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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES

(CCJE)

Opinion of the CCJE Bureau

following a request by the CCJE member in respect of Slovakia

as regards the reform of the judiciary in Slovakia

INTRODUCTION

The CCJE member in respect of Slovakia informed the CCJE, in a letter dated 4 November 2020, about the forthcoming reform of the judiciary in Slovakia, which was approved by the Government and submitted for approval to Parliament on 1 October 2020. He emphasised that the Slovak judiciary has been facing critically low public confidence for a long time and in such a situation, the Government's intention to implement a reform of the judiciary that would restore the necessary public confidence is fully legitimate. On the other hand, he expressed concern that several aspects of the forthcoming reform can limit, in the interests of 'cleansing the judiciary', the already existing constitutional safeguards of the independence of the judiciary in a way that could jeopardise Article 6 of the European Convention on Human Rights (hereinafter the ECHR). Specifically, he has pointed that according to the draft of the Constitutional Act amending and supplementing the Constitution of the Slovak Republic:

- without any prior consultations with representatives of the Slovak judiciary and without any public discussion, the possibility of the Constitutional Court to assess the compliance of constitutional laws with the Constitution will be explicitly excluded;
- an explicit possibility shall be introduced to remove the President, the Vice-President, and a member of the Judicial Council of the Slovak republic, at any time before the expiry of their term of office;
- a possibility shall be introduced to transfer judges to a lower court without consent when changing the system of courts;
- functional immunity, which is currently the same for judges of general courts, judges of the Constitutional Court and representatives of Parliament, is to be limited only in relation to judges of general courts, while introducing a new crime of 'bending the law', which can be committed only by a judge, lay judge or arbitrator and which, in view of the vague wording 'arbitrarily applies the law', already in itself creates room for an inadmissible interference by the executive into the independence of the judiciary, represented by judges of the general courts, in the form of their unjustified/purposeful prosecution.

Having examined the letter of the CCJE member in respect of Slovakia in the light of European standards, including the Council of Europe Committee of Ministers' Recommendations, the CCJE and the Venice Commission Opinions and standards, the CCJE Bureau has delivered the below Opinion comprising a legal analysis of the above-mentioned amendments.

O P I N I O N

A. In the opinion of the CCJE Bureau, the forthcoming amendment of the Constitution which provides for an explicit possibility to remove the President, the Vice-President, and a member of the Judicial Council (hereinafter „JC") at any time before the expiry of their term of office is not in conformity with the CCJE standards and European standards concerning the judicial independence in general.

As stated in the CCJE Opinion no. 10 (2007) on the Council for the Judiciary at the service of society (hereinafter "Opinion 10"), members of the JC (both judges and non-judges) in order to fulfil its general mission, namely to safeguard both the independence of the of the judicial

system and the independence of individual judges,[1] should be granted guarantees for their independence and impartiality.[2]

The security of the fixed term of the mandates of members of JCs and functional immunity serve the purpose of ensuring their independence from external pressure. They allow them to carry out their work without having to constantly defend themselves against, for instance, unfounded and vexatious accusations. Members of JCs often have to make decisions that are unpopular or will not please judges or authorities who elected or appointed them. In subjecting them to an unrestricted power of removal, their independence will be seriously reduced, making them too dependent on the wishes of those who elected or appointed them, and thus removing them from their role of pursuing the goals of an independent and efficient judiciary. Measures which interfere with the security of tenure of the members of JC raise a suspicion that the intention behind those measures is to influence its decisions. The intended measure will inevitably lead to politicisation – or at least the impression of politicisation – of the activities of the JC, as its members will depend on the judges, government, parliament, and the President not only for their appointment, but also when exercising their mandate. In the CCJE's opinion this will not contribute to enhancing public confidence in Slovak judiciary.

A mechanism of removal without having to justify reasons for removal is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the JC, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their removal from office in cases of misbehaviour so gross as to justify such a course. Depending on the nature of the misbehaviour, it is strongly recommended to deal with the misbehaviour cases through the usual disciplinary or criminal procedure, which should be clearly set out by the law. The proportionality principle should be adequately taken into account and the dismissal of a member of a JC should only be applied as a measure of last resort.

B. According to the Constitution currently in force, a judge can be transferred to another court only with his/her consent or based on a decision of the disciplinary panel. According to the draft amendment to the Constitution, this provision is to be supplemented in such a way that the judge's consent to the transfer will not be required when changing the court system if this is necessary to ensure the proper administration of justice, the details being provided by law.

The main Council of Europe standard in this matter is enshrined in Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (hereinafter "CM/Rec(2010)12 Recommendation"), as follows: "A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system."[3]

It has to be noted that, in the CCJE Bureau's opinion, the aforementioned paragraph regarding a possibility of transferring a judge without his/her consent cannot be viewed and understood separately from other principles aimed at establishing standards of irremovability and consequently independence of judges. For that reason, the implementation of the proposed amendment will only comply with European standards provided that principles of security of tenure and irremovability as key elements of the independence of judges are observed. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where

[1] Opinion 10, para 8.
[2] Ibidem, para 36.
[3] CM/Rec(2010)12 Recommendation, chapter VI "Status of the judge", subsection "Tenure", para 52.

such exists;[4] the terms of office of judges should be established by law;[5] and a right to remedy should be guaranteed.[6] Furthermore, CM/Rec(2010)12 Recommendation states: "Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy."[7]

Similarly, the European Charter on the statute for judges (hereinafter "Charter"), adopted in 1998, in dealing with matters of appointments and irremovability stipulates that "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".[8] In the case of decisions affecting selection, recruitment, appointment, career progress or termination of office of a judge, the Charter envisages the intervention of an authority independent of the executive and legislative powers[9] within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

Although Magna Carta of Judges (hereinafter "Magna Carta") does not expressly address the issue of transfer of judges, it points out that judicial independence shall be guaranteed in respect of judicial activity and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.[10]

The most problematic proposal in this respect seems to be that the proposed wording of the amendment to the Constitution creates room for judges to be transferred to a lower court without consent when changing the system of courts. To minimise the risk arising from the proposed amendment precise and clear provisions should be further on established on a legislative level where as a minimum it should be guaranteed: that a judge can only be transferred to a court of the same instance; that transfer should not infringe judge's right to respect to private and family life; and that all the costs incurred by the transfer will be covered by the state.

C. As far as the proposed change of rules regarding the prosecution of judges are concerned the CCJE Bureau points out that the principles of the Magna Carta and Opinions of the CCJE are largely disregarded. In the opinion of the Bureau, there is a risk that the envisaged constitutional changes are in violation of (or infringe upon) the principles of judicial independence.

The Committee of Ministers of the Council of Europe has clarified two fundamental principles as to the liability of judges: "The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability,

[4] Ibidem, para 49.
[5] Ibidem, para 50, first sentence.
[6] Ibidem, para 8.
[7] Ibidem.
[8] Charter, para 3.4.
[9] Compare ibidem, para 1.4.
[10] Magna Carta, para 4.

except in case of malice"[11] "When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen."[12]

Magna Carta states: "Judicial independence and impartiality are essential prerequisites for the operation of justice."[13] "Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary."[14] "Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions."[15]

The Venice Commission, in its turn, has constantly endorsed the principle that judges must not enjoy any form of criminal immunity for ordinary crimes committed out of the exercise of their functions. As it considered in its Report on the Independence of the Judicial System, "it is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional (but only functional) immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crime, e. g. taking bribes) which does not exclude disciplinary proceedings against judges for professional misconduct."[16]

It must be stressed that the notion of judicial (functional) immunity is part of the wider concept of judicial independence. Judicial immunity is not an end in itself but serves the independence of the judge who should be able to decide cases without fearing civil or criminal liability for judicial adjudication done in good faith. The Constitution currently in force in Slovakia observes these principles insofar it provides that no judge will be prosecuted for decision-making.

The proposed amendment intends to change this and reduce the existing protection of the judicial independence by introducing a very broad and vague definition according to which the protection against prosecution is only granted for a "legal opinion expressed in a decision unless a criminal offence has been committed thereby." The new wording clearly entails a potential risk of a vexatious pursuit of criminal proceedings against a judge who is disliked. The CCJE reiterates that criminal liability should not be imposed on judges for unintentional failings.[17] As stated in its Opinion no. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy (hereinafter "Opinion 18"): "In accordance with the fundamental principle of judicial independence, the appeal system is in principle the only way by which a judicial decision can be reversed or modified after it has been handed down and the only way by which judges can be held accountable for their decisions, unless they were acting in bad faith."[18] The CCJE Bureau therefore takes the view that the adoption of the proposed amendment would not only substantially reduce the existing guarantee of judicial independence and open a door to interpretation and politically motivated misinterpretation, but also lead to more (political or disciplinary) pressure on judges.

[11] CM/Rec(2010)12 Recommendation, para 68.
[12] Ibidem, para 71.
[13] Ibidem, para 2.
[14] Ibidem, para 4.
[15] Ibidem, para 20. See also Opinion no. 3 of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para. 52-54 and 75.
[16] CDL-AD(2010)004, para. 61.
[17] Magna Carta, para. 20.
[18] Opinion 18, para. 23.

The CCJE Bureau recognises that corruption among judges is a main threat to society and the functioning of a democratic state. In its Opinion No. 21 (2018) on preventing corruption among judges, it has pointed out that corruption is interlinked with the concept of judicial independence. It has recalled that the member States should fight corruption in the judiciary; that they should focus on the robust and impartial prosecution (disciplinary and criminal) of corruption cases while fostering at the same time a true culture of judicial integrity; and that adequate remuneration and adequate working conditions together with a transparent, fair and performance oriented professional career system are key elements of ensuring the judicial independence of judges.

Nevertheless, as far as the new legislation is based on the justification that it pursues the prevention of corruption, this is not a convincing argument for the restriction of the independence of the judiciary in the way it is proposed. Fighting corruption should not impair the principle of judicial independence. Judicial independence is fundamental for the rule of law and thereby the basis for the fight against corruption. The CCJE Bureau, noting that anti-corruption campaigns are often used as an excuse to justify limitations of judicial independence, strongly opposes this approach, which threatens to influence the judicial system(s) by limiting judicial independence.

Another aspect that requires careful consideration is the government's proposal to change Art. 136, paragraph 3 of the Constitution. Under the existing law the Constitutional Court gives its assent to a pre-trial detention of a judge and of the General Prosecutor. According to the proposed amendment the Constitutional Court will no longer be allowed to review and allow pre-trial detention of judges (and of the General Prosecutor). The assent of the Constitutional Court is an important shield contained in the law against false accusations of judges: its consent is needed to initiate criminal proceedings against judges. The intended removal of this mechanism takes away (another) safeguard for judges (which are then subject to normal pre-trial detention rules). One cannot overlook that the parliament has already approved the introduction of a new crime of 'bending the law', which is committed by a judge, lay judge or arbitrator, if he/she arbitrarily exercises the law when making a decision and thereby harms or otherwise benefits another, which, in view of the vague wording 'arbitrarily applies the law', already in itself creates room for abuse. The CCJE is therefore reluctant to agree with the explanation in the explanatory memorandum to the amendments, which states: "The society has undergone some significant development. The Slovak Republic has become part of the European Union and a number of other safeguards have been adopted at the constitutional level (e.g. the establishment of the Judicial Council) protecting the judiciary from inadmissible interference from another branch of power."

Last, in this context, the question arises as to whether, according to the government proposing judicial reform, the Slovak Republic has achieved such a degree of transformation that there is no longer threat of an inadmissible interference by the executive into the independence of the judiciary represented by judges of the general courts in the form of unjustified/purposeful prosecution of them; and therefore it is appropriate to remove the consent of the Constitutional Court to the detention of a judge, why these safeguards remain in relation to judges of the Constitutional Court and members of parliament as representatives of the legislative power. Or, on the contrary, if it is still necessary to maintain constitutional safeguards against possible unreasonable/purposeful prosecution of representatives of the legislature and judges of the Constitutional Court by the executive, why these safeguards should not be maintained in relation to judges of the general courts. Such a selective approach only exacerbates the concern that the removal of existing constitutional safeguards will create scope for possible inadmissible interference into the independence of the judiciary.

C O N C L U S I O N S

Measures which interfere with the security of tenure of the members of JC raise a suspicion that the intention behind those measures is to influence its decisions. The intended measure will inevitably lead to politicisation – or at least the impression of politicisation – of the activities of the JC, as its members will depend on those who elected or appointed them not only for their appointment, but also when exercising their mandate. The mandate of the members of the JC should only end at the expiration of their term, on retirement, on resignation or death, or on their removal from office in cases of misbehaviour so gross as to justify such a course.

The implementation of the proposed amendment providing for a transfer of judges to a lower court without consent when changing the system of courts will only comply with European standards provided that principles of security of tenure and irremovability as key elements of the independence of judges are observed. In this respect, precise and clear provisions should be further on established on a legislative level.

The adoption of the proposed amendment limiting the functional immunity of judges would not only substantially reduce the existing guarantee of judicial independence and open a door to interpretation and politically motivated misinterpretation, but also lead to more (political or disciplinary) pressure on judges. Although acknowledging the legitimacy of these concerns, fighting corruption should not impair the principle of judicial independence.