

PROPOSAL

for an

EAJ Statement on material independence of judges**I. Necessity of material independence**

- 1) Material Independence is an important element of judicial independence.
- 2) The effectivity of material independence depends on the amount/furnishing of the material safeguards and also on the role the judiciary plays in the procedure for changes of the elements of these safeguards.
- 3) Material independence not only depends on the remuneration but is also influenced by bonuses, housing facility etc., social security costs and pension. All these elements should be fixed in the law and not depend on discretionary decisions.
- 4) Security of material independence encompasses also the pension of judges. It must be safeguarded that judges who retire are - when considering all together - in a position to keep a living standard, which is in reasonable relation to their position and social status before retirement.

II. Safeguards to secure material independence

- 5) Preferably the scheme and height of judges' remuneration should be secured on a legal basis. If this is not the case equally matched means should protect judges' remuneration against unilateral changes.
- 6) If the height of remuneration is not directly fixed in the law itself, the modalities and procedures of fixing it should be regulated in a law.
- 7) Councils for the judiciary and Judges associations should be able to participate effectively in the procedures for adopting legislation on judges' remuneration, pensions and other elements of judges' material security respectively in the negotiation procedure on judges' remuneration and material security.
- 8) Councils for the judiciary and Judges associations should be guaranteed standing at respective court procedures regarding judges' remuneration, pensions and other elements of judges' material security (in their own name and representing their members).

III. Adequate material independence

- 9) As representatives of one of the powers of the state, judges should have a corresponding remuneration (and material privileges in addition to it) as the representatives of the other powers of state.
- 10) Judges of the Supreme Courts should have at least the same remunerations as Ministers (or MPs).
- 11) Judges of the Appellate Courts should have at least the same remuneration as MPs (or highest position in the administration).
- 12) In order to make the profession of judge attractive to the best of the best, the income of judges appointed from the ranks of experienced legal professionals should be in a reasonably relationship with the income of their colleagues in their previous profession.
- 13) Awareness is necessary that also during the process of selection and initial training candidates need to have adequate attractive income.
- 14) Restrictions on the possibility of additional income, which the law provides for judges in the interests of independence and impartiality, should be taken into account when determining judges' remuneration.
- 15) The scheme of remuneration within the judiciary may consider the duration of experience in the judiciary. If there is different remuneration assigned to different posts within the judiciary the level of the court should be taken into account in a reasonable way balancing the different but equally important tasks of all instances, which together provide the guarantees of a well-functioning justice system.
- 16) There should not be a different remuneration of judges from different courts of the same level, nor a different level of pension after retirement.

- 17) Judges should have at least the same income as prosecutors of the same level.
- 18) After retirement other professional activity should be allowed after a cooling off period, which intends to avoid the impression there might previously have been a lack of independence or impartiality.

IV. Adjustment of remuneration or pensions

- 19) A reduction of judges' remuneration should not be possible. As a temporary measure in extraordinary financial crisis of the state and only of this corresponds to the other state employees/politicians/representatives of the other powers of the state and if the given proportion is kept, a reduction or suspension of remuneration may be allowed exclusively for the time of such crisis.
- 20) A reduction of the remuneration of politicians or their waiver of an increase should not automatically infringe the remuneration of judges.
- 21) The purchase power of the remuneration should be considered and the remuneration should be adapted to inflation. At least if the income of other state employees increases with inflation indices or the average income in the country judges should not be excluded from such increase.
- 22) Salaries and bonuses should not depend on the performance, neither its quality nor its quantity.

Explanatory Memorandum

Ad 1)

Judicial independence is a pre-requisite for safeguarding the rule of law and the fundamental guarantee of a fair trial. This independence has to be guaranteed not only when exercising the judicial function but also in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration of judges and regarding the financing of the judiciary in general. Judicial independence shall be statutory, functional and financial (Magna Carta of Judges, Art 3, 4).

The guarantee of independence is inextricably linked to the important task of judging and that a salary commensurate with the importance of the functions performed by judges should in fact be a guarantee inextricably linked to the independence of judges. The European Court of Justice has stated that the receipt by members of the judiciary of a level of remuneration on commensurate with the importance of the functions they carry out constitutes an essential guarantee to judicial independence (ECJ, C-64/16, *Associação Sindical dos Juízes Portugueses*, § 45).

Judges should have sufficient financial means at their disposal, which secures them a life which corresponds with the status of their profession orientated on their tasks and responsibility for the society.

Countries in which corruption played an endemic problem tried to build a wall against infection of the judiciary by providing high remuneration to judges.

Ad 2)

Judges' remuneration should be commensurate with the dignity of their profession and burden of responsibilities (CCJE, Opinion No 1(2001), §61). Judges should be offered a competitive and appealing remuneration package (ENCJ, Attractiveness of the Judicial Career, Report 2023-2024, §19).

The level of judges' remuneration should be fixed so as to shield them from pressures aimed at influencing their decisions – and, more generally, their behaviour, and that a failure to ensure that judges are paid the judicial benefits to which they are entitled by law constitutes a circumstance liable to impede the exercise of their judicial functions with the necessary dedication (ECtHR, *Kubat and Others v. The Czech Republic*, §95).

To provide the necessary material independence it is not only necessary that the scheme of remuneration and how it is implemented is adequately constructed, but also that possible changes foresee an actual involvement of the judiciary (see 7, 8).

Ad 3)

The quality of decision making depends on the allocation of adequate human, financial and material resources to each judicial system as well as the maintenance of financial security for each judge within that system (CCJE, Opinion No 11(2008), Recommendation (b)).

The concept of judicial remuneration should encompass all social benefits, including pension. Automatic adjustment mechanisms that align judicial remuneration with inflation and market conditions, like indexation of salaries, are necessary. Other factors may include previous experience, seniority or length of service, where applicable, special responsibilities, travelling time and number of vacation days. All of these may be taken into consideration when calculating remuneration (ENCJ, Attractiveness of the Judicial Career, Report 2023-2024, §20).

When assessing the material security situation of judges, it is necessary to look not only at the basic remuneration. Additional pay like all kind of bonuses, but also the social security benefits. In the interest of transparency and safety it is favourable that the overwhelming part of the income is included in the basic remuneration. All kinds of remuneration should be regulated by clear criteria and not depend on discretion by administration (president of Courts, Councils) or others, which could be a door of influence.

Ad 4)

Like everybody else, judges will orientate their plans and activities to arrange the conditions of their life not only in respect of the time in which they exercise their profession, but also in respect of the time after.

The level of pension should be as close as possible to the level of remuneration during the last period of service, to complete the guarantees of financial security and correspond with the status of a former judge and so also to provide a financial motivation for choosing a career as a judge.

As occupational pensions are an element of remuneration, they give rise to rights that must be protected, including from the point of view of property rights (ECJ, C-262/88). The length-of-service allowance constitutes a loyalty bonus by way of reward but, above all, with the effect of compensating for the deprivations, restrictions and incompatibilities suffered throughout the exercise of the profession. Disregarding this case-law constitutes a serious breach of EU law (ECJ, C-224/01).

Ad 5) – 6)

Best safeguard for the material independence of judges is that the respective elements are fixed in the law or even in the constitution (e.g. Ireland). This is the case in many countries. In other countries the scheme is fixed in the law but the concrete height of salaries is the result of negotiations (e.g. Nordic countries have a combination of the Nordic labour model and National legislation concerning state officials salaries and pensions in general).

The principal rules or the system of remuneration for professional judges should laid down by law (Recommendation CM/Rec (2010)12, Appendix, §53). This is seen as essential in most countries. In some systems (e.g. in the Nordic countries) this necessity to shield the material independence is experienced as sufficiently guaranteed by the way how salaries are fixed as result of negotiation with competent bodies.

Ad 7) – 8)

Councils for the judiciary and Judges associations should be involved when the legislator is going to adopt or amend legal provisions regarding the judiciary or the status of judges.

Prior to its deliberation in Parliament, the Council for the Judiciary shall be consulted on all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary (CCJE, Opinion No 10(2007) - Recommendation D(h)).

When the concrete determination of the salaries is done in a procedure of negotiations it should be secured that Councils for the Judiciary and judges associations should have some say here as well.

Councils for the judiciary and Judges associations should not only have the possibility to represent judges in court proceedings regarding their material independence, but should also themselves have a standing in court in questions of material independence of judges (and the judiciary) e.g. at the constitutional court.

The first objective for an association of judges of establishing and defending independence encompasses among other factors defending judges and the judiciary against any infringements of independence, claiming sufficient resources and satisfactory working conditions, aiming for adequate remuneration and social security. In fostering and defending the independence of judges and the judiciary, Judges associations have to carry out a wide range of activities. (CCJE, Opinion No 23(2020), §§17, 24).

Associations of judges represent the experience and opinion of judges, and they need ways to forward their considerations and proposals to the other powers of state. Consultation of judges by their representatives or professional associations on any proposed change in their statute or any change proposed as to the basis on which they are remunerated, or as to their social welfare, including their retirement pension, should ensure that judges are not left out of the decision-making process in these fields (CCJE, Opinion No 23(2023), §38).

Ad 9) – 11)

Each of the three powers of the state has its special task. All three powers are necessary for a democratic state governed by the rule of law.

The judiciary is one of the three powers of state in a democracy. They are complementary, with no one power being “supreme” or dominating the others. In a democratic state, the three powers of the state function as a system of checks and balances that holds each accountable in the interest of society as a whole. The other powers of the state should recognise the legitimate constitutional function that is carried out by the judiciary and ensure it is given sufficient resources to fulfil those functions (CCJE, Opinion No 18(2014), §§9, 42).

It is therefore self-evident that the top-representatives of each power should have a corresponding remuneration. The general power of final decisions of the Supreme Courts consequently ranks Supreme Court Judges at least as ministers, and also judges of courts of appeal need to be adequately ranked.

Ad 12)

To ensure the quality of the judiciary, judicial positions must be attractive to qualified people and therefore competitive salaries and pensions must be offered to ensure that the best candidates are not lost to the private sector or other public offices.

In systems where judges are selected from experienced lawyers it is equally important to offer a financial perspective, which attracts experienced lawyers to change into the judiciary.

Ad 13)

In some justice systems there is another obstacle to attract qualified interested persons to apply for the position of a judge. A long period of training and/or examination without adequate income and the uncertainty if in the end there will be an appointment prevents qualified persons from undergoing this procedure. This negative impact could be reduced if already in this stage a candidate gets some financial support from the state.

Ad 14)

Extrajudicial activity may trigger doubts on the impartiality of judges. Therefore, many justice systems reduce the permission of judges to perform extra-judicial activities to teaching, lecturing, arbitration activities, activities in science and arts or exercising duties, which had to be exercised by a judge due to a legal provision. Such limitation of the fundamental right of freedom of employment is justified, but the reduced possibility to earn additional income out of out-of-office activities must be taken into account when fixing the remuneration and pension scheme of judges (compare also ECJ C-224/2001, *Gerhard Köbler v. Republik Österreich*).

Ad 15)

The Italian system, where in principle judges during their career follow the same path of development of their remuneration regardless of the position within the judiciary, seems to be unique.

Normally the scheme of remuneration provides judges of a higher instance with higher salaries. This raises the question about the relation of the remuneration at these different levels. Supreme Court judges should earn at least an equivalent to the highest representatives of the other powers of the state (see above 9). The remuneration of the lower instance judges may consider that several of their decisions are subject to possible scrutiny by judges of higher instances, but that also first instance judges have their indispensable responsibilities.

Ad 16)

There can be no justification for different salaries for equal work. There can be no justification for differences in the amount of the salaries/pensions of judges who perform/have performed work under identical conditions (identical functions, same hierarchical level of the court, identical competences, identical education, identical seniority, etc.). Such different categories of judges at different courts of the same level tend to create hierarchical thinking, mistrust and splitting within the judiciary.

Ad 17)

There is no reason why prosecutors should have a higher remuneration than judges. This among others contradicts their role as a party of a procedure, on the motions of whom judges will take their decision.

The higher remuneration of prosecutors in a small number of countries originates in the role which in these justice systems prosecutors had in the past regarding the administration of courts or the supervision of jurisprudence. These arguments should have no basis at the present time, all the more so as the CCJE has stated that the proximity and complementary nature of the tasks of judges and prosecutors create similar requirements and guarantees as regards their status and conditions of service, including remuneration (CCJE, Opinion No 12(2009), § 37).

Ad 18)

The importance of income after retirement for material independence is already highlighted under point 4. When the impression could be avoided, that the additional source of income after the retirement might already have influenced the performance of the judge when exercising his office, it would be discriminatory to forbid judges to gain additional income after retirement (see Universal Charter of the Judge, Article 8-3).

Ad 19)

As a rule, reduction in judges' remuneration and pensions should not be possible.

Judges' salaries and pensions should be protected against reduction during the judge's term of office, to avoid threats to the independence of justice. Any change in the amount of salaries and pensions should be provided for by law in such a way as to annihilate the possibility of decreasing the income of serving and retired judges. Judges' salaries and pensions must be protected by specific legal provisions against cuts. A reduction in judges' remuneration should be possible only in the case of an extraordinary financial crisis of the state and only if it applies to all other state employees (and politicians/representatives of other state powers), keeping the given proportion (see also ENCJ, Funding of the judiciary, Report 2015-2016).

A reduction of the remuneration is also protected by Article 1 (1) of Protocol No 1 to the ECHR (see in regard of the pension ECtHR, *Khoniakina v. Georgia*, §72).

Ad 20)

Sometimes remuneration of judges is linked to the income of politicians, who for political reasons exclude themselves from a general increase of salaries. To apply such waiver to judges often overlooks that politicians normally have possibilities of additional income.

Ad 21)

Judicial salaries have to keep pace with inflation. Wage adjustments must keep pace with rising living costs to maintain purchasing power. Judges' salaries should be indexed to the inflation rate annually, according to precise calculation criteria laid down by law. A remuneration, which should be adequate needs an increase, if the purchasing power decreases. Without adapting salaries to the development of purchase power over time the remuneration would lose its functions of securing an income, which corresponds to the role, status and responsibility of judges. (In the past sometimes, it was used as populist political means to exclude judges from participating in general granted increases of income following the rate of inflation.)

Ad 22)

The combination of income and performance criteria especially quantitative outcome of judges' work may unduly influence the performance.

The remuneration must not depend on the results of the judge's work, or on his/her performances, and must not be reduced during his or her judicial service (Universal Charter of the Judge, Article 8-1).