmonized with Amendment XI, which implies the same guarantees as in the case of transfer. In practice, transfer and assignment were used as mechanisms of influencing a judge, as ways of rewarding or punishing. The constitutionality of

Article 21 "Assignment to another State Body, Institution" is debatable in view of Article 147 of the Constitution, which only provides for another court. This particularly pertains to the Ministry of Justice, as another branch of government. It is also questionable from the point of view of international legal standards, although there are such possibilities in comparative law. However, even then, it should be regulated whether and when it is mandatory to be discharged from the judicial function, as well as the obligation of an independent body to decide on a possible conflict of interest.

3. Mutual independence of judges (Articles 22–29 of the Law)

That section elaborates on the principle of independence. However, given that in practice the presidents of the courts use the change of annual tasks as a mechanism for sanctioning and rewarding individual judges and influence the distribution of cases, and thus the unequal workload of judges, endangering the right of citizens to an independent and impartial judge, it should be considered as a special neuralgic point (perhaps entirely related to point 4 "Court Presidents"). Amendments should also be considered in accordance with CCJE Opinion No. 19 (2016) on the role of court presidents.

Related, Opinion No. 19 points to the fact that the judge is free from pressure from the court president: "There are several principles that are essential in the relations between the court president and other judges of the court and the work of the court president in this context. Internal judicial independence requires that individual judges be free from directives or pressure from the president of the court when adjudicating cases". Opinion No. 19 itself refers to two sources – CCJE Opinion No. 12 (2009), Bordeaux Declaration, paragraph 11, and CCJE Opinion No. 7 (2005) on justice and society.[23]

Specific proposals should be made in accordance with international legal standards, but in any case, consider the possibility that the change of annual tasks must be carried out by a justified decision with a precise quantitative definition of the needs of the court, but also the capacity of the judge to perform the tasks to which s/he is assigned.

Regarding the schedule of cases, in CCJE Opinion No. 19 (2016) it is stated: "Cases should be allocated to judges in accordance with objective pre-established criteria. They should not be withdrawn from a particular judge without valid reasons. Decisions on the withdrawal of cases should only be taken on the basis of pre-established criteria following a transparent procedure. Where the court

[23] Opinion No. 19 (2016), paragraph 13

presidents have a role in the allocation of cases among the members of the court, these principles should be followed". The opinion in connection with the cited refers to the Council of Europe Plan on Action on Strengthening Judicial Independence and Impartiality (CM(2016)-36final), Action 2.1. The assignment of cases to judges is also regulated in the Study of the Venice Commission No. 494/2008, Article 11[24], and in particular, it should be noted that the Study emphasizes, with reference to Recommendation (94)12, which contains principles (Principles I.2.e and f), that the principle of allocation of cases is very important for the principle of independence of judges. Perhaps we should also look at the Croatian Law on Judges, Article 11 of which leaves the possibility for the immediately higher court (the president) to assign the case to another court with real and territorial jurisdiction.

Also, since the random allocation of cases is an exception and not a rule, for judges who are "uncooperative" with the court president, in addition to the right to objection (Article 26), the right to appeal the decision of the president of the immediately higher court to the HJC should be provided for, since in that case the judge does not have the right to appeal to the HJC, in the sense of the current Article 29 (because a special procedure is envisaged). Furthermore, it is necessary to consider the introduction of the protection of a judge from influence in the exercise of the judicial function in special proceedings.

The deadlines stipulated in Article 28 (the obligation of the judge to report to the court president for each case why the first-instance proceedings have not been completed within one year and to report to him/her every three months on the further course of the proceedings) are unrealistic in some courts, given the number of cases, and Article 90 stipulates failure to act as a form of disciplinary offense.

In connection with the deadlines, that is, the need for the court presidents to schedule a hearing within a reasonable time, CCJE Opinion No. 19 refers to the Revised Saturn Guidelines for Judicial Time Management (CEPEJ(2014)16[25], Time management Checklist, CEPEJ(2005)12REV).[26]

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24 Study of the Venice Commission no. 494/2008, Article 11

25 *Revised Saturn Guidelines for Judicial Time Management*, https://rm.coe.int/16807482cf

26 Guidelines for Judicial Time Management (in Croatian), https://rm.coe.int/europska-komisija-za-ucinkovitost-pravosu-a-cepej-pokazatelji-za-uprav/1680747bb6.

4. Relationship of judgeship to other functions, engagements and activities (Articles 30 and 31)

This section was previously commented on in relation to the principles. The current prohibition of judges to "act politically in some other manner" should be clarified, as it is rather vague and may be subject to abuse.

5. Performance evaluation of judges

An important point of view regarding evaluation is expressed in CCEJ Opinion No. 17 (2014) on performance evaluation of judges.

In that Opinion, a distinction is made between *formal and informal evaluation systems*, the criteria used during evaluation, how evaluations are performed, who performs evaluations, or who collects data for the evaluation, etc. The evaluation of judges is also discussed in Recommendation CM-Rec(2010)12, paragraph 58, where it is stated: "Where judicial authorities establish systems for the assessment of judges, such systems should be based on objective criteria. These should be published by the competent judicial authority. The procedure should enable judges to express their view on their own activities and on the assessment of these activities, as well as to challenge assessments before an independent authority or a court".

So far, it has not been a distinct neuralgic point, but considering that it is possible that the evaluation "score" directly conditions the salary - pension (which is contrary to paragraphs 28, 45 of the mentioned Opinion), it can become a new channel of influence, such as the case with employees and civil servants in the judiciary. In any case, the objective quantitative and qualitative criteria of the evaluation, the objective of the evaluation, the sources of evidence of the evaluation, the fairness of the procedure, and the possibilities that judges express their opinion on the procedure and the proposed conclusions of the evaluation must be foreseen. The principles and procedures of the evaluation must be available to the public, but the results of individual evaluations must in principle remain confidential in order to guarantee the independence of the judge.[27]

[27] See, e.g., Pim Albers, Performance indicators and evaluation for judges and courts, https://rm.coe.int/performance-indicators-and-evaluation-for-judges-and-courts-dr-pim-alb/16807907b0.

6. Financial status of a judge

The provisions of Articles 37-42 regulate the basic salary, salary groups, coefficients, salary of the court president and his/her deputy, assigned and transferred judges, as well as salary increases. However, it is not regulated, in the sense of Amendment V, that the salary cannot be reduced, nor is it envisaged that it must be adjusted to the increase in the cost of living. The accounting system is the same, which is why problems have occurred in practice.

That is why it is necessary to replace the term wage with the term salary, and then clearly define salary, salary remuneration and other incomes, and thus precisely determine the coefficient in terms of what it contains. In connection with salary remuneration, it should be clearly defined what the employee's right is and what the possibility is, and what the condition is for realizing that possibility.[28]

All this is necessary in order to make a clear distinction between the income related to the employee's work and the income related to the employment of the employee. Also, universal salary institutes, salary remuneration, expense reimbursement and other benefits should be included into the Law on Judges as a special law in proportion to the specificity reflected in specificity of the subjects (judges and presidents of courts).

Related, in the section entitled "Financial independence", the documents concerning the salary of judges, social welfare, etc. are discussed.

Re. 3 Election of judges

1. Election requirements (Articles 43–46 of the Law)

In connection with this group of provisions of the Law, it is necessary to determine the exclusive jurisdiction of the HJC for the election of all judges[29], court presidents and lay judges and precisely define both general and other criteria and mandates.

In terms of Amendment IX, in Article 43, work experience required for a particular court should be added. In connection with Article 44 and the required

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28 Defining salary and remuneration requires a clear distinction in relation to reimbursement of expenses and, finally, other income. This defines the right to the possibility of reimbursement of expenses and the right to other incomes.

29 The Judicial Academy is one of the youngest institutions, which does not have financial or other forms of independence, therefore, prescribing any initial or in-service training in that Academy as a condition for the selection of judges can represent a basis for an easy and effective political influence.

work experience, the required years of work experience should be considered in order to avoid the frequent occurrence of "skipping" instances during the election (from the basic to the court of appeal).

Recommendation No. R(94) regulates the basis for the appointment of judges in paragraph 17, the bodies that appoint judges and consultative bodies in paragraph 32, as well as the methods of appointment with specific examples of individual countries and other important circumstances. Also, within the framework of independence, the same issue is regulated by the Venice Commission in Study No. 494/2008 - the basis of appointment or promotion, the consultative body, with a reference to the CCJE Opinion No. 10 on the advice of the judiciary. In Study No. 494/2008 it is concluded: "To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges".[30] Opinion of the Venice Commission No. 403/2006 regulates judicial appointments.[31]

2. Procedure for the election of judges

So far, this procedure has had the greatest impact on the judiciary, so special attention should be paid to that group of provisions. Political authorities directly influenced the judiciary by determining who would judge. Amendments to the Constitution have not depoliticized the judiciary (new channels of influence on the election were installed). In accordance with international standards, along with a comparative legal analysis, solutions should be proposed (they should also be linked to the amendment of the Law on the HJC). In any case, the emphasis should be on the transparency in the election process, selection criteria, the possibility of filing an administrative complaint, but also a constitutional appeal.

3. Oath of a judge and taking office

In this part, according to the amendments to the Constitution, it is necessary to amend that the oath is not taken before the President of the National Assembly. Thus, for example, in Article 11 of the law on the judicial council and the courts of Montenegro, it is regulated that a judge takes an oath before the judicial council.

30 Study of the Venice Commission No. 494/2008, paragraph 32 of Article 3

31 Opinion No. 403 / 2006 of the Venice Commission, Judicial Appointments

Re. 4 Termination of judicial office

This group of provisions must regulate the status of judges in a clear way, by envisaging in detail all the grounds for the termination of a judge's office and reasons for dismissal. This is necessary as to remove constant pressure on the work of judges and prevent abuse in the interpretation of legal standards. Also, it is necessary for a judge to have the right to legal protection, i.e. to a constitutional appeal against the decision of the HJC, in addition to what has been envisaged.

Article 57 must be harmonized with Amendment X - the occurrence of conditions prescribed by law of loss of citizenship of the Republic of Serbia; grounds for the termination of a judge's office; appeal to the CC which does not exclude the right to a constitutional appeal.

1. Dismissal of a judge (Articles 62–68)

This is potentially one of the most neuralgic points. In any case, the dismissal model should be harmonized with Amendment X – "A judge shall be dismissed if s/he is convicted for a crime to a prison sentence of at least six months, or if it is established in the disciplinary procedure that s/he has committed a serious disciplinary offense which, according to the High Judicial Council, seriously damages the reputation of the judicial function or the public trust in the courts".

Pursuant to Recommendation No. R(94)12 of the Committee of Ministers of the CoE, Principles VI (2) and (3), the offenses for which a judge could be dismissed should be precisely defined.

It is also necessary to consider Recommendations CM/Rec(2010)12, paragraphs 49 and 50 (Tenure and irremovability). Paragraph 50 reads: "The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions". In addition, Article 5 of the European Charter on the Statute (Law) for Judges states: "The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority".

Accordingly, the procedure also has to be harmonized with the right to a fair trial from the Convention on Human Rights.

Re. 5 Court president

Many court presidents are under the direct influence of political authorities and, through them, the most direct influence on the independence of judges is exerted. The influence is focused on how judges should judge and adjudicate and, depending on that, what conveniences and benefits they will have in court, or, how they will be "punished". Since the appointment of court presidents by the HJC will not eliminate the influence of political authorities on court presidents, it is expected that this channel of influence will continue to exist, which is why a special attention should be paid to that group of provisions of the Law. Proposals should be based on the analysis of legal solutions of countries similar to ours and international legal standards (e.g., CCJE Opinion No. 19).[32]

The role of judicial-administrative councils should also be considered; Requirements for the Election of Court Presidents (Article 69 of the Law); whether, apart from the prescribed criteria, it should be determined how many years the candidate must hold the office of a judge in the court (in order to prevent his/her election to that court immediately after the appointment as the president); Term of Office (Article 72) should be harmonized with Amendment XV (elected by the HJC for five years without the possibility of re-election); Acting President of the Court (Art. 73) is one of the effective mechanisms to ensure the loyalty of the president of the court, so it should be considered whether that function should be kept at all - in any case, stipulate that it cannot last longer than six months without the possibility of appointing a new person in the function; delete that the president of the court does not retire if s/he has reached the retirement age during his/her term of office (so far it was a mechanism for ensuring loyal and obedient presidents); delete paragraph 3 of Art. 76, , according to which the dismissal procedure is initiated upon the proposal of the Minister responsible for justice (contrary to the principles of the rule of law - interference of the executive power in the judicial); when it comes to the Decision on Dismissal (Art. 77), the same legal protection and guarantees should be provided as for judges; when it comes to the President of the Supreme Court (Art. 79), the decision should be harmonized with Amendment XV, which stipulates that s/he is elected by the HJC for a five-year term, without the possibility of re-election.

32. CCJE Opinion No.19 on the role of court presidents

Re. 6 Special provisions on lay judges

Requirements for Appointment (Art. 81) – debatable application of the disqualifying condition – "or act politically in some other manner" – as already explained for judges - abuses are possible, because it is an indefinite term; Procedure and Appointment (Art. 82) - not on the proposal of the Minister responsible for justice; the procedure must be public, transparent, carried out according to previously clearly established criteria, it should be based on a competition, with the obligatory opinion of the assembly of all the judges for which s/he is chosen; Removal from Office (Art. 86) – as for judges; Termination of Office (Art. 86) – same legal protection as for judges.

For lay judges and specialized judges, see CCJE Opinion No. 15, on the specialisation of judges, which also indirectly concludes about judges who are not experts.

Re. 7 Disciplinary liability of judges

Proposed solutions should be designed in accordance with the adopted standards, but also with the opinions and recommendations of relevant authorities. In any case, introducing a new disciplinary offense should be considered - "exerting influence on a judge in the performance of the judicial function" (in order to prevent the influence of the court presidents, i.e. within the judiciary).

Disciplinary and ethical liability should be distinguished.

In this sense, paragraph (Article) 18 of the Magna Carta of Judges reads: "Deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training". Also, a special part is dedicated to the Codes of Ethics accepted by judges in CCJE Opinion No. 3, where among else, in paragraph 43, Article 2, it is stated: "Other countries, such as Estonia, Lithuania, Ukraine, Moldova, Slovenia, the Czech Republic and Slovakia, have a "judicial code of ethics" or "principles of conduct" adopted by representative assemblies of judges and distinct from disciplinary rules".

Legal protection should also be provided in accordance with Article 6 of the Magna Carta of Judges. An independent body must conduct the disciplinary proceedings, with the possibility of addressing the court.[33]

In the part of Recommendation No. R(94)12, paragraph 32, entitled "The Appointment and Consultative Bodies", it is mentioned that such bodies should, among other things, be responsible for the disciplinary liability of judges. Disciplinary measures are regulated in paragraph 57 of CCJE Opinion No. 1, with reference to Recommendation No. R(94)12.

Furthermore, CCJE Opinion No. 3 regulates issues related to the conduct of judges (ethics, inappropriate conduct and impartiality) and, in this connection, disciplinary liability. In point B, Article 4, a distinction is made between criminal, civil and disciplinary liability. In that part, the disciplinary liability of judges is regulated in more detail, with concrete examples of some countries. Based on examples from different countries, the Report on Freedom of Expression for Judges asserts what kind of judges' conduct are subject to disciplinary liability.[34] Also, the political activity of a judge is a reason for disciplinary liability, and the Explanatory Memorandum contains provisions on this in Chapter VII.

[33] Paragraph 72 of CCJE Opinion No. 3 reads: "In some countries, the initial disciplinary body is the highest judicial body (the Supreme Court). The CCJE considers that the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court".

[34] The example of Croatia is mentioned in paragraph 17 of the Report: "According to the Law on High Council of Justice, violation of official secret relating to the performance of judicial duties and damaging the reputation of the court or judicial office are considered as disciplinary grounds". In Germany, culpable violation of an official duty is a reason for initiating disciplinary proceedings. Preserving the dignity of the judicial profession is the obligation of the judge, and a failure to comply entails disciplinary liability in Russia, etc. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)018-e