

COUNCIL OF EUROPE'S STANDARDS OF THE JUDICIAL AND PROSECUTORIAL TRAINING AND NOMINATION PROCESS

Grzegorz Borkowski

Head of Office in National Council of Judiciary

Summary. The article shows the importance of the judicial training as it is perceived by the Council of Europe's bodies, i.e. as a prerequisite of a judicial independence. This issue has been raised in several documents issued e.g. by the Consultative Council of the European Judges (CCJE) and the European Commission of Democracy through Law (Venice Commission). It has also been stressed in the Recommendations of the Committee of Ministers and mentioned by the United Nations. The quality of the prosecutorial trainings is of no less importance.

Key words: judicial education and training, independence of the judiciary, European standards, prosecutorial and training, Council of Europe, initial training, in-service (continuous) training

THE JUDICIAL TRAINING – BASIC PRINCIPLES

The issue of judicial training is intrinsically connected with judicial independence. All main documents, especially those of Council of Europe's bodies, which deal with the issue of judicial independence mention the sufficient judicial training as one of the preconditions of being an independent judge.

The importance of the training of judges is certainly recognized not only in Europe, but in many international instruments and the UN Basic Principles on the Independence of the Judiciary, adopted in 1985, may serve as a good example. According to point 10 of the Principles:

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.

The UN Basic Principles on the Independence of the Judiciary and the standards contained therein were recalled in Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges. Moreover in Principle III (Proper working conditions) the Committee of Ministers of the Council of Europe stated bluntly that proper conditions should be provided to enable judges to work effi-

ciently and, in particular, by recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts.

In 2010, i.e. 16 years later the Committee of Ministers came to a conclusion that the above-mentioned Recommendation needs to be substantially updated in order to reinforce all measures necessary to promote judges' independence and efficiency, guarantee and make more effective their responsibility and strengthen the role of individual judges and the judiciary generally. Consequently Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities was adopted on 17 November 2010. According to the Appendix of the Recommendation "judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state". This should include economic, social and cultural issues related to the exercise of judicial functions. The intensity and duration of such training should be determined in the light of previous professional experience (p. 56). Moreover, an independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office (p. 57).

In the Explanatory Memorandum to this document, the Ministers' Deputies explained that initial training, as a precondition to the exercise of judicial functions, and in-service training for all judges, comprising both theoretical and practical teaching, should be fully funded by the state. In some member states in-service training is compulsory. In others it is an ethical obligation. Initial and in-service training should include European law, with particular reference to its practical application in day-to-day work, the Convention and the case law of the European Court of Human Rights, as well as the practice of foreign languages as required. Training on economic, social and cultural issues is meant to take into consideration the general need for social awareness and understanding of different subjects reflecting the complexity of life in society. Initial and in-service training should allow for study visits to European jurisdictions and other authorities and courts. In-service training assessment should not be used as a form of integrated assessment of the judge. When referring to the intensity and duration of the training in the light of previous experiences, the idea is not to have an individualised training system but rather to reflect the variety of systems, noting that in some member states, candidates may sometimes have a long professional experience as non-judges before being trained to become judges, and that in this precise case, their initial training will be different from the one provided to post-university candidates with no professional experience. What is more, the Ministers' Deputies pointed out that the Recommendation had been developed having regard to Opinion No. 4 of the CCJE (see below).

CCJE'S STANDARDS

Consultative Council of European Judges (CCJE) adopted on 17 November 2010 Fundamental Principles, called Magna Carta of Judges, summarising and codifying the main conclusions of the opinions that it had previously adopted. According to Principle 8 “initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system”.

Yet CCJE had paid attention to the issues of judicial training and appointment in its opinions before, e.g. in its Opinion no. 1 on standards concerning the independence of the judiciary and the irremovability of judges.

Nevertheless, the most in-depth study on the importance of judicial training (both initial and in-service) was carried out by the Consultative Council of European Judges in its Opinion no. 4 on appropriate initial and in-service training for judges at national and European levels. CCJE stated there, *inter alia*, that 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. 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.

CCJE also noted that there are great differences among European countries with respect to the initial and in-service training of judges. These differences can in part be related to particular features of the different judicial systems, but in some respects do not seem to be inevitable or necessary. Some countries offer lengthy formal training in specialised establishments, followed by intensive further training. Others provide a sort of apprenticeship under the supervision of an experienced judge, who imparts knowledge and professional advice on the basis of concrete examples, showing what approach to take and avoiding any kind of didacticism. Common law countries rely heavily on a lengthy professional experience, commonly as advocates. Between these possibilities, there is a whole range of countries where training is to varying degrees organised and compulsory. Regardless of the diversity of national institutional systems and the problems arising in certain countries, training should be seen as essential in view of the need to improve not only the skills of those in the judicial public service but also the very functioning of that service (p. 6–7). It was also underlined that training is a matter of public interest, and the independence of the authority responsible for drawing up syllabuses and deciding what training should be provided must be preserved. The Judiciary should play a major role in or itself be responsible for organising and supervising training. Accordingly, and in keeping with the recommendations of the European Charter on the Statute for Judges (see below), the CCJE advocated that these responsibilities should, in each country, be entrusted, not to the Ministry of Justice or any other authority answerable to the Legislature or the Executive, but to the

judiciary itself or another independent body (including a Judicial Service Commission). Judges' associations can also play a valuable role in encouraging and facilitating training, working in conjunction with the judicial or other body which has direct responsibility.

In order to ensure a proper separation of roles, the same authority should not be directly responsible for both training and disciplining judges. The CCJE therefore recommended that, under the authority of the judiciary or other independent body, training should be entrusted to a special autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise training programmes and ensure their implementation. Those responsible for training should not also be directly responsible for appointing or promoting judges. If the body (i.e. a judicial service commission) referred to in the CCJE's Opinion N° 1, paragraphs 73 (3), 37, and 45, is competent for training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks. For CCJE it is also obvious that judges who are recruited at the start of their professional career need to be trained.

Also the European Charter on the statute for judges approved at a multilateral meeting organised by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998, deals with the judicial training in point 2.3:

The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

THE VENICE COMMISSION'S POSITION

The issue of judicial appointment and judicial initial training drew also attention of the European Commission of Democracy through Law (Venice Commission), which in 2007 adopted even an opinion on judicial appointments (no. 403/2006). Venice Commission stated *inter alia* that in Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed; appointment rules can be grouped under two main categories: the elective system and direct appointment system. In *elective systems* judges are directly elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament. This system is sometimes seen as providing greater democratic legitimacy, but Venice Commission came to a conclusion that it may also lead to involving judges in the political campaign and to the politisation of the process. In the *direct appointment system* the appointing body can be the Head of State¹. What matters

¹ This was the case in Albania, upon the proposal of the High Council of Justice; in Armenia, based on the recommendation of the Judicial Council; in the Czech Republic; in Georgia, upon the

most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. In some countries judges are appointed by the government (the example of Sweden was given). There may also be a mixture of appointment by the Head of State and appointment by the Government. Another option is direct appointment (not only a proposal) made by a judicial council².

Venice Commission stressed in Conclusions to its Draft Report On The Independence Of The Judicial System: Part I: The Independence Of Judges (Study No. 494/2008) that all decisions concerning appointment and the professional career of judges should be based on merit and the diversity of the judiciary as a whole should be taken into account; it is an indispensable guarantee for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. While respecting the variety of legal systems existing, the Venice Commission recommended that old democracies not yet having done so consider the establishment of an independent judicial council.

THE STANDARDS OF THE PROSECUTORIAL TRAINING AND NOMINATION PROCESS

As in some countries (e.g. France, Romania, Italy etc.) the notion “magistrate” comprising both judges and prosecutors is used, it is no surprise that not only judicial but also prosecutorial training was in the scope of interest of the Council of Europe’s bodies. For example in so-called Bordeaux Declaration “Judges And Prosecutors In A Democratic Society”, which is a joint Opinion No.12 (2009) Of The Consultative Council Of European Judges (CCJE) And

proposal of the High Council of Justice; in Greece, after prior decision of the Supreme Judicial Council; in Ireland; in Italy upon the proposal of the High Council of the Judiciary, in Lithuania, upon the recommendations submitted by the “special institution of judges provided by law”; in Malta, upon the recommendation of the Prime Minister; in Moldova, upon proposal submitted by the Superior Council of Magistrates; in the Netherlands at the recommendation of the court concerned through the Council for the Judiciary; in Poland on the motion of the National Council of the Judiciary in Romania based on the proposals of the Superior Council of Magistracy; in the Russian Federation judges of ordinary federal courts are appointed by the President upon the nomination of the Chairman of the Supreme Court and of the Chairman of the Higher Arbitration Court respectively – candidates are normally selected on the basis of a recommendation by qualification boards; in Slovakia on the basis of a proposal of the Judiciary Council.

² For example in Italy and Portugal the judicial council has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them. In Bulgaria judges, prosecutors and investigating magistrates are appointed by the Supreme Judicial Council. In Croatia judges are appointed and relieved of duty by the State Judicial Council. In Cyprus the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers are exclusively within the competence of the Supreme Council of Judicature. In “the Former Yugoslav Republic of Macedonia” judges and court presidents shall be elected and dismissed by the Judicial Council.

Opinion No.4 (2009) Of The Consultative Council Of European Prosecutors (CCPE) the issue of training of judges and public prosecutors was raised. The Explanatory Memorandum to the Declaration states that the highest level of professional skill is a pre-requisite for the trust which the public has in both judges and public prosecutors and on which they principally base their legitimacy and role. Adequate professional training plays a crucial role since it allows the improvement of their performance, and thereby enhances the quality of justice as a whole. [...]. Different European legal systems provide training for judges and prosecutors according to various models. Some countries have established an academy, a national school or other specialised institution; some others assign the competence to specific bodies. [...], in all cases, to assure the autonomous character of the institution in charge of organising such training, because this autonomy is a safeguard of cultural pluralism and independence.

The importance of training prosecutors is reflected in United Nations Guidelines on the Role of Prosecutors which already in point 2 declare:

States shall ensure that:

a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;

(b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Sub-paragraph “a” of the above-mentioned Guidelines was a basis to formulate point 5 of Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system according to which States should take measures to ensure that the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. In point 7 the Recommendation says that training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment.

Venice Commission's Report On European Standards As Regards The Independence Of The Judicial System: Part II – The Prosecution Service (Study No. 494/2008) reminds that the qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and pro-

motion are in place. Of necessity, a prosecutor, like a judge, will have on occasion to take unpopular decisions which may be the subject of criticism in the media and may also become the subject of political controversy. For these reasons it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimised on account of having taken an unpopular decision. The Report underlines the necessity of the prosecutorial training and nomination process:

Appropriate training should be available for prosecutors throughout their career. The importance of training for prosecutors is certainly of the same level as that for judges. Such training should include legal, including human rights, training as well as managerial training, especially for senior prosecutors. Again, an expert body like a Prosecutorial Council could play an important role in the definition of training programmes. For reasons of cost and efficiency, *synergies could be found in common training for prosecutors and judges.*

SUMMARY

The remarks above prove, in the Author's opinion, that the Member States of the Council of Europe realize the importance of the judicial and the prosecutorial training. It will not be a controversial thesis that only a well-trained judge or prosecutor may fulfill their tasks properly and only a judge with a profound knowledge (also about European law) may face the challenges of the today's world and be truly independent. The proper judicial education has always been perceived as one of the guarantees of the judicial independence and the issue has never been more burning than in the modern world and society.

STANDARDY RADY EUROPY W ZAKRESIE SZKOLENIA I POWOŁYWANIA SĘDZIÓW I PROKURATORÓW

Streszczenie. Celem artykułu jest ukazanie znaczenia szkolenia sędziów i sposobu ich powoływania jako gwarancji ich niezawisłości, w sposób, w jaki jest to postrzegane przez organy Rady Europy, tj. Radę Konsultacyjną Sędziów Europejskich czy Komisję Wenecką. Przywołane zostały również odpowiednie Rekomendacje Komitetu Ministrów Rady Europy oraz dokumenty Narodów Zjednoczonych. Z uwagi na to, że niektóre kraje posługują się zbiorczym pojęciem „magistrate” dla określenia zarówno sędziów, jak i prokuratorów, przytoczono także dokumenty dotyczące znaczenia szkolenia prokuratorów i sposobu ich powoływania.

Słowa kluczowe: szkolenie i powoływanie sędziów, niezawisłość sędziowska, standardy Rady Europy, szkolenie i powoływanie prokuratorów, Rada Europy, szkolenie wstępne, szkolenie ustawiczne