COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 18 January 2002 CCJE (2001)43
[ccje/doc2001/ccje(2001)43e]

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Report of the 2nd meeting
Strasbourg, 21-23 November 2001

REPORT TO THE COMMITTEE OF MINISTERS

FOREWORD

The CCJE invites the Committee of Ministers:

a. to note that, in accordance with its specific terms of reference, it has prepared for the Ministers' attention:

i. Opinion no. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges (Recommendation No. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields) – see Section II and Appendix III of this report; and

ii. 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 (see Section III and Appendix IV of this report);

b. to note that it has forwarded Opinion nos. 1 (2001) and 2 (2001) to the European Committee on Legal Co-operation (CDCJ), the European Committee on Crime Problems (CDPC) and the Steering Committee for Human Rights (CDDH);

c. to adopt, subject to any changes which it might wish to make, the CCJE's draft revised terms of reference for 2002 and 2003 (see Section IV and Appendix V of this report) and to authorise the European Association of Judges (EAJ) to take part as an observer in CCJE activities;

d. to note that the CCJE has adopted a questionnaire on judges' training and another on the conduct, ethics and responsibility of judges (see Section VI and Appendix VI of this report);

e. to take note of the report as a whole.

CONTENTS

REPORT TO THE COMMITTEE OF MINISTERS

I. INTRODUCTION

1. The Consultative Council of European Judges (CCJE) held its 2nd meeting on 21-23 November 2001 at the Council of Europe's headquarters in Strasbourg.

2. The CCJE's main task is to prepare opinions for the attention of the Committee of Ministers on general questions concerning the independence, impartiality and competence of judges and to contribute to implementation of the framework global action plan for judges in Europe, which the Committee of Ministers adopted at its 740th meeting.

3. The Right Honourable Lord Justice MANCE (United Kingdom) and Mr Alain LACABARATS (France) were re-elected CCJE Chair and Vice-Chair respectively. The list of participants appears in Appendix I to this report and the agenda in Appendix II.

4. In accordance with its terms of reference and with the decision taken at its first meeting (see CCJE (2000) 3, Section III A), the CCJE adopted two opinions for the attention of the Committee of Ministers:

- Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges (with reference to Recommendation No. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields). The text of Opinion No. 1 (2001) appears in Appendix III to this report (see also Section II below);

- 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. The text of Opinion No. 2 (2001) appears in Appendix IV to this report (see also Section III below).

5. The CCJE invited the Committee of Ministers to adopt, subject to any changes which it might wish to make, the CCJE's draft revised terms of reference for 2002 and 2003, as set out in Appendix V to this report (see also Section IV below).

6. As approved by the CCJE, the questionnaire on judges' training and the questionnaire on the conduct, ethics and responsibility of judges appear in Appendix VI to this report.

II. ADOPTION OF OPINION NO. 1 (2001)

7. Having taken account of delegations' written and oral observations, the CCJE amended the draft opinion prepared by the CCJE-GT and unanimously adopted the text of Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges (with reference to Recommendation No. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields).

8. In accordance with its terms of reference, the CCJE submitted Opinion No. 1 (2001) to the Committee of Ministers as it appears in Appendix III to this report.

9. The CCJE invited the Committee of Ministers to note that, in accordance with its terms of reference, it had forwarded Opinion No. 1 (2001) to the CDCJ, CDPC and CDDH so that they could consider any appropriate further action, especially of a standard-setting nature.

10. Having completed its work on Opinion No. 1 (2001), the CCJE expressed thanks for the valuable input made by everyone involved in its preparation. Particular thanks went to the CCJE specialist, Mr G. OBERTO, for providing a report and other very useful information.

11. After considering the standards contained in Recommendation No. R (94) 12 on the independence, efficiency and role of judges, the CCJE deemed it advisable to prepare additional recommendations or to amend Recommendation No. R (94) 12 in the light of Opinion No. 1 (2001) and future work to be carried out by the CCJE (see paragraph 73 (11) of Appendix III). Other matters raised in the framework global action plan for judges in Europe (see CCJE (2001) 24), such as that of rules of conduct, were closely linked to the theme of independence.

12. The CCJE Chair tabled a preliminary draft of proposals for amendments to Recommendation No. R (94) 12 in the light of work already carried out (see Appendix VII), it being understood that this would require further consideration and that further proposals might follow depending on the results of future work.

13. The CCJE confirmed its readiness to prepare an opinion at the CDCJ's request on the text of Recommendation No. R (94) 12 with possible amendments or on any other instrument supplementing that recommendation.

III. ADOPTION OF OPINION NO. 2 (2001)

14. Having taken account of delegations' written and oral observations, the CCJE amended the draft opinion prepared by the CCJE-GT and unanimously adopted the text of 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.

15. In accordance with its terms of reference, the CCJE submitted Opinion No. 2 (2001) to the Committee of Ministers as it appears in Appendix IV to this report.

16. The CCJE invited the Committee of Ministers to note that, in accordance with its terms of reference, it had forwarded Opinion No. 2 (2001) to the CDCJ, CDPC and CDDH so that they could consider any appropriate further action, especially of a standard-setting nature

17. Having completed its work on Opinion no. 2 (2001), the CCJE expressed thanks for the valuable input made by everyone involved in its preparation. Particular

thanks went to the CCJE specialist, Mr J. CHLEBNY, for providing a report and other very useful information.

IV. ADOPTION OF THE CCJE'S DRAFT REVISED TERMS OF REFERENCE FOR 2002 AND 2003

18. After considering the preliminary draft revised terms of reference prepared by the Working Party for 2002 and 2003, the CCJE adopted the draft as it appears in Appendix V to this report.

19. The draft revised terms of reference took account of the priorities set out in the framework global action plan for judges in Europe (see CCJE (2001) 24).

20. Having considered a request for observer status submitted by the President of the European Association of Judges (EAJ), the CCJE responded favourably and invited the Committee of Ministers to authorise the EAJ to take part as an observer in CCJE activities.

21. The CCJE invited the Committee of Ministers to adopt, subject to any changes which it might wish to make, the draft revised terms of reference for 2002 and 2003 as set out in Appendix V to this report.

V. CONTRIBUTION AS OF 2002 TO IMPLEMENTATION OF THE FRAMEWORK GLOBAL ACTION PLAN FOR JUDGES IN EUROPE

22. The CCJE confirmed its desire to take an active role in implementing the framework global action plan for judges in Europe and considered that its work might also assist states in meeting their obligations under Article 6 of the European Convention on Human Rights.

23. In accordance with the decision taken at its first meeting (see CCJE (2000) 3, Section III B), the CCJE set goals to be attained in 2002 and 2003.

A. Preparation of opinions

i) 2002

24. The CCJE agreed that in 2002, anticipating the adoption by the Committee of Ministers of its revised terms of reference, it should consider the theme of principles and rules governing judges' professional conduct, with special reference to efficiency, incompatible behaviour and impartiality (see in particular CCJE (2001) 24, Section III B).

25. The CCJE observed that consideration of this theme would supplement with advantage its observations in Opinion No. 1 (2001), in particular those concerning Recommendation No. R (94) 12.

26. In order to prepare an opinion on this topic, the delegations were invited to send the Secretariat their replies to the questionnaire in Appendix VI by the end of January 2002. A specialist would be invited to prepare an initial draft report by 15

April 2002 on the basis of these replies. The Secretariat would use the report to draw up a preliminary draft opinion by 1 May 2002 for consideration by the Working Party in June 2002 and subsequent adoption by the CCJE in November 2002.

27. In accordance with the terms of reference, the opinion on rules governing judges' professional conduct would then be submitted to the Committee of Ministers.

28. The CCJE would also send the opinion to the CDCJ and CDPC so that they could consider any appropriate further action, especially of a standard-setting nature.

ii) 2003

29. In 2003, anticipating the adoption by the Committee of Ministers of its revised terms of reference, the CCJE would consider the theme of appropriate initial and in-service training for judges at national and European level (see in particular CCJE (2001) 24, Section III A).

30. This activity would be carried out under a similar procedure to that described in paragraph 26 above: the delegations would be invited to send in their replies to the relevant questionnaire by a specified date, a specialist would prepare an initial draft report on the basis of these replies and the Secretariat would draw up a preliminary draft opinion for consideration by the Working Party and subsequent adoption by the CCJE.

31. In accordance with the terms of reference, the opinion on appropriate initial and in-service training for judges at national and European level would then be submitted to the Committee of Ministers.

32. The CCJE would also refer the opinion to the CDCJ and CDPC so that they could consider any appropriate further action, especially of a standard-setting nature, and to members of the Lisbon Network to be taken into account in their future work.

B. Other activities

33. The CCJE was prepared to provide practical help for states to come into line with standards concerning judges. It proposed in particular to look into good practices which could be passed on to all member states.

34. The CCJE confirmed that encouragement should be given to the development of partnerships in the judicial field between courts, judges and judges' associations, and especially between East and West European courts. Delegations would inform the Secretariat of their availability in this respect, indicating which national bodies were prepared to participate in such a programme and how participation would be organised.

VI. OTHER BUSINESS

a) <u>CCJE participation in the discussion meeting of the Stability Pact for South-Eastern Europe</u>

35. The CCJE Chair reported that he had been invited in that capacity to take part in a discussion meeting called by the Chair of the Sub-Working Table on Justice and Home Affairs, in Budapest on 26 November 2001, discussing the framework document for judicial reform in South-Eastern Europe.

36. The CCJE welcomed this invitation, which would provide an opportunity to support the justice reforms in hand in the region and underline the importance of CCJE activities.

b) Agenda for the next CCJE meeting

37. The CCJE agreed the following agenda for its next meeting:

1) Preparation of an opinion on the rules governing judges' professional conduct;
2) Exchange of views on matters to be addressed by the CCJE from 2004 onwards;
3) Exchange of views on practical assistance to states in judicial matters;
4) Exchange of views on partnerships in the judicial field;
5) Exchange of views on publications;
6) Exchange of views on working methods in other contexts than meetings.

c) CCJE Working Party

38. In accordance with its revised terms of reference and subject to their adoption by the Committee of Ministers, the CCJE had formed its Working Party (CCJE-GT). This comprised a Chair, Mr Alain LACABARATS (France), and eleven members: Mr Gerhard REISSNER (Austria), Mr Robert FREMR (Czech Republic), Mr Otto MALLMANN (Germany), Mr Raffaele SABATO (Italy), Mr Virgilijus VALANČIUS (Lithuania), Mr Jean-Claude WIWINIUS (Luxembourg), Mr Orlando AFONSO (Portugal), Mr Dušan OGRIZEK (Slovenia), Mr Johan HIRSCHFELDT (Sweden), Ms Tanja TEMELKOSKA-MILENKOVIC ("the former Yugoslav Republic of Macedonia") and the Right Honourable Lord Justice MANCE (United Kingdom).

d) Dates of next meetings

39. The CCJE noted that its next plenary meeting would be held in Strasbourg from 13 to 15 November 2002 and that the CCJE-GT would next meet in Strasbourg from 19 to 21 June 2002.

APPENDIX I

LISTE DES PARTICIPANTS

MEMBER STATES / ETATS MEMBRES

ALBANIA / ALBANIE : Mr Perikli ZAHARIA, High Court of the Republic of Albania, TIRANA

Mr Theodhori SOLLAKU, High Council of Justice of the Republic of Albania, TIRANA

ANDORRA/ANDORRE : M. Antoni FINANA, Batllia d'Andorre, ANDORRA LA VELLA

ARMENIA / ARMENIE: (excusé/apologised)

AUSTRIA / AUTRICHE : M. Helmut HUBNER, Court of Appeal, LINZ

Mr Gerhard REISSNER, District Court of Floridsdorf, VIENNA

AZERBAIJAN / AZERBAÏDJAN: (excusé/apologised)

BELGIUM / BELGIQUE : M. Marc LAHOUSSE, Palais de Justice, BRUXELLES

BULGARIA / BULGARIE: Ms Cveta MARKOVA, District Court of Varna, VARNA

CROATIA / CROATIE: Mr Duro SESSA, Municipal Court in Zagreb, ZAGREB

CYPRUS / CHYPRE : Mr Stelios NATHANAEL, District Court Larnaca-Famagusta, LARNACA

CZECH REPUBLIC / REPUBLIQUE TCHEQUE: Mr Robert FREMR, High Court, PRAGUE

DENMARK / DANEMARK: Mr Henrik ZAHLE, Supreme Court, KØBENHAVN K

ESTONIA / ESTONIE: Mr Uno LÖHMUS, Supreme Court of the Republic of Estonia, TARTU

FINLAND / FINLANDE: Mr Gustav BYGGLIN, Supreme Court of Finland, HELSINKI

FRANCE: M. Alain LACABARATS, Cour d'Appel de Paris, PARIS

GEORGIA / GEORGIE: Ms Nino KADAGIDZE, Regional Court, TBILISI (apologised/excusée)

GERMANY / ALLEMAGNE: Mr Otto MALLMANN, Federal Administrative Court, BERLIN

GREECE/GRECE: (excusé/apologised)

HUNGARY / HONGRIE: Mr Károly HORECZKY, Supreme Court, BUDAPEST

ICELAND / ISLANDE: Ms Hjördís HÁKONARDÓTTIR, District Court of Reykjavik, REYKJAVIK

IRELAND / IRLANDE: Mr Kevin O'HIGGINS, High Court, DUBLIN

ITALY / ITALIE : Mr Raffaele SABATO, Tribunale di Napoli, NAPLES

LATVIA / LETTONIE : (excusé/apologised)

LIECHTENSTEIN : Mr Lothar HAGEN, Criminal Court, VADUZ

LITHUANIA / LITUANIE: Mr Virgilijus VALANČIUS, Civil Cases Division of the Lithuanian Court of Appeal, VILNIUS

LUXEMBOUG : M. Jean-Marie HENGEN, Justice de Paix Esch-sur Alzette, ESCH-SUR-ALZETTE

M. Jean-Claude WIWINIUS, Cour Supérieure de Justice, Luxembourg

MALTA / MALTE: Mr Joseph D. CAMILLERI, The Courts of Justice, VALLETTA

MOLDOVA : M. Mihai POALELUNGI, Cour d'Appel de la République de Moldova, CHISINAU

NETHERLANDS / PAYS-BAS: Mr Joep VERBURG, Court of Appeal in the Hague, THE HAGUE

NORWAY / NORVEGE: Mr Trond DOLVA, Supreme Court of Justice, OSLO

POLAND / POLOGNE: Mr Marek PIETRUSZYŃSKI, Supreme Court, WARSAW

PORTUGAL : M. Orlando AFONSO, Cour d'Appel d'Evora, ALMADA

ROMANIA / ROUMANIE: Mme Sanda HUIDUC, Supreme Court of Romania, BUCAREST

RUSSIAN FEDERATION / FEDERATION DE RUSSIE : M. Vladimir TOUMANOV, Cour Constitutionnelle de la Fédération de Russie, MOSCOU

SAN MARINO / SAINT-MARIN: (excusé/apologised)

SLOVAKIA / SLOVAQUIE: Mr Milan KARABIN, Supreme Court of the Slovak Republic, BRATISLAVA

SLOVENIA / SLOVENIE: Mr Dušan OGRIZEK, Supreme Court of the Republic of Slovenia, LJUBLJANA

Mr Aleš ZALAR, Ljubljana District Court, LJUBLJANA

SPAIN / ESPAGNE: (excusé/apologised)

SWEDEN / SUEDE: Mr Johan HIRSCHFELDT, Court of Appeal, STOCKHOLM

Mr Lars WENNERSTRÖM, Supreme Administrative Court, STOCKHOLM

SWITZERLAND / SUISSE : M. Martin SCHUBARTH, Tribunal Fédéral suisse, LAUSANNE

"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA" / "L'EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE": Mrs Tanja TEMELKOSKA MILENKOVIC, Court Palace, SKOPJE

TURKEY / TURQUIE: Mr Şeref ÜNAL, Ministry of Justice, ANKARA

UKRAINE: Mr Victor GORODOVENKO, Melitopol local court of Zaporizhska, MELITOPOL

UNITED KINGDOM / ROYAUME-UNI: The Right Honourable Lord Justice MANCE, Royal Courts of Justice, LONDON

SPECIALISTS / SPECIALISTES

Mr Jacek CHLEBNY, Supreme Administrative Court of Poland, ŁÓDŹ

M. Giacomo OBERTO, Tribunal de Turin, TURIN

COMMUNAUTE EUROPEENNE/EUROPEAN COMMUNITY

Commission européenne/European Commission : (excusé/apologised)

Union européenne / European Union : (excusé/apologised)

OBSERVERS WITH THE COUNCIL OF EUROPE / OBSERVATEURS AUPRES DU CONSEIL DE L'EUROPE

CANADA: M. Charles D. GONTHIER, Cour Suprême du Canada, OTTAWA

HOLY SEE / SAINT-SIEGE: (apologised/excusé)

UNITED STATES OF AMERICA / ETATS-UNIS D'AMERIQUE: (excusé/apologised)

JAPAN / JAPON: Mr Yasuyuki MURAOKA, Supreme Court of Japan, TOKYO

Mr Takeshi OKAHARA, Supreme Court of Japan, TOKYO

Mr Naoki ONISHI, Consulate General of Japan, STRASBOURG

MEXICO / MEXIQUE: (excusé/apologised)

OBSERVERS WITH THE COMMITTEE / OBSERVATEURS AUPRES DU COMITE

States Observers / Etats Observateurs

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE: (excusé/apologised)

FEDERAL REPUBLIC OF YUGOSLAVIA / REPUBLIQUE FEDERALE DE YOUGOSLAVIE: (excusé/apologised)

COUNCIL OF EUROPE'S SECRETARIAT / SECRETARIAT DU CONSEIL DE L'EUROPE

Mrs Margaret KILLERBY, Head of the Department of Private Law, Directorate General I - Legal Affairs / Chef du Service du droit privé, Direction Générale I - Affaires Juridiques

Mme Danuta WIŚNIEWSKA-CAZALS, Administrative Officer, Secretary of the CCJE, Department of Private Law, Directorate General I - Legal Affairs / Administratrice, Secrétaire du CCJE, Service du droit privé, Direction Générale I - Affaires Juridiques

Mme Marie-Luce DAVIES, Secretary, Department of Private Law, Directorate General I - Legal Affairs / Secrétaire, Service du droit privé, Direction Générale I - Affaires Juridiques

M. Francesco BRUNO, Trainee, Department of Private Law, Directorate General I - Legal Affairs / Stagiaire, Service du droit privé, Direction Générale I - Affaires Juridiques

Interpreters/Interprètes:
Mr Jean SLAVIK
Mr Amath FAYE
Mr Christopher TYCZKA

APPENDIX II

AGENDA / ORDRE DU JOUR

1. Opening of the meeting / *Ouverture de la réunion*

2. Election of the Chair and Vice-Chair / *Elections du Président et du Vice-Président*

3. Adoption of the agenda / *Adoption de l'ordre du jour*

4. Information by the Secretariat / *Informations par le Secrétariat*

5. Examination and adoption of the draft opinion on the standards concerning the independence and irremovability of judges (Recommendation No. (94)12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields)/ *examen et adoption d'un projet d'avis sur les normes relatives à l'indépendance et l'inamovibilité des juges (Recommandation n° (94) 12 sur l'indépendance, l'efficacité et le rôle des juges et la pertinence de ces normes et de toutes autres normes internationales pour les problèmes présents dans ces domaines)*

   Working document / *Document de travail*

   Draft opinion based on the texts prepared by the specialist, the Chair and Vice Chair of the CCJE and the replies sent by States to a questionnaire on this subject/ *Projet d'avis basée sur les textes élaborés par le spécialiste, le Président et le Vice-Président du CCJE et les réponses envoyées par les Etats au questionnaire sur ce sujet*

   CCJE-GT (2001) 6
   Appendix/*Annexe III*

6. Examination and adoption of the draft opinion 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/ *Examen et adoption d'un projet d'avis sur le financement et la gestion des tribunaux au regard de l'efficacité de la justice et au regard des dispositions de l'article 6 de la Convention européenne des Droits de l'Homme*

   Working document / *Document de travail*

   Draft opinion based on the texts prepared by the specialist, the Chair and Vice Chair of the CCJE and the replies sent by States to a questionnaire on this subject/ *Projet d'avis basée sur les textes élaborés par le spécialiste, le Président et le Vice-Président du CCJE et les réponses envoyées par les Etats au questionnaire sur ce sujet*

   CCJE-GT (2001) 6
   Appendix/Annexe *IV*

7. Examination and adoption of the draft terms of reference for the CCJE for 2002 and 2003/*examen et adoption d'un projet de mandat pour le CCJE pour 2002 et 2003*

Working document / *Document de travail*

Draft specific terms of reference for the CCJE for 2002 and 2003 / *projet de mandat spécifique pour le CCJE pour 2002 et 2003*

CCJE-GT (2001) 6
Appendix/*Annexe V*

8. Exchange of views on the draft questionnaires on the appropriate initial and in-service training of judges and on the principles and rules governing judges' professional conduct/ *échange de vues sur les projets de questionnaires sur les programmes appropriés de formation initiale et continue pour les juges et sur les principes et les règles régissant les impératifs professionnels applicables aux juges*

Working document / *Document de travail*

Draft questionnaires on judges' training and draft questionnaire on the conduct, ethics and responsibility of judges/*projets de questionnaires relatifs à la formation des juges et projet de questionnaire relatif à la conduite, l'éthique et la responsabilité des juges*

CCJE(2001) 34

9. Calendar of future meetings of the CCJE and the CCJE-GT/*Calendrier des futures réunions du CCJE et du CCJE-GT*

10. Examination of the request of the European Association of Judges for status of observer to the CCJE / *Examen de la demande du statut d'observateur auprès du CCJE présentée par l'Association Européenne des Magistrats*

Working document / *Document de travail*

Request of the European Association of Judges for status of observer to the CCJE / *Demande du statut d'observateur auprès du CCJE présentée par l'Association européenne des Magistrats*

CCJE(2001) 35

11. Any other business / *Divers*

11.1 Exchange of views on the electronic conference of CCJE judges/*échange de vues sur la conférence électronique des juges du CCJE*
11.2 Exchange of views on publications/*échange de vues sur les publications*

11.3 Exchange of views on partnerships between courts/ *échange de vues sur le partenariat dans le domaine judiciaire*

Background documents / *Documents de référence*

Report of the 1st meeting of the Consultative Council of European Judges (CCJE) (Strasbourg, 8-10 November 2000) / *Rapport de la première réunion du Conseil Consultatif de Juges Européens (CCJE) (Strasbourg, les 8-10 novembre 2000)*

CCJE(2000) 3

Decision of the Committee of Ministers concerning the abridged report of the first meeting of the Consultative Council of European Judges (CCJE) (Strasbourg, 8-10 November 2000)/ *Décision du Comité des Ministres concernant le rapport abrégé de la première réunion du Conseil Consultatif de Juges Européens (CCJE) (Strasbourg, 8-10 novembre 2000)*

CCJE (2001) 1

Report of the 1st meeting of the Working Party of the Consultative Council of European Judges (CCJE-GT) (Strasbourg, 21-23 May 2001)/ *Rapport de la première réunion du Groupe de travail du Conseil Consultatif de Juges Européens (CCJE-GT) (Strasbourg, les 21-23 May 2001)*

CCJE-GT (2001) 6

Framework global action plan for judges in Europe /
Programme cadre d'action global pour les juges en Europe
CCJE (2001) 24

Preliminary draft opinion prepared by Mr Giacomo OBERTO, expert consultant, Judge at the Tribunal of Turin /*Avant-projet d'avis établi par Monsieur Giacomo OBERTO, expert consultant, Juge au tribunal de Turin*

CCJE-GT (2001) 3

Preliminary draft opinion prepared by Mr Jacek CHLEBNY, Judge of the Supreme Administrative Court of Poland, President of Lodz Branch/ *Avant-projet d'avis établi par Monsieur Jacek CHLEBNY, Juge à la Cour Suprême Administrative de la Pologne, Président de la Section de Lodz*

CCJE-GT(2001) 4

Questionnaire on the independence of judges, their appointment and careers, and funding of the courts / *Questionnaire relatif à l'indépendance de juges, à la désignation et la carrière des juges et au financement des tribunaux*

CCJE (2000) 4

Synthesis of the answers to the questionnaire submitted by national delegations/ *Synthèse des réponses au questionnaire soumises par les délégations nationales*

CCJE-GT(2001) 1

Compendium of relevant legislation concerning independence of judges in European countries /*Recueil de législation pertinente concernant l'indépendance des juges dans les Etats européens*

CCJE-GT(2001) 5

Answers to the questionnaire submitted by national delegations/ *Réponses au questionnaire soumises par les délégations nationales :*

Andorra/*Andorre*

CCJE (2001) 28
French only/*français seulement*

Austria/*Autriche*

CCJE (2001) 33
English only/*anglais seulement*

Belgium/*Belgique*

CCJE (2001) 2
French only/français seulement

Croatia/ *Croatie*

CCJE (2001) 22
English only/*anglais seulement*

Cyprus/*Chypre*

CCJE (2001) 3
English only/anglais seulement

Czech Republic/*République Tchèque*

CCJE (2001) 4
English only/*anglais seulement*

Denmark/ *Danemark*

CCJE (2001) 26
English only/*anglais seulement*

Estonia/*Estonie*

CCJE (2001) 5
English only/*anglais seulement*

Finland/*Finlande*

CCJE (2001) 23
English only/*anglais seulement*

France

CCJE (2001) 6
French only/*français seulement*

Germany/*Allemagne*

CCJE (2001) 25
English only/*anglais seulement*

Iceland/*Islande*

CCJE (2001) 7
English only/*anglais seulement*

Ireland/*Irlande*

CCJE (2001) 8
English only/*anglais seulement*

Italy/ *Italie*

CCJE (2001) 31
English only/*anglais seulement*

Lithuania/*Lituanie*

CCJE (2001) 9
English only/*anglais seulement*

Luxembourg

CCJE (2001) 10
French only/*français seulement*

Malta/*Malte*

CCJE (2001) 11
English *only*/*anglais seulement*

Moldova

CCJE (2001) 29
French only/*français seulement*

Netherlands/ *Pays-Bas*

CCJE (2001) 30
English only/*anglais seulement*

Norway/ *Norvège*

CCJE (2001) 18
English only/*anglais seulement*

Poland/*Pologne*

CCJE (2001) 12
English only/*anglais seulement*

Romania/*Roumanie*

CCJE (2001) 13
English only/anglais *seulement*

Russian Federation/ *Fédération de Russie*

CCJE (2001) 19
French only/*français seulement*

Slovakia/*Slovaquie*

CCJE (2001) 14
English only/*anglais seulement*

Slovenia /*Slovénie*

CCJE (2001) 15
English only/*anglais seulement*

Sweden/*Suède*

CCJE (2001) 16
English only/*anglais seulement*

Switzerland/ *Suisse*

CCJE (2001) 27
French only/*français seulement*

"The Former Yugoslav Republic of Macedonia"/
"*L'ex République Yougoslave de Macédoine"*

CCJE (2001) 20
English only/*anglais seulement*

Turkey/*Turquie*

CCJE (2001) 17
English only/*anglais seulement*

United Kingdom/ *Royaume-Uni*

CCJE (2001) 21
English only/anglais seulement

APPENDIX III

OPINION No 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES

(RECOMMENDATION No. R (94) 12 ON THE INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES AND THE RELEVANCE OF ITS STANDARDS AND ANY OTHER INTERNATIONAL STANDARDS TO CURRENT PROBLEMS IN THESE FIELDS)

1. The Consultative Council of European Judges (CCJE) has drawn up this opinion on the basis of the responses of States to a questionnaire, texts prepared by the Working Party of the CCJE and texts prepared by the Chair and Vice Chair of the CCJE and the specialist of the CCJE on this topic, Mr Giacomo OBERTO (Italy).

2. The material made available to the CCJE includes a number of statements, more or less official, of principles regarding judicial independence.

3. One may cite as particularly important formal examples:
- UN basic principles on the independence of the judiciary (1985),
- 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.

4. Less formal developments have been:
- The European Charter on the Statute for Judges adopted by participants from European countries and two judges' international associations meeting in Strasbourg on 8-10 July 1998, supported by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12-14 October 1998, and again by judges and representatives from Ministries of Justice from 25 European countries meeting in Lisbon on 8-10 April 1999,
- Statements by delegates of High Councils of Judges, or judges' associations, such as those made at a meeting in Warsaw and Slok on 23-26 June 1997.

5. Other material mentioned during the CCJE's discussions includes:
- Beijing Statement on principles of the independence of the judiciary in the Lawasia Region (August 1997), now signed by 32 Chief Justices of that region,
- The Latimer House Guidelines for the Commonwealth (19 June 1998), the outcome of a colloquium attended by representatives of 23 Commonwealth countries or overseas territories and sponsored by Commonwealth judges and lawyers with support from the Commonwealth Secretariat and the Commonwealth Office.

6. **Throughout the CCJE discussions, members of the CCJE emphasised that what is critical is not the perfection of principles and, still less, the harmonisation of institutions; it is the putting into full effect of principles already developed.**

7. The CCJE also considered whether improvements or further developments of existing general principles may be appropriate.

8. The purpose of this opinion is to look in greater detail at a number of the topics discussed and to identify the problems or points concerning the independence of judges that would benefit from attention.

9. It is proposed to take the following topic headings:

- The rationale of judicial independence
- The level at which judicial independence is guaranteed
- Basis of appointment or promotion
- The appointing and consultative bodies
- Tenure - period of appointment
- Tenure - irremovability and discipline
- Remuneration
- Freedom from undue external influence
- Independence within the judiciary
- The judicial role

In the course of looking at these topics, the CCJE has sought to identify certain examples of difficulties regarding or threats to independence which came to its attention. Further, it has identified the importance of the principles under discussion to (in particular) the arrangements and practice regarding the appointment and re-appointment of judges to international courts. This topic is dealt with in paragraphs 52, 54-55).

The rationales of judicial independence

10. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are "charged with the ultimate decision over life, freedoms, rights, duties and property of citizens" (recital to UN basic principles, echoed in Beijing declaration; and Articles 5 and 6 of the European Convention on Human Rights). Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice.

11. This independence must exist in relation to society generally and in relation to the particular parties to any dispute on which judges have to adjudicate. The judiciary is one of three basic and equal pillars in the modern democratic state[1]. It has an

[1] The CCJE will not attempt to precise the extensive literature on the subject of separation of powers, and the text gives only a simplified account, as is aptly demonstrated in The Judiciary and the Separation of Powers by Lopez Guerra (Venice Commission paper for a Conference for Constitutional and Supreme Court Judges from the Southern African Region, February 2000).

important role and functions in relation to the other two pillars. It ensures that governments and the administration can be held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced, and, to a greater or lesser extent, in ensuring that they comply with any relevant constitution or higher law (such as that of the European Union). To fulfil its role in these respects, the judiciary must be independent of these bodies, which involves freedom from inappropriate connections with and influence by these bodies[2]. Independence thus serves as the guarantee of impartiality[3]. This has implications, necessarily, for almost every aspect of a judge's career: from training to appointment and promotion and to disciplining.

12. Judicial independence presupposes total impartiality on the part of judges. When adjudicating between any parties, judges must be impartial, that is free from any connection, inclination or bias, which affects - or may be seen as affecting - their ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that "no man may be judge in his own cause". This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined.

13. The rationale of judicial independence, as stated above, provides a key by which to assess its practical implications – that is, the features which are necessary to secure it, and the mean by which it may be secured, at a constitutional or lower legal level[4], as well as in day-to-day practice, in individual states. The focus of this opinion is upon the general institutional framework and guarantees securing judicial independence in society, rather than upon the principle requiring personal impartiality (both in fact and appearance) of the judge in any particular case. Although there is an overlap, it is proposed to address the latter topic in the context of the CCJE's examination of judicial conduct and standards of behaviour.

The level at which judicial independence is guaranteed

14. The independence of the judiciary should be guaranteed by domestic standards at the highest possible level. Accordingly, States should include the concept of the independence of the judiciary either in their constitutions or among the fundamental principles acknowledged by countries which do not have any written constitution but in which respect for the independence of the judiciary is guaranteed by age-old culture and tradition. This marks the fundamental importance of independence, whilst

[2] For a more sophisticated analysis identifying the impossibility, and it can be said, undesirability, of anyone being completely independent of all influence, e.g. social and cultural parameters, see The Role of Judicial Independence for the Rule of Law, Prof. Henrich (Venice Commission paper for workshop in Kyrgystan, April 1998).

[3] See paragraph 12 below.

[4] See paragraphs 14-16 below.

acknowledging the special position of common law jurisdictions (England and Scotland in particular) with a long tradition of independence, but without written constitutions.

15. The UN basic principles provide for the independence of the judiciary to be "guaranteed by the State and enshrined in the Constitution or the law of the country". Recommendation No. R (94) 12 specifies (in the first sentence of Principle I.2) that "The independence of judges shall be guaranteed pursuant to the provisions of the [European] Convention [on Human Rights] and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law".

16. The European Charter on the statute for judges provides still more specifically: "In each European State, the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level". **This more specific prescription of the European Charter met with the general support of the CCJE. The CCJE recommends its adoption, instead of the less specific provisions of the first sentence of Principle I.2 of Recommendation No. R (94) 12.**

Basis of appointment or promotion

17. The UN basic principles state (paragraph 13): "Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience". Recommendation No. R (94) 12 is also unequivocal: "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency". Recommendation No. R (94) 12 makes clear that it is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters (as well as in most respects to lay judges and other persons exercising judicial functions). There is, therefore, general acceptance both that appointments should be made "on the merits" based on "objective criteria" and that political considerations *should* be inadmissible.

18. The central problems remain (a) of giving content to general aspirations towards "merits-based" appointments and "objectivity" and (b) of aligning theory and reality. The present topic is also closely linked with the next two topics (*The appointing body* and *Tenure*).

19. In some countries there is, constitutionally, a direct political input into the appointment of judges. Where judges are elected (either by the people as at the Swiss cantonal level, or by Parliament as at the Swiss federal level, in Slovenia and "the Former Yugoslav Republic of Macedonia" and in the case of the German Federal Constitutional Court and part of the members of the Italian Constitutional Court), the aim is no doubt to give the judiciary in the exercise of its functions a certain direct democratic underpinning. It cannot be to submit the appointment or promotion of judges to narrow party political considerations. Where there is any risk that it is being, or would be used, in such a way, the method may be more dangerous than advantageous.

20. Even where a separate authority exists with responsibility for or in the process of judicial appointment or promotion, political considerations are not, in practice, necessarily excluded. Thus, in Croatia, a High Judiciary Council of 11 members (seven judges, two attorneys and two professors) has responsibility for such appointments, *but* the Minister of Justice may propose the 11 members to be elected by the House of Representatives of the Croatian Parliament *and* the High Judiciary Council has to consult with the judiciary committee of the Croatian Parliament, controlled by the party forming the Government for the time being, with regard to any such appointments. Although Article 4 of the amended Croatian Constitution refers to the principle of separation of powers, it also goes on to state that this includes "all forms of mutual co-operation and reciprocal control of power holders", which certainly does not exclude political influence on judicial appointments or promotion. In Ireland, although there is a judicial appointments commission[5], political considerations may still determine which of rival candidates, all approved by the commission, is or are actually appointed by the Minister of Justice (and the commission has no role in relation to promotions).

21. In other countries, the systems presently in place differ between countries with a career judiciary (most civil law countries) and those where judges are appointed from the ranks of experienced practitioners (e.g. common law countries, like Cyprus, Malta and the UK, and other countries like Denmark).

22. In countries with a career judiciary, the initial appointment of career judges normally depends upon objective success in examination. The important issues seem to be (a) whether competitive examination can suffice - should not personal qualities be assessed and practical skills be taught and examined? (b) whether an authority independent of the executive and legislature should be involved at this stage – in Austria, for example Personalsenates (composed of five judges) have a formal role in recommending promotions, but none in relation to appointments.

23. By contrast, where judges are or may be appointed from the ranks of experienced practitioners, examinations are unlikely to be relevant and practical skills and consultation with other persons having direct experience of the candidate are likely to be the basis of appointment.

24. In all the above situations, it is suggested that objective standards are required not merely to exclude political influence, but for other reasons, such as the risk of favouritism, conservatism and cronyism (or "cloning"), which exist if appointments are made in an unstructured way or on the basis of personal recommendations.

25. Any "objective criteria", seeking to ensure that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency", are bound to be in general terms. Nonetheless, it is their actual content and effect in any particular state that is ultimately critical. **The CCJE recommended that the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to**

[5] See further paragraph 43 below.

objective criteria, with the aim of ensuring that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency". Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.

26. The responses to questionnaires indicate a widespread lack of any or any such published criteria. General criteria have been published by the Lord Chancellor in the UK, and the Scottish executive has issued a consultation document. Austrian law defines criteria for promotion. Many countries simply rely on the integrity of independent councils of judges responsible for appointing or recommending appointments, e.g. Cyprus, Estonia. In Finland, the relevant advisory board compares the candidates' merits and its proposal of any appointment *includes the reasons for its decision*. Likewise in Iceland, the Selection Committee[6] provides the Minister for Justice with a written appraisal of applicants for district judgeships, while the Supreme Court advises on competence for appointment to the Supreme Court. In Germany, at both federal and Land level, councils for judicial appointments may be responsible for delivering written views (without detailed reasons) on the suitability of candidates for judicial appointment and promotion, which do not bind the Minister of Justice, but which may lead to (sometimes public) criticism if he does not follow them. The giving of reasons might be regarded as a healthy discipline and would be likely to give insight to the criteria being applied in practice, but countervailing considerations may also be thought to militate against the giving of reasons in individual cases (e.g. the sensitivity of the judgment between closely comparable candidates and privacy with regard to sources or information).

27. In Lithuania, although no clear criteria governing promotion exist, the performance of district judges is monitored by a series of quantitative *and qualitative* criteria based mainly on statistics (including statistics relating to reversals on appeal), and is made the subject of reports to the Courts Department of the Ministry of Justice. The Minister of Justice has only an indirect role in selection and promotion. But the monitoring system has been "strictly criticised" by the Lithuanian Association of Judges. Statistical data have an important social role in understanding and improving the workings and efficiency of courts. But they are not the same as objective standards for evaluation, whether in respect of appointment to a new post or promotion or otherwise. Great caution is required in any use of statistics as an aid in this context.

28. In Luxembourg, promotion is said to be based normally on the seniority principle. In the Netherlands there are still elements of the early seniority system, and in Belgium and Italy objectively defined criteria of seniority and competence determine promotion. In Austria, in relation to the recommendations for promotion made by the Personalsenates (composed of five judges) to the Minister of Justice, the position by law is that seniority is considered only in case of equal professional ability of candidates.

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[6] consisting of three lawyers appointed by the Minister of Justice on the recommendation of the Supreme Court, the Judges Association and the Association of Attorneys, on whose applications and qualifications the Supreme Court also comments.

29. The European Charter on the statute for judges addresses systems for promotion "when it is not based on seniority" (paragraph 4.1.), and the Explanatory Memorandum notes that this is "a system which the Charter did not in any way exclude because it is deemed to provide very effective protection for independence". **Although adequate experience is a relevant pre-condition to promotion, the CCJE considered that seniority, in the modern world, is no longer generally[7] acceptable as the governing principle determining promotion.** The public has a strong interest not just in the independence, but also in the quality of its judiciary, and, especially in times of change, in the quality of the leaders of its judiciary. There is a potential sacrifice in dynamism in a system of promotion based entirely on seniority, which may not be justified by any real gain in independence. The CCJE considered however that seniority requirements based on years of professional experience can assist to support independence.

30. In Italy and to some extent Sweden, the status, function and remuneration of judges have been uncoupled. Remuneration follows, almost automatically, from seniority of experience and does not generally vary according to status or function. Status depends on promotion but does not necessarily involve sitting in any different court. Thus, a judge with appellate status may prefer to continue to sit at first instance. In this way the system aims to increase independence by removing any financial incentive to seek promotion or a different function.

31. The CCJE considered the question of equality between women and men. The Latimer House Guidelines state: "Appointments to all levels of the judiciary should have, as an objective, the achievement of equality between women and men". In England, the Lord Chancellor's "guiding principles" provide for appointment strictly on merit "regardless of gender, ethnic origin, marital status, sexual orientation….", but the Lord Chancellor has made clear his wish to encourage applications for judicial appointment from both women and ethnic minorities. These are both clearly appropriate aims. The Austrian delegate reported that in Austria, where there were two equally qualified candidates, it was specifically provided that the candidate from the under-represented sex should be appointed. Even on the assumption that this limited positive reaction to the problem of under-representation would pose no legal problems, the CCJE identified as practical difficulties, first, that it singles out one area of potential under-representation (gender) and, secondly, that there could be argument about what, in the circumstances of any particular country, constitutes under-representation, for relevant discriminatory reasons, in such an area. **The CCJE does not propose a provision like the Austrian as a general international standard, but does underline the need to achieve equality through "guiding principles" like those referred to in the third sentence above.**

The appointing and consultative bodies

32. The CCJE noted the large diversity of methods by which judges are appointed. There is evident unanimity that appointments should be "merit-based".

[7] The CCJE is however aware of some cases, where such a system appears to work successfully, e.g. for the appointment of the Chief Justice in India and Japan.

33. The various methods currently used to select judges can all be seen as having advantages and disadvantages: it may be argued that election confers a more direct democratic legitimacy, but it involves a candidate in a campaign, in politics and in the temptation to buy or give favours. Co-option by the existing judiciary may produce technically qualified candidates, but risks conservatism and cronyism (or "cloning")[8] – and would be regarded as positively undemocratic in some constitutional thinking. Appointment by the executive or legislature may also be argued to reinforce legitimacy, but carries a risk of dependence on those other powers. Another method involves nomination by an independent body.

34. There is room for concern that the present diversity of approach may tacitly facilitate the continuation of undue political influence over appointments. The CCJE noted the view of the specialist, Mr Oberto, that informal appointment procedures and overtly political influence on judicial appointments in certain States were not helpful models in other, newer democracies, where it was vital to secure judicial independence by the introduction of strictly non-political appointing bodies.

35. The CCJE noted, to take one example of a new democracy, that in the Czech Republic judicial appointments are made by the President of the Republic, on the motion of the Minister of Justice and promotions (i.e. transfer to a higher court or to the position of a presiding or deputy presiding judge) by either the president or the Minister. No Supreme Judiciary Council exists, although judges sit on committees which select candidates for judicial appointment.

36. Recommendation No R (94) 12 presently hedges its position in this area. It starts by assuming an independent appointing body:

"The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules".

But it then goes on to contemplate and provide for a quite different system:

"However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above."

The examples which follow of "guarantees" offer even greater scope for relaxation of formal procedures – they start with an special independent body to give advice which the government "follows in practice", include next "the right to appeal against a decision to an independent authority" and end with the bland (and imprecisely expressed) possibility that it is sufficient if "the authority which makes the decision safeguards against undue and improper influences".

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[8] See paragraph 24 above.

37. The background to this formulation is found in conditions in 1994. But the CCJE is concerned now about its somewhat vague and open nature in the context of the wider Europe, where constitutional or legal "traditions" are less relevant and formal procedures are a necessity with which it is dangerous to dispense. **Therefore, the CCJE considered that every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria.**

38. The CCJE recognised that it may not be possible to go further, in view of the diversity of systems at present accepted in European States. The CCJE is, however, an advisory body, with a mandate to consider both possible changes to existing standards and practices and the development of generally acceptable standards. Further, the European Charter on the statute for judges already goes considerably further than Recommendation No. R (94) 12, by providing as follows:

"In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."

39. The Explanatory Memorandum explains that the "intervention" of an independent authority was intended in a sense wide enough to cover an opinion, recommendation or proposal as well as an actual decision. The European Charter still goes well beyond current practice in many European States. (Not surprisingly, delegates of High Councils of Judges and judges' associations meeting in Warsaw on 23-26 June 1997 wanted even fuller judicial "control" over judicial appointments and promotion than advocated by the European Charter.)

40. The responses to questionnaires show that most European States have introduced a body independent of the executive and legislature with an exclusive or lesser role in respect of appointments and (where relevant) promotions; examples are Andorra, Belgium, Cyprus, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Moldova, Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, "the Former Yugoslav Republic of Macedonia" and Turkey.

41. The absence of such a body was felt to be a weakness in the Czech Republic. In Malta such a body exists, but the fact that consultation with it by the appointing authority[9] was optional was felt to be a weakness. In Croatia, the extent of potential political influence over the body was identified as a problem[10].

42. The following systems will serve as three examples of a higher judiciary council meeting the suggestions of the European Charter.

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[9] The President on advice from the Prime Minister.

[10] See paragraph 20 above.

i) Under article 104 of the Italian Constitution, such a council consists of the President of the Republic, the First President and Procurator General of the Court of Cassation, 20 judges elected by the judiciary and 10 members elected by Parliament in joint session from among university professors and lawyers of 15 years standing. Under article 105, its responsibility is "to designate, to recruit and transfer, to promote and to take disciplinary measures in respect of judges, in accordance with the rules of the judicial organisation".

ii) The Hungarian Reform Laws on Courts of 1997 set up the National Judicial Council exercising the power of court administration including the appointment of judges. The Council is composed of the President of the Supreme Court (President of the Council), nine judges, the Minister of Justice, the Attorney General, the President of the Bar Association and two deputies of Parliament.

iii) In Turkey a Supreme Council selects and promotes both judges and public prosecutors. It consists of seven members including five judges from either the Court of Cassation and the Council of State. The Minister of Justice chairs it and the Undersecretary of the Minister of Justice is also an ex-officio member of the Council.

43. A common law example is provided by Ireland, where the Judicial Appointments Board was established by Courts and Courts Officers Act 1995, section 13 for the purpose of "identifying persons and informing Government of the suitability of those persons for appointment to judicial office". Its membership of nine persons consists of the Chief Justice, the three Presidents of the High Court, Circuit Court and District Court, the Attorney General, a practicing barrister nominated by the Chairman of the Bar, a practicing solicitor nominated by the Chairman of the Law Society, and up to three persons appointed by the Minister of Justice, engaged in or having knowledge or experience of commerce, finance or administration or with experience as consumers of court services. But it does not exclude all political influence from the process[11].

44. The German model (above) involves councils, whose role may be different depending on whether one is speaking of federal or Land courts and on the level of court. There are councils for judicial appointments whose role is usually purely advisory. In addition, several German Länder provide that judges shall be chosen jointly by the competent Minister and a committee for the selection of judges. This committee usually has a right of veto. It is typically composed of members of parliament, judges elected by their colleagues and a lawyer. The involvement of the Minister of Justice is regarded in Germany as an important democratic element because he is responsible to parliament. It is regarded as constitutionally important that the actual appointing body should not consist of judges alone or have a majority of judges.

45. Even in legal systems where good standards have been observed by force of tradition and informal self-discipline, customarily under the scrutiny of a free media, there has been increasing recognition in recent years of a need for more objective and formal safeguards. In other states, particularly those of former communist countries,

[11] See paragraph 20 above.

the need is pressing. **The CCJE considered that the European Charter - in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges[12] - pointed in a general direction which the CCJE wished to commend. This is particularly important for countries which do not have other long-entrenched and democratically proved systems.**

Tenure - period of appointment

46. The UN basic principles, Recommendation No. R (94) 12 and the European Charter on the statute for judges all refer to the possibility of appointment for a fixed legal term, rather than until a legal retirement age.

47. The European Charter, paragraph 3.3 also refers to recruitment procedures providing "for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis".

48. European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence.

49. Many civil law systems involve periods of training or probation for new judges.

50. Certain countries make some appointments for a limited period of years (e.g. in the case of the German Federal Constitutional Court, for 12 years). Judges are commonly also appointed to international courts (e.g. the European Court of Justice and the European Court of Human Rights) for limited periods.

51. Some countries also make extensive use of deputy judges, whose tenure is limited or less well protected than that of full-time judges (e.g. the UK and Denmark).

52. The CCJE considered that where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that:

i. the judge, if he or she wishes, is considered for re-appointment by the appointing body and
ii. the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations.

53. **The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter).**

[12] See paragraphs 38-39 above.

54. The CCJE was conscious that its terms of reference make no specific reference to the position of judges at an international level. The CCJE is borne of a recommendation (no. 23) in the Wise Persons' Report of 1998, that direct co-operation with national institutions of the judiciary should be reinforced, and Resolution No. 1 adopted thereafter by the Ministers of Justice at their 22nd Conference meeting in Chisinau on 17-18 June 1999 referred to the CCJE's role as being to assist in carrying out the priorities identified in the global action plan "for the strengthening of the role of judges in Europe and to advise …. whether it is necessary to update the legal instruments of the Council of Europe ….". The global action plan is heavily focused on the internal legal systems of member states. But it should not be forgotten that the criteria for Council of Europe membership include "fulfillment of the obligations resulting from the European Convention on Human Rights" and that in this respect "submission to the jurisdiction of the European Court of Human Rights, binding under international law, is clearly the most important standard of the Council of Europe" (Wise Persons' Report, paragraph 9).

55. The CCJE considered that the ever increasing significance for national legal systems of supranational courts and their decisions made it essential to encourage member States to respect the principles concerning independence, irremovability, appointment and term of office in relation to judges of such supranational courts (see in particular paragraph 52 above).

56. **The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority referred in the paragraphs 37 and 45 should be encouraged in relation to appointment and re-appointment to international courts.** The Council of Europe and its institutions are in short founded on belief in common values superior to those of any single member State, and that belief has already achieved significant practical effect. It would undermine those values and the progress that has been made to develop and apply them, if their application was not insisted upon at the international level.

Tenure - irremovability and discipline

57. It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office: see the UN basic principles, paragraph 12; Recommendation No. R (94) 12 Principle I(2)(a)(ii) and (3) and Principle VI (1) and (2). The European Charter affirms that this principle extends to appointment or assignment to a different office or location without consent (other than in case of court re-organisation or temporarily), but both it and Recommendation No. R (94) 12 contemplate that transfer to other duties may be ordered by way of disciplinary sanction.

58. The CCJE noted that the Czech Republic has no mandatory retirement age, but "a judge may be recalled by the Minister of Justice from his position after reaching the age of 65".

59. The existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and basis upon which, judges may be disciplined. Recommendation No. R (94) 12, Principle VI(2) and (3), insists on the need for precise definition of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on Human Rights. Beyond that it says only that "States should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself". The European Charter assigns this role to the independent authority which it suggests should "intervene" in all aspects of the selection and career of every judge.

60. **The CCJE considered**

(a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (see paragraph 16 above);

(b) that the intervention of an independent authority[13], with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline; and

(c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area.

A detailed opinion on this matter containing draft texts for consideration by the CDCJ could be prepared by the CCJE at the later stage when it deals expressly with standards of conduct, although there is no doubt that they have a strong inter-relationship with the present topic of independence.

Remuneration

61. Recommendation No. R (94) 12 provides that judges' "remuneration should be guaranteed by law" and "commensurate with the dignity of their profession and burden of responsibilities" (Principles I(2)(a)(ii) and III(1)(b)). The European Charter contains an important, hard-headed and realistic recognition of the role of adequate remuneration in shielding "from pressures aimed at influencing their decisions and more generally their behaviour ….", and of the importance of guaranteed sickness pay and adequate retirement pensions (paragraph 6). **The CCJE fully approved the European Charter's statement.**

62. While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to

[13] See paragraphs 37 and 45 above.

make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living.

Freedom from undue external influence

63. Freedom from undue external influence constitutes a well-recognised general principle: see UN basic principles, paragraph 2; Recommendation No. R (94) 12, Principle I(2)(d), which continues: "The law should provide for sanctions against persons seeking to influence judges in any such manner". As general principles, freedom from undue influence and the need in extreme cases for sanctions are incontrovertible[14]. Further, the CCJE has no reason to think that they are not appropriately provided for as such in the laws of member States. On the other hand, their operation in practice requires care, scrutiny and in some contexts political restraint. Discussions with and the understanding and support of judges from different States could prove valuable in this connection. The difficulty lies rather in deciding what constitutes undue influence, and in striking an appropriate balance between for example the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press. Judges must accept that they are public figures and must not be too susceptible or of too fragile a constitution. **The CCJE agreed that no alteration of the existing principle seems required, but that judges in different States could benefit from discussing together and exchanging information about particular situations.**

Independence within the judiciary

64. The fundamental point is that a judge is in the performance of his functions no-one's employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.

65. Recommendation No. R (94) 12, Principle I(2)(a)(i) provides that "decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law" and Principle I(2)(a)(iv) provides that "with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively". **The CCJE noted that the responses to questionnaires indicated that these principles were generally observed, and no amendment has been suggested.**

66. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law" (Recommendation No. R (94) 12, Principle I (2)(d). This

[14] See also the balance between the general principle of freedom of expression and the exception (where steps are required to maintain the authority and impartiality of the judiciary) in Article 10 of the ECHR.

means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case).

67. Principle I (2)(d) continues: "Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary". This is, on any view, obscure. "Reporting" on the merits of cases, even to other members of the judiciary, appears on the face of it inconsistent with individual independence. If a decision were to be so incompetent as to amount to a disciplinary offence, that might be different, but, in that very remote case, the judge would not be "reporting" at all, but answering a charge.

68. The hierarchical power conferred in many legal systems on superior courts might in practice undermine individual judicial independence. One solution would be to transfer of all relevant powers to a Higher Judicial Council, which would then protect independence inside and outside of the judiciary. This brings one back to the recommendation of the European Charter on the statute for judges, to which attention has already been invited under the heading of *The appointing body* and *Freedom from undue external influence.*

69. Court inspection systems, in the countries where they exist, should not concern themselves with the merits or the correctness of decisions and should not lead judges, on grounds of efficiency, to favour productivity over the proper performance of their role, which is to come to a carefully considered decision in keeping with the interests of those seeking justice[15].

70. The CCJE took note in this connection of the modern Italian system of separation of grade, remuneration and office described in paragraph 30 above. The aim of this system is to reinforce independence and it also means that difficult first instance cases (e.g. in Italy, Mafia cases) may be tried by highly capable judges.

The judicial role

71. This heading could cover a wide field. Much of this field will arise for detailed consideration when the CCJE considers the topic of standards and is better left until then. That applies to individual topics such as membership of a political party and engagement in political activity.

72. An important topic touched on during the CCJE meeting concerns the inter-changeability in some systems of the posts of judge, public prosecutor and official of the Ministry of Justice. In spite of this inter-changeability, the CCJE decided that the consideration of the role, status and duties of public prosecutors in parallel with that of judges lay outside its terms of reference. However, there remains an important question whether such a system is consistent with judicial independence. This is a subject which is no doubt of considerable importance to the legal systems affected. **The CCJE considered that it could merit further consideration at a later stage,**

[15] See also paragraph 27 above.

perhaps in connection with the study of rules of conduct for judges, but that it would require further specialist input.

Conclusions

73. The CCJE considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular in Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(1) The fundamental principles of judicial independence should be set out at the constitutional or highest possible legal level in each member State and its more specific rules at the legislative level (paragraph 16).

(2) The authorities responsible in each member State for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria with the aim of ensuring that the selection and career of judges are based on merit having regard to qualification, integrity, ability and efficiency (paragraph 25).

(3) Seniority should not be the governing principle determining promotion. Adequate professional experience is however relevant, and pre-conditions related to years of experience may assist to support independence (paragraph 29).

(4) The CCJE considered that the European Charter on the statute for judges – in so far as it advocated the intervention of an independent authority with substantial judicial representation chosen democratically by other judges – pointed in a general direction which the CCJE wished to commend (paragraph 45).

(5) The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter) (paragraph 53).

(6) The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority referred in the paragraphs 37 and 45 should be encouraged in relation to appointment and re-appointment to international courts (paragraph 56).

(7) The CCJE considered that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (paragraph 60).

(8) Judges' remuneration should be commensurate with their role and responsibilities and should provide appropriately for sickness pay and retirement pay. It should be guaranteed by specific legal provision against reduction and there should be provision for increases in line with the cost of living (paragraphs 61-62).

(9) The independence of any individual judge in the performance of his or her functions exists notwithstanding any internal court hierarchy (paragraph 64).

(10) The use of statistical data and the court inspection systems shall not serve to prejudice the independence of judges (paragraphs 27 and 69).

(11) The CCJE considered that it would be useful to prepare additional recommendations or to amend Recommendation No. R (94) 12 in the light of this opinion and the further work to be carried out by the CCJE.

APPENDIX IV

OPINION No 2 (2001)
OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)
FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS
OF THE COUNCIL OF EUROPE

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

1. The Consultative Council of European Judges (CCJE) has drawn up this opinion on the basis of the responses of States to a questionnaire, texts prepared by the Working Party of the CCJE and texts prepared by the Chair and Vice Chair of the CCJE and the specialist of the CCJE on this topic, Mr Jacek CHLEBNY (Poland).

2. The CCJE recognised that the funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions.

3. Moreover, there is an obvious link between, on the one hand, the funding and management of courts and, on the other, the principles of the European Convention on Human Rights: access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has appropriate funds and resources at its disposal in order to perform efficiently.

4. All the general principles and standards of the Council of Europe on the funding and management of courts place a duty on states to make financial resources available that match the needs of the different judicial systems.

5. **The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations.** Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. **Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.**

6. In the majority of countries, the Ministry of Justice is in turn involved in presenting the court budget to, and negotiating it with, the Ministry of Finance. In many countries, prior judicial input takes place in the form of proposals made either directly or indirectly by courts to the Ministry of Justice. However, in some cases, courts present budget proposals to the Ministry of Finance direct. Examples are the Supreme Courts of Estonia and of Slovakia for their own budgets and the Supreme Courts of Cyprus and of Slovenia for courts of all levels. In Switzerland the Federal Supreme Court has the right to submit its own budget (approved by its Administrative Commission, consisting of three judges) to the Federal Parliament, and its President

and Secretary-General have the right to appear to defend its budget before Parliament. In Lithuania a Constitutional Court decision of 21st December 1999 established the principle that each court had the right to have its own budget, separately itemised in the State budget approved by Parliament. In Russia, the Federal Budget must make separate provision for the budget of the Constitutional Court, the Supreme Court and other common law courts and the Federal Court of Arbitration and other arbitral tribunals, *and* the Council of Russian Judges has the right not only to participate in the negotiation of the federal budget, but also to be represented in its discussion in the chambers of the Russian Federal Assembly. In the Nordic States recent legislation has formalised the procedure for co-ordinating court budgets and submitting them to the Ministry of Justice – in Denmark the Court Administration (on whose steering committee the majority of the members are representatives of different courts) fulfils this role. In Sweden the National Courts Administration (a special governmental body, with a steering committee, the minority of whose members are judges) fulfils a like function, with obligations to prepare rolling three-year budgets.

7. In contrast, in other countries there is no formal procedure for judicial input into the budget negotiated by the Minister of Justice or equivalent to fund court costs, and any influence is informal. Belgium, Croatia, France, Germany, Italy (save for certain disbursements), Luxembourg, Malta, Ukraine and the United Kingdom all provide examples of legal systems within this category.

8. The extent to which the court system is considered to be adequately funded is not always related to the extent to which formal procedures exist for proposals by or consultation with the judiciary, although more direct judicial input was still regarded as an important need. The replies to the questionnaire too often reveal a wide range of deficiencies, from, in particular, a shortage of appropriate material resources (premises, furniture, office and computer equipment, etc) to a total lack of the kind of assistance that is essential to judges for the modern exercise of judicial functions (qualified staff, specialist assistants, access to computerised documentation sources, etc). In Eastern European countries especially, budgetary restraints have led Parliaments to constrict the monies made available for court funding to a relatively small proportion of that required (e.g. 50% in Russia). Even in Western European countries, budgetary constraints have operated to limit courtrooms, offices, IT and/or staff (in the latter case, meaning sometimes that judges cannot be freed from non-judicial tasks).

9. One problem which may arise is that the judiciary, which is not always seen as a special branch of the power of the State, has specific needs in order to carry out its tasks and remain independent. Unfortunately economic aspects may dominate discussions concerning important structural changes of the judiciary and its efficiency. While no country can ignore its overall financial capability in deciding what level of services it can support, the judiciary and the courts as one essential arm of the State have a strong claim on resources.

10. Although the CCJE cannot ignore the economic disparities between countries, the development of appropriate funding for courts requires greater involvement by the courts themselves in the process of drawing up the budget. **The CCJE agreed that it was therefore important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.**

11. One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists[1] – a co-ordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees.

12. Management of the budget allocated to the courts is an increasingly extensive responsibility requiring professional attention. The CCJE discussions have shown that there is a broad distinction between, on the one hand, systems in which management is undertaken by the judiciary or persons or a body answerable to the judiciary, or by the independent authority with appropriate administrative support answerable to it and, on the other, those in which management is entirely the responsibility of a government department or service. The former approach has been adopted in some new democracies, as well as other countries because of its perceived advantages in ensuring judicial independence and in ensuring the judiciary's ability to perform its functions.

13. If judges are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary support in order to carry out the task. In any event, it is important that judges are responsible for all administrative decisions which directly affect performance of the courts' functions.

Conclusion

14. The CCJE considered that States should reconsider existing arrangements for the funding and management of courts in the light of this opinion. The CCJE in particular further draws attention to the need to allocate sufficient resources to courts to enable them to function in accordance with the standards laid down in Article 6 of the European Convention on Human Rights.

[1] See the Opinion N° 1 (2201) on standards concerning the independence, efficiency and role of judges, under the heading "the appointing and consultative bodies"

APPENDIX V

DRAFT SPECIFIC TERMS OF REFERENCE OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

LEGAL CO-OPERATION

Specific Terms of Reference

1. Name of committee: Consultative Council of European Judges (CCJE)

2. Type of committee: Consultative body

3. Source of terms of reference: Committee of Ministers

4. Terms of reference:

Pursuant to:

- main recommendation No. 23 in the Wise Persons' report concerning the reinforcement of direct co-operation with national judicial institutions,
- the conclusions and the follow-up action agreed by the Committee of Ministers in 2000 on the respect of commitments of member States concerning the functioning of the judicial system,
- Resolution No. 1 on measures to reinforce the independence and impartiality of judges in Europe adopted by the European Ministers of Justice at the end of their 22nd Conference in 2000, in particular concerning a global action plan to strengthen the role of judges and the setting up within the Council of Europe of a consultative group composed of judges to assist in the implementation of the priorities identified in this programme and to advise the Steering Committees on whether and how to update the Council of Europe's legal instruments
- the framework global action plan for judges in Europe adopted by the Committee of Ministers in 2000,

the CCJE has the task of contributing in 2002 and 2003 to the implementation of the framework global action plan for judges, in particular by:

a. adopting an opinion in 2002 for the attention of the Committee of Ministers on the principles and rules governing judges professional conduct with special reference to efficiency, incompatible behaviour and impartiality (see in particular Part III B of the global action plan);

This work will be carried out on the basis of replies by delegations to a questionnaire, a draft report prepared by a specialist, a draft opinion prepared by the Secretariat and revised by the Working Party of the CCJE in 2002,

b. adopting an opinion in 2003 for the attention of the Committee of Ministers on the appropriate initial and in-service training for judges at the national and European level (see in particular Part III A of the framework global action plan);

This work will be carried out on the basis of replies by delegations to a questionnaire, a draft report prepared by a specialist, a draft opinion prepared by the Secretariat and revised by the Working Party of the CCJE in 2003,

c. providing practical assistance to enable States to comply with Council of Europe standards concerning judges (eg Best Practice Survey);

d. preparing texts or opinions at the request of the Committee of Ministers or other bodies of the Council of Europe;

e. encouraging partnerships in the judicial field involving courts, judges and judges' associations in particular partnerships between courts in Eastern and Western Europe.

5. Membership of the committee:

a. All member states may be represented on the CCJE. Members should be chosen, in contact, where such authorities exist, with the national authorities responsible for ensuring the independence and impartiality of judges and with the national administration responsible for managing the judiciary, from among serving judges having a thorough knowledge of questions relating to the functioning of the judicial system and personal integrity.

   The Council of Europe will cover travel and subsistence expenses for one representative per state.

b. The European Commission and the General Secretariat of the Council of the European Union may take part in the work of the CCJE, but without the right to vote or to reimbursement of expenses.

c. The following Council of Europe observers may send a representative to meetings of the CCJE but without the right to vote or to reimbursement of expenses:

   - Holy See,
   - United States of America,
   - Canada,
   - Japan,
   - Mexico

d. The following may participate in the work of the CCJE according to the specific rules of the Committee of Ministers:

   - Bosnia and Herzegovina
   - Federal Republic of Yugoslavia

e. The following observers with the CCJE may attend the meeting of the CCJE, without the right to vote or defrayal of expenses: the European Association of Judges.

6. Structures and working methods:

The CCJE is an advisory body of the Committee of Ministers which prepares opinions for that Committee on general questions concerning the independence, impartiality and competence of judges. For that purpose, the Consultative Council works in co-operation with, in particular, the European Committee on Legal Co-operation (CDCJ), the European Committee on Crime Problems (CDPC), the Committee of Experts on the Efficiency of Justice (CJ-EJ) and also, depending on the subjects dealt with, other committees or bodies.

To discharge its terms of reference, the Consultative Council may set up working parties and organise hearings. It may also make use of scientific specialists.

7. Duration:

These terms of reference expire on 31 December 2003.

APPENDIX VI

**QUESTIONNAIRE ON
JUDGES' TRAINING
AND
QUESTIONNAIRE ON THE CONDUCT,
ETHICS AND RESPONSIBILITY OF JUDGES**

A. Introduction

1. At its first meeting (8-10 November 2000), the CCJE asked the Working Party Chair to draft questionnaires on the topics for consideration in 2002 and 2003:

i. appropriate initial and in-service training programmes for judges at national and European levels (see doc. CCJE (2000) 3, Part III B);

ii. principles and rules governing judges professional conduct with especial reference to efficiency, incompatible behaviour and impartiality (see doc. CCJE (2000) 3, Part III B);

2. In accordance with the CCJE's request, the Chair of the CCJE-GT, in conjunction with the Chair of the CCJE, has drafted the questionnaires in order to gather the relevant information summarising national positions vis-à-vis the topics concerned.

3. This document contains the questionnaires on the topics referred to under A 1 i and ii above as they have been approved by the CCJE at its 2nd meeting (21-23 November 2001).

B. Questionnaire on judges' training

a) Initial training for prospective judges

1. Are prospective judges given any initial training?
If so, how long does this last?

2. Is the right to or requirement to undergo training stipulated in any law or regulation?
If so, please specify.

3. Is training run and financed by the state or by other means?
Is it free of charge for prospective judges and are the latter paid?

4. Is there a judges' training institution?
If so, is it a permanent public body?

5. If there is such an institution, please describe briefly how it is organised, how it operates and who provides the training.

6. What subjects does judges' initial training cover?

7. Is there an end-of-training examination to assess ability to perform the duties of judge?

b) In-service training

1. Is there an in-service judges' training scheme?
If so, how is it organised and what subjects are covered?

2. Is in-service training optional or compulsory?

3. Who runs such training?

4. What approaches are adopted to impress upon judges the need to improve their professional skills?

5. Is there a specific training scheme for judges at the beginning of their careers?
If so, please describe it briefly.

C. Questionnaire on the conduct, ethics and responsibility of judges

1. What are the statutory obligations by which judges are bound?

2. Is there a judge's code of conduct?

   2.1 If so, who drafted it and who adopted it?
   2.2 What are the obligations imposed upon judges?
   2.3 Is there provision for sanctions in the event of violation by judges?

3. What incompatibilities are there between the duties of judge and other functions or professions?

4. In what circumstances can the impartiality or apparent impartiality of judges be called into question in accordance with the law or case-law?

5. Can judges incur criminal or civil liability for acts committed in the performance of their duties? If so,

   5.1 In what circumstances?
   5.2 What is the procedure involved?
   5.3 What is the competent institution or authority?
   5.4 What sanctions or compensatory measures can be applied?

6. Can judges be subject to disciplinary proceedings? If so,

   6.1 In what circumstances?
   6.2 What is the procedure involved?
   6.3 What is the competent institution or authority?
   6.4 What disciplinary sanctions can be imposed?

APPENDIX VII

RECOMMENDATION No. R (94) 12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES

Amendments proposed
by the
Chair of the CCJE
(see parts in bold)

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

RECOMMENDATION No. R (94) 12

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

ON THE INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES

(Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law";

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Noting the essential role of judges and other persons exercising judicial functions in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the independence of judges in order to strengthen the Rule of Law in democratic states;

Aware of the need to reinforce the position and powers of judges in order to achieve an efficient and fair legal system;

Conscious of the desirability of ensuring the proper exercise of judicial responsibilities which are a collection of judicial duties and powers aimed at protecting the interests of all persons,

Recommends that governments of member states adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary as a whole and strengthen their independence and efficiency, by implementing, in particular, the following principles:

Scope of the recommendation

1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters.

2. With respect to lay judges and other persons exercising judicial functions, the principles laid down in this recommendation apply except where it is clear from the context that they only apply to professional judges, such as regarding the principles concerning the remuneration and career of judges.

Principle I - General principles on the independence of judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges.

2. In particular, the following measures should be taken:

a. The independence of judges should be guaranteed **by inserting its fundamental principles into internal law at the constitutional or highest possible level, and by including its more specific rules in internal legislation[1].** Subject to the legal traditions of each state, such rules may provide, for instance, the following:

i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law;

ii. the terms of office of judges and their remuneration should be guaranteed by law;

iii. no organ other than the courts themselves should decide on its own competence, as defined by law;

iv. with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively.

b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.

[1] See paragraph 16 of draft Opinion No. 1 (2001).

c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. **The authorities responsible in member States for making and advising on appointments and promotions should introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency[2]. Seniority is no longer generally acceptable as the governing principle determining promotion, although seniority requirements based on years of professional experience can assist to support independence[3].** The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules. **It should in any event have among its members substantial judicial representation chosen democratically by other judges.**

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

i. a special independent and competent body to give the government advice which it follows in practice. **Any such body should have substantial judicial representation among its members,** or

ii. the right for an individual to appeal against a decision to an independent authority. **Any such authority should have substantial judicial representation among its members, or**

iii. **scrutiny and public review of the procedures for judicial appointments and their working by an independent authority (with substantial judicial representation) or an independent individual in order to ensure that they are transparent, independent and related to the objective criteria mentioned above.**

d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

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[2] See paragraph 25 of Opinion No. 1 (2001).

[3] See paragraph 29 of Opinion No. 1 (2001).

e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

3. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. **This guarantee should be enshrined at the highest level, as mentioned in Principle I 2 (a)[4].**

Principle II - The authority of judges

1. All persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge.

2. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court.

Principle III - Proper working conditions

1. Proper conditions should be provided to enable judges to work efficiently**, as Article 6 of the European Convention on Human Rights requires, as well as to be free of any pressures which might adversely influence their decisions or conduct,** in particular, by:

a. 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;

b. ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities;

c. **ensuring that the status and remuneration (including guaranteed sickness pay and pension arrangements) are commensurate with their role, experience and responsibilities[5];**

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[4] See paragraph 60 of Opinion No. 1 (2001).

[5] See paragraph 61 of Opinion No. 1 (2001).

d. providing adequate support staff and equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay;

e. taking appropriate measures to assign non-judicial tasks to other persons, in conformity with Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts.

2. All necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.

Principle IV - Associations

Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests.

Principle V - Judicial responsibilities

1. In proceedings, judges have the duty to protect the rights and freedoms of all persons.

2. Judges have the duty and should be given the power to exercise their judicial responsibilities to ensure that the law is properly applied and cases are dealt with fairly, efficiently and speedily.

3. Judges should in particular have the following responsibilities:

a. to act independently in all cases and free from any outside influence;

b. to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention;

c. to withdraw from a case or decline to act where there are valid reasons, and not otherwise. Such reasons should be defined by law and may, for instance, relate to serious health problems, conflicts of interest or the interests of justice;

d. where necessary, to explain in an impartial manner procedural matters to parties;

e. where appropriate, to encourage the parties to reach a friendly settlement;

f. except where the law or established practice otherwise provides, to give clear and complete reasons for their judgments, using language which is readily understandable;

g. to undergo any necessary training in order to carry out their duties in an efficient and proper manner.

Principle VI - Failure to carry out responsibilities and disciplinary offences

1. Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and **the legal provisions and** traditions of each state, such measures may include, for instance:

a. withdrawal of cases from the judge;

b. moving the judge to other judicial tasks within the court;

c. economic sanctions such as a reduction in salary for a temporary period;

d. suspension.

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges.