DOI: 10.19266/1829-4286-2016-01-45-54

The International Principles Governing a Good Administration of Justice

GIORGIO MALINVERNI
University of Geneva, Switzerland

The formation and consolidation of the judiciary is one of the most complicated and core issues facing post-Soviet transformation states. It is the last instance where the decisions of the state authorities can be appealed ensuring the protection of human rights and liberties, and the trust in state authorities. The independence and impartiality of the judges as well as the insurance of their remuneration constitute the basis of a good administration of justice. In post-Soviet transformation states the main obstacles to this are the legacy of judicial system based on other principles, as well as the lack of appropriate culture and traditions.

Keywords
Justice, the judiciary, independence of judges, irremovability, impartiality, remuneration

The relevant documents

At the *European* level, the international organization having produced the most important documents on a good administration of justice is no doubt the Council of Europe. This work has been performed by several organs of the Council, of whom it is one of the most important tasks, according to its own statute. The most important text is no doubt Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial. This provision, which has generated a very large case law of the European Court of Human Rights, has exercised an incredible influence on the organisation of justice in the 47 member States of the Council of Europe.

In addition to this legally binding provision, one should also mention some other documents. Even if they belong to the so-called *soft law*, they have a significant impact on the improvement of the

administration of justice all over Europe and the Strasbourg Court does not hesitate to quote them in its judgments. The most important are:

- Recommendation (2010) 12 of the Committee of Ministers, on the independence of justice, of 17 November 2010;
- Opinion N°1, on the standards of the independence of the judges and of their irremovability, adopted by the Consultative Council of European Judges (CCEJ);
- Opinion N° 6, adopted by the same council, on the notion of fair trial in a reasonable time;
- Opinion N° 10, still adopted by the same council, on the Council of the Judiciary at the service of the society;
- Still from the same body, Opinion n° 11, on the quality of judicial decisions;
- The European Charter on the statute of judges, adopted in July 1998;
- Many opinions of the Venice Commission, the most important one being the report on the independence of the judicial system (Part I: the independence of the judges, of March 16, 2010 (CDL-AD (2010) 004).

At the *universal* level, one should mention Article 10 of the Universal Declaration of Human Rights, as well as Article 14 of the international Covenant on civil and political rights. They guarantee approximately the same rights as Article 6 of the European Convention.

A resolution of the General Assembly of the United Nations of 1985, on the independence of the judiciary, should also be cited here, as well as the so-called Bangalore Principles of 2002. Based on all these texts, the following observations may be made.

First, they guarantee only the basic principles, the minimum standards all States should apply. Second, they very often leave to the States a choice among several possible solutions, which are all considered as being in conformity with the international standards. Third, one very often gets the impression that some of the recommendations they contain concern principally the so-called “new democracies”, which do not still have solid democratic traditions and institutions.

The independence and impartiality of the judiciary

The independence of the judiciary has both an *objective* and a *subjective* dimension. In its objective meaning, the independence of the judiciary is an indispensable dimension of the judiciary. In its subjective meaning, independence refers to the right of every individual to have its rights protected by an independent judge. Without independent judges, there cannot be a good administration of justice. Only independent judges are able to fulfil their role of guardians of civil rights and liberties.

The independence of the judges depends on several factors: in addition to institutional elements, the personality and the professional qualities of the judges play a major role. As far as the institutional factors are concerned, States shall adopt rules to enable them to select the most qualified lawyers to perform judicial activities. A framework should also be defined, within which judges may exercise their activities without being submitted to external influences. The above-mentioned documents usually make a distinction between the necessity to protect judges against *external* influences and the requirement to safeguard their *internal* independence.

The external independence. The external independence shall protect judges against any influence from another State organ, be it the executive or the legislative. This aspect of the independence is a corollary of the principle of the separation of powers, and it is expressly mentioned at paragraphs 11 ss. of Recommendation (2010) 12 of the Committee of Ministers of the Council of Europe[1]. What is often difficult to address is to determine what may constitute an inappropriate influence, and to manage a fair balance between the necessity to protect a trial against pressures from political actors or from the press and the interest to discuss freely subjects of public interest in the public opinion and in free medias[2]. What is sure is that judges must admit that they are public figures[3].

[1] ECtHR, *Volkov v. Ukraine*, 9 January 2013.

[2] For the Venice Commission, " in order to shield the judicial process from undue pressure, one should consider the application of the principle *sub judice*, which should be carefully defined, so that an appropriate balance is struck between the need to protect the judicial process on the one hand and the freedom of the press and

a) *The principle of immunity*. The principle of immunity of judges is closely linked to that of the external independence. This issue has been dealt with in Opinion N° 3 of the Consultative Council of European Judges.

As far as *criminal* liability is concerned, judges should be held responsible only for breaches committed outside their judicial functions. With very exceptional situations, like cases of corruption, they cannot be held criminally liable for mistakes or errors committed in the exercise of their functions[4]. Remedies to potential judicial errors shall indeed be sought in an efficient system of appeal to the superior instance.

As far as *civil* liability is concerned, a remedy to potential judicial errors, in relation to the jurisdiction of the tribunal, to the merits of the judgement or to the rules of procedure, should also be sought in an appropriate system of appeals. An unsatisfactory administration of the civil justice, for example unreasonable delays, should not in principle be attributed to this or that judge. The responsibility for such a situation should be attributed to the State. Apart from very exceptional situations, the personal liability of a judge is not engaged.

b) *The incompatibilities*. Another consequence of the external independence of the judiciary is the system of incompatibilities. Judges should avoid finding themselves in a situation in which their independence and impartiality could be questioned. For this reason, the incompatibilities regime forbids that judges perform other activities, except, to some degree, teaching at the University.

c) *The impartiality of the judges*. Article 6 ECHR guarantees the right to be tried by an independent and an impartial tribunal. The notion of impartiality is very close to that of the independence. In practice very often these two guarantees are examined together.

---

open discussion of matters of public interest on the other" (CDL-AD (2010 004, para. 64).

[3] CCEJ, Opinion N° 1, para. 63.

[4] CCEJ, Opinion N° 3 : "Criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions (para. 75) ; Venice Commission, CDL-AD (2010)004 : "Judges should enjoy functional – but only factual – immunity (immunity from prosecution for acts performed in the exercise of their functions), with the exception of intentional crimes, e.g. taking bribes" (para. 61).

The European Court makes a distinction between *objective* and *subjective* impartiality. The latter means the absence of any prevention towards the accused person. But the impartiality of a judge must also be appreciated objectively. What is important here is the appearance. If the circumstances of a given case create the appearance of a prevention of a judge towards the accused, that judge cannot any more be considered as impartial (*justice must not only be done: it must be seen to be done*). The criteria to be taken into consideration to hold a judge as impartial (in the objective sense) are, for instance, that the same judge has successively dealt with the same case in different positions[5], the fact that he already sat on the bench in another case, but concerning the same person etc.

The main consequence of the principle of impartiality is the right of the accused person to decline a given judge, and the obligation of the latter not to sit on the bench.

d) *Judgements shall be final and binding.*One more characteristic of the external independence of the judges is that their decisions are final and binding. Of course this does not exclude the possibility of reopening the procedure in cases where the law allows this possibility, for instance if new facts are discovered. But the so-called "supervisory review" proceedings, as they existed in the post-soviet States, are not accepted by the Strasbourg Court[6], because they questioned judgments already in force, having acquired a *res judicata* status, and because the time limit within which an appeal could have been lodged had already expired.

As the Venice Commission quite rightly pointed out, "judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other State body outside the time limit for an appeal"[7].

The internal independence. Though this aspect of the independence of the judiciary has not attracted the interest of scholars as much as the one of the external independence, it is not less important. The principle of the internal independence is expressly mentioned in paragraph 22 ss. of the above mentioned Recommendation (2010) 12. It requires that, in their

[5] ECtHR, *De Cubber v. Belgium*, 14 September 1987.
[6] ECtHR, *Irina Fedotova v. Russia*, 19 January 2007.
[7] Venice Commission, CDL-AD (2010)004, para. 67.

judicial activities, judges are not hierarchically subordinate to the President of the tribunal or to any other superior instance[8].

Every judge, whatever his position within the court, performs his duties in the name of the State and is responsible only to the law: "judges are subject only to the law". When a judge decides a case, he must not receive any instruction, even from the tribunal where he sits[9].

An important aspect of the internal independence is the attribution of cases to the various judges of the tribunal. What should absolutely be avoided is that, by attributing a file to a certain judge the president of the tribunal tries to influence the issue of the trial. Recommendation 2010 (12) thus insists on the fact that the attribution of files to the various judges should not be dictated by the wishes of the parties. Preference should be given to a system based on the alphabetical order of the names of the judges, or by lots. In other words judges should not be selected on an *ad hoc* and/or *ad personam basis,* but according to transparent criteria. In addition, once a file has been attributed to a judge, it should not be withdrawn, except in very exceptional cases, such as the illness of the judge. The proceedings by which a case is withdrawn must be provided for by the law and rely on objective criteria[10]. By stating that every person has the right to be tried by an independent and impartial tribunal, Article 6 ECHR guarantees implicitly that the organisation of the judiciary cannot be left to the discretion of the judicial power[11].

[8] For the Venice Commission, "granting the Supreme Court the power to supervise the activities of the general courts would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify the judgments of lower courts, it should not supervise them" (CDL-INF (1997) 6, para. 6.

[9] According to the CCEJ, "the fundamental point is tht a judge is in the performance of his functions no-one's employee ; he or she is holder of a State office. He or she is thus servant of, and answerable only to the law… 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 law" (Opinion N° 1, para. 64 and 66).

[10] ECtHR, *Koudeschkina v. Russia*, 26 February 2009.

[11] ECtHR, *Coëme and others v. Belgium*, 22 June 2000.

The competent authority to appoint judges

Most of the above mentioned documents recommend that decisions concerning the appointment of judges and their career be based on objective criteria. Their advancement and promotion should be based on their qualifications, their efficiency and integrity[12]. The merit of a judge should not be measured solely according to his legal knowledge or his analytical skills. His ability to deliver judgments should also be taken into consideration.

While accepting other systems, Recommendation (2010) 12 of the Committee of Ministers shows a preference for a specialised body, such as the Council for the Judiciary, to appoint judges. What is decisive for the authors of this text is that the body entrusted with the task of appointing and promoting judges be independent from the Government and from the Parliament. To guarantee such independence, it is imperative that the members of the Council of the Judiciary are themselves appointed – at least in part – by the judiciary itself and that the Council has the power to adopt its own rules of procedure.

In its opinion N° 10, the CCEJ shows a preference for a body with a mixed composition, i.e. composed of judges and other lawyers (advocates, professors of law), so that the point of view of other categories of lawyers is also reflected[13].

In its report of 2010, the Venice Commission shows also a preference for a mixed composition of the Council of the Judiciary, and insists on the fact that a substantial part of its members should come from among the judges and that the latter should be elected by their peers.

[12] Opinion N° 1 of the CCEJ recommends that "the authorities responsible in member States for making and advising on appointments and promotions should introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career are based on merit, having regard to qualifications, integrity, ability and efficiency" (para. 25).

[13] "The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided » (para. 16). In addition, "such a mixed composition would present the advantage of reflecting the different viewpoints within the society, thus providing the judiciary with an addtitional source of legitimacy" (para.19).

But the Venice Commission also notes that many different systems coexist in Europe. In the old democracies, the executive power sometimes has a decisive influence in the appointment of judges. In these countries, the procedures of designation should be transparent and the decision be based exclusively on objective criteria. Such systems can produce satisfactory results, because the influence of the executive power is in a way compensated by an old judicial culture.

In the so-called new democracies, where such an old judicial culture and tradition does not exist yet, a control by an independent body, such as the Council of the Judiciary, is necessary. The election of judges by Parliament is not recommended, because of the risk that political considerations will prevail. For the Venice Commission "appointments of judges of ordinary (non constitutional) courts are not appropriate objects for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded"[14].

To conclude this item, most of the above mentioned documents show a preference for a mixed composition of the Council of the Judiciary, and Recommendation 2010 (12) adds that judges should be in the majority, or at least in equal number with the representatives of other legal professions.

The duration of the mandate and the irremovability of judges

Recommendation (2010) 12 states that judges, whatever the way they have been appointed, should be guaranteed the right to remain in place until the end of their term or until they retire (para. 49). It also recommends that they have a full time activity. For the CCEJ, "this is the approach less problematic from the viewpoint of independence"[15].

The European Charter on the status of judges, as well as Opinion N°1 of the Consultative Council of European Judges both recommend that, in case of a temporary or a provisional appointment of a judge, the transformation of his position into a full time post be made in transparency and on objective criteria. Precarious mandates should, as far as possible, be avoided, because they can compromise the independence of judges. For the Venice Commission, "setting probationary periods can

[14] Venice Commission, CDL-AD (2007)028, para. 47.
[15] CCEJ, Opinion N° 1, para. 48.

undermine the independence of judges, since they might feel under pressure to decide cases in a particular way"[16]. The Venice Commission nonetheless recognizes that, in some countries probationary periods are sometimes necessary to make sure that a judge has the required qualifications. In such cases, "a refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office"[17]. And the Venice Commission added that "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of a judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value"[18]. Recommendation (2010) 12 guarantees the principle of the *irremovability* of judges and, according to the CCEJ, this principle is inherent to a genuine independence. For that reason, "it should be an express element of the independence enshrined at the highest internal level"[19]. A consequence of the principle of irremovability is that a judge cannot be moved to another tribunal without its express consent. According to the European Charter, "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"[20]. Only a very limited number of exceptions may be made to this fundamental principle, for example to strengthen temporarily an overburdened tribunal. As far as disciplinary measures are concerned, they may be ordered only by the Council of the Judiciary, where it exists, or by a disciplinary tribunal. In addition, an appeal should be possible against any disciplinary measure taken against a judge. For the CCEJ, "the intervention of an independent authority, with procedure guaranteeing full rights of defence, is of particular importance in matters of discipline"[21].

[16] Venice Commission, Document CDL-AD (2007) 028, para 40. See also European Charter, para. 3.3.
[17] Venice Commission, document CDL-AD (2007) 028, para. 41
[18] Idem, para. 44.
[19] CCEJ, Opinion N°1, para. 60.
[20] European Charter, para. 3.4.
[21] CCEJ, Opinion N° 1, para 60. See also Venice Commission, Document CDL-AD (2007)028, para. 49.

The remuneration of judges

Almost all the relevant documents mentioned above deal with the issue of the remuneration of judges, which should be appropriate and in relation to the importance of the task they fulfil. It should in any case be sufficient to protect them from any external influence. For the CCEJ, "it is important (and especially so in relation to the new democracies) to make specific legal provisions guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living"[22]. Retired judges should also be provided with a convenient pension. For the Venice Commission, the salaries of the judges should never be calculated on the basis of their performances and bonuses should be prohibited.[23] As far as the budget allocated to the judiciary is concerned, it should be sufficient to ensure a genuine independence of the courts. For the Venice Commission, "it will be necessary to provide the Courts with resources appropriate to enable them to live up to the standards laid down in Article 6 of the European Convention on human Rights… and perform their duties with the integrity and efficiency which are essential to the fostering of public confidence in justice and the rule of law"[24].In addition, the judicial power should be heard when the Parliament votes the State budget. For the CCEJ, "although the funding of courts is part of the State budget presented to Parliament, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting the budget. Decisions on allocation of funds of the courts must be taken with the strictest respect for judicial independence"[25].

[22] CCEJ, Opinion N° 1, para. 62.
[23] Venice Commission, Document CDL-AD (2010) 004 para. 46.
[24] Venice Commission, Document CDL-AD (2010) 004.
[25] CCEJ, Opinion N° 2, para. 5.