

Problems Relating to Judicial Selection in the Context of Sustainable Development of Society

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Abstract

A broad competence is conferred upon judges in their capacity as public-office holders, including achieving the fair settlement of criminal and civil relationships and solving disputes between private persons and public authorities by way of administrative proceedings. In administering justice, judges are public officials who have a task to ensure that what today's society understands by a fair trial. In today's democratic world, the right to a fair trial should be understood not only as access to justice and judicial protection in criminal, civil and administrative proceedings, but also as compliance of courts with the principles of law, including those of fairness and impartiality, and, more broadly, the legitimacy of judges as public officials. Judges are not abstract public officials, which means that they must have impeccable reputation and adhere to high moral standards.

Keywords: judge, judicial selection, right to a fair trial, sustainable development

1. Introduction

That is why it is particularly important how candidates for judicial office are picked, namely the judicial selection process, which should be aimed at the impartial, transparent and professional evaluation of candidates in order to achieve that a person who will be able to ensure a fair trial in his/her judicial capacity owing to professional and personal qualities is appointed to judicial office, thereby facilitating public trust in the judiciary.

The research deals with problems relating to the conformity of the professional selection of candidates for judicial office with current needs. The judiciary is independent and any judiciary selection process must be conducted in line with the principle of the independence of the judiciary, meanwhile bearing in mind that independence may not imply arbitrariness and uncontrollability. A judge may have no personal interest in cases being adjudicated, and a judge's work has a clearly defined goal, which is to safeguard the rights and interests of natural and legal persons. Therefore, it is not only the state's right but also its duty to secure an independent, professional and transparent judicial selection procedure, which would involve not only judicial authorities but also, indirectly, society. The research focuses on the assessment of mutual coherence of these aspects in the context of an individual's right to a fair trial.

The objective of the research is to examine the legislation dealing with the selection of candidates for judicial office at district (town) and regional courts, analysing it in the context of the right to a fair trial, in order to formulate suggestions for improving the

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legislation, thereby promoting the above right.

Various research methods, such as the descriptive and analytical, deductive and inductive methods, been used to analyse laws and the opinions of legal scholars and formulate conclusions and suggestions.

2. Research

2.1 Analysis of requirements for candidates for the position of judge

Undoubtedly, one of the pillars of the sustainable development of society and the state is social peace, which includes the effectiveness of the dispute resolution system. In a state governed by the rule of law and democracy, such a dispute settlement system is represented by a court. Article 92 of the Constitution of the Republic of Latvia stipulates that everyone has the right and legal interests in a fair court (Constitution, 1922). Importantly, the term “court” has a specific content. The court is not only an institution; it is a specific procedure for the organization of court proceedings, which consists of both procedural legal acts (for example, the Civil Procedure Law, the Criminal Procedure Law) and officials applying legal acts - judges. The legal framework establishes the link between these two elements in the first part of Article 10 of the Law on the Judiciary, which stipulates that judges are independent and subject only to law when adjudicating (Law on the Judiciary, 1992). A detailed explanation of the court as an institution and a fair court as a result of court proceedings is provided in several judgments of the Constitutional Court of the Republic of Latvia; specifically, the concept of the “fair court” includes two aspects, namely “fair court” as an independent judicial authority and “fair court” as due process of law (Judgment of the Constitutional Court of the Republic of Latvia, 2020). However, in order for the content of that finding to be complete, it must contain another element, namely the judge himself/herself, whose professional conduct determines whether the aim of a fair trial will be attained in the proceedings.

The term “judge” is translated as a court clerk judging a court and it can be considered a formal interpretation of the term. However, another interpretation of the content of the term is much more revealing. According to it, a judge is “a person who evaluates (someone's personality, activity, etc.) and recognizes it as good or undesirable, reprehensible, as well as a person who passes decisions on some issues” (Thesaurus, 2022). It can be concluded that a judge, when performing his or her official duties, has the power to assess and provide legal qualification to events, resolve disputes and impose penalties. In accordance with Paragraph 6 of Section 193 of the Civil Procedure Law and consistent with the motive of the judgment, the court (judge) “shall indicate the court decision on full or partial satisfaction of the claim or on its total or partial rejection, separately showing the claims which are satisfied and which are rejected, and the substance of the judgment” (Civil Procedure Law, 1999). On the other hand, Part 2 of Section 319 of the Criminal Procedure Law stipulates that “a court judgment is a court decision on the guilt or innocence of an accused, the imposition or non-imposition of a sentence, as well as acquittal or release from punishment” (Criminal Procedure Law, 2005). The extent of the powers granted to a judge by the legal framework indicates the need to carefully assess the suitability of candidates for the position of judge. Trust in the judiciary is undeniably one of the preconditions for the development of society. However, it must be admitted that

the percentage of trust is mediocre – there are more Latvians who do not trust the judiciary (50%) than those who do (37%). In contrast, in Lithuania, 43% of the population trust the courts, and in Estonia even 63%. The European record holder is Denmark with 86% having trust in the court system, whereas the anti-record record is set in Croatia, where only 20% of the public believe in the judiciary (Gailite, 2020). According to Aldis Laviņš, Judge of the Constitutional Court of the Republic of Latvia, “trust in the judiciary is formed by various aspects, such as the professional conduct during the court session, the indication of convincing arguments in court decisions, and the attitude of judges towards the public interest in the performance of the court” (Laviņš, 2018). Obviously, the performance of a judge and his/her moral competences are important for strengthening the rule of law. The judge is entrusted with the assessment of the evidence in the case based on legal awareness, the laws of logic, scientific knowledge and life observations (Part 1 of Section 97 of the Code of Civil Procedure, 1999). In order for the assessment of evidence to take place in accordance with the principles of the rule of law, the assessment of evidence may only be carried out by a judge whose professional and personal qualities meet the highest standards.

In Latvia, the requirements for candidates for the position of a judge are specified in the Paragraph 1 of Section 51 of the “Law on Judicial Power” (Law on the Judiciary, 1993). The requirements for Latvian citizenship, higher education, legal qualification, etc. specified in this norm are general requirements for a judge of any court.

Similar requirements and also in other countries, for example Finland, where “a candidate applying for a position as a judge must meet certain formal qualifications such as Finnish citizenship, a Master’s degree in law, and a certain level of proficiency of both official languages of Finland” (Hakala-Manninen E., Laitinen R., Niemelä S. 2021).

Depending on the court instance for which the person is applying, there are additional requirements to be fulfilled, which are mainly related to the previous work experience of the candidate. For example, a candidate for the office of the judges of the Court of First Instance is required to have practiced as a lawyer for at least five years or have served as an assistant to the Chief Justice of the Supreme Court or judge for at least five years; however, a candidate for the position of a judge at the Court of Appeals is required to hold the position of a district (city) court judge with the overall work experience of a judge spanning at least six years and who has received a positive assessment of the Judicial Qualification Board for professional activity, as well as a person with the work experience of 10 years in academic positions in law, a sworn advocate, a prosecutor; a candidate for the position of a judge of the Court of Cassation Instance can be a district (city) court judge or a judge of a regional court with at least 10 years of the total work experience of a judge who has received a positive evaluation at the general meeting of the judges of the Department of the Supreme Court, a person who has at least 15 years of the total work experience as an academic staff in law, sworn advocate or prosecutor who has passed the qualification examination and has received a positive evaluation of the general meeting of the judges of the Department of the Supreme Court (Law on the Judiciary, 1993).

Evidently a candidate for the position of a judge of a higher instance court is required to have more extensive previous professional experience, which includes a longer period of work in the legal profession and the competencies acquired in previous positions. Such requirements are understandable and should be supported because the competence of the

judges of the Court of Appeals and even more so of the Courts of Cassation is greater than that of the judges of the Court of First Instance, which is why the influence of their rulings on the rule of law is greater. This is especially true of the cassation instance, which as indicated in the scientific literature: “The court ruling in the cassation instance constitutes a case law, which is an important auxiliary source of law” (Kudeikina, Kaija, 2020).

The initial quality of a judge's work depends on the effectiveness of the candidate's evaluation process. It is at the selection stage that the foundation for the judge's future work is laid. Obviously the most careful, comprehensive and profound evaluation of the candidate's competences in relation to the criteria set for the position of a judge is performed during the initial assessment, at the stage when the person applying for the position of a judge is assessed for the first time. On the other hand, self-regulation of judges is of great importance in the evaluation of a person who already holds the position of a judge and is applying for the position of a judge of a higher court, when a judge must not only comply with the requirements specified by law, but also receive a positive evaluation from the corporate governance institutions (Judges' Qualification Board or the General Meeting of Judges of the Supreme Court Department).

The operation of the judiciary and public confidence in the judiciary as a foundation for the well-being of society and the state are inextricably linked to the selection of candidates for the office of judge. Thus, the requirements for candidates for the position of a judge and the related selection process cannot be underestimated; in fact, they are an important tool for ensuring stable and sustainable development. The authors of the paper support the opinion of the International Criminal Court Judge Sanji Monageng that “a successful judiciary is one whose members are appointed following a rigorous process of assessing both the candidate's legal qualifications as well as integrity. Different countries' constitutions and other laws provide for different requirements, but it is crucial that only the best people are appointed to judicial positions. Judiciaries should not be politicized - this means that ruling parties should not appoint judges who will be answerable to them and not to the constitution and members of the public” (Monageng, 2018).

If the requirements for a candidate for the position of a judge such as age, citizenship, the highest proficiency level in the state language are objectively determinable and assessable, and their assessment is unrelated to a possible violation of the prohibition of differential treatment, the requirement of an impeccable reputation is much more difficult to objectively assess and subjective treatment of the requirement is not permissible. An impeccable reputation is a common legal term that is not exclusive to the evaluation of judicial candidates. And yet the legislature has not provided clear criteria for establishing what constitutes an “an impeccable reputation”. It is a general clause, the content of which must be assigned on a case-by-case basis. Obviously, there have been attempts to define the features of “impeccable reputation” in different pieces of legislation, as well as to define whether the common features apply to all public officials, such as insolvency administrators, sworn advocates, etc., or whether there are any special features which would apply only to candidates for the office of judges.

It should be emphasized that an impeccable reputation as a precondition for holding a certain position is not limited to public officials, it is also required for officials of private companies, thus the requirement of “an impeccable reputation” is widespread in social

relations. However, neither legal scholars nor politicians have a common understanding of the features of "an impeccable reputation". For example, Doctor of Philosophy Skaidriņe Lasmane considers an impeccable reputation to be the concept of communication and public relations as well as the person's perception by the public and the loss of reputation is discussed only when the situation has become publicly known. However, Doctor of Political Science Valts Kalniņš believes that "good reputation, be it an acceptable or excellent reputation, depends on the values of society and the social norms that apply to the position in question. Reputation is therefore inseparable from the context in which the person whose reputation is at stake is situated" (LV portal, 2019). It is hardly possible to agree with S. Lasmane's interpretation of an impeccable reputation being only a communication tool. An impeccable reputation is a statutory requirement for specified positions, including that of a judge, and is therefore a requirement of the legal framework. The fact that an impeccable reputation is an open legal term makes it difficult to apply this requirement without rendering it irrelevant or limiting it only to the public image of a particular person. Linking an impeccable reputation only to a person's public image would mean diminishing the importance of a person's an impeccable reputation in order to enable the person to hold a particular position. On this issue, one should agree with the opinion of V. Kalniņš, emphasizing that the assessment of an impeccable reputation pertains to a specific position for which a person is applying.

However, the authors of this paper believe that candidates for the position of a judge must have a higher reputation than other officials because the judge exercises the power of the state and the judge has coercive instruments, for example, when a legally valid court judgment is mandatory and enforceable. This is confirmed by the opinion expressed by the Judicial Ethics Commission according to which "a judge is endowed with broad powers and guarantees of independence and immunity prescribed by law" (Opinion of the Judicial Ethics Commission, 2022).

The increased requirements of an impeccable reputation are proportionate to the powers of a judge. It should be noted that the Constitutional Court of the Republic of Latvia stipulates that the requirement of an impeccable reputation of persons performing functions important to the state may be more stringent than in other areas, including the criteria related to the personality of the candidate. Such a legitimate aim of restrictions is related to the duty of the state to ensure the proper functioning of its institutions and to establish such regulations that the state power is exercised in accordance with the public interest, but more broadly, with the principles of the democratic state system and public security (Constitutional Court, 2006).

In order to understand the personality requirements for a candidate for the office of judge and the content of the open legal term "an impeccable reputation", the content of the term "reputation" must be considered first. One of the explanations of the term "reputation" is "honor, dignity, public opinion about a person, good or bad reputation of a person's personal or professional qualities" (Latvian Conversation Dictionary, 2004), which is why reputation is associated with public thoughts about a person whose reputation can be both positive and negative. The decisive factor is the public opinion and the public evaluation, and not the individual's self-assessment or opinion of himself/herself. In some cases, there may be problems of interpretation related to the different reputational values of the person being assessed and the public. For example, the judge who committed the administrative

offense considers the fact of the offense as not adversely affecting his/her reputation, since the assessment of his/her reputation is carried out in relation to his/her professional activity, which has not been affected. However, consistent with the assessment of the disciplinary court, the fact of committing an administrative violation not only negatively affects the judge's own reputation, but also negatively impacts the court's activity in general, and the fact that a judge's professional activity is impeccable does not diminish the decline in reputation (Disciplinary Court, 2019).

The assessment of different views can be conducted by focusing on the analysis of the term “impeccable”, because, as mentioned above, reputation can also be negative, which is why the issue of reputation should not be considered in general; instead, reputation should be positive or even impeccable in the opinion of the legislator. The content of the adjective “impeccable” is as follows: it is a person “who has no faults, neither reprehensible nor undesirable character or personality traits” (Thesaurus, 2022). Therefore, a candidate for the position of a judge must have a personality without any shortcomings or undesirable qualities but with high moral standards. And yet, these statements should be considered as relatively general. In general, one of the most important aspects of an impeccable reputation is having public dignity and trust. One of the preconditions for gaining public dignity and trust is the compliance of the official's actions with the norms of law, ethics and morality. The requirement for an impeccable reputation is independent and it covers a person's private life. An official must adhere to high standards of conduct in both professional and private lives. The requirement of an impeccable reputation applies to the official throughout his/her term in office (Insolvency Control Service, 2021).

Also, the Law on the Judiciary does not contain any specific features or objective criteria by which reputation could be measured or determined. Given that the public's perception of features is mainly shaped by the person's current and past conduct or else examples from a person's life, it is possible that a person's past conduct is one of the essential components of the concept of “reputation”. Consistent with this approach, feedback from previous jobs may be considered for establishing an impeccable reputation. Another proof may be the presumption that a person has an impeccable reputation until proven otherwise.

The scientific literature suggests the need to follow three principles in the selection of candidates for the positions of judges. Namely, the first principle is the independence of the judiciary, which safeguards judicial independence and in which the manner of appointment is important. The second principle is the principle of democracy. In most countries the executive and legislative branches are involved in judicial appointments. Third is checks and balances. (Bovend'Eert, 2018).

In accordance with Paragraph 3 of Section 51 of the Law On the Judiciary, “candidates for the position of a judge shall be selected through an open competition” (Law on the Judiciary, 1993). An open competition is a way to ensure a fair and professional selection and evaluation process for appointing the best candidates.

The Council of Justice is responsible for selecting candidates for the position of a judge in Latvia. It is established in accordance with the Law on the Judiciary. “Council of Justice is a collegial institution that participates in the development of the policy and strategy of the judicial system and in the improvement of the organization of the judicial system. The purpose of establishing the Council of Justice is to balance the relationship between the

executive, judiciary and legislative authorities, giving it a significant role in matters affecting the judiciary " (Supreme Court, 2022).

The Council of Justice consists of the following permanent members (officials):

- 1) Chief Justice of the Supreme Court;
- 2) Chairman of the Constitutional Court;
- 3) Minister of Justice;
- 4) Chairman of the Legal Commission of the Saeima;
- 5) Prosecutor General;
- 6) Chairman of the Latvian Council of Sworn Advocates;
- 7) Chairman of the Latvian Council of Sworn Notaries;
- 8) Chairman of the Latvian Council of Sworn Bailiffs.

The Judicial Council consists of the following elected members:

- 1) a judge elected by the plenary session of the Supreme Court;
- 2) six judges elected by the Conference of Judges (Law on the Judiciary, 1993)

The proportion of power is observed, whereas the politicization of the Council of Justice is not, as there are only two persons related to politics - the Minister of Justice and the Chairman of the Legal Commission of the Saeima; similarly, there is no any obstacle for compliance with the other principles mentioned above. The Council of Justice is composed mainly of members of the judiciary and is to some extent considered to be a corporate governance body for judges. The Council of Justice does not include a representative of the public whose interests must be represented by the Council of Justice when selecting candidates for the position of a judge. Thus, when assessing a candidate for the position of a judge from the perspective of impeccable reputation, the Council of Justice conducts it based on professional understanding of the term.

2.2 Problem aspects of the selection process of judges

Therefore, the selection process is not unambiguous as it contains "weaknesses". One of them is the lack of unification. According to Prof. Paul Bovend'Eert, "there is no formal method for the selection of candidates for judicial positions in the US. But in practice, there is a wide range of safeguards to promote the appointment of qualified judges and justices. In practice, (home state) members of the Senate play an important role in selecting candidates for their district courts and circuit courts by forming selection committees. Prominent lawyers, state or federal judges or law professors are selected. The Department of Justice then reviews the legal qualifications of the candidates. The American Bar Association (ABA) advises on the qualifications of candidates. And the Senate Judiciary Committee extensively examines the qualifications and background of candidates.

In Europe there is no typical or standard procedure for the appointment of judges. In fact, there are no real European standards for this procedure. Methods of judicial appointments vary according to different legal traditions and legal systems. They can also differ within a legal system. For example, judicial appointments for lower courts can be quite different from appointments to the Supreme Court or Constitutional Court" (Bovend'Eert, 2018). For example, the procedure of the selection of judges in Finland goes as follows: "An announcement is made of vacant position(s) in a court. The National Courts Administration, the central administration of courts, draws up a summary of each

applicant's official merits. The Judicial Appointments Board, an independent body that consist mainly of judges, prepares a reasoned proposal of who should be appointed to the office(s) based on the summary and statements it has gathered from relevant court(s)" (Hakala-Manninen E., Laitinen R., Niemelä S. 2021).

In Latvia, the selection process is more complicated. The first stage is the submission of documents, where compliance with the formal criteria is checked. The next stage is the test, which consists of 60 questions on a wide variety of topics. In the third stage, motivated answers must be given to questions about the judge's experience and skills, as well as the vision of the judicial system and the role of the judge (I plan to move this test to the last round of selection). The next stage consists of two parts. First, two weddings are solved - each wedding has two hours to solve. Then follows the oral part of the selection test, where the applicant chooses two questions. These questions are known to the candidates in advance, as they are published together with the announcement of the competition. Then the commission questions the applicant about these issues, as well as about the wedding. The commission may also ask about the test. The purpose of the question, test and wedding is definitely to find out the knowledge of the applicants. The last stage is the applicant's interview with a psychologist, who gives his assessment of individual competencies, and then there is the competency interview, which is conducted by the selection committee, which gives an assessment of the competencies required for the position of judge. The evaluation also takes into account the information obtained in the previous rounds of selection.

Obviously, there would be no reason to require the same process for the nomination of judges in all countries, given the different historical experiences and the diversity of legal systems, but with regard to impeccable reputation, the requirements can be approximated. An impeccable reputation is an understandable requirement for candidate for the office of judges in any country, as the functions of a judge are similar in all countries. The Ethical Principles for the Judiciary of Bangalore apply to any judge and are designed "to implement the ethical standards of judges. Their purpose is to provide guidance to judges and to ensure the principles governing the ethics of members of the judiciary. They also aim to assist members of the executive and legislative authorities as well as lawyers and the general public to better understand and support the work of judges" (Ethical Principles of Bangalore Judges, 2002). In accordance with these principles, there was passed a new Latvian Code of Ethics for Judges in Latvia in 2021. It must be concluded, however, that the document does not provide a clear explanation of impeccable reputation, namely, that its necessity can be interpreted indirectly through the requirements of the canon of integrity and dignity, which means that "the integrity and dignity of a judge strengthens and increases public confidence in the judiciary" (Code of Judicial Ethics, 2021).

The second weakness is related to the insufficient involvement of the public in the evaluation of candidates for the position of a judge. It was previously clarified that an impeccable reputation is linked to the public's view of the individual and it would be acceptable if the public had the opportunity to engage in the evaluation of the candidate during the selection process. At present, the legal framework does not provide for such a possibility. The public learns about the candidate *post factum*. The information function is imposed on the media. Consequently, the public expresses its opinion following the completion of the candidate's evaluation and his/her appointment to the position of a

judge. In some cases, the public expresses a negative opinion, which creates a dilemma because the opinion of the selection commission does not agree with that of the public. The solution to this dilemma is not set out in the legal framework, thus, leading to issues in resolving the situation. One example of such a situation emerged with a candidate for the position of a judge selected for the Economic Court. Following the public pressure on the need to meet the requirement of impeccable reputation, the candidate was forced to ask for the suspension of his appointment (Delphi, 2021).

In order to prevent such contradictions, the public should be able to get acquainted with the candidates for the post of a judge and express their views during the selection process. The selection of candidates for the position of a sworn advocate is similarly regulated. Article 40 of the Advocacy Law of the Republic of Latvia stipulates that “the Latvian Council of Sworn Advocates shall publish a list of persons who have submitted documents regarding admission to the sworn advocates on its website, send it to the e-mails of senior and sworn advocates practicing under jurisdiction of a particular court and to the administration of a specific court, inviting them to submit written comments on these persons within one month” (Advocacy Law of the Republic of Latvia, 1993). Thus, informing the public about candidates takes place in two ways: in general, by publishing the information on a publicly accessible website where it can be accessed by anyone interested, and by purposefully informing other members of the judiciary who can comment on both the professional and personal qualities of the candidate.

3. Conclusion and Implications

A fair trial is not only an abstraction. The substance of a fair trial already has a sufficiently broad explanation. Indeed, certain means are needed for attaining a goal. Likewise, highly qualified judges – public officials whose direct task is to administer justice – are necessary for securing a fair trial. A judge’s qualification means not only professional education but also moral qualities of the judge. Judicial selection is an interdisciplinary multi-step system for selecting the most suitable candidates from the potential pool. Legislation lays down objective criteria to be met by candidates for judicial office, such as education, nationality, professional experience, age. The legislator has defined certain prohibitions: for example, persons for whom natural person’s insolvency proceedings have been announced and five years have not yet passed since the date of termination of the proceedings may not be appointed as judges, etc. These criteria can easily be checked and compared. This is not the case with regard to the evaluation of impeccable reputation. It is a general clause, which is given substance only partially. However, one of the issues is how moral qualities can correlate with impeccable reputation. It is obvious that these notions cannot be put on a par. In assessing whether a candidate for judicial office has impeccable reputation, one should consider not only formal and comparable criteria set out in laws, but also the candidate’s moral qualities. Impeccable reputation does not of itself exclude a lack of moral qualities or bad traits, such as a lack of empathy, lust for power, cruelty. These qualities are broader and are outside the scope of impeccable reputation. Professional suitability criteria can successfully be evaluated by professional selection commissions. In order to assess whether a candidate is capable of working for the benefit of society and developing an inclusive case-law in line with societal needs and

the understanding of social justice, the judicial selection procedure must be publicly available, allowing people to give their views about candidates.

As a result of the research, the authors have arrived at the following:

- 1) judicial selection is a component of the right to a fair trial, which ensures public confidence in the judiciary in the long term, thus facilitating sustainable development of society;
- 2) the judiciary is not a closed system, and society may take an active part in judicial selection;
- 3) an assessment of personal qualities during judicial selection is an adequate and necessary tool, considering that judges apply, inter alia, the principle of fairness when administering justice;
- 4) a fair trial also begins with a high-quality selection procedure for judges, during which not only the judge's legal knowledge, but also his reputation, motivation and social skills are evaluated;
- 5) judicial selection must be guided according to clear and predetermined criteria;
- 6) the description of the competencies required by the applicants describes the ideal judge, but not all qualities can be expressed in the same way in all applicants. However, the set criteria should be sufficient for the judicial system to be able to select the most professional lawyers who will be future judges;
- 7) the position of a judge is one of the few positions in the legal profession where it is possible to achieve a truly fair resolution of a dispute. The judge is not related to the interests and needs of other persons, parties. The judge looks at the dispute neutrally and independently. A judge is able to make a significant contribution to the overall development of the country.

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