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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

The Opinions of the CCJE

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The functioning of European judicial systems is a long-standing concern of the Council of Europe, as it is evident from the numerous recommendations and resolutions produced by this institution, opinions and reports prepared by committees established at its initiative.

Regarding the last point, the Committee of Ministers of the Council of Europe decided that a body composed of judges could usefully contribute to the debate on justice, and thus in 2000, the CCJE was born.

Composed of judges appointed by the competent authorities of each member state of the Council of Europe, the CCJE is not, however, a committee of governmental experts. Its member judges speak on their own behalf; the Opinions are not adopted after a formal vote but are the result of a consensus on each of the topics.

Since 2001, the CCJE has adopted 17 Opinions :

- Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges ;
- Opinion No. 2 (2001) on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights ;
- Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality ;
- Opinion No. 4 (2003) on appropriate initial and in-service training for judges at national and European levels ;

- Opinion No. 5 (2003) on the law and practice of judicial appointments to the European Court of Human Rights ;
- Opinion No. 6 (2004) on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement ;
- Opinion No. 7 (2005) on justice and society ;
- Opinion No. 8 (2006) on the role of judges in the protection of the rule of law and human rights in the context of terrorism ;
- Opinion No. 9 (2006) on the role of national judges in ensuring an effective application of international and European law ;
- Opinion No. 10 (2007) on the Council for the Judiciary at the service of society ;
- Opinion No. 11 (2008) on the quality of judicial decisions ;
- Opinion No. 12 (2009) on the relations between judges and prosecutors in a democratic society ;
- Opinion No. 13 (2010) on the role of judges in the enforcement of judicial decisions ;
- Opinion No. 14 (2011) on justice and information technologies (IT) ;
- Opinion No.15 (2012) on the specialisation of judges ;
- Opinion No. 16 (2013) on the relations between judges and lawyers ;
- Opinion No. 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence.

All these opinions are available on the website of the Council of Europe, on the page of this site designated for the CCJE.

This body is not the only one, in the Council of Europe, to examine issues relating to the functioning of justice.

The European Commission for the Efficiency of Justice (CEPEJ) plays an essential role in the mechanism set up to assess the quality of the judicial systems in the member states.

Prosecutors have their own deliberation body (the Consultative Council of European Prosecutors (CCPE)).

The Venice Commission also carries out an important work to assess, under a constitutional point of view, the rule of law in Europe.

But the main purpose of the CCJE Opinions is to provide a framework, developed by judges themselves, of expected characteristics of a judicial system to meet the requirements of the European Convention of Human Rights and Fundamental Freedoms (the Convention), from the point of view of the status of judges (I), as well as for the functioning of courts (II).

I. The status of judges

The credibility of a judge and the public confidence in the quality of a judicial action imply that no pressure, direct or indirect, no order can force a judge to rule otherwise than in line with his/her conscience and in compliance with legal rules.

Hence the importance of the principle of the independence of judges (A).

But individuals must also be protected against the risk of an arbitrariness of the judge, who must always act in accordance with clearly defined ethical principles and be subject to disciplinary rules and accountability (B).

A - Independence of judges

Judicial independence is an essential requirement of the right to fair trial, as defined by the Article 6 § 1 of the Convention.

Certainly, the independence cannot be seen as a privilege granted to judges. Purely functional, it makes sense only if it allows the users of justice to have the assurance of an objective assessment of disputes, submitted to a court, based solely on the law.

But as a characteristic of the rule of law in a democratic society, the independence must be affirmed at the highest level of national law, particularly in the Constitutions of the states, for those states which have a written Constitution.

The same level of protection should be granted to the tenure, understood as the impossibility of giving a new assignment to a judge without his/her consent. The security of tenure of judges is a corollary and the practical implementation of their independence.

The CCJE further considered that the independence of the judge, in order to be effective, must be guaranteed by an independent body, the Council for the Judiciary, entrusted with broadest powers for all decisions regarding the status of judges, the rules of their appointment, promotion, evaluation and training, the assessment of the quality of the judicial system and its way of functioning. According to the CCJE, the Council for the Judiciary could also be the contact point for other state authorities for funding of judicial activities, the budget allocated to justice determining the ability of the courts to exercise their duties independently.

B - Ethics, discipline and responsibility

Ethical principles, conceived as guidelines for action and standards of conduct, are a natural and essential prerequisite for the necessary confidence which the justice must inspire, taking into account its significant powers.

These principles should be developed with the assistance of the judges themselves and be included in their training program.

The CCJE examined the ethical obligations adopted in Europe and the common

values of different judicial systems (Opinion No. 3, paragraphs 10 to 40).

Without getting into details, it should be underlined that if a judge's impartiality may be considered as an essential ethical rule, the training, initial and continuing, is also essential, especially in a context of increasing complexity of law, which involves the specialisation of courts in some areas.

Similarly, the professional conscience justifies that the judge, even though the effectiveness of his/her action largely depending on the means available to the institution, complies with the requirement of a reasonable time for trial, under the Article 6 § 1 of the Convention, without neglecting the essential reasons for his/her decisions, in clear and easily understandable terms. As stated by the CCJE in its Opinion No. 11 (paragraph 34), "the quality of the decision depends mainly on the quality of motivation".

As for the disciplinary rules applied to the judge, they are necessary but they must be compatible with the constitutional principle of independence.

The result is that the faults that may justify the initiation of disciplinary proceedings must be clear, the procedure must respect the rights of the defense, the sanctions must also be clarified and an appeal must be available against decisions of the independent body in charge of disciplinary proceedings.

For other forms of liability, the CCJE considered that, if a judge is criminally responsible in the terms of common law for offenses committed outside his/her functions, he/she cannot be held responsible for the facts relating to the practice of his/her profession, in case of non-intentional fault on his/her part.

Finally, according to the CCJE, there can be no civil liability for the judge for his/her judicial decisions, which are the exclusive exercise of the remedies provided by law.

For other assumptions of malfunctioning of justice, a civil liability action should be brought against the state, with recourse possible against the judge only in the case of intentional misconduct on his part.

II. The functioning of courts

To summarise the CCJE Opinions relating directly or indirectly to the functioning of judicial systems in each state in Europe, two concepts should be highlighted:

- transparency (A);
- efficiency (B).

A - Transparency

The non-transparence of the judiciary and its ways of action inevitably result in the concern of the users and the search for alternative dispute resolution methods.

As a public service, the judiciary must instead act in conditions that ensure the

understanding of judicial mechanisms.

Certainly, there cannot be total transparency, particularly because of the need to protect the effectiveness of criminal investigations and the interests of those involved.

But this does not prevent the development of different forms of action to provide basic civic information, in the schools and universities, the participation of courts in public information programmes, establishment of reception and communication services in courts, dissemination of information on court proceedings in writing or through the websites, the use of information technologies to facilitate the access to justice and the follow-up to procedures.

Spaces of dialogue and common training should also be provided between judges, prosecutors and lawyers on topics of common interest, to contribute to the search for a justice of the highest quality.

The possibilities for dialogue and joint training must also be provided between judges, prosecutors and lawyers on the topics of common interest in order to contribute to the search of justice of the highest quality.

B - Efficiency

As regards another basic requirement of the Article 6 § 1 of the Convention, the efficiency of the judiciary is provided particularly by simplified and modernised models of access, development of legal aid systems with public financing, introduction of simplified procedures for small claims and fast-track procedures for urgent matters, implementation of dynamic ordinary civil procedures under judicial control and with the assistance of lawyers, continuing until the effective enforcement of judgment, development of alternative dispute resolution, particularly useful for certain types of disputes.

But the desired effectiveness of procedures should not lead to ignorance of the fundamental rights of individuals.

The judge must ensure, in all matters and even if the use of an alternative method of resolution such as mediation has been chosen, the fairness of the procedure and the respect for the interests of each party.

Regarding the prosecutor, whose status, according to the Opinion No. 12 of the CCJE, should guarantee the independence, it is accepted that he/she participates, within the framework of exercising his/her duties, in the establishment of a fair trial, especially in criminal matters where he/she has particularly important prerogatives. The specificity of the role of prosecution service means that it exercises its functions in "a fair, objective and impartial manner" (Opinion No. 12, Bordeaux Declaration, n° 6).

However, the judge must maintain control over the assessment of cases.

If, for example, in Europe, the simplified procedures for recognition of guilt have been developed, the judge must exercise effective control over the course of these procedures, that the confession has been real and its consequences.

To conclude, this summary does not account for all the topics discussed by the CCJE in its Opinions and detailed formulated recommendations.

It must also be recognised that these Opinions do not provide precise and definitive answers to some basic questions, such as:

- Can we determine which of the ways of judicial selection (competition open to students from the university, selection from legal professionals recognized for their skills, election) would be most relevant?
- What role for the judge in the dispute resolution process? Direct actor in the resolution or appeal body which may be seized only in the case of failure of an amicable settlement or administrative processing?
- What status for members of the prosecution service? Unit of the judiciary or separation of functions?
- Inquisitorial or adversarial nature of civil and criminal proceedings?
- The right to the exercise of a remedy or remedies subject to the authorisation of a judge?

Regardless of the fact that there is no necessarily possible unequivocal answer, the CCJE Opinions do not seek in any event to erase the particularities related to historical and legal traditions of the member states, but the general guidelines are nevertheless clear:

- There is no rule of law without a strong judiciary, independent and responsible;
- Judicial independence can only be conceived to guarantee the users of justice the quality of judgments and dispute resolution within a reasonable time;
- The efficiency of dispute resolution ways is a key objective, but particular attention should be paid to the conditions of the right of access to justice and respect for the rights of individuals.

These Opinions tend to draw an outline of a European statute for judges, a model for dealing with the procedures in trials and characteristics of judicial systems as intended not only by the European Court of Human Rights through many decisions it makes in this area, but also by national judges participating in the work of the CCJE.

However, the objectives pursued are far from being achieved, as demonstrated in particular in the report prepared in May 2014 by the Secretary General of the Council of Europe on "The state of democracy, human rights and rule of law in Europe".

It was noted in particular (Part 2: Justice and Rule of Law, Chapter A: Organisation and Administration of Justice):

- the existence of inappropriate interferences between the different branches of state power;

- the fact that some Councils for the Judiciary are "fallen under the undue influence of other branches of state power";
- an "erosion" of the impartiality and independence of justice, "also visible in legislative proposals aimed at strengthening the disciplinary procedures for judges";
- the fact that the phenomenon of corruption is "deeply rooted in justice in many member states";
- recurrent jamming of justice, making it impossible to render decisions within a reasonable time;
- the restrictions for the access to courts and efficiency of their administration, and budget reductions affecting judicial education programmes;
- the fact that some states do not implement the decisions of their courts, "especially those which condemn the state".

This certainly overwhelming finding should justify the increased action of the CCJE, as well as of other bodies and committees of the Council of Europe, particularly in their role of assisting the judicial institutions in the member states and promoting the culture of rule of law and separation of powers in Europe.

The principles of the European Convention of Human Rights and Fundamental Freedoms, as well as the case-law of the European Court of Human Rights are an essential legitimate basis and justification for all these actions, intended to ensure that European citizens exercise the same rights and freedoms.

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