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Speech

Selection, Promotion and Training of Judges: Impact on Judicial Accountability and the Integrity of the Justice System

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Ladies and gentlemen,

It is a real honour and a privilege to join you today on such an important topic. I would like to thank the organisers for their kind invitation and their hospitality! Only last week I attended a conference in Helsinki and it seems fitting to find myself a week later at the OSCE Human Dimension seminar. This morning our Working Group will look into certain aspects of judicial independence, integrity and accountability. I have been asked by the organisers to get our discussion started in a 15 minute introduction. Instead of already discussing some of the technical standards regarding selection, promotion and training of judges, I would like to use those 15 minutes to give you some personal observations concerning the backdrop of that discussion.

The importance of the judiciary for the proper functioning of a state governed by the Rule of Law has often been underestimated. Politicians and public debate in the media have focused more on the need for democratic legitimacy that is ensured by parliamentary control. The ‘silent’ third power, the institution that ensures the peaceful settlement of disputes and the supervision of the executive, has long remained in the background.

Certain societal developments have changed the outlook of the judiciary. A research in 2001 pointed out that, of all the public authorities, it is probably the judiciary, which has changed the most in European societies.

- First, the role of the judiciary vis-à-vis the other state powers has grown in importance as a result of societal changes. Societies nowadays are much more based on individualism than a few decades ago. Modern societies consist of emancipated citizens. As a result thereof, there is a tendency for citizens to challenge decisions affecting their rights or interests and to commence legal proceedings before judicial authorities.
- Second, the functioning of the judiciary has become more and more 'politicised'. Increasingly, judges do not only apply and interpret the law. They make policy-related choices in their judicial decisions. This process is stimulated by the increasing use of so-called open or vague norms by some legislators in order to ensure the necessary level of flexibility when applying the law (and in practice equally important: to ensure the support of a parliamentary majority to adopt a certain bill). As a consequence of this legislative technique, judges are increasingly seen as a political actor, which makes the judge more vulnerable.

- Third, the role of the judge in the courtroom is changing as well. The trial judge is no longer expected to remain passive, but to assume a more active role in order to ensure the fairness of the proceedings. The case-law of the European Court of Human Rights seems to stress this point. In the *Cuscani* judgment the Court stated that the trial judge was "the ultimate guardian of the fairness of the proceedings".
- And finally, in some countries (like the Netherlands) the changing role of the judge is also the result of certain 'European' tendencies. For instance the pivotal role that is allocated to national judges in applying EU law and the European Convention on Human Rights. Especially in case the national judge was not empowered to rule on the constitutionality of ordinary laws , these European-related developments have drastically changed the role of the judiciary.

At the same time, it is fair to say that the authority and independence of judicial authorities (including Constitutional courts and European courts) has in recent years suffered. In many countries, the judiciary finds itself under political pressure and confronted with a weak framework of constitutional safeguards.

In March this year the President of the Venice Commission issued a statement expressing concerns about several cases of undue interference in the work of Constitutional Courts in its member States. As you are probably aware, there is currently a constitutional crisis in Poland which was started by a conflict over the composition of the Constitutional Tribunal. The conflict originated in the Sejm, the Polish parliament. This conflict has been used by the Sejm to curtail the powers of the CT by adopting a new Constitutional Tribunal Act. The amendments were examined by the Venice Commission who stated that the amendments “could lead to a serious slow-down of the activity of the Tribunal and could make it ineffective as a guardian of the Constitution”. A vision shared by the European Commission who discussed the situation concerning the Constitutional Tribunal in July 2016 and argued that there is a “systemic threat to the rule of law in Poland”. Constitutional democracies require checks and balances. The role of an independent constitutional court is especially important in times of strong political majorities. And the authority of such constitutional tribunals is seriously undermined if their judgments are not fully implemented which is a real concern since the authorities have threatened to impose sanctions on judges for recognizing the judgements of the Constitutional Tribunal. Equally worrying is the reaction by Poland’s ruling Law and Justice (PiS) party when these concerns are raised. When the Venice Commission visited Poland in

September this year, high-level officials described the visit as ‘meaningless’ and ‘tourism’. In effect, dialogue seems to break down between government and those who raise Rule of Law concerns.

Similar concerns exist over statements made by the President of Turkey who has declared that he will not respect a recent judgment of the Constitutional Court of Turkey, has threatened to abolish this Court, and has – following the failed *coup d’etat* – suspended more than 2700 judges while detaining many of them.

Or the front page of the British tabloid *Daily Mail* a couple of weeks ago publishing the pictures and names of the three judges ruling on Brexit and describing them as ‘Enemies of the People’?

The list unfortunately goes on and on.

Those who critically comment on government policies are targeted. That holds true for the media (for example the Hungarian ‘media package’), civil society (for example the Foreign Agent Law in Russia), international human rights bodies. But also for the independent judge, whereas an independent judiciary is – and I quote the Canadian Supreme Court [2004 SCC 42] – “absolutely necessary to ensure that the power of the state is exercised in accordance with the rule of law and the provisions of the Constitution. In this capacity, courts act as a shield against

unwarranted deprivations by the state of the rights and freedoms of individuals".

It is – obviously – dangerous to oversimplify very complex societal developments and try to give a possible reason for the above, but I think certain themes can be identified.

First, many authorities are faced with problematic societal developments, such as the fight against terrorism and organised crime, the regulation of migration and the need to take far-reaching austerity measures. Some authorities felt that Rule of Law norms made it impossible for them to initiate effective policies. Not seldom it was the judge – domestic or European – who was asked to rule on the compatibility of those national policies with Rule of Law standards. And not seldom the judge held that the new policies were incompatible with those standards.

As a consequence, a tension between the judicial domain and the political domain has arisen. Some argue that judges – including those of the Strasbourg Court – have become too decisive in modern-day societies. There is a perception that judges too easily overturn decisions taken by democratically elected representatives in Parliament. Of course, judges do more than simply apply the law; they also interpret the law. The latter function is even more important in case the legislator has used

open norms which need further clarification in legal practice. To my mind, that does not mean that judges are deliberately entering the political domain or making political choices. It means that they operate in a political context and are often asked to decide on issues which have a great societal impact.

So what can be done to guarantee the continued authority of judiciaries? I would like to highlight four elements in my speech:

- ensuring diversity on the bench (appointment policies);
- ensuring qualified judges (the importance of training);
- ensuring the integrity of judges, including vetting procedures; and
- ensuring the quality of judicial decisions, i.e. accountability.

When dealing with those issues I will focus on ordinary courts. Constitutional justice deserves some specifications; the differences between constitutional justice and the ordinary administration of justice justify for example different appointment procedures.

Ensuring diversity on the bench: appointment policies

Who appoints members of the judiciary, *how* are they appointed and how do we ensure that we get the best possible judges? Choosing the appropriate system for judicial appointments is one of the primary challenges faced by any society. At the same time, international standards allow for a wide diversity. As for example the Universal Declaration on the Independence of Justice notices, there is “no single proper method of judicial selection”. Some legal systems emphasise the fact that judicial appointments are an administrative task that belongs to the executive, although various international documents favour the involvement of independent and competent bodies advising the executive in such cases (see also CDL-AD(2007)028). Other states emphasise the need for democratic legitimacy and assign the task of judicial appointments to Parliament or to direct elections by the people (this occurs at the Swiss cantonal level but is rather exceptional). And some countries have entrusted the task of judicial appointments to an independent (judicial) body in view of the desire to avoid any appearance of improper influence by the administration. Whoever is in charge of judicial appointments, selection should be based on “merit, having regard to qualifications, integrity, ability and efficiency” (Recommendation R(94)12). The European Charter on the Statute for Judges also indicates that selection must not be based on discriminatory criteria relating to gender, ethnic or social origin, philosophical or

political opinions or religious convictions. The desirability of ‘diversity’ on the bench is highlighted more strongly in various non-European documents, such as the Syracuse Principles, the International Bar Association Code of minimum standards of judicial independence, and the Montreal Declaration which demand fair representation on the bench of the various social classes, ethnic groups, geographical regions and ideological inclinations, so as to ensure equality of access to judicial office, and a broad spectrum of community attitudes and feelings among the persons holding judicial office. So I think it is fair to say that there is a consensus within the OSCE region that judicial appointments need to be based on objective, transparent and non-discriminatory selection criteria, which can relate to formal requirements (nationality, minimum age, qualifications, professional competence, absence of any criminal convictions, et cetera), judicial skills and human skills. Although the Venice Commission has in my opinion rightly pointed out that it may be very difficult to evaluate the latter skills in practice (CDL-AD(2009)023).

One issue that has so far not received sufficient attention is whether a judicial post is always sufficiently ‘attractive’ for various groups in society and what the possible discouraging factors for candidates may be for not applying for a judicial post. I would be interested to hear your views on that during the discussion.

Ensuring qualified judges: the importance of training

In various documents the importance of proper training facilities for judges has been stressed in order to prepare judges for performing their judicial task in an independent manner (see for example Principle 2.3 of the European Charter on the Statute for Judges[1]). This seems to imply that only initial training of candidate judges is required, but the same is true for continuous training during the judicial career (see Principle III.1.a of Recommendation R (94) 12).

The European Charter on the Statute for Judges merely talks about 'appropriate training' without giving more explicit guidelines as to the contents of the training programmes. Other soft law documents refer in this respect to training on recent legislation and case-law, practical training and study visits to European and foreign authorities and courts. Training on the application of international law is also stressed in this respect.[2]

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[1] "Certain precautions must be taken in preparing judges for the giving of independent and impartial decisions, whereby competence, impartiality and the requisite open-mindedness are guaranteed in both the content of the training programmes and the functioning of the bodies implementing them."

[2] See, for example, the conclusions of the conference "The training of judges on the application of international conventions", held in Bordeaux on 2-4 July 1997, organised by the Council of Europe and the

This training can be organised either in specific institutions or through training programmes within the courts.[3] But it is stressed that a High Council of the Judiciary (or a similar body) should be involved in ensuring the appropriateness of training programmes and of the organisation which implements them. Equally, the importance of co-operation between various national training institutes is highlighted.[4] In this respect I would like to draw your attention to two noteworthy initiatives:

- The European Judicial Training Network (EJTN) which serves as a platform and promoter for the training and exchange of knowledge of the European judiciary. It develops training standards and curricula, coordinates judicial training exchanges and programmes, disseminates training expertise and promotes cooperation between EU judicial training institutions.

Ecole Nationale de la Magistrature (to be found in: Council of Europe, *Independence, impartiality and competence of judges – Achievements of the Council of Europe* (doc. no. MJU-22 (99) 5), p. 45).

3 Conclusions of the conference "The guarantees of the independence of judges – evaluation of judicial reform", held in Budapest on 13-15 May 1998, organised by various national Associations of Judges (to be found in: Council of Europe, *Independence, impartiality and competence of judges – Achievements of the Council of Europe* (doc. no. MJU-22 (99) 5), p. 49).

4 Conclusions of the conference "The training of judges and public prosecutors in Europe", held in Lisbonne on 27-28 April 1995, organised by the so-called Lisbon Network (to be found in: Council of Europe, *Independence, impartiality and competence of judges – Achievements of the Council of Europe* (doc. no. MJU-22 (99) 5), p. 42).

- The HELP Programme of the Council of Europe, which stands for Human Rights Education for Legal Professionals. It supports the Council of Europe member states in implementing the European Convention on Human Rights at the national level.

Ensuring the integrity of judges: vetting procedures

The general theme of this seminar is how to strike a balance between ensuring judicial independence while at the same time ensuring the quality of members of the judiciary. The authority of the judiciary can only be maintained if the system is cleansed of those who are found to be incompetent, corrupt or linked to organised crime. This can be achieved in a number of ways. But recently we have seen the introduction in some countries of extraordinary vetting procedures to check the suitability of existing judges and prosecutors, so I would like to focus on that aspect.

In 2016 the Venice Commission had the opportunity to cooperate with the Albanian authorities on the introduction of such vetting procedures (CDL-AD(2016)009). It held that “such measures are not only justified but are necessary […] to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system.”

Having said that, vetting procedures should be regarded as exceptional (linked to a pre-existing historical context of a major political or ideological change) and accompanied by certain safeguards:

- The introduction of such procedures should be “a strictly temporary measure” (the Commission refers to a fixed time-limit of about 3-5 years at most);
- Individuals who may be affected by the vetting procedures should enjoy basic fair trial guarantees and should have the right to appeal to an independent body;
- any limitations on the fundamental rights of judges and prosecutors within the vetting procedures should be proportional to the legitimate aims pursued by the vetting.

Vetting is only one aspect of the issue of ensuring the integrity of judges; during the discussion I would be interested to hear your views on different mechanisms.

Ensuring the quality of judicial decisions: accountability

Accountability of the judiciary is a very fashionable concept but we should be mindful of the fact that it may be used for political purposes to destroy the reputation of the whole judiciary. The

main objective should be that the judiciary enjoys the respect of the society and that nothing is done to undermine that authority.

Having said that: judges are not inviolable. The Venice Commission has on many occasion stated that judges “should not benefit from a general immunity” [CDL-AD(2003)012]. Judges may be held accountable in a number of ways:

- judicial errors can be dealt with by way of an appeal against the disputed judicial decision;
- judges may be held accountable by means of criminal or disciplinary avenues in case of the committal of intentional crimes, such as taking bribes, or corrupt / fraudulent acts.
- judges may be – indirectly – held accountable by means of a civil claim against the State for wrongful administration of justice (for example by commencing tort proceedings).

But as a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise of their functions in good faith. Judicial independence could otherwise be seriously threatened. This point of departure is reflected in Principle 16 of the United Nations Basic Principles on the Independence of the Judiciary: “[…] judges should enjoy personal immunity from civil

suits for monetary damages for improper acts or omissions in the exercise of their judicial functions".[5]

Principle 5.2 of the European Charter on the Statute for Judges is slightly more flexible than the United Nations Basic Principles. It states that compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties is guaranteed by the State. And provides for the possibility that the state may then claim recourse from the judge.

Various safeguards are provided: (a) the State may only ask for reimbursement in case of a "gross and inexcusable" breach; (b) only "within a fixed limit"; and (c) reimbursement can only be ordered after "legal proceedings". The European Charter on the Statute for Judges also states that the State can only ask for reimbursement after "prior agreement" of a High Council of the Judiciary. The Consultative Council of European Judges endorses all these points but adds that it should generally be considered inappropriate to impose any personal civil liability on judges,

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[5] See also Principle 2.24 of the Universal Declaration on the Independence of Justice (Montréal, 1983) and Principle 17 of the Syracuse Draft Principles on the Independence of the Judiciary (Syracuse, 1981). Both documents can be found in S. Shetreet & J. Deschênes (eds.), *Judicial independence: the contemporary debate*, Dordrecht: Martinus Nijhoff, 1985, p. 447 and 414.

even by way of reimbursement of the state, except in cases of *wilful default*.[6]

Ladies and gentlemen, these are just a few preliminary thoughts on some of the issues that were raised in the background document provided for this seminar to start the discussion. I look forward to our exchange of views and would like to thank you for your attention!

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[6] CCJE-GT (2002) 7, p. 31.