

Explanatory memorandum

Introduction

1. Within the framework of the activities undertaken to promote and guarantee the efficiency and fairness of civil and criminal justice, it was decided to prepare a Recommendation on the independence, efficiency and role of judges.
2. Indeed, the Council of Europe includes among its aims the institution and protection of a democratic and political system characterised by the rule of law and the establishment of a constitutionally governed State, as well as the promotion and protection of human rights and fundamental freedoms.
3. The Recommendation on the independence, efficiency and role of judges recognises and emphasises the pre-eminent and significant role played by judges in the implementation of these aims. The independence of judges is one of the central pillars of the Rule of Law. The need to promote the independence of judges is not confined to individual judges only but may have consequences for the judicial system as a whole. States should therefore bear in mind that, although a specific measure does not concern any individual judge directly, it might have consequences for the independence of judges.
4. The texts of the draft Recommendation and its explanatory memorandum were prepared by the Project Group on efficiency and fairness of civil justice (CJ-JU). After examination by the European Committee on legal co-operation (CDCJ), the draft Recommendation and its explanatory memorandum were submitted to the Committee of Ministers of the Council of Europe. The Committee of Ministers adopted the text of the draft Recommendation and authorised the publication of the explanatory memorandum to the Recommendation.
5. In addition to representatives of the member States of the Council of Europe and the Commission of the European Community, the following observers attended the meetings of the Project Group which prepared these texts: Albania, Holy See, Latvia, Russia, the European Association of judges sitting in commercial courts and the International Association of Judges.
6. In order to establish an efficient and fair legal system, it is necessary to strengthen the position and powers of judges and to ensure the proper exercise of judicial responsibilities. When preparing this Recommendation, account was taken of the United Nations Basic Principles on the independence of the judiciary (1985) and the Procedures for the effective implementation of these Principles adopted in 1989. The Basic Principles of the United Nations are, in relation to the draft Recommendation, to be seen as a basic text expressing minimum standards which are fully compatible with the Recommendation. This implies, on the one hand, that it was not always considered necessary to deal with all subjects covered by the Basic Principles which would therefore apply. On the other hand, where further protection of the independence of judges within the framework of the like-minded member States of the Council of Europe was considered possible, this has been reflected in the Recommendation. Because of its importance, the Committee felt however that it was appropriate to insert the text of Basic Principle No 12 in the text of the Recommendation, without making any amendments to it (see principle I, paragraph 3).
7. The starting-point for the Recommendation is the idea that the powers conferred on judges are counterbalanced by their duties. The Recommendation fits into the framework of measures to be

taken to make the judicial system fairer and more efficient. One of the cornerstones of a fair system of justice is the independence of judges. It is necessary to give judges appropriate powers guaranteeing their independence. However, such powers do not authorise them to act in an arbitrary manner. Judges are also subject to certain duties. Judicial responsibilities are accordingly determined by the relationship between the powers and the duties of judges.

8. Consequently, with the same aim of preserving the independence of judges, it is essential to make judges liable to a system of supervision which makes sure that their rights and duties are respected.

9. The Recommendation calls upon the member States to adopt or reinforce, as the case may be, all measures necessary to promote the role of judges and strengthen their efficiency and independence.

10. It contains six principles which should be applied by the governments of member States. These principles relate to the independence of judges, the authority of judges, proper working conditions, the right to form associations, judicial responsibilities and the consequences of failure to carry out responsibilities and disciplinary offences. Although the Recommendation enumerates principles, it was felt necessary to give details concerning these principles, so as to provide guidance to the States implementing the Recommendation. In view of the different legal traditions of the member States relating to the protection of judges, the Recommendation does not seek a complete harmonisation of the law on this matter but provides examples or general rules which show the direction in which steps need to be taken.

Scope of the Recommendation

11. The scope of the Recommendation is not confined to specific fields of law and also covers both professional judges and lay judges, except, in the case of lay judges, with regard to the question of remuneration and certain other matters such as the requirement to have proper legal training. It covers the resolution of civil and criminal cases but also administrative law and constitutional law. The Recommendation, when defining the scope, refers to persons exercising judicial functions rather than to judges as some persons exercising judicial functions in certain States do not have the title of judges although they enjoy the same independence as judges in the exercise of their functions. For instance, some countries have a system whereby specialists perform the function of judges in cases which need highly specialised knowledge, such as auditors or experts in land surveying. Such experts exercising judicial functions cannot be compared with "lay judges" since they are often appointed because of their specialist knowledge. A number of these recommendations would also be appropriate for such persons. For reasons of convenience, it was however felt appropriate to use the term "judge" for any person exercising judicial functions. In any case, it is a matter for the internal law, and in particular the constitutions, to decide who are considered judges for the purposes of this Recommendation.

The Recommendation does not interfere with systems designated to discharge the courts of minor cases in, for instance, criminal or administrative matters (for example the so-called "ordonnance pénale" in France or the "Ordnungswidrigkeiten" in Germany). On the contrary, the Council of Europe has previously encouraged the adoption of such measures¹.

Commentary on the principles

¹ See Recommendation No R (87) 18 on the simplification of criminal justice.

Principle I (General principles on the independence of judges)

12. Support for the independence of the judges is expressed in the first principle which calls for all necessary measures to be taken to respect, protect and promote the independence of judges. The scope of the concept of "independence of judges" is not confined to judges themselves but covers the judicial system as a whole.

13. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles (cf. paragraph 2 a. of this principle). This requirement implies that the independence of judges must be guaranteed in one way or another under domestic law. Depending on the legal system of each country, this guarantee may take the form of a written or unwritten constitution, a treaty or convention incorporated in the national legal system, or even written or unwritten principles of superior status, such as general legal principles.

14. With regard to the measures for implementing this principle, several aspects should be considered, taking into account the legal traditions of each State. The law should lay down rules on how and when appeals may be made against judges' decisions to courts enjoying judicial independence. A revision of decisions outside that legal framework, by the government or the administration would clearly not be admissible. Similarly, the term of office of judges and their remuneration should be guaranteed by law. As to the term of office, the Recommendation provides specific rules on when it would be admissible to suspend judges or permanently remove them (cf Principle VI). Moreover, a specific recommendation (cf Principle III, 1, c) is made in respect of the remuneration of judges. Courts should also be able to decide on their own competence, as defined by the law and the administration or government should not be able to take decisions which render the judges' decisions obsolete, with the exception of very special cases of amnesty, pardon, clemency or similar situations. Such exceptions are known in every democracy and find their justification in humanitarian principles of superior value.

15. The independence of judges is first and foremost linked to the maintenance of the separation of powers (cf. paragraph 2 b. of this principle). The organs of the executive and the legislature have a duty to ensure that judges are independent. Some of the measures taken by these organs may directly or indirectly interfere with or modify the exercise of judicial power. Consequently, the organs of the executive and legislative branches must refrain from adopting any measure which could undermine the independence of judges. In addition pressure groups and other interest groups should not be allowed to undermine this independence.

16. It is essential that the independence of judges should be guaranteed when they are selected and throughout their professional career (cf. paragraph 2 c. of this principle) and that there should be no discrimination². All decisions concerning the professional life of judges should be based on objective criteria and even though each member State has its own method of recruitment, election or appointment, the selection of candidates for the judiciary and the career of judges must be based on merit. In particular where the decision to appoint judges is taken by organs which are not independent of the government or the administration or, for instance, by the Parliament or the President of the State, it is important that such decisions are taken only on the basis of objective criteria.

² The United Nations Basic Principles on the judiciary provides in paragraph 10:
"Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory."

All decisions affecting the professional career of judges should be based on objective criteria. It is not only at the time of appointment as judge that judicial independence needs to be preserved but throughout the entire professional career as judge. For instance, a decision to promote a judge to another position could in practice be a disguised sanction for an "inconvenient judge". Such a decision would of course not be compatible with the terms of the Recommendation. In order to deal with such situations, some States, such as Italy, have adopted a system of separation of judicial careers and judicial functions.

The Recommendation seeks (paragraph 2 c, sub-paragraph 1) to propose standards which should be upheld in all member States, ensuring that decisions are taken without any undue influence from the executive branch or the administration.

Although the Recommendation proposes an ideal system for judicial appointments, it was recognised (cf sub-paragraph 2) that a number of the member States of the Council of Europe have adopted other systems, often involving the government, Parliament or the Head of State. The Recommendation does not propose to change these systems which have been in operation for decades or centuries and which in practice work well. But also in States where the judges are formally appointed by the government, there should be some kind of system whereby the appointment procedures of judges are transparent and independent in practice. In some States, this is ensured by special independent and competent bodies which give advice to the government, the Parliament or the Head of State which in practice is followed or by providing a possibility of appeal by the person concerned. Other States have opted for systems involving wide consultations with the judiciary, although the formal decision is taken by a member of government.

It was not felt appropriate to deal explicitly in the text of the Recommendation with systems where appointments are made by the President or the Parliament, although the Committee was of the opinion that the general principles on appointments would apply also for such systems.

An important aspect of ensuring that the most suitable persons are appointed as judges is the training of lawyers. Professional judges must have proper legal training. In addition, training contributes to judicial independence. If judges have adequate theoretical and practical knowledge as well as skills, it would mean that they could act more independently against the administration and, if they so wish, could change legal profession without necessarily having to continue to be judges.

17. In the decision-making process, judges should be able to act independently (cf. paragraph 2 d. of this principle). The judge should have unfettered freedom to decide a case impartially, in accordance with his conscience and his interpretation of the facts, and in pursuance of the prevailing rules of law. The purpose of this provision is to ensure that no pressure of any kind and from any quarter obliges the judge to deliver judgment along the lines desired by a party, the administration, the government or any other person. Attempts to corrupt judges should be punished under criminal law. In some States, judges are obliged to report, for instance, on backlog of cases to the President of the court or to official authorities. Such reporting obligations, which are necessary for an efficient management of scarce resources in courts and for planning purposes are of course compatible with the concept of judicial independence. However, as it could be used as a means of exerting influence on judges, they should not be obliged to report on the merits of the cases with a view to justifying their decisions.

18. There are various possible systems for the distribution of cases, such as the drawing of lots, distribution in accordance with the alphabetical order of the names of the judges or by giving cases to the divisions of the court in an order specified beforehand (so-called "automatic distribution") or

the sharing out of cases among judges by decision of the President of the court (cf. paragraph 2 e. of this principle). What matters is not so much the system of distribution, but the fact that the actual distribution should not be tainted by outside influence and should not benefit one of the parties. In some States, a decision by the President of the court is considered acceptable. Appropriate rules for substituting judges could be provided for within the framework of the rules governing the distribution of cases. This would ensure that where, as may occur relatively frequently (e.g. illness, vacation), a judge is unable to hear a case it is dealt with properly. In that way extraordinary decisions (cf. paragraph 2 f. of this principle) would be necessary only in a limited number of cases. Rules for the substitution of judges should take account of the period of absence of the judge.

19. Nevertheless, it might on some occasions be necessary to withdraw a particular case from a judge. Therefore, and out of the same concern to preserve the independence of the judicial system, the law should provide that a case should not be withdrawn from a judge by the appropriate body without valid reasons (cf. paragraph 2 f. of this principle). The aim is to prevent a case from being withdrawn from a judge by the executive because the likely decision would not correspond to the expectations of, say, the government or the administration.

20. A case may not be withdrawn from a judge unless there are valid reasons and the decision is taken by the competent body. The concept of "valid reasons" covers all grounds of withdrawal which do not affect the independence of judges. Reasons of efficiency may also constitute valid grounds. For example, when a judge faces a backlog in his caseload due to illness, it is possible for cases to be withdrawn from him and assigned to other judges. Similarly, it may prove necessary to withdraw cases from judges who have been assigned a time-consuming case which may prevent them from dealing with other cases already assigned to them. It may prove necessary for the list of valid reasons to be determined by statute. In no event does this provision affect the right of parties to withdraw a case.

21. With regard to the question of the possibility for a judge to withdraw from a case, see Principle V (paragraph 3 c).

Principle II (The authority of the judges)

22. In order to ensure that the judge enjoys the respect due to him as a judge and that the proceedings are conducted efficiently and smoothly, all persons connected with a case (eg. parties, witnesses, experts) must be subject to the authority of the judge in accordance with domestic law. State bodies or their representatives must also submit to the authority of the judge.

23. Judges should have available to them the necessary practical measures and appropriate powers to maintain order in their courts. Once such powers are allocated to judges, they have a responsibility to prevent the occurrence of situations which call in question their independence.

24. By way of example, reference may be made to the contempt of court procedures which exist in certain member States. In addition, the presence of security guards at hearings could be useful for the purpose of ejecting persons who disturb public order.

Principle III (Proper working conditions)

25. Proper working conditions for judges are a particularly noteworthy aspect of the arrangements for improving the efficiency and fairness of justice. Such working conditions, to which judges are entitled, derive in fact from the powers bestowed on them and the independence they are required to exercise.

26. The following measures will contribute to the provision of proper conditions enabling judges to work efficiently.

27. It is necessary to recruit judges in sufficient numbers to avert an excessive workload and enable the proceedings already started, regardless of their volume, to be finalised within a reasonable time (cf. paragraph 1 a). States may wish to give consideration to the possibility of allowing single judges to deal with cases of first instance.³

28. With a view to ensuring that the law is properly applied, it is not enough merely to require, at the selection stage, that judges possess suitable qualifications; they must also be given appropriate training before their appointment and during their career. It lies with member States to determine the content of such training although the Recommendation proposes some fields where training is of importance. In some cases, training prior to appointment may be very limited, for example when the national system provides for the appointment of former practising lawyers as judges. In the course of their career, judges must receive training which keeps them abreast of important new developments, such as recent trends in legislation and case law, social trends and relevant studies on topical issues or problems.

29. Status and remuneration are important factors determining appropriate working conditions (cf. paragraph 1 b). The status accorded to judges should be commensurate with the dignity of their profession and their remuneration should represent sufficient compensation for their burden of responsibilities. These factors are essential to the independence of judges, especially the recognition of the importance of their role as judges, expressed in terms of due respect and adequate financial remuneration.

30. Paragraph 1 b is closely bound up with the reference in Principle I to all decisions concerning the professional life of judges, which obviously includes their status and their remuneration.

31. The quality of judicial decisions depends primarily on the quality and competence of judges. Some member States have great difficulty in attracting the best lawyers to the judge's profession and retaining their services. There is intense competition with the private sector because the latter offers more attractive career prospects. Paragraph 1 c is therefore aimed at encouraging member States to make efforts to ensure that such lawyers can expect a successful career as judges. To this end, they must improve career structures, provide for genuine opportunities for promotion and increase remuneration.

32. Judges will also be able to work more efficiently and deliver their judgments promptly if they are assisted by adequate back-up staff and equipment (cf. paragraph 1 d). In order to ensure improved management of courts and of case files, it is necessary to make all office automation and data processing facilities available to judges.

33. Finally, in order to ease the burden on judges and enable them to concentrate on their work of hearing and determining cases, it is important to relieve them of all non-judicial tasks which can be assigned to other persons (cf. paragraph 1 f). Judges are not normally themselves empowered to

³ Paragraph V of Recommendation No R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts provides "Generalising, if not yet so, trial by a single judge at first instance in all appropriate matters."

delegate certain tasks to other persons, but it is the law in the broad sense of the term which would authorise the transfer of such non-judicial tasks⁴.

34. However, delegation cannot be done in such a manner that it will endanger the judicial independence of judges. Judicial tasks should, of course, remain within the exclusive purview of the judge.

35. A final aspect in relation to working conditions concerns the safety and physical protection of judges (cf. paragraph 2). Member States should provide adequate facilities to ensure the protection of judges when this is necessary. While protection is needed more especially for judges dealing with criminal cases, it may also be needed for judges handling civil or commercial cases. The presence of security guards on court premises and police protection for judges who are the victims of serious threats are measures which could be envisaged.

Principle IV (Associations)

36. Under this principle, judges are given the right to take collective action to safeguard their professional independence and protect their interests. To this end, judges are free to form associations whose activities are confined to defending the independence and the interests of the profession. Such associations may, for example, take part in salary negotiations with the Ministry of Justice or contribute to the training of judges. The associations act either alone or with another body.

37. In some member States, judicial bodies or the Ministry of Justice have a hand in the administration of the courts and tribunals. Once again, such intervention must always be based on respect for the independence of judges.

Principle V (Judicial responsibilities)

38. The independent allotted task of judges is that of safeguarding the rights and freedoms of all persons within the scope of their duty to administer justice (cf. paragraph 1). The judge is responsible for protecting the rights and freedoms granted to individuals. This obligation should not only be seen as a duty to protect the minimum rights as expressed in the European Convention of Human Rights. The obligation goes further but it is difficult to define in precise terms its scope. Ultimately, the obligation has to do with the defence of Democracy and the Rule of Law, safeguarding against oppression and the totalitarian State as expressed in the Statute of the Council of Europe.

39. This principle, which deals with the responsibilities of the judge, covers the relationship between the judge's duties and powers. Judges should be given appropriate powers to assure them of total independence in the fulfilment of their tasks. Judges have a duty to exercise the powers bestowed on them (cf. paragraph 2).

40. Judges should be given proper working conditions to ensure that they are able to carry out their responsibilities (cf Principle III). A balance is struck between the right of judges to adequate working conditions and their responsibility for the use of the resources placed at their disposal, but a lack of adequate working conditions is no excuse for failing to carry out the judicial responsibilities

³ See also Recommendation No. R (86) 12 of the Committee of Ministers concerning measures to prevent and reduce the excessive workload in the courts, and in particular the Appendix thereto (examples of non-judicial tasks of which judges in some States could be relieved according to the particular circumstances of each country).

referred to in paragraph 3.

41. Paragraph 3 specifies several responsibilities entrusted to judges.

a. First of all, it is incumbent on judges to act independently in all cases, unaffected by any outside influence. This does not apply to cases where a lower court is bound by a higher court in respect of points of law.

b. Independent judges should give impartial decisions based solely on an assessment of the facts and their understanding of the law. Sub-paragraph 3 b refers expressly to the principle of fairness and the rights of the parties as enshrined in the Convention, more particularly in Article 6.1 of that Convention, which stipulates that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

c. Judges have an obligation to give judgment in the cases assigned to them. This responsibility counterbalances Principle I. paragraph 2 f. If a case cannot be withdrawn from a judge by the appropriate body without valid reasons, judges are also not entitled themselves to withdraw from a case without valid reasons. On the other hand, where such reasons exist, judges should have an obligation to withdraw from the case. This twofold requirement contributes to guaranteeing the independence of judges. This responsibility is more particularly applicable to situations where judges withdraw from cases solely because the judgments to be delivered would be unpopular though justified. However, judges can disqualify themselves if there is a conflict of interest or any other valid reason. A "valid reason" can be defined by legislation or case law. Other examples of valid reasons are serious health problems or the interests of justice. This latter concept is difficult to define but relates to some extent to the principle that "justice must not only be done, but must also be seen to be done". For instance, if a case concerns a neighbour of a judge and the judge does not know this neighbour, there is no conflict of interest. However, the judge may consider it necessary to withdraw from the case in the interests of justice so as not to cast any shadow of a doubt over the impartiality of the court.

d. It is also the duty of the judge in the interests of justice, to give an impartial explanation of certain procedural matters in appropriate cases to the parties. In particular parties who are not represented by lawyers need often explanations concerning the procedure and judges must ensure that such parties are sufficiently informed to enable them to understand the proceedings.

e. The responsibility of encouraging the parties, where appropriate, to reach a friendly settlement underscores the importance of the conciliatory role played by the judge for the sake of efficiency of justice. In addition, it is the natural function of the judge to secure the reconciliation of the parties: discussion is better than litigation. Judges must however carry out this task with tact and sense and in such a manner that their impartiality cannot be questioned.

f. Again in the interests of guaranteeing the efficiency and fairness of justice, judges must give clear and complete reasons for their judgments, which as far as possible should be comprehensible to the parties. They should try to avoid using complex words when there are more common synonyms, or quotations in a foreign language when an equivalent exists in the language of the country. The obligation to give reasons is, however, not absolute. In some States, it is not necessary to give reasons in specific types of cases, for instance judgments by default or which are based on the defendants approval (Germany), where a jury has tried the case or in matters concerning provisional measures (Malta) or where a Court of Appeal does not change the decision of the District Court (Sweden). Usually, such situations dispensing from the main principle are defined by law or, at least, established in long standing practice of the courts.

g. In order to counterbalance the obligation placed on States to provide for appropriate training for judges before their appointment and during their career (Principle III.1.a), judges should participate in any training needed for the efficient and proper performance of their duties. Indeed, if member States make training facilities available, judges should use them. This responsibility is more particularly concerned with the obligation to keep abreast of recent changes in legislation or case law.

Principle VI (Failure to carry out responsibilities and disciplinary offences)

42. This final principle places an obligation on judges to exercise their powers and assume their responsibilities. Like any other representative of one of the branches of State authority, judges are subject to monitoring of their compliance with this obligation.

43. When judges fail to carry out their duties in an efficient and proper manner, appropriate measures must be taken. Such measures may, for instance, include, depending on the legal traditions of the State, withdrawal of cases from the judge, moving the judge to other judicial tasks within the court, economic sanctions such as a reduction of salary for a temporary period or suspension (cf. paragraph 1 of this principle). It goes without saying that taking such measures must remain exceptional in order to preserve judicial independence. It lies with the member States to decide which is the appropriate body for monitoring judges' activities which is why the Recommendation in paragraph 3 only requests the member States to "consider" setting up a special competent body. It should be possible to appeal against decisions of this body to a court. It could be a judicial body but other bodies, such as the Ministry of Justice, fulfil this task in some member States. Any measure taken by the supervisory body must be based on respect for the independence of judges. For example a ministry should not, under the pretext of exercising its supervisory authority, be allowed to withdraw a case from a judge whose decision does not appear likely to be consistent with the wishes of the administration. However, if a judge faces a substantial backlog in his case-load, the President of the Court, a higher judicial authority or the Ministry of Justice may decide to undertake an investigation into the reasons for this state of affairs. In such cases, the requirement of efficiency of justice does not impair the independence of the judge.

44. Where, according to domestic law, judges are alleged to have committed disciplinary offences, it is essential that any proceedings brought against them should safeguard their independence and that any competent tribunal or body should be independent and impartial. In some member States, a judge suspected of having committed a disciplinary offence is brought before a tribunal composed of judges or composed of judges and other persons not belonging to the judiciary. Other member States have no real disciplinary courts or tribunals. The only disciplinary sanction in such countries is dismissal. In certain countries only the national parliament is entitled to dismiss judges of higher courts from their posts. In conclusion: the fact that the tribunal conducting the disciplinary proceedings does not fall under the jurisdiction of judges or is not subject to a degree of influence by judges is not a source of difficulty provided that the independence of the tribunal or body and the impartiality of the proceedings are respected.

45. Paragraph 2 takes account of the different circumstances in which judges may be removed from office before the age of retirement.

46. The principle of absolute security of tenure for judges given permanent appointments is aimed at guaranteeing their independence and ensures that a permanently appointed judge cannot be removed from office without valid reasons before he reaches the mandatory retirement age.

However, some member States do not guarantee security of tenure for judges up to the age for retirement. This applies to cases where either judges have to be re-elected after a certain period or some judges undergo a period of "probation" when they first take up their duties, during which they can be dismissed.

47. The concept of "valid reasons" covers cases involving disciplinary offences or incapacity. It goes without saying that, in dismissal proceedings, judges enjoy the same rights and procedural guarantees as any other party to litigation. Reference should also be made to the United Nations Basic Principles on the judiciary.⁵

⁴ Paragraph 19 of the United Nations Basic Principles on the judiciary provides: "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."