



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CCJE-BU(2014)4

Strasbourg, 1 July 2014

**BUREAU OF THE CONSULTATIVE COUNCIL
OF EUROPEAN JUDGES
(CCJE-BU)**

**COMMENT
on certain provisions of the
Constitutional Act of 4 June 2014
amending and supplementing the Constitution of the Slovak Republic**

Document prepared by the Bureau
of the Consultative Council of European Judges

INTRODUCTION:

The Slovak member of the Consultative Council of European Judges (CCJE) informed the CCJE in a letter dated 11 June 2014 about a Constitutional Act on amending and supplementing the Constitution of the Slovak Republic, which had been adopted on 4 June 2014. She considered that these amendments infringe fundamental principles regarding the status of judges and their independence. We understand that these concerns are also shared by the Plenary Assembly of the Supreme Court of the Slovak Republic and by the European Association of Judges. The Slovak member of the CCJE claims that politicians had announced that a “radical cleaning of the Slovak Judiciary” should take place. The amendments order that all judges will have to undergo a “security reliability clearance”, which will be based on information gathered by police and by the National Security Office. She asks the CCJE for its opinion on whether this amendment of the constitution is in accordance with the international standards concerning the functioning of the judiciary in a democratic state.

In accordance with the CCJE’s terms of reference on targeted co-operation at the request of other bodies of the Council of Europe, member states, judges associations or members of the CCJE, the Bureau of the CCJE has studied the constitutional law of 4 June 2014, an English translation of which was provided to it. The following comments deal only with those parts which relate to the questions raised by the Slovak member. No explanatory notes or other background material explaining the reasons for the new legal provisions have been made available.

CONTENT OF THE DRAFT LAW:

A new Article is inserted into the Constitution, the first three paragraphs of which state, in the English translation provided to the CCJE:

Art 154d(1) The requirements of judicial competence which guarantee that the judicial office will be performed properly shall also apply to a judge appointed before 1st September 2014. Adoption of opinion on fulfilment of requirements of judicial competence, under first sentence, of a judge appointed to judicial office before 1st September 2014 shall be decided on the basis of the documentation from state authority performing the role of the protection of classified information and statement of the judge, by the Judicial Council of the Slovak Republic by its resolution. Details of the decision-making of the Judicial Council of the Slovak Republic on the adoption of the opinion on fulfilment of requirements of judicial competence which guarantee that the judicial office will be performed properly, including the manner of expression of opinion of the judge on the documentation shall be established by law.

(2) Complaint may be lodged against the resolution of the Judicial Council of the Slovak Republic in accordance with paragraph 1, whereas it shall be decided by the Constitutional Court; the details shall be established by law.

(3) If the judge appointed to the judicial office before 1st September 2014 does not meet the requirements of judicial competence which guarantee that the judicial office will be performed properly, under the final resolution of the Judicial Council of the Slovak Republic under paragraph 1 or under final decision of the Constitutional Court, by which the complaint was dismissed under paragraph 2, the Judicial Council of the Slovak Republic shall propose the President of the Slovak Republic to recall the judge. Failure to fulfil the requirements for

judicial competence which guarantee that the judicial office will be performed properly shall be a reason for the withdrawal of the judge. “

Accordingly, Article 147, which stipulates that the President of the Slovak Republic shall “recall” a judge is amended by an additional sentence in paragraph 1 thereof. Thus, in addition to the existing possibilities for the “recall” of a judge in the case of a sentence passed for a deliberate criminal offence by the judge or a decision of a disciplinary tribunal for a deed that is incompatible with the execution of the post of a judge, or health problems or reaching the age of 65, or loosing the eligibility to be elected to the parliament states:

(Article 147 para 1 last sentence:) „The President of the Slovak Republic on the proposal of the Judicial Council of the Slovak Republic shall recall a judge who fails to meet requirements on judicial competence that guarantee the judicial office shall be performed properly, on the ground of the final resolution of the Judicial Council of the Slovak Republic under the Article 154d paragraph 1 or according to the final decision of the Constitutional Court by which the petition under the Art. 154d paragraph 2 was dismissed.“

In addition Articles 141a (regarding the Judicial Council of the Slovak Republic) and Article 129 and 133 are amended to give jurisdiction to the Council to propose the dismissal of a judge under the new Article 154d. It also gives jurisdiction to the Constitutional Court to grant a remedy against such a decision of the Council.

In Article 141a para 5 which enumerates the powers of the Judicial Council new powers are introduced:

(Art 141a para 5)

lit b “to adopt an opinion on whether a candidate for appointment to the judicial office meets the requirements of judicial competence which guarantee that he/she will perform the judicial office properly”, and

lit i) “to monitor whether a judge meets requirements of judicial competence which guarantee that he/she will perform the judicial office properly throughout the entire term of a judicial office”,

Article 141 a delegates the following jurisdiction to the legislator:

“Article 141 a Abs. 11 (11) Details on the election and withdrawal of the President of the Judicial Council of the Slovak Republic, on the manner of appointment of the members of the Judicial Council of the Slovak Republic, on its competence, on the representation of the President of the Judicial Council of the Slovak Republic, on organisation and its relationship towards the judicial administration authorities and towards the authorities of the judicial self-administration, as well as on the manner of supervision whether the judge meets the requirements of judicial competence, which guarantee that the judicial office will be performed properly throughout the entire term of the judicial office, shall be established by the law.”

As a requirement to become a judge the new law adds the necessity “to meet the conditions on judge competence guaranteeing the office of judge will be performed properly”. It also provides that other (additional) conditions may be established by law:

(Article 145 para 2 new): “As a judge shall be appointed a citizen of the Slovak Republic eligible to be elected to the National Council of the Slovak Republic, who reached age of thirty years, has university education in law, meets the conditions on judge competence guaranteeing the office of judge will be performed properly. Other conditions for the appointment as a judge and his/her judicial promotion, as well as the scope of immunity of judges shall be established by the law.”

This new amendments can be summarized as follows:

In order to become a judge a new criterion is explicitly introduced that (in the wording of the translation provided) “...to meet the conditions on judge competence guaranteeing the office of judge will be performed properly”. This criterion is enshrined as a constitutional requirement. Further, the precise definition of how this criterion is to be checked as well as the possibility of establishing other criteria is entrusted to the legislator. This criterion will apply not only to new appointees but also to all judges who have already been appointed and in the case of existing judges they will have to undergo an examination. The constitutional provision stipulates, in mandatory form, that the basis for this examination will be documentation from the state authority that performs the role of safeguarding classified information and, in addition, a statement from the judge who is being examined. The decision will be taken by the Judicial Council. A challenge to this decision is possible. If a final decision proposes the judge’s dismissal, the President of the Republic has to “recall” that judge (Article 147 para 1 “shall recall”).

CONSIDERATIONS OF THE CCJE AND PROBLEMS IDENTIFIED:

An examination of these legal provisions in the light of European standards raises the following concerns:

1.) Permanent tenure

An essential element for judicial independence, which is a pre-requisite to the maintenance of the rule of law and the fundamental guarantee of a fair trial¹, is the tenure of office of the judge. Security of tenure and irremovability are key elements of the independence of judges². A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform his judicial functions.³ In all these exceptional cases strict procedural rules have to be followed. Such proceedings should be conducted by an independent authority or a court and there must be a full guarantee of a fair trial. The procedural rules must provide the judge with the right to challenge the decision and sanction proposed. Disciplinary sanctions should be proportionate.⁴

These international standards, which are necessary elements of the independence of judges will be infringed by extending the possibility of “recalling” a judge in circumstances where it is said that the judge “...fails to meet requirements on judicial competence that

¹ Opinion of the CCJE No. 1(2001), para 10; Recommendation CM/Rec(2010)12 para 3,11; CCJE Magna Carta of Judges (2010) para 2) et alt.

² Recommendation CM/Rec (2010)12 para 49.

³ Recommendation CM/Rec (2010) 12 para 50; see also UN Basic Principles on the Independence of the Judiciary para 18.

⁴ Recommendation CM/Rec (2010) 12 para 69; see also CCJE Opinion No 3 para 77 iii) to vi).

guarantee the judicial office shall be performed properly” (Article 147 new). The unqualified terms “requirements on competence” and “proper performance” are not sufficiently defined or in accordance with the sense of the above mentioned international standards. These vague provisions open the door to a wide range of possible interpretation even if the problems combined with the strong requirement to “guarantee” are not taken into account. Such dangerous and inappropriate extensions are not needed in order to take the necessary proportionate consequences of criminal or serious disciplinary offences by particular judges.

2.) Lustration of all judges:

Under the new Article 154d all judges who have already been appointed and have tenure will have to undergo an examination to decide whether or not they fulfil the criterion “judicial competence which guarantees that the judicial office will be performed properly”. This mandatory provision has the effect of a lustration or a vetting process. Such processes, which aim at excluding persons with serious integrity deficits in order to re-establish civic trust may be utilised after a change of a governmental *system* from a totalitarian regime to a democratic state.⁵ The Parliamentary Assembly of the Council of Europe recommends that criminal acts that have committed are prosecuted and punished under the ordinary criminal code⁶ and that any lustration process must comply with the standards expected of a democratic state governed by the rule of law⁷. The requirements of tenure in a state governed by the rule of law have been explained above. The CCJE underlines the fact that the fall of the communist regime in (Czech-)Slovakia occurred a long time ago, that Slovakia has, for a long time been a member of the Council of Europe and thus dedicated to the principles and aims of that international organisation and that Slovakia became member of the European Union several years ago. On that occasion the status of the judiciary had been examined (amongst many other matters required before membership could be granted) and the judiciary was found to comply sufficiently with the standards of the European Union. Following from these historical facts it is immediately clear that there has been no recent transition from a totalitarian system to a democratic system and, therefore, there is no room for a lustration or vetting process. There may be judges who have not carried out their duties correctly or who have abused their position but they should be held accountable within the existing framework of the criminal law or disciplinary procedures.

3.) Documentation from state authority performing the role of safeguarding classified information as the basis of the decision:

Article 154d stipulates that the Judicial Council has to rely on documentation from the state authority performing the role of safeguarding classified information when it decides whether a judge can stay in office. The judge shall be given the opportunity to comment on this documentation. As mentioned above decisions which may lead to the dismissal of a judge require a fair and transparent procedure, which is in accordance with Article 6 of

⁵ UN High Commissioner for Human Rights in “Rule-of-law tools for post-conflict states vetting an operational framework”, 2006 and Resolution of the Parliamentary Assembly of the Council of Europe 1096 (1996) “On Measures to dismantle the Heritage of former Communist Totalitarian Systems”.

⁶ PACE Resolution 1096(1996) para 7.

⁷ Idem para 13.

the Convention thus guaranteeing that the person concerned will be able effectively to defend himself of any allegations made. The characteristic of a secret service institution is that information is gathered in a secret way, which, by definition, is not transparent. Very often the source of the information remains secret in order that the source may provide further co-operation. In many countries, the regulations regarding the means and the procedure by which information is collected are vague (the CCJE has no information on the legal provisions which exist in Slovakia in this respect). Therefore as a rule material provided by a secret service will not (on its own and without further information as to its source) be sufficient to be used as proof in a court procedure.

Activities of a secret service institution normally presuppose that there is a certain danger which makes an observation necessary to prevent that danger. The constitutional amendment appears to establish the presumption that all judges need to be observed to prevent some kind of danger. Such an underlying assumption and the consequence of observation of each and every judge puts an undue pressure on the judiciary which is in fundamental conflict with its independence and, furthermore, infringes the principle of the presumption of innocence.

A general gathering of information about judges by secret service institutions and the use of documentation thereby obtained as the basis for a decision of the Judicial Council are therefore unsuitable and unacceptable.

4.) Separation of powers:

Secret service Institutions are part of the executive power. The amended Article 154d of the Constitution gives a decisive influence to the state authority performing the role of safeguarding classified information as the “basis” of the decisions of the Judicial Council). A central principle of a state governed by the rule of law is the effective separation of power. The Constitution of the Slovak Republic acknowledges this in the very first article dealing with the judiciary: Article 141 para 2 “Justice at all levels is administered independently of other state bodies”. The new provision effectively permits the strong influence of the executive power on the judiciary and this contradicts this fundamental principle, thereby seriously damaging the equally important principle of the independence of the judiciary.

5.) Delegation to legislation:

The constitutional amendments leave a large range of details to the legislator. Among these elements are the “manner of supervisions whether the judge meets the requirements” (Article 141a para 11), “the details of decision-making of the Judicial Council of the Slovak Republic on the adoption of the opinion on fulfilment of requirements” (Article 154d) and “the manner of expression of the opinion of the judge on the documentation” (Article 154d). Owing to the fact that the above- mentioned amendments regarding the examination of all judges are in conflict with international standards it is especially dangerous that details, which may reduce or enlarge the infringement are not firmly set out and so established at the constitutional level.

SUMMARY:

The CCJE concludes:

- The tenure of judges, which is an essential element of their independence is unduly questioned and endangered if, without concrete and reasonable suspicion, examinations of judges can be initiated.
- The lustration of all judges with tenure is not in line with international standards. The Slovak Republic has, for many years, been a state committed to the rule of law and, at the present time there is no post-revolutionary change from a totalitarian regime to a democratic state, which is the situation when, exceptionally, such means may be acceptable.
- As a rule it is inappropriate that material gathered by secret service institutions be used in procedures to decide if judges fulfil the necessary requirements established by clearly laid down laws. Any attempt to use against judges material which is gathered in the usual manner in which secret service institutions do so is likely seriously to infringe the independence of the judiciary.
- The Influence of a secret service, which is part of the executive power of the state, on judges' performance and career will conflict with the principles of separation of powers.