



On the occasion of the Eight Assembly of the EULEX
Judges, held in Prizren on 9 December 2009

The Assembly composed of the following Judges: Maria Giuliana Civinini, Guy Van Craen, Angela Kaptein, Anna Bednarek, Antoinette Lepeltier-Durel, Arkadiusz Sedek, Christine Lindemann-Proetel, Dragomir Yordanov, Emilio Gatti, Eija-Liisa Helin, Ferdinando Buatier de Mongeot, Francesco Florit, Gerrit-Marc Sprenger, Gianfranco Gallo, Hajnalka Karpati, Harri Katara, Klaus Huner, Johanna Schokkenbroek, Nikolay Entchev, Rositza Buzova, Torsten Koschinka, Vitor Pardal, Vladimir Kanev, Verginia Micheva-Ruseva

Adopts the DECISION

Unanimously, to discuss and approve this Advice to the Kosovo Judicial Council on different tools to strengthen and protect the independence of the Judiciary.

A D V I C E

To: The Kosovo Judicial Council

From: Assembly of EULEX Judges, EULEX Justice Component

Subject: Advice to the Kosovo Judicial Council on different tools to strengthen and protect the independence of the Judiciary

Executive Summary

As foreseen by article 3 of the joint Action of the Council of the European Union of 4 February 2008 on the European union Rule of Law Mission in Kosovo, this has the task to “(a) monitor, mentor and advice the competent

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Kosovo institutions on all areas related to the wider rule of law (including a custom service), whilst retaining certain executive responsibilities”.

Article 2.4 of the Law on jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of 13 March 2008 (Law no. 03/L-053) provides that: *“besides exercising their judicial functions pursuant to the provision of articles 3, 5 and 5 of this law, EULEX judges will monitor, mentor and advice the Kosovo judges, in the respect of the principle of independence of the judiciary and according to the modalities as established by the present law and by the EULEX KOSOVO”.*

In particular, advising consists of formal and official positions taken by the EULEX Judges collectively in the Assembly of EULEX Judges and directed to the national judicial, legislative or government authorities to stimulate their actions in the respective fields of competence. In other words, advising is intended to provide professional counseling to the competent authorities (MoJ, KJC, KJI, Presidents of the Courts, Supreme Court, Parliament, Law Faculties) on each topic raising from the monitoring and mentoring experience. The advising provides the Kosovan stakeholders with the necessary insights to intervene in those areas of the justice system that need general and structural improvements to be implemented for all the judicial system and that cannot be performed by the mentoring activity of single EULEX Judges.

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Introduction and present situation

Having considered the current weakness of the Kosovo Judicial Council, still in the process of being fully re-appointed meanwhile the process of re-vetting



is being finalized; after acknowledging that the instruments currently available to the Kosovo Judiciary to respond to undue political pressure directed against a single judge or the judiciary as a whole; and with the understanding the adequate legislative instruments and adequate guidelines will be promoted and endorsed by the KJC and competent legislative bodies as to ensure the independence of the judiciary, the Assembly of EULEX judges, approved this advice seeking to bring to the attention of the KJC some of the instruments already available in the best European practice and proven efficient in ensuring the independence of the judiciary.

The Assembly of EULEX Judges, in the present advice, presents different tools available to defend and promote the independence of the Kosovo Judiciary, some of which falling under the direct competence of the KJC for its autonomous implementation, such as:

- Internal Regulations and guideline for the KJC on how to react against any kind of external pressure that may endanger the independence of the judicial system and/or the individual judge;
- Rules on case selection and case allocation based on objective and predetermined criteria;
- Pre-determined regulation for the assignment of posts, career steps and functions, the career advancements, and transfer of magistrates;
- Remedies before an independent body against Presidents' decisions and opinions which may harm the career of judges;
- The organization of adequate trainings, also involving the existing structure;
- To promote and facilitate the association of magistrates to a local and international level.

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Some of these tools require political and legislative actions and therefore describe legal and administrative reforms that the KJC may promote. The promotion would be directed to the competent legislative and administrative bodies from the KJC, as the self-governing and representative body of the judiciary in order to ensure that adequate administrative and legal measures are undertaken promptly, among which:

- Status and career regulated by law and managed by an independent self-governing body;
- Determination of the salary of the judiciary subtracted from the direct control of politics;
- Immovability of the Judge from its post;
- Norm regulating the Disciplinary procedure which would endorse all the guarantees of fairness;
- No hierarchical authority of the President of the court but administrative issues and legal prevision determining the powers of the Presidents of Courts’;
- A fair, transparent and just process of re-vetting.

The importance of the principle that «judges are subject only to the law»:

Protection of judges against undue influence.

1. General principle: «Judges are subject only to the law»

The principle of the «submission of judges only to the law» is a fundamental pillar of the modern judicial systems in pursuance to the principle of separation of powers.

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It is explicitly affirmed in: Constitutional charters¹, international Conventions, Recommendations, and Opinions², Declarations and Charters adopted by Judges' Associations³, and it is listed among the core Principles of international organizations⁴. The principle pursuant to

¹ See for example, the Italian Constitution at Art. 101; the Georgian Constitution at Art. 84; the Kosovo Constitution at Art. 102.

² **Article 6 of the European Convention on Human Rights:** "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law" (see also article 47 of the Charter of Fundamental Rights of the European Union – 2000/C 364/01)

Recommendation No. R(94) 12 of the Committee of Ministers of the CoE on independence, efficiency and role of judges: "In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressure, 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. 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. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary"

OPINION No 1 (2001) of CCJE on Independence of the Judiciary: "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are "charged with the ultimate decision over life, freedoms, rights, duties and property of citizens" (recital to UN basic principles, echoed in Beijing declaration; and Articles 5 and 6 of the European Convention on Human Rights). Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice."

Opinion no.10 (2007) of CCJE on the Council for the Judiciary: The independence of judges, in a globalised and interdependent society, should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights, and impartial justice free from external influence. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of judges' impartiality therefore offers a guarantee of citizens' equality before the courts."

³ See: the MEDEL (*Magistrats Européen pour la Démocratie et la Liberté*) Declaration of Palermo, 1993, art. 2.1.: "Magistrates are subject only to legality and to the law"; The Universal Charter of the judge, unanimously approved by the International Association of Judges in Taipei on November 17, 1999, art. 3: "In the performance of the judicial duties the judge is subject only to the law and must consider only the law".

⁴ **Article 2 of the Basic principles drawn up by the UN:** "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".

Article 8 of the Basic principles drawn up by the UN: judges "shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".

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which the “judge is subject only to the law” shall be considered a universal general principle governing justice.

As minimum requirement, the principle demands that:

- Judges may not be subject to the authority of the legislative and the executive powers;
- Judges shall be free from *external* and *internal* interferences.

The Judge subject only to the Law is a **principle and guarantee of independence of Judges** considered both as a body and as single individuals.

Independence is the main instrument to assure the **IMPARTIALITY** of the Judiciary and it is given to Judges not as a privilege but as the fundamental pre-condition for their impartiality.

An independent Judge will be able to decide impartially and therefore guarantee that everyone is equal before the law; Judges need not to be worried or afraid of possible retaliations affecting their future, their career, their salary, their and their family’s security and life, they need to have “nothing to hope and nothing to be afraid of”, they need to be independent!

2. External interference or pressure

To fight successfully against interferences and pressures exerted on a single judge or upon the judiciary as a system, it is needed: - to define what is an interference or pressure; - to enucleate indicators of the presence of these interferences; - to establish how to react against interferences and how to protect the judges against them.

An external influence can be exercised by:

- the Executive; the legislator; the local Government;
- individuals from the Government; public officials or legislators;
- political parties;
- political and economic elites;

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- military and/or paramilitary intelligence;
- criminal networks;
- Media.

An external influence on the single judge or on the judicial system is:

- any undue interference in the decision-making process;
- any administrative or legislative measure⁵ that can undermine the freedom of: conscience, interpretation and decision of the judge(s);
- any actions of pressure groups or lobbying groups directed on the judges;
- any action which might induce the judge into worries or fear to suffer a damage to his/her person, to his/her family or to his/her belongings.

Objective criteria and indicating factors to detect an external influence may be found in:

- the so-called “telephone justice”;
- public statements of politicians (representatives of the Government) or representative of pressure or interest groups;
- politically-oriented composition of the magistrate (self-)governing body or/and its disciplinary bodies;
- corruption;
- lack of career guarantees/political interference in the judges' career.

3. Internal interference or pressure on the single judge or on the judicial system is:

- any undue interference in the decision-making process coming from: representatives of the Judicial governing body, Presidents of Courts,

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⁵ (Too) frequent changes of the law can be considered an undue interference on the judicial system when they are the instrument for forcing judges to adopt a solution and/or decision that – in a factual point of view – is of the interest of politicians or of politic/economic groups.



- other members of the judiciary that – in practical terms - can affect, directly or indirectly, the career or the status of the judge;
- lack of objective and predetermined rules on cases selection and cases allocation;
 - lack of regulation on the withdrawal of a case from a judge;
 - a hierarchical structure of the career;
 - lack of a guaranteed disciplinary procedure;
 - lack of staff and resources in support of the judicial activities.

4. How to protect judges against undue external and internal influence.

The establishment of an independent body of self-government is the first protection against any kind of influence and interference in the judicial decision-making process. In Kosovo, the body of self government is foreseen by article 108 of the Constitution and it has the explicit duty to *ensure the independence and impartiality of the judicial system*. It is of paramount importance that the functions of the KJC and its constitutional prerogative are adequately encompassed and protected by the law on KJC, as to guarantee that the Council may successfully work as a *fully independent institution in the performance of its functions*.

The process of appointment of the members of the KJC certainly has a strong impact on the independence of the body. The European experience shows that, regardless of the composition of the council - which is clearly established by the Kosovo Constitution - the selection of the Councilors through a proper electoral process gives dignity and higher independence to the council members than other forms of appointment.

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In the Opinion no.10 (2007) of CCJE on the Council for the Judiciary it is strongly stressed that: “The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges. [...] The Council for the Judiciary is also obliged to safeguard from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law”.

To fulfill in a proper and adequate way its mandate, the Council for the Judiciary has to be composed by a majority or totality of judges⁶ (and prosecutors, if they are part of the judiciary) elected by their peers. It must be provided with adequate recourses ensuring and safeguarding its proper, independent and autonomous functioning.

To effectively allow the Council of Judiciary to fulfill the important task of protecting judges’ independence, the following competences have to fall within its mandate:

1. selection, appointment, promotion and career development, evaluation of professionalism;
2. code of conduct and code of discipline;
3. disciplinary measures (through a special Committee);
4. court administration/ court budget management;
5. protection of the image of justice and of the image of single judges;
6. training (limited to policy and guidelines to an autonomous body, like a school);

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⁶ The inclusion of lower-level judges along with senior judges should be granted.



5. Protection against external influence.

Especially in post-conflict Countries and young democracies, judges (if not completely re-appointed through a fair and guaranteed re-appointment process) have experienced heavy political pressures and/or political control.

It is crucial that judges realize that they should act independently in the exercise of their judicial functions without being afraid for their safety, their career, and their future.

It is also crucial that public opinion is aware of how important is the independence of the judiciary in a democratic Country and, if needed, it shall be ready to raise its voice against the political instances.

The main tools to react against external pressure are the following:

- The High Council of Judiciary to react publicly against any kind of external pressure that may endanger the independence of the judicial system and/or the individual judge:

Every time it is verified a behavior which may harm the prestige and the independent exercise of the jurisdiction, the Council should react publicly.

To this aim an **internal regulation** should be adopted establishing a clear procedure and the conditions to introduce it.

Example:

Conditions: behaviors detrimental to the prestige and the independent exercise of the jurisdiction able to affect the normal course or the credibility of the judicial function or of the judicial system are put in place.

Procedure: the judge targeted by this kind of behaviors, the President and/or the Chief Prosecutor of the relevant Court, any member of the Council could request the intervention of the Council by delivering a

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written request to the President's Office; the President appoints a reporting member who opens a file and prepares the case to be presented before the Council. The Offices of the Public Administrations may be requested to send relevant documents. Pieces of evidence (such as newspaper articles, video-tapes, documents) may be gathered. At the scheduled session, the reporting member refers to the Council the result of the investigation. S/he may present a written deliberation proposal asking to the Council: - to gather evidences (i.e. hearing the judge, the President of the Court, other people informed of the facts); - to dismiss the case; - to publicly intervene to defend the independence and the prestige of the judges and/or the judicial function/institution.

The deliberation should be adopted by the simple majority of the members of the Council and should be adequately publicized.

- Status and career regulated by the law and managed by an independent self-governing body:

As already stressed, the Council of Judiciary shall be the body having exclusive competence over the management of judges' career (appointment, assignment of post and function, mutation, promotion, evaluation) on the basis of the law and through a guaranteed and transparent procedure (the adoption of internal regulations establishing clear and transparent procedures based on objective criteria is crucial).

Adequate salary granting the dignity of the function shall be assured, without possibility of reduction.

An internal regulation for the implementation and evaluation of professionalism should be put in place based on objective and transparent criteria.

- Immovability:

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“It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office: see the UN basic principles, paragraph 12; Recommendation No. R (94) 12 Principle I(2)(a)(ii) and (3) and Principle VI (1) and (2). The European Charter affirms that this principle extends to appointment or assignment to a different office or location without consent (other than in case of court re-organization or temporarily assignment), but both the Charter and Recommendation No. R (94) 12 contemplate that transfer to other duties may be ordered by way of disciplinary sanction” (Opinion n. 1 CCJE).

- **Disciplinary procedure:**

The disciplinary procedure shall be regulated by law with the provision of:

- Procedural guarantees;
- Full right of defense;
- Reasoned decision by an independent body;
- Remedy internal to the independent body or preferably in front of the Supreme Court.

6. Independence within the judiciary

It is crucial to protect the judges not only against external influences and undue pressures, but also against internal influences that may originate from the President of the Court, from the Council as a body or from its members, from group of political pressure internal to the judiciary.

How to protect judges against internal influence?

The **main tools** to prevent internal pressure are the following:

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- Rules on case selection and case allocation based on objective and predetermined criteria.

A transparent and objective case allocation system has to be established to enforce the principle of pre-constitution of the judge (article 6 ECHR) and to avoid interferences in the decision-making process. The assignment of a case to a specific judge and/or to a specific panel, as well as the composition of the panel, shall be done under the supervision of the President of the Court on the basis of clear and objective (automatic) criteria, pre-determined and verifiable *ex post*. The exercise of discretionary power of the President can open the door to the concrete possibility of allocating (or not allocating) cases depending on the predictable decision the judge may adopt and, in last instance, to corruption.

The Council for the Judiciary should adopt an internal regulation on “Selection and allocation of cases and composition of the panels” establishing general rules all the Courts have to comply with. *Inter alia*, it should be provided that the President of the Court, after consultation with the judges and the local BAR Association, the Chief Prosecutor, elaborates an organizational plan containing the assignment of judges to the different sectors (civil law, administrative law, criminal law) and the concrete criteria for allocation of cases to judges. The plan has to be sent to the Council who approves it or rejects it with recommendations.

- Legal provision of Presidents of Courts’ powers

The powers of the President of the Court have to be clearly established by law. Discretionary powers are needed to a certain extent to ensure a flexible management of the Court, but they have to be provided for by law and have to be exercised in a transparent and controllable way.

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- No hierarchical authority of the President but for administrative issues.

The Presidents of the Courts shouldn't have hierarchical authority over the judges who shall be fully independent in the exercise of the judicial function and all the activities which are instrumental to this function (case management).

- Remedies before an independent body against Presidents decisions and opinions which may harm the career of judges.

The Council for the Judiciary should adopt an internal regulation establishing a remedy against any decisions (i.e. assignment to a sector, workload distribution, allocations criteria) or any opinion (i.e. evaluation of professionalism) of the President of the Court, which may harm the career of judges. The interested judge should have the right to file a remedy before the Council which may decide to grant the decision or to confirm the opinion of the President, or reject it with recommendations.

7. The role of the training.

The importance of training in building the awareness of independence and impartiality has to be stressed⁷. The Council for the Judiciary shall

⁷ See among others Opinion n. 4 (2003) CCJE: “[...] The independence of the judiciary confers rights judges of all levels and jurisdictions, but also imposes ethical duties. The latter include the duty to perform judicial work professionally and diligently, which implies that they should have great professional ability, acquired, maintained and enhanced by the training which they have a duty, as well as a right, to undergo. 3. It is essential that judges, selected after having done full legal studies, receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily. 4. Such training is also a guarantee of their independence and impartiality, in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms. 5. Lastly, training is a prerequisite if the judiciary is to be respected and worthy of respect. The trust citizens’ place in the judicial system will be strengthened if judges have a depth and diversity of knowledge which extend beyond the technical field of law to areas of important social concern, as well as courtroom and personal skills and understanding enabling them to manage cases and deal with all persons involved appropriately and sensitively. Training is in short essential for the objective,



promote initial and continuous training of judges through an independent school (such as the KJI). While the school should be free of elaborating best training methods and programs, the Council should issue adequate guidelines particularly in the field of ethic, deontology, independence, efficiency of the judicial work.

8. The role of judges association.

CoE Recommendation, Principle IV states that «Judges should be free to form associations which, both alone or with other bodies, have the task of safeguarding their independence and protect their interests». The association of Judges, at the local level as well as at the Regional and international level, promote the sharing of best practice, lessons learned and strengthen the self consciousness of the Judges as category, strengthening the independence of the category as a whole. Facilitating, promoting and supporting different forms of associations of Judges is therefore advisable with the aim, *inter alia*, to enrich the professionalism of the Judges, to increase the judges awareness of their role and ultimately strengthen the deontology of the category as a whole.

Recommendation

The Assembly of the EULEX Judges recommends the Kosovo Judicial Council to take into serious and urgent consideration the situation of the Kosovo Judiciary and the need it has to be further supported to develop as an independent and impartial body. By this submission of different tools

impartial and competent performance of judicial functions, and to protect judges from inappropriate influences.”

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available to defend and promote the independence of the Kosovo Judiciary, the Assembly of EULEX Judges calls the Kosovo Judicial Council to adopt the tools and measures here exposed which fall in its domain, and to be proactive in bringing the Kosovo legislator and the relevant Institutions to the adoption of those tools which fall under their responsibility.

The Assembly of the EULEX Judges also warmly invites the Kosovo Judicial Council to contact and cooperate with the Presidency of the EULEX Judges to seek for advise and support on these matters. The EULEX Judges and their staff members will be glad and honored to provide their support to the Kosovo colleagues for the advised improvements which will benefit the Kosovo Judiciary and all people of Kosovo. Further cooperation can be provided for a proper Mentoring in the adoption of the suggested tools and the compilation of any related document / measure.

For the above reasons the Eight Assembly of EULEX Judges:

ADVISES

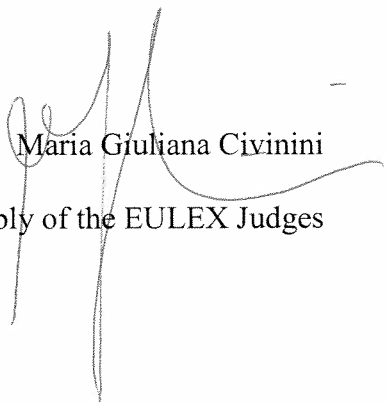
The Kosovo Judicial Council to take action to strengthen and protect the independence of the Judiciary

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